Neutral Citation Number: [2011] IEHC 230

THE HIGH COURT

2009 189 EXT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT, 2003

BETWEEN/

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

-AND-

STEPHEN O'SULLIVAN

RESPONDENT

JUDGMENT of Mr Justice Edwards delivered on the 2nd day of June 2011

Introduction:
The respondent is the subject of a European Arrest Warrant issued by the United Kingdom of Great Britain & Northern Ireland on the 3rd of July 2009. The said warrant having been endorsed by the High Court pursuant to s. 13 of the European Arrest Warrant Act 2003 as amended (hereinafter "the 2003 Act"), the respondent was arrested in this jurisdiction on foot of the said warrant on the 8th of September 2009. Subsequently, on the 9th of February 2010, the High Court (Peart J) made an Order pursuant to s.16 of the 2003 Act 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 a date in June 2010.

The matter now comes before the Court again on foot of a request, which the applicant contends is made 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 purportedly 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.

The respondent, through his solicitors and counsel, has raised both procedural and substantive objections to the High Court giving its consent. First, he has raised an objection to the validity of the purported s.22(7) request on the basis that it is not a request from "the issuing state". Secondly, there is an objection to the form of the request and in particular that it allegedly contains no admissible evidence and contains only inadmissible evidence. Thirdly, there are substantive objections to the granting of consent based (i) the absence of an explanation for the non-inclusion of the offence (which predates the European Arrest Warrant) in the warrant; and (ii) an alleged legitimate expectation on the part of the respondent that "all pre-warrant offences known to the UK authorities" would be included in the warrant when it was applied for.

The offences to which the European Arrest Warrant related.
The European Arrest Warrant was a conviction type warrant on foot of which the respondents surrender was sought by the issuing state so that he might serve out a sentence of 6½ years imprisonment imposed upon him by Luton Crown Court on the 24th of April 2009 in respect of six offences as follows:

> 1. Two offences of conspiracy to defraud: sentenced to 5 years imprisonment on each offence concurrently;
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> 2. Conspiracy to lend or allow to be used documents to which s.38(2) of the Goods Vehicles(Licensing of Vehicles) Act 1995 applied, contrary to s. 1(1) of the Criminal Law Act 1977: sentenced to 1 year and 6 months imprisonment concurrent to the 5 years sentence above; and
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> 3. Three offences of concealing the proceeds of crime: sentenced to 1 year and six months imprisonment on each offence concurrently but consecutive to the 5 years sentence above.

It is important to note that while the alleged bail offence in respect of which consent pursuant to s. 22(7) is now sought was not the subject of the European Arrest Warrant on foot of which the respondent was surrendered, it was referred to therein. It is referred to both in Part D of the warrant in explanation of the circumstances in which the decision of the Court of Trial, after due notification to him, was rendered in absentia; and in Part E of the warrant, within the subdivision thereof which contains the narrative description of the circumstances in which the offences which are the subject of the warrant were committed.

The alleged bail offence was referred to as follows in Part D:

> "On Friday 13th March 2009, Stephen O'Sullivan failed to attend the Court and his Defence Counsel could give no explanation for his non-attendance. On that same day the Trial Judge issued a warrant not backed for bail for Stephen O'Sullivan's Arrest."

and:

> "The attendance of the defendant at the Crown Court is secured by the Magistrate's Court remanding him in custody or on bail when he is committed for trial. If, having been bailed, he fails to attend on the day notified to him as the day of trial, a bench warrant may be issued forthwith for his arrest under the Bail Act 1976, section 7."

Further, the alleged bail offence was referred to as follows in Part E:

> "In addition the Trial Judge indicated that he would impose a consecutive sentence for the Bail Act offence when O'Sullivan is arrested.
>
> The maximum sentence on conviction in the Crown Court for an offence of absconding by a person who has been released on bail in criminal proceedings to which Section 6(1) of the Bail Act 1976 applies is imprisonment for a term not exceeding 12 months or to a fine or to both."

The raising of the issue of specialty at the s. 16 hearing

It is also relevant to note that one of the grounds advanced at the s. 16 hearing on foot of which the respondent objected to being surrendered was that if surrendered to the issuing state the rule of specialty would be breached. This objection was based upon the references to the alleged bail offence contained in the European Arrest Warrant and recited above. This objection was rejected by the Court, and it is appropriate to quote in full the relevant portion of Peart J's judgment - Minister for Justice, Equality & Law Reform v Stephen O'Sullivan (Unreported, Peart J., 9th February, 2010). The learned judge said:

> **"Rule of Specialty:**
>
> Firstly, it is submitted that it is clear that if surrendered to the issuing state, the rule of specialty will be breached, and that this is evident from the warrant itself and that this is sufficient to rebut the presumption contained in s. 4A of the Act that following surrender the issuing state will comply with its obligations under the Framework Decision.
>
> This issue arises because on page eight of the warrant after a lengthy recitation of the offences for which he was sentenced and for which surrender is sought, the issuing judicial authority goes on to state:
>
> > "In addition, the trial judge indicated that he would impose a consecutive sentence for the Bail Act offence when O'Sullivan is arrested.
> >
> > The maximum sentence on conviction in the Crown Court for an offence of absconding by a person who has been released on bail in criminal proceedings to which Section 6 (1) of the Bail Act 1976 applies is imprisonment for a term not exceeding 12 months or to a fine or to both."
>
> Mr Masterson has submitted that this Court is precluded from making the order sought in view of the specialty provisions of s. 22 of the Act, and that these paragraphs clearly rebut the presumption that this Court might otherwise rely upon, namely that the court in the United Kingdom before the respondent will appear upon surrender or any other court for that matter will observe the rule of specialty and refrain from prosecuting, sentencing or otherwise penalising the respondent in respect of any offence besides those in respect of which his surrender is ordered. It is submitted that this Court is entitled to take at face value what is stated in the warrant, and that it ought not to assume that what is stated in this regard in the warrant was not intended to be stated, or take the view that since it is something which need not have been stated, the Court can ignore it. The presumption in s. 22 of the Act is in the following terms:
>
> > (3) It shall be presumed that, in relation to a person to whom a European arrest warrant applies, the issuing state does not intend to-
> >
> > (a) proceed against him or her,
> >
> > (b) sentence or detain him or her in his or her personal liberty,
> >
> > in respect of an offence, unless the contrary is proved.
>
> It is submitted also that the protections provided by s. 22 of the Act whereby this Court can rely on the fact that if the issuing state intends to prosecute the respondent for the Bail Act offence or punish him in that regard it will first seek the consent of the High Court here so to do, cannot apply in the present case. The basis of that submission is that s. 22(2) speaks of a future prosecution/punishment for an offence other than the offences for which surrender is ordered, whereas in the present case it is submitted that the decision to punish the respondent for the bail offence has already been made. Section 22 (2) provides:
>
> > "(2) Subject to this section, the High Court shall refuse to surrender a person under this Act if it is satisfied that—
> > (a) the law of the issuing state does not provide that a person who is surrendered to it pursuant to a European arrest warrant shall not be proceeded against, sentenced, or detained for the purposes of executing a sentence or detention order, or otherwise restricted in his or her personal liberty, in respect of an offence, and
> >
> > (b) the person will be proceeded against, sentenced, or detained for the purposes of executing a sentence or detention order, or otherwise restricted in his or her personal liberty in respect of an offence."
>
> I am not satisfied that it ought to be concluded that the issuing state intends to breach its obligations as to specialty simply because the trial judge expressed the view on the date of conviction that he would impose a twelve month sentence in respect of the respondent's absconding. I believe first of all that this remark as referred to in the warrant must be seen in the context and in the circumstances in which it was made. For example, it cannot be assumed that on that date the judge was aware that the respondent had left the United Kingdom. He may have simply failed to attend the court but remaining in the United Kingdom. In the latter situation, specialty considerations would not even arise for consideration since its application is confined to the context of extradition. But secondly, simply because a judge makes a remark like that one, is not to go further and presume that the Crown Prosecution Service whose decision it would be to prosecute would do so in breach of specialty rules simply because the judge had expressed himself in the way he appears to have done.

As to the argument that the protections afforded by s. 22 ought not to be seen as applicable because those protections apply only in respect of a future decision to prosecute, I do not see that argument as meritorious. Section 22 must be read in its entirety, and the presumption contained in subsection (3) must be read in conjunction with subsection (2). I believe that the present situation is covered by the section and I can safely presume that even though the warrant states what is stated in this regard, the issuing state will not breach its obligation arising both under the Framework Decision as well as the provisions of s.146 of the Extradition Act, 2003 in the United Kingdom, and I am safe in relying upon the presumption that if they wish to prosecute or punish the respondent in respect of the Bail Act offence it will first seek the consent of the High Court here as required."

The Request

The request the subject matter of the present application was received directly from his Honour Judge Bright Q.C., Resident Crown Court Judge at St Alban's. It is addressed to the judicial authority in this jurisdiction, and is dated 29th November 2010. It is in the following terms:

"Dear Judge,

Stephen O'Sullivan

You will recall delivering judgement on 9th February 2010 in an application for the surrender of Stephen O'Sullivan following the issue of a European Arrest Warrant issued on the 3rd July 2009. I write on behalf of the Crown Court in England to request that the High Court in Dublin permit proceedings before me at the St Albans Crown Court for an alleged offence by Stephen O'Sullivan of failing to surrender to bail.

The following facts do not appear to be in dispute:

1. Stephen Sullivan was prosecuted in Luton Crown Court on indictment containing six counts. Three were for offences of conspiracy, two of which were common law conspiracies to defraud and the third of which was a statutory conspiracy. In addition he faces three counts of money-laundering, contrary to the Proceeds of Crime Act 2002.

2. His trial, together with two co-defendants, took place before me between January and March 2009.

3. Stephen O'Sullivan had been granted conditional bail following his arrest in 2008 and remained on bail during his trial.

4. The jury retired on 12th of March 2009 and continue their deliberations on 13th of March 2009.

5. Stephen O'Sullivan did not attend Luton Crown Court on 13th March 2009. The jury continued its deliberations in his absence on 13th and 16th March when it returned verdicts of guilty on all six counts.

6. Stephen O'Sullivan was sentenced in his absence to a total of 6 1/2 years imprisonment. Subsequently he was located in the Republic of Ireland. A European Arrest Warrant was issued on 3rd July 2009 and he was brought before the High Court in Dublin. On 9th February 2010 you made an order for his surrender to the United Kingdom. He was flown back to the UK in June 2010 and has since appeared before me at Luton Crown Court for directions in relation to proposed confiscation proceedings. He immediately began to serve a sentence which I had passed upon him in his absence. As I understand it, there has been no appeal against either conviction or sentence.

7. As recorded in your judgement, section 146 of the Extradition Act 2003 applies. A copy of that section is attached to this letter. The section because Stephen Sullivan was extradited to the United Kingdom from a Category 1 territory (the Republic of Ireland) and the warrant was a Part 3 warrant. Accordingly, pursuant to sub-section 2, Stephen O'Sullivan may be dealt with in the UK for an alleged offence committed before his extradition (namely failing to surrender to bail on 13th March 2009) only if sub-section (3) or (4) apply. Stephen O'Sullivan was not extradited in respect of the alleged offence of failing to surrender to bail. Accordingly, sub-section (3) (c) applies.

8. An allegation of failing to surrender to bail is an extradition offence in that it carries a maximum sentence of 12 months imprisonment. I therefore seek consent from the Republic of Ireland for the Crown Court in England to consider the allegation of failing to surrender to bail. I am the appropriate judge within the sub-section (3) (c) because, though I have since moved to St Albans Crown Court where I am Resident Judge, I was the judge who conducted the trial of Stephen O'Sullivan and his co-defendants, passed the sentence upon him and will deal with the confiscation proceedings still outstanding against him.

9. I consider it appropriate that the Crown Court should consider whether Stephen O'Sullivan is guilty of an offence of failing to surrender to bail for the following reasons:

1. As a matter of public policy, if Stephen O'Sullivan has committed such an offence the question of imposing sanctions against him should be considered on its merits because it is not in the interests of justice for no sanction to be imposed if a defendant fails to surrender to bail.

2. If Mr O'Sullivan had no lawful excuse for failing to attend court on the 13th of March 2009, his failure to do so has obstructed the criminal judicial process in that confiscation proceedings relating to the proceeds of his crimes have been delayed and costs have been incurred by the repeated adjournment of those proceedings.

3. Those who stood surety for Mr O'Sullivan have been ordered to forfeit significant sums of money on the basis of Mr O'Sullivan's non-attendance and have therefore already suffered the adverse consequences thereof.

4. Significant public resources have been expended in securing his return to the United Kingdom.

5. If consent is given, Mr O'Sullivan will have all the rights which the English judicial system offers to defendants facing allegations of criminal offences. He has the benefit of legal aid and is represented

both by solicitors and by leading and junior counsel. He will be asked if he admits or denies the allegation after having had the benefit of legal advice. If he admits the allegation, he will have counsel to advance mitigation and I will consider their submissions as to the appropriate sanction which should be imposed. If he denies the allegation, there will be a trial in which the allegation will have to be proved to the criminal standard. He will again be represented if he so wishes. On behalf of the Crown Court in England I, as the appropriate judge, therefore seek the permission of the High Court in Dublin to consider the allegation that Mr O'Sullivan failed, without lawful excuse to surrender to his bail.

6. I very much look forward to receiving your response as soon as may be convenient. ….."

The basis on which the applicant urges the Court to grant the requested consent.
The applicant has urged upon the Court that it may be satisfied to grant the requested consent on the basis that the conditions precedent for the granting of such are met in the circumstances of this case, viz:

- The request is in writing;

- The request emanates from the issuing state;

- The respondent has already been surrendered;

- In so far as the information that the Court would require is concerned, the request makes explicit reference to the warrant itself. Accordingly, all of information that would be required under article 8 of the Framework Decision is necessarily included in the request.

- In this case –

o Identity is not an issue;

o Correspondence, which I am told is not an issue, can be demonstrated with s. 13 of Criminal Justice Act, 1984

o The requirements of s.38(1)(a)(i) of the 2003 Act as to minimum gravity are satisfied in that the appropriate penalty for the offence in respect of which the request is made is 12 months imprisonment.

o No other issues arise under Part 3 of 2003 Act

o The policy reasons underpinning the making of the request as set out in Judge Bright's letter may be regarded as surplusage, in so far as the Court is only concerned with whether the requirements of the 2003 Act are satisfied.

The respondent's objections
Leading counsel for the respondent, Dr Michael Forde S.C., has advanced five grounds of objection to this Court granting the consent that is sought. These were advanced primarily in oral submissions although brief written submissions were also filed on behalf of the respondent. The Court proposes to deal with each of the objections raised seriatim.

Ground of objection no 1:
Counsel for the respondent submits that the request is bad and that the Court cannot proceed to consider it because these proceedings have not been formally commenced by means of a recognised form of originating process. He submits that normally an applicant seeking relief in the High Court is required, at minimum, to issue a Notice of Motion. However, in this case no recognisable form of originating process has been employed.

The Court is satisfied that there is no substance in this complaint. A recognised form of originating process is not required before the Court can proceed to consider the s. 22(7) request in this case. The proceedings herein are *sui generis*. They are neither wholly adversarial nor are they wholly inquisitorial, though what the court is engaging in is closer to the latter type of proceedings than to the former. There are no published Rules of Court covering such proceedings and accordingly the Court is free, in the exercise of its inherent jurisdiction to regulate its own process, to direct its own procedure in proceedings under the 2003 Act. Counsel for the applicant has confirmed that the procedure that is adopted in practice in cases such as the present is that the applicant, upon receipt of a s. 22(7) request from an issuing state, attends *ex parte* before a judge of the High Court, who is usually the judge in charge of the European Arrest Warrant list, although it may be any High Court judge, for the purpose of bringing the request to the Court's attention and thereafter seeking the Court's directions as to service on the respondent and also concerning how the matter should progressed thereafter. It has been confirmed to the Court that that is the procedure that was followed in the present case. Upon receipt by the applicant of Judge Bright's request the applicant instructed counsel to appear before the High Court, and the Court (Irvine J) having been duly appraised of the request, gave appropriate directions as to service on the respondent and progression of the case thereafter. In doing so, the Court directed its own procedure which it had full jurisdiction and entitlement to do in the absence of the making and promulgation of relevant Rules of Court or rules of procedure, whether by the Superior Courts Rules Committee or by anybody else.

Ground of objection no 2:
The respondent objects that Judge Bright's request is not a request properly demonstrated to be from the issuing state. His counsel has submitted that s. 22(7) of the 2003 Act requires a relevant request from "the issuing state". He submits that Judge Bright is manifestly a judicial authority, and says that in the light of the definition of the expression "issuing state" in s.2 (1) of the 2003 Act the *expressio unius exclusio alterius* canon of interpretation precludes a judicial authority from coming within the definition of an issuing state.

Counsel for the respondent poses the question: is a member of the judiciary duly authorised to make applications of this nature? He points out that under the 2003 Act, whenever contact or communication is deemed necessary between an issuing judicial authority and the authorities here, or the courts here, the Act expressly authorises it or provides for it, e.g. in s.10, s.12 (1), s.20(1) & s.22 of the 2003 Act. However, the 2003 Act does not authorise a judicial authority to make a request under s. 22(7). He submits that this Court cannot assume that the issuing judicial authority or any judicial authority is authorised to act on behalf of the issuing state. He says it is irrelevant whether or not English law permits it unless the Court has evidence concerning what English law provides in that regard. He urges that there is no such evidence in this case and that the Court must therefore proceed on the basis that Judge Bright has no ostensible authority to make this application. Counsel further poses the question: is Judge Bright, as one of Her Majesty's Crown Court Judges, designated by Her Majesty to initiate prosecutions or to encourage prosecutions? He contends that in respect of

the offences that were the subject of the European Arrest Warrant the prosecuting authority was the Vehicle Operator Services Agency (hereinafter the VOSA). Counsel asks: why is this request not being made by the VOSA rather than by Judge Bright? Indeed, he has sought to characterise the fact that the request emanates from Judge Bright personally as being "the real oddity in this case."

With regard to the VOSA, it should be stated that counsel for the applicant does not concede counsel for the respondent's assertion that the prosecuting authority in respect of the offences that were the subject of the European Arrest Warrant was the VOSA, and contends that in so far as the warrant makes any reference to the VOSA, that agency would appear to have been the relevant investigator, in the same way as in routine criminal matters a particular police force, or constabulary, would be the relevant investigator, rather than the prosecutor. He speculates that in the present case the prosecutor may have been the Crown Prosecution Service but acknowledges a deficit of evidence as to the exact position.

In response to the respondents submissions generally, counsel for the applicant, Mr Remy Farrell, B.L., has submitted that the sole procedural requirement stipulated in s. 22(7) of the 2003 Act is that there be before the court a "request in writing from the issuing state". He contends that it is abundantly clear that the expression "issuing state" is used deliberately and is intended to allow for the receipt of such an application from the judicial authority, the central authority or indeed the executive of the issuing state. He submits that the reason for such an inclusive approach is not difficult to discern: whereas the European arrest warrant is predicated on the existence of an underlying judicial warrant the same does not apply in the case of a s. 22 request where the decision/intention to prosecute may repose in a non-judicial personage depending on the legal system of the issuing state.

Moreover, the expressions "issuing state" "issuing judicial authority" and "judicial authority" are all defined in s.2(1) of the 2003 Act The definitions are as follows:

> "issuing state" means, in relation to a European arrest warrant, a Member State designated under *section 3*, a judicial authority of which has issued that European arrest warrant;"
>
> "issuing judicial authority" means, in relation to a European arrest warrant, the judicial authority in the issuing state that issued the European arrest warrant concerned;
>
> "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 s. 33 by a court in the State.
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> [S.33 of the 2003 Act provides that a "court" (defined in s. 33(5) as a court that has issued a domestic warrant for the arrest of a person, or the High Court) in this State may issue a European Arrest Warrant in specified circumstances]

In the present case the request is made by a judge in the issuing state and it has been transmitted by the Serious Organised Crime Agency. The respondent suggests that the *expressio unius exclusio alterius* canon of interpretation precludes a judicial authority being regarded as coming within the definition of an issuing state. Counsel for the applicant has commented that precisely the same might be said in relation to a central authority as defined by the Act. If that is so then the respondent essentially contends that the expression "issuing state" means neither the judicial authority nor the central authority of the issuing state. This begs the question as to what it is actually intended to cover. Counsel for the applicant has urged upon the Court that in the circumstances the interpretation contended for by the respondent is absurd.

Counsel for the applicant has contended that support for the applicant's position is to be found in Article 27.4 of the Framework Decision which provides:

> "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."

Counsel has urged upon the court that this provision simply requires that the request be submitted to the executing judicial authority and it is entirely silent as to who should submit it. He has further submitted that viewed in the context of the schemes of both the Act and the Framework Decision, such an approach makes abundant sense given the necessity to accommodate the various legal systems of the Member States. The position is that it is not competent for the 2003 Act, or the Oireachtas which enacted it, to specify or define who may make such a request on behalf of the issuing state.

Counsel for the applicant has further submitted that counsel for the respondent's general approach is flawed, as exhibited by the questions that he has posed, rhetorically or otherwise, concerning whether Judge Bright has the necessary authority to make the request for consent that has been made in this case. He summarises Dr Forde's argument as being essentially this: "if we look at the consent request on the basis of what we know, or rather what we think we know, about procedures in our neighbouring jurisdiction then we must conclude that 'it's all a little bit odd' and requires some sort of explanation". However, there are two problems with that approach, according to counsel for the applicant. The first is that when one comes to look at the procedures that obtain in jurisdictions with which one is perhaps less familiar one would probably fail recognise such an oddity, if indeed it is an oddity. The second, and more fundamental problem is this, did our legislature envisage that whenever the Irish judicial authority receives a request from a person or agency that is ostensibly acting on behalf of an issuing state it is obliged to embark upon an inquiry into, and have established to it's satisfaction, that the requesting person or agency has the requisite authority under the law of the issuing state to make the request. "Surely not", he asks rhetorically.

This Court has carefully considered the submissions of Counsel on both sides with respect to this ground of objection, and the Court finds itself entirely in agreement with the arguments advanced by the applicant's counsel, and has not been persuaded by those advanced on behalf of the respondent. In the circumstances the Court is satisfied that Judge Bright's letter must be regarded as being a valid request pursuant to s. 22(7) of the 2003 Act, made on behalf of the "issuing state" as defined in s. 2(1) of the same Act, for consent to further prosecute the respondent for an offence not covered by the European Arrest Warrant on foot of which the respondent was surrendered.

Ground of objection no 3:
Counsel for the respondent has submitted that the Court is precluded from responding in any way to the s.22 (7) request in this case because there is no admissible evidence before the Court relating to it.

Counsel has submitted that the rule against hearsay is a fundamental principle within the law of evidence in this country and that the

only material before the Court is inadmissible hearsay. He submits that the rule against hearsay cannot be disregarded and he bases his argument in this regard on the principle of national procedural autonomy which is a fundamental principle of EU law. He contends that the principle of national procedural autonomy is reflected in recital 12.2 bis of the Framework Decision which recites (*inter alia*) that the Framework Decision does not prevent a member state "from applying its constitutional rules relating to due process, …" In other words, says counsel, indigenous rules and procedures (including the rules of evidence and, in particular, the rule against hearsay) should obtain.

The following further points are made by the respondent in relation to this ground of objection in written submissions filed on his behalf.

> "2. The assertions of fact contained in the letter of November 29th, 2010 are not admissible evidence, not being contained in any affidavit, declaration, affirmation or attestation or other sworn statement envisaged in s. 20(3) of the EAW Act.
>
> 3. None of the EAW Act's provisions that permit unsworn documents to prove themselves apply to these assertions: contrast ss. 12(8) and (9) of this Act. Insofar as *Sliczynski* [2008] IESC 73 may suggest otherwise, that case can be distinguished. (If there is an appeal, it will be contended that *Sliczynski*, *inter alia*, was decided *per incuriam* (the main contention made in *Abimolo* (sic) on 3rd May 2011 but not addressed in the *ex tempore* judgment of Murray C.J.; there will be reliance on Art 47 of the E.U. Charter.)"

While counsel for the respondent may be of the belief that the views expressed by the Supreme Court in *Minister for Justice Equality and Law Reform v. Sliczynski* were *per incuriam* this Court considers that it is nonetheless bound to apply it. It has done so in the past in appropriate circumstances and will continue to do so unless and until the Supreme Court states that it should do otherwise. In any case, I am in full agreement with the views expressed in the judgments of Murray C.J and Macken J (Finnegan J concurring with both) and I am not prepared to entertain any suggestion that their views as expressed in *Sliczynski* were in any way ill considered or rendered in disregard of established legal principles or in circumstances where a relevant statutory provision was overlooked. As far as this Court is concerned *Sliczynski* represents a valid and binding precedent that this Court is obliged to follow. Now in fairness to counsel for the respondent, it should be stated that in making oral submissions in this matter he was disposed to row back somewhat on what is contained in his written submissions, and his oral argument before this Court proceeded solely on the premise that the circumstances of the present case are distinguishable from those in *Sliczynski* and that accordingly this Court is not bound to follow *Sliczynski*.

Counsel for the respondent sought to distinguish *Sliczynski* on the basis that that case was concerned with information provided in connection with the surrender procedure pursuant to s.20 of the 2003 Act (which, *inter alia*, transposes Article 15.2 of Framework Decision), whereas, he contends, the Court is engaged upon a wholly different procedure in this case involving a request pursuant to s. 22(7) of the 2003 Act (which reflects Article 27.4 of the Framework Decision), made on behalf of the "issuing state" for consent to further prosecute the respondent for an offence not covered by the European Arrest Warrant on foot of which he was surrendered. He submits that the Oireachtas has dealt with what is to be admitted as evidence without proof in surrender proceedings in s 11(1)(A) and s. 20(1) & (2) of the 2003 Act, but says that in any other circumstances in which it is sought to put evidence before the Court in proceedings arising under the 2003 Act such evidence can only be received if it is in one of the forms specified in s. 20(3).

In reply to these submissions counsel for the applicant has submitted that as a matter of first principles the rule against hearsay has no application to the admissibility of a "request" which does not amount to an out of court statement led to prove the truth of its contents. Counsel for the applicant submits that the objection to admissibility that has been raised fails to appreciate the nature of the rule against hearsay. A hearsay statement is an out of court statement adduced for the purpose of proving the truth of that statement. The Court is not concerned with a statement of that type; rather it is concerned with a request. Hearsay does not exclude an imperative command that is related in evidence, or a request, or a question. Indeed, there are many utterances not caught by the hearsay rule. Counsel has submitted that insofar as matters of fact are referred to in the letter from Judge Bright these simply recite background details that are intended to contextualise the request for consent, but the truth of these details does not require to be established for the purpose of consideration of the request. Rather, in so far as a request is made in this case it is a request that is made in respect of a specific offence, and the Court is in effect being asked: "can the respondent be prosecuted for this particular offence in these particular circumstances assuming these matters to be so". The letter of request does not amount, or purport to amount, to evidence of the truth of the facts asserted and accordingly the rule against hearsay simply doesn't apply. Counsel also submits that, in any event, and without prejudice to the foregoing, most of the assertions objected to are contained within the original European arrest warrant which is receivable without any need for further proof.

In so far as the procedural autonomy point is concerned, Counsel for the applicant concedes that it is up to the member state concerned to decide the processes and procedures to be used. Moreover, he has stated that in general terms he accepts the view that the Framework Decision is not intended to redefine the rule against hearsay. However, he says, it is the Oireachtas that has redefined the application of rule against hearsay in European Arrest Warrant matters coming before the Irish courts – in s. 20. The Oireachtas has rendered a whole swath of material admissible that would otherwise be inadmissible because otherwise the European Arrest Warrant system would be entirely unworkable. He urges that if one looks at the judgment of Murray C.J. in *Sliczynski*, the Chief Justice clearly takes the view that it is a matter of interpretation of the statute as it stands, albeit informed by the principles underlying the Framework Decision and albeit by adopting a conforming interpretation. It is by looking at the Act itself that one comes to view that this material is admissible and that the rule against hearsay doesn't apply.

Counsel for the applicant also contends that the same argument that counsel for the respondent now makes before this Court, based upon the principle of procedural autonomy, was also recently made by him before the Supreme Court in a case of *Minister for Justice, Equality and Law Reform v. Abimbola*, and he informs the Court that in an *ex tempore* judgment delivered on the 2nd of May 2011 that argument was rejected out of hand. Counsel for the applicant questions how, in the circumstances, it could be appropriate or proper for the same argument to be made again before this Court. In reply, counsel for the respondent has submitted that *Abimbolo* is distinguishable from the present case. The Court has made enquiries to ascertain whether there is an approved transcript of the *ex tempore* Supreme Court judgment to which Counsel for the applicant has referred but unfortunately it is not yet available. In the circumstances the Court will express no view on the propriety of the submission made on behalf of the respondent based upon procedural autonomy.

Further, counsel for the applicant does not accept that *Sliczynski* is distinguishable on any meaningful basis and it was submitted that the following passage from the judgment of the Chief Justice in that case deals with the objection definitively:

> "In my view s. 20(1) and (2) of the Act of 2003, as amended, are provisions by which the Oireachtas sought to give effect to the system of surrender envisaged by the Framework Decision so as to ensure that information could be

> furnished by the requesting Judicial Authority to the executing Judicial Authority, the High Court. If further information is transmitted by the requesting Judicial Authority either on its own initiative or following a request it is the function of the Central Authority to transmit it to the Executing Judicial Authority, in this country, the High Court. Section 20 must be interpreted in the light of the objectives of the Framework Decision and its provisions. In my view it specifically gives effect to Article 15(2) and (3) of the Directive. In so providing I am satisfied that the Oireachtas intended, consistent with the obligations of the State pursuant to the Framework Decision, that the High Court would have available to it the information provided by the issuing Judicial Authority and would have full regard to that information, in addition to information provided in the European Arrest Warrant itself, for the purpose of deciding whether a person should be surrendered on foot of a European Arrest Warrant. Moreover to interpret the provisions of the Act otherwise would render them meaningless since if direct evidence had to be given of the information concerned every Judge or member of the issuing Judicial Authority providing information would either have to give evidence personally or swear an Affidavit of matters within their own knowledge. If that were the case the provisions referred to would serve no purpose. Clearly in my view they were intended to ensure that the High Court would have, where required, information from the Judicial Authority concerned in addition to that already contained in the arrest warrant itself."

Counsel for the applicant submits that the same logic must apply to a request received under s. 22(7). He urges, in elaboration of this, that the principles set out in *Sliczynski* are directly relevant in this case, regardless of whether one is of the view that s. 20 does, or alternatively does not, render the material at issue admissible. (In that regard both sides acknowledge that s. 20 is expressed to apply to "proceedings to which this Act applies" and not just to applications for surrender, but counsel for the applicant accepts that some doubt may remain on the basis that s.20 relates to requests made rather than requests received.) He submits that what *Sliczynski* says in effect is that ss. (1) & (2) of s. 20 are irrelevant and otiose if the material received cannot be relied upon. There is no point in the Irish judicial authority being entitled to request and receive additional information from an issuing state if it cannot then act on it. By application of the same logic, while 22(7) of the 2003 Act (reflecting Article 27.4 of the Framework Decision) sets out in different terms, but in the same way, another procedure, i.e. a procedure based upon the executing judicial authority receiving a request, rather than making a request as in s.20, by application of the same logic the contents of the request received must be admissible. He contends that the position contended for by Dr. Forde is absurd. It amounts to the proposition that the Court may receive the request but that it is not allowed to consider its contents.

This Court has carefully considered the submissions made on both sides relating to this ground of objection, and it finds the arguments advanced on behalf of the applicant to be persuasive and compelling. The Court is satisfied that the factual matters asserted in Judge Bright's letter of request are intended to contextualise the request for consent, but that the truth of these details does not require to be established for the purpose of allowing this Court to consider the request. As the letter of request does not amount, or purport to amount, to evidence of the truth of the facts asserted its contents do not offend against the rule against hearsay. Accordingly, the Court is satisfied that the rule against hearsay does not preclude it from receiving and considering the s. 22(7) request in this case.

Further, the Court is also satisfied that the material must be admissible in any event if s. 22(7) is construed in conformity with the Framework Decision, and in particular Article 27.4 thereof, by application mutatis mutandis of the logic behind the judgments of the learned Supreme Court judges in the *Sliczynski* case. The Court does not consider that *Sliczynski* has been meaningfully distinguished in the circumstances of this case.

Further, and without prejudice to the views just expressed that the contents of Judge Bright's request are not caught by the rule against hearsay, the Court in any case rejects the argument based upon procedural autonomy on the basis that a conforming interpretation of s.22(7) of the 2003 Act, informed by the principles underlying the Framework Decision, allows for the admissibility of Judge Bright's letter of request notwithstanding the existence of the rule against hearsay within the law of evidence as it is normally applied in this jurisdiction.

Moreover, even if the contents of the Judge Bright's letter of request were to be regarded as hearsay the Court is satisfied that it is competent to relax the rule against hearsay in *sui generis* proceedings such as these, as the rule is primarily intended to be invoked for the benefit of, alternatively to protect, one or other party to an adversarial proceeding, and it is has less of a beneficial or protective role to play in proceedings that are predominantly inquisitorial. It seems to this Court that in proceedings such as these are, which are neither wholly adversarial nor wholly inquisitorial, but which have more in common with inquisitorial proceedings than adversarial proceedings, and which are *sui generis* in nature, it is legitimate for the Court to receive hearsay material and to be concerned only with the weight that may be attached to it on account of its hearsay nature. I have previously expressed views to this effect in my decision in *Minister for Justice , Equality & Law Reform v Sawczuk* [2011] IEHC 41 where I said with reference to certain material being placed before me in respect of which a hearsay objection was being maintained:

> "Moreover, although the information contained therein is hearsay the Court may receive such hearsay in proceedings such as this, which are *sui generis* in nature and which are more in the nature of an inquiry than an adversarial contest. The fact that the material is hearsay may be relevant to the weight to be attached to it, but not to the admissibility of it in proceedings such as this. The Court observes that such an approach is by no means unique to the European Arrest Warrant jurisdiction. In various other proceedings which are not wholly adversarial and which are to a greater or lesser extent *sui generis* a similar approach is adopted. For example, in asylum matters regard is routinely had to "country of origin information" which is invariably hearsay. Similarly, the Supreme Court made it clear in *Eastern Health Board v MK* [1999] I.R. 99 that hearsay evidence could be received in wardship proceedings involving children, having regard to the unique nature of such proceedings which are centred on the welfare of the child and place the court in an inquisitorial role in determining what, in all the circumstances, is in the best interests of the child."

Ground of objection no 4:
Dr. Forde S.C. has rather cryptically characterised the objection under this heading as being that "the dog didn't bark". (The Court assumes this must be an allusion to what Sherlock Holmes described as "the curious incident of the dog in the night-time" in the Arthur Conan Doyle short story "Silver Blaze.") As the Court understands it his complaint is based on the absence of any ostensible explanation as to why it is that a judge is looking for consent to prosecute rather than a prosecuting agency. This Court is invited by the respondent to infer that Judge Bright's request was unauthorised from the absence of such an explanation (in the same way, the Court supposes, as Holmes reasoned in Silver Blaze that the dog must have known the killer - a highly tenuous analogy). This is the same point that was ventilated already in the context of whether Judge Bright is duly authorised to represent the issuing state. He again asks why is the judge taking the initiative? The submission is that in the absence of an explanation for why the judge is taking the initiative the Irish judicial authority cannot assume he has the required authority.

This Court fundamentally disagrees with the suggestion that it has any business or entitlement to enquire into Judge Bright's authority

to make the request in question, or indeed into the propriety of him doing so. It has already ruled that the request may be considered to be a request on behalf of the issuing state. The Court will, however, remark that Judge Bright is an interested judicial authority in as much as he had seisen of the respondent's trial at the time at which the respondent is alleged to have absconded in breach of his bail. Moreover, in breaching his bail, if indeed he did so, the respondent must be considered to have at least reneged on a solemn undertaking given to a court in the issuing state that he would turn up for his trial (and very possibly other undertakings) and it seems to this court that Judge Bright, as the relevant trial judge, is well within his rights to seek to have the respondent brought to account in regard to that. Every court is entitled to police its own process and when somebody breaches a solemn undertaking given to a court by absconding in the course of a trial then it is reasonable to expect that the trial judge will take steps to ensure that that person is brought to account. The fact that Judge Bright has made a request for this Court's consent to the prosecution of the respondent does not justify an inference or assumption that the actual prosecution will not be conducted by the appropriate prosecuting agency, whether that be the Crown Prosecution Service, or the VOSA, or some other entity. Moreover, and as pointed out by Judge Bright, he will have all the rights of any accused person and may be expected to receive a fair trial in the event that he disputes the charge. This Court is further of the view that no inference may be drawn, or assumption made, on the basis of the Judge having made the request, that Judge Bright has in any way pre-judged the issue or will act other than judicially. The European Arrest Warrant system, which is founded upon mutual trust and respect between member states, and mutual recognition of judicial action and decisions, requires this Court, in the absence of cogent evidence to the contrary, to proceed on the presumption that the rights of the respondent will be respected and that a requesting state including its judiciary will, in operating the European Arrest Warrant system, abide by and fulfil its legal obligations both towards other member states and persons in the position of the respondent. There is no cogent, or indeed any evidence at all, to suggest that Judge Bright is acting other than appropriately, judicially, conscientiously and with the utmost propriety. The Court has no hesitation in rejecting this ground of objection.

Ground of objection no 5:
This ground is based upon the doctrine of legitimate expectation and counsel for the respondent predicated his submissions in this regard with a concession that it might not be his best point. He contends that the bail offence was known about when the European Arrest Warrant was issued and it could have been included in that warrant. Counsel submits that the fact that it was not so included caused the respondent to have a legitimate expectation that he would not be prosecuted, or that the issuing state would not seek to prosecute him, for the bail offence. The respondent relies on the case of *Minister for Justice Equality & Law Reform v Johnston* [2008] IESC 11 in support of the proposition advanced. Counsel for the respondent further submits that the rule of specialty should apply in the circumstances and that no consent should be given on foot of the s. 22(7) request. It was urged that the specialty exception provided for by s. 22(7) is intended to cover a situation where the issuing judicial authority was unaware of other matter when warrant was issued. It was submitted that in this case the issuing judicial authority was clearly aware of it because it is actually mentioned in the warrant. In the circumstances the issuing judicial authority must be deemed to have made a conscious decision not to include it in warrant.

In response to this counsel for the applicant has submitted that the central premise of the respondent's submission under this heading would appear to be to the effect that consent ought not be granted in respect of an offence that predates the surrender of the respondent. Such a position renders the consent procedure in s. 22 entirely meaningless. For the purposes of s. 22 the expression "offence" has a specific meaning:

> "22.—(1) In this section, except where the context otherwise requires, 'offence' means, in relation to a person to whom a European arrest warrant applies, an offence (other than an offence specified in the European arrest warrant in respect of which the person's surrender is ordered under this Act) under the law of the issuing state **committed before the person's surrender**, but shall not include an offence consisting, in whole, of acts or omissions of which the offence specified in the European arrest warrant consists in whole or in part."

Counsel for the applicant has submitted that the rule of specialty only applies to offences committed prior to surrender. *Ipso facto* a consent application need only be made in respect of offences committed prior to surrender.

The respondent cited the case of *Minister for Justice Equality & Law Reform v Johnston* [2008] IESC 11 in support of the proposition that the respondent had a legitimate expectation that he would not be prosecuted for the offence the subject of the instant application. In *Johnston* there was evidence from the respondent to the effect that he had been told by a policeman that he was no longer being sought in respect of the offences for which his surrender was sought a number of years later. Macken J considered the application of the doctrine of legitimate expectation to such cases:

> "The law relating to legitimate expectation has long been the subject of judgments in this jurisdiction, in the United Kingdom and undoubtedly in Scotland and in many other jurisdictions. It is true also that it has been an evolving area of the law and it may well be that the principles applicable to the doctrine of legitimate expectation have not yet been fully expounded. What is however clearly established in the case law in this jurisdiction, in Northern Ireland and elsewhere is the following primary principle. The expectation which a person is entitled to hold is one which must in all the circumstances of the case be reasonable or legitimate for him to hold. It has been stated in *Daly v Minister for the Marine*, (Unreported, Supreme Court, 4th October 2001), as follows:
>
> "The learned trial judge decided the case essentially on the facts. The applicant did not, he held, have an expectation which was reasonable or legitimate for him to have. The very name of the doctrine demonstrates, in my view, that his approach is correct. If authority were needed for this self-evident proposition it is to be found in express terms in the judgment of this court in Wiley v The Revenue Commissioners (No. 2) [1994] 2 IR 160 . Blayney J. in the High Court and both Finlay C.J. and McCarthy J. accepted that the plaintiff, … expected, as a fact, that he would be granted a refund of excess tax … . He had received a refund on previous occasions but the Minister altered the terms of the scheme so as to require medical evidence that the applicant possess the disability described in the scheme. He did not however in the view of the court have an expectation which was **legitimate**."
>
> The Minister relied upon the following passage from the judgment of Barr J. in Canon v Minister for the Marine [1991] 1 IR 82 , which seems to me to distil the essence of the doctrine, which is fairness:
>
> … the concept of legitimate expectation, being derived from an equitable doctrine, must be reviewed in the light of equitable principles. The test is whether in all the circumstances it would be unfair or unjust to allow a party to resile from a position created or adopted by him which at that time gave rise to a legitimate expectation in the mind of another that that situation would continue and might be acted upon by him to his advantage." (emphasis added)

For the purposes of this judgment I do not consider it necessary, strictly speaking, to go beyond the above definition because it seems to me that the respondent/appellant has presented no evidence whatsoever upon which such a conversation taking place in

the circumstances in which it did, could constitute a reasonable or legitimate expectation either that the warrant was thereafter wholly inoperable or could have as its consequence that the "prosecution would not be proceeded with" as contended for, save for his reliance on the *Eviston* decision, which I consider to be of little assistance to him."

Counsel for the applicant submits that leaving aside the absence of any evidence as to the expectation, legitimate or otherwise, on the part of the respondent, the issue of a potential breach of the rule of specialty in respect of the breach of bail offence in respect of which surrender is now sought was explicitly raised and argued by way of Points of Objection in the Section 16 hearing in respect of the original European arrest warrant. The respondent had contended that the indication given in the European arrest warrant to the effect that if subsequently convicted of a breach of bail offence the respondent would receive a consecutive sentence amounted to a breach of the rule of specialty. By way of reply the Minister contended that there was no such breach in circumstances where the respondent could not be prosecuted for such an offence unless there was an application for consent in accordance with Section 22(7).

The court (Peart J) in a judgment delivered on 9th February 2010 rejected the respondent's argument and agreed that there was no basis for apprehending a breach of specialty given the presumptions in Section 22 and the procedure which was available under Section 22(7). The respondent was present for the making of the relevant arguments and indeed the judgement of Peart J. Counsel for the applicant submits that in the circumstances that it is difficult to see how the respondent can now be heard to say that he has a legitimate expectation that he would not be proceeded against for breaking his bail.

This Court has no hesitation in rejecting this objection based upon legitimate expectation both on account of the absence of any evidence as to the expectation, legitimate or otherwise, on the part of the respondent and on account of the fact that s.22 expressly contemplates consent being sought in respect of an offence committed before the respondent's surrender. Moreover, the Court considers that the last point made by counsel for the applicant concerning the remarks of Peart J in his judgment following the s.16 hearing is a point well made.

Conclusion
This Court having rejected the specific objections raised by the respondent, and being satisfied that the offence in respect of which consent is sought for the purposes of s.22(7) is not an offence for which the respondent could not by virtue of Part 3 of the 2003 Act, or the Framework Decision (including the recitals thereto) be surrendered, the Court is disposed to grant the consent sought.