THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 33

CA Record Nos.: 2015/0445 & 2015/0451

High Court Record Nos.: 2014/81 EXT & 2014/115 EXT

Ryan P.
Mahon J.
Edwards J.

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003, AS AMENDED, SECTION 16(5)(a)

THE MINISTER FOR JUSTICE & EQUALITY

Appellant

V

TOMAS VILKAS

Respondent

Judgment delivered on the 15th day of February, 2018 by Mr. Justice Edwards

Introduction

1. These appeals are concerned with a net point of statutory interpretation in respect of s. 16(5)(a) of the European Arrest Warrant Act 2003, as amended (hereinafter the Act of 2003).

2. In the first instance it may be helpful to set out in full the terms of s.16 of the Act of 2003, so that sub-subsection (5)(a) thereof may be viewed and appreciated in its proper context.

3. Section 16 of the Act of 2003 provides:

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

(a) the High Court is satisfied that the person before it is the person in respect of whom the European arrest warrant was issued,

(b) the European arrest warrant, or a true copy thereof, has been endorsed

in accordance with section 13 for execution of the warrant,

(c) the European arrest warrant states, where appropriate, the matters required by section 45 (inserted by section 23 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012),

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

(e) the surrender of the person is not prohibited by Part 3.

(2) Where a person does not consent to his or her surrender to the issuing state, the High Court may, upon such date as is fixed under section 14 or such later date as it considers appropriate, make an order directing that the person be surrendered to such other person as is duly authorised by the issuing state to receive him or her, provided that—

(a) the European arrest warrant, including, where appropriate, the matters required by section 45 (inserted by section 23 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012), is provided to the court,

(b) the High Court is satisfied that the person before it is the person in respect of whom the European arrest warrant was issued,

(c) the High Court is not required, under section 21A, 22, 23 or 24 (inserted by

sections 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005), to refuse to surrender the person under this Act, and

(d) the surrender of the person is not prohibited by Part 3.

(2A) Where the High Court does not—

(a) make an order under subsection (1) on the date fixed under section 13, or

(b) make an order under subsection (2) on the date fixed under section 14,

it may remand the person before it in custody or on bail and, for those purposes, the High Court shall have the same powers in relation to remand as it would have if the person were brought before it charged with an indictable offence.

(3) An order under subsection (1) or (2) shall, subject to section 18, take effect upon the expiration of 15 days beginning on the date of the making of the order or such earlier date as the High Court, on the application of the Central Authority in the State and with the consent of the person to whom the order applies, directs.

(3A) Subject to subsections (5) and (6), a person to whom an order for the time being in force under subsection (1) or (2) applies shall be surrendered to the issuing state concerned not later than 10 days after the order takes effect in accordance with subsection (3).

(4) Where the High Court makes an order under subsection (1) or (2), it shall, unless it orders postponement of surrender under section 18—

(a) inform the person to whom the order relates of his or her right to make a complaint under Article 40.4.2□□of the Constitution at any time before his or her surrender to the issuing state,

(b) order that that person be detained in a prison (or, if the person is not more than 21 years of age, in a remand institution) for a period not exceeding 25 days pending the carrying out of the terms of the order, and

(c) direct that the person be again brought before the High Court—

(i) if he or she is not surrendered before the expiration of the time for surrender under subsection (3A), as soon as practicable after that expiration, or

(ii) if it appears to the Central Authority in the State that, because of circumstances beyond the control of the State or the issuing state concerned, that person will not be surrendered on the expiration referred to in subparagraph (i), before that expiration.

(5) Where a person is brought before the High Court pursuant to subsection (4)(c), the High Court shall—

(a) if satisfied that, because of circumstances beyond the control of the State or the issuing state concerned, the person was not surrendered within the time for surrender under subsection (3A) or, as the case may be, will not be so surrendered—

(i) with the agreement of the issuing judicial authority, fix a new date for the surrender of the person, and

(ii) order that the person be detained in a prison (or, if the person is not more than 21 years of age, in a remand institution) for a period not exceeding 10 days after the date fixed under subparagraph (i), pending the surrender,

and

(b) in any other case, order that the person be discharged.

(5A) A person to whom an order for the time being in force under subsection (5)(a) applies—

(a) shall be surrendered to the issuing state concerned not later than 10 days after the order takes effect, or

(b) if surrender under paragraph (a) has not been effected, shall be discharged.

(5B) Where a person is ordered, under subsection (4)(b), to be detained in a prison (or, if the person is not more than 21 years of age, in a remand institution) and is brought before the High Court pursuant to subsection (4)(c), the person shall be deemed to be in lawful custody at all times beginning at the time of the making of the order under subsection (4)(b) and ending when he or she is brought before the Court.

(6) Where a person—

(a) lodges an appeal pursuant to subsection (11), or

(b) makes a complaint under Article 40.4.2□□of the Constitution,

he or she shall not be surrendered to the issuing state while proceedings relating to the appeal or complaint are pending.

(7) Where the High Court decides not to make an order under subsection (1) or (2)—

(a) it shall give reasons for its decision, and

(b) the person shall, subject to subsection (8), be released from custody.

(8) Subsection (7)(b) shall not apply if—

(a) (i) the person has been sentenced to a term of imprisonment,

(ii) on the date on which he or she would, but for this subsection, be entitled to be released under subsection (7), all or part of the term of imprisonment remains unexpired, and

(iii) the person is required to serve all or part of the remainder of that term of imprisonment in the State,

or

(b) (i) the person has been charged with or convicted of an offence in the State, and

(ii) on the date on which he or she would, but for this paragraph, be entitled to be released from custody under subsection (7), he or she is required to be in custody by virtue of having been remanded in custody pending his or her being tried, or the imposition of sentence, in respect of that offence.

(9) If the High Court has not, after the expiration of 60 days from the arrest of the person concerned under section 13 or 14, made an order under subsection (1) or (2) or subsection (1) or (2) of section 15, or has decided not to make an order under subsection (1) or (2), it shall direct the Central Authority in the State to inform the issuing judicial authority and, where appropriate, Eurojust in relation thereto and of the reasons therefor specified in the direction, and the Central Authority in the State shall comply with such direction.

(10) If the High Court has not, after the expiration of 90 days from the arrest of the person concerned under section 13 or 14, made an order under subsection (1) or (2) or subsection (1) or (2) of section 15, or has decided not to make an order under subsection (1) or (2), it shall direct the Central Authority in the State to inform the issuing judicial authority and, where appropriate, Eurojust in relation thereto and of the reason therefor specified in the direction, and the Central Authority in the State shall comply with such direction.

(11) An appeal against an order under subsection (1) or (2) or a decision not to make such an order may be brought in the Supreme Court if, and only if, the High Court certifies that the order or decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.

(12) Where a person lodges an appeal pursuant to subsection (11), the High Court may remand the person in custody or on bail pending the hearing of the appeal and, for that purpose, the High Court shall have the same powers in relation to remand as it would have if the person were brought before it charged with an indictable offence."

The relevant facts

4. On the 9th of July 2015 the High Court (Donnelly J.) made orders pursuant to s.16(1) of the Act of 2003 on foot of two European arrest warrants issued by the Republic of Lithuania, directing that the respondent be surrendered to such person as was duly authorised by the issuing state to receive him.

5. In accordance with s.16(3) of the Act of 2003 the said orders took effect, in each case, upon the expiration of 15 days beginning on the date of the making of the relevant order, i.e., on the 24th of July 2015.

6. Thereafter, and in the first instance, the appellant was required in accordance with s.16(3A) of the Act of 2003 to actually surrender the respondent to the issuing state "not later than 10 days" after the orders took effect, i.e., not later than the 3rd of August 2015.

7. The appellant made arrangements with the Lithuanian authorities to effect the surrender of the respondent on the 31st of July 2015 by means of a commercial Lufthansa flight from Dublin to a destination in Lithuania. On the date in question the respondent frustrated the process in the first instance by refusing to board the plane, and then by becoming agitated and aggressive to such an extent as to cause the pilot to indicate that he was not in any event prepared to have him on board the flight. In the circumstances it was not possible to surrender of the respondent as planned, and the flight departed without him.

8. Following these events, and later on the same day, the appellant applied to the High Court (Donnelly J.) for orders pursuant to s.16(5)(a) of the Act of 2003 fixing a new date for the respondent's surrender and, pending his surrender, remanding him in custody for a period not exceeding 10 days after the new date to be fixed. The High Court, with the agreement of the issuing judicial authority, fixed the 6th of August 2015 as a new date for the surrender of the respondent in both cases and made the remand orders sought.

9. On the 13th of August 2015, a further attempt was made to surrender the respondent by arranging that he would travel on a commercial flight. However, once again the respondent frustrated the process and prevented his surrender from being effected on that date.

10. The appellant then immediately contacted the Lithuanian authorities and sought to agree yet another new date for the surrender of the respondent, with a view to proposing that date to the High Court as part of an intended application for further orders fixing a new surrender date pursuant to s.16(5)(a) of the Act of 2003. Given the repeated actions of the respondent, it was agreed that that it would not be possible for the respondent to travel on a commercial flight and that in those circumstances the respondent would be transported by ferry and subsequently by land to Lithuania. These arrangements being more complicated than those originally envisaged, and requiring more time to organise, it was proposed to the Lithuanian authorities, and agreed by them, that the further new date for the surrender of the respondent should be the 15th of September 2015, subject to approval by the High Court.

11. On the 14th of August 2015 the appellant duly applied again to the High Court for Orders pursuant to section 16(5)(a) fixing the 15th of September 2015 as a further new date for the surrender of the respondent, and for the further remand of the respondent, pending his surrender, for a period not exceeding 10 days after the new date proposed to be fixed. Detective Sergeant Fallon was present in court to give evidence of the further obstruction and non-cooperation of the respondent, although the events giving rise to the need for a second application were not in fact in dispute.

12. The High Court (Keane J.) refused the relief sought and discharged the respondent in both matters. In an *ex tempore* ruling the Court gave as its reason for doing so that it was not satisfied that on a proper construction of s.16 of the Act of 2003 it had jurisdiction to make the orders then being sought. The judge's concerns are encapsulated in the following extract from the transcript of his remarks exhibited before this Court:

"JUDGE: Very good. Well it seems to me, for all of the reasons I've outlined, I'm not in a position to entertain an application in relation to the respondent in this case as a person brought before the Court pursuant to subsection 4(c) of section 16 of the European Arrest Warrant Act as amended. And in those circumstances the application fails *in limine*, or rather it seems to me that under the statutory framework of the legislation, and in particular, as I say, the provisions of section 16(5) of the Act, because it in turn refers to subsection 4(c), which is in itself a provision which relates to an order made under section 16(1) or subsection 2, and because I must have regard to the provisions of section 16(5)A, which appear to suggest that a person to whom an order for the time being in force under subsection 5(a) applies, in circumstances where it is common case that the respondent is such a person, shall either be (a) surrendered to the issuing state concerned not later than 10 days after the order takes effect - and we are talking here of the order made on the 31st of July - or (b) if surrender under paragraph (a) has not been effected, shall be discharged. And I simply cannot reconcile with the clear and express and simple binary terms of that subsection the suggestion that in fact those words are entirely superfluous, and it is in fact possible in relation to somebody who is a person to whom an order for the time being in force under subsection 5(a) applies, instead of doing one or other of the two alternatives contemplated by the Oireachtas in that subsection, that it is in fact possible to make a further application under subsection 5(a) in relation to that person, and if it is possible to do that once in relation to a person properly the subject of subsection 5A then it is plainly possible to do that an unlimited number of times, subject only to the qualification identified on behalf of the applicant that of course that can only arise in circumstances where the Court is satisfied that the inability to effect the surrender of the person concerned has come about through circumstances beyond the control of the State. So, as I say, for those reasons it seems to me that on a proper construction of the provisions of section 16 of the European Arrest Warrant Act as amended that I have no jurisdiction in relation to this respondent, the subject of the order of Ms Justice Donnelly made on the 31st of July 2015, to entertain an application made in respect of that respondent through the invocation of the provisions of section 16(5) of the Act. And therefore I cannot hear the application."

13. The *ex tempore* ruling of Keane J. is reflected in the two perfected Orders dated the 14th of August 2015, which are in identical terms and which record:

"THE COURT DOTH FIND that the High Court does not have jurisdiction to hear the said application in circumstances where an Order pursuant to the said Section had previously been made and is currently in force pursuant to Section 16(5)(A) of the said Act."

These are the two Orders which are the subject matter of the present appeal. It is accepted by all concerned that the reference in the said Orders to "Section 16(5)(A)" should be to "Section 16(5)(a)", but nothing turns on that.

Grounds of Appeal

14. The grounds of appeal are identical in each case and were pleaded in the following terms:

"1. The learned trial judge erred in determining that the High Court did not have jurisdiction to hear an application pursuant to Section 16 (5) (a) of the European Arrest Warrant Act 2003, as amended by the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012, due to the fact that

a) The respondent was properly brought before the High Court pursuant to Section 16 (4) (c) (ii) of the European Arrest Warrant Act 2003, as amended.

b) The Minister for Justice and Equality was entitled to make an application pursuant to 16 (5) (a) of the European Arrest Warrant Act 2003, as amended. The High Court (and this court on appeal) has jurisdiction to make such an order notwithstanding the existence of a previous order made pursuant to the same provision.

c) Section 16 (3A) of the European Arrest Warrant Act 2003, as amended sets the "time for surrender" at ten days subject to an extension being granted under Section 16 (5) or an appeal being lodged or a complaint being made within the meaning of subsection (6).

d) The reference to the "the expiration of the time for surrender under subsection (3A)" as provided for in Section 16 (4) (c) (i) of the European Arrest Warrant Act 2003, as amended, is properly interpreted as the expiration of ten-days or such longer period as has been permitted pursuant to an Order granted under Section 16 (5) of the said Act or which may be required by reason of the lodgement of an appeal or the making of a complaint as contemplated by subsection (6)."

Grounds of Opposition

15. The respondent opposes the appeals on the following grounds as pleaded in his statements of opposition:

"a) The respondent was not properly before the High Court pursuant to s.16(5) (a) of the European Arrest Warrant Act 2003. S.16(5)(a) permits the High Court to entertain an application for an extension of the time period specified in the original Surrender made pursuant to s.16(1). Such an application was brought in the instant case on the 31st July 2015 and time was extended. It is clear from the express terms of both s.16(5)(a) and s.16(5A), that there is no jurisdiction for the High Court to hear a further extension application once an Order has been made pursuant to s.16(5)(a) extending time for surrender.

b) S.16(5A) states that 'a person to whom cm order for the time being in force under subsection (5)(a) applies (a) shall be surrendered to the issuing state concerned not later than 10 days after the new date fixed under that subsection, or (b) if surrender under paragraph (a) has not been effected, shall be discharged'. The respondent was a person in respect of whom an application under s.16(5)(a) was made, successfully, on the 31st July 2015. Accordingly, and as the learned trial Judge correctly determined, the words of s.16(5A) prohibited the Court from hearing a further extension application. The words of s.16(5A) are clear and unambiguous. They do not lead to an absurdity and they are not incompatible with a purposive interpretation of the Statute. S.16(5A) is designed to prevent the potentially indefinite detention of a respondent.

c) S.16(3A) is to be read 'subject to subsections 5 & 6'. In this regard, subsection (5A) states that a respondent who has not been surrendered by the end of the extension period provided for in s.16(5)(a) 'shall be discharged', Accordingly, s.16(3A) cannot be understood or applied in the manner contended for by the Appellant, as it would contradict the plain and unambiguous direction contained in s.16(5A).

d) It is clear that s.16(3A) merely relates to the time period specified in the initial s.16(1) Order of the High Court. In this

regard, subsection (3A) expressly refers to the order made under subsection 1. Nothing in the said subsection (3A) or in any other part of s.16 operates, or was intended by the Oireachtas to operate, so as to override the imperative set out in s.16(5A)."

The Preliminary Reference

16. Following an initial hearing in this matter, this Court expressed itself satisfied that the intention of the Irish legislature in enacting s.16(3) to s.16(5A), inclusive, of the European Arrest Warrant Act 2003 was, in general terms, to faithfully transpose Article 23 of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (the Framework Decision) into Irish domestic law. However, we felt that this provided us with limited assistance in circumstances where the correct interpretation of Article 23 of the Framework Decision was itself unclear, specifically in terms of whether it contemplated and allowed for the fixing of a new date for surrender on more than one occasion. Using the preliminary reference procedure, the assistance of the Court of Justice of the European Union (CJEU) was requested in clarifying whether Article 23, properly interpreted, contemplates and allows for the fixing of a new date for surrender on more than one occasion.

17. The questions referred were:

> 1. Does Article 23 of the Framework Decision contemplate or/and allow for the agreement of a new surrender date on more than one occasion?
>
> 2. If so, does it do so in any, or all, of the following situations: i.e., where the surrender of the requested person within the period laid down in [Article 23(2)] has already been prevented by circumstances beyond the control of any of the Member States, leading to the agreement of a new surrender date, and such circumstances:
>
> (i) are found to be ongoing; or
>
> (ii) having ceased, are found to be reoccurring; or
>
> (iii) having ceased, different such circumstances have arisen which have prevented, or are likely to prevent, surrender of the requested person within the required period referable to the said new surrender date?

The reference was accepted by the CJEU, and allocated record no. C-640/15. On the 27th of October 2016 the CJEU issued the opinion of Advocate General Bobek (ECLI:EU:C:2016:826), the bottom line of which was to be found in paragraph 86 thereof, i.e.:

> "It is my view that Article 23(3) of the Framework Decision is to be interpreted as allowing for the agreement of a new surrender date on more than one occasion only if the new or re-occurring circumstances having prevented surrender constitute in themselves a new instance of *force majeure*."

18. Then on the 25th of January 2017 the CJEU (Third Chamber) issued its judgment in case C-640/15 (ECLI:EU:C:2017:39). It answered the question referred as follows:

> "– Article 23(3) of the Framework Decision must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, the executing and issuing judicial authorities agree on a new surrender date under that provision where the surrender of the requested person within 10 days of a first new surrender date agreed on pursuant to that provision proves impossible on account of the repeated resistance of that person, in so far as, on account of exceptional circumstances, that resistance could not have been foreseen by those authorities and the consequences of the resistance for the surrender could not have been avoided in spite of the exercise of all due care by those authorities, which is for the referring court to ascertain.
>
> – Articles 15(1) and 23 of the Framework Decision must be interpreted as meaning that those authorities remain obliged to agree on a new surrender date if the time limits prescribed in Article 23 have expired."

Submissions

19. The Court wishes to record its appreciation to counsel on both sides for their excellent submissions, both written and oral, which were of considerable assistance.

Initial Submissions on behalf of the Appellant

20. The appellant contends that these appeals raise a net issue as to the correct interpretation of subsection (5), which in its introductory clause refers to *"a person being brought before the High Court pursuant to subsection (4)(c)."* Subsection (4)(c) refers, in both of its subparagraphs, to a person who has not or will not be surrendered before *"the expiration of the time for surrender under subsection (3A)."*

21. In turn, subsection (3A) provides:-

> *"Subject to subsections (5) and (6), a person to whom an order for the time being in force under subsection (1) or (2) applies shall be surrendered to the issuing state concerned not later than 10 days after the order takes effect in accordance with subsection (3)."*

In the appellant's submission, the net issue for determination is whether it can be said that *"the time for surrender under subsection (3A)"* (referred to in subsection (4) (c)) is *"10 days after the order takes effect in accordance with subsection (3)",* or whether it includes the longer periods required in the circumstances set out in subsections (5) and (6).

22. It was submitted that to interpret *"the time for surrender in accordance with (3A)"* as referring only to the initial 10 day period from the time that the Order for surrender takes effect is an excessively narrow reading of the section, the clear wording of which has the effect that the general provision that the initial time for surrender will be the 10 day period is entirely subject to the requirements of both subsection (5) and subsection (6). The phrase *"subject to subsections (5) and (6)" at* the commencement of

subsection (3A) must be given some meaning.

23. Counsel for the appellant has submitted that by making the general provision subject to this specific condition or qualification, it is clear that subsection (3A) does not purport to create an absolute time limit of 10 days. The wording of subsection (3A) is such as to equate the position of subsections (5) and (6), as no distinction is made between them in that subsection. All references to "*the time for surrender under subsection (3A)"* in the following subsections, must be read in light of the fact that the Oireachtas clearly intended that the initial 10 day time period was "subject to subsections (5) and (6)."

24. This Court was invited by counsel for the appellant to consider for example, the making of a complaint under Article 40.4.2° on the 10th day of the initial period for surrender, a circumstance covered by subsection (6). It was submitted that if a conditional order is made, directing an enquiry into the lawfulness of the detention, the person concerned would obviously not then be surrendered within the 10 day period. The Court is asked rhetorically, "is this to be regarded as a failure to surrender within *"the time for surrender under subsection (3A)"*? It was submitted that, if so, then the person would have to be brought before the High Court pursuant to subsection (4)(c) and the High Court would have to consider the matters in subsection (5). However, subsections (5) and (6) are clearly regarded by subsection (3A) as *alternative* methods by which time can be extended, so this does not make any sense.

25. It was further submitted that the provisions of subsection (5) appear to be directed at matters other than the lodgement of an appeal or the making of a complaint pursuant to Article 40.4.2°. The natural and ordinary meaning of the words of subsection (5) ("*circumstances beyond the control of the State..."*) do not appear to include a situation where the State has placed a requested person in unlawful detention, or the High Court has made an order which is liable to be overturned on appeal. It was urged upon this Court that only on the most strained interpretation (if at all) could such a situation be said to fall within subsection (5).

26. Counsel for the appellant submitted that it is evident from reading the relevant provisions of s.16 as a whole that subsections (5) and (6) are intended to deal with distinct and alternative situations. However, the interpretation placed by the trial judge on *"the time for surrender under subsection (3A)"* would force the appellant to bring a person who had lodged an appeal to this Court before the High Court after the initial 10 day period has expired. It was submitted that such a requirement would be unworkable and would contradict the obvious meaning of subsection (3A) which is that subsections (5) and (6) apply to quite distinct situations, as well as being inconsistent with the scheme of s.16 as a whole.

27. It was further submitted in development of the last point that, equally, it cannot reasonably be contended that the phrase *"the time for surrender under subsection (3A)"* should be interpreted differently at different places within s.16.

28. It was therefore submitted that the natural and ordinary meaning of the phrase *"the time for surrender under subsection (3A)"* means any of the time periods contemplated by that subsection, ie, the initial 10 day period arising out of the taking effect of the order for surrender itself, or such longer period as may result from the provisions of either subsections (5) or (6).

29. It was further submitted that in circumstances where the clear words of subsection (3A) require that the *"time for surrender"* can be **either** the initial 10 day period or such extended period as may be required by subsections (5) and (6), it is manifest that the 10 day period can be extended. Once it is extended, then the phrase *"time for surrender under subsection (3A),"* which appears in subsection (4)(c) means that a person who is brought before the High Court when the first extension pursuant to subsection (5)(a) has proved fruitless is still a person brought before the High Court pursuant to subsection (c) because he or she is a person who has not been surrendered or will not be surrendered before or on the expiration of *"the time for surrender under subsection (3A)."* For the same reason, the High Court can again be satisfied pursuant to subsection (5)(a) that the person was not surrendered within "the time for surrender under subsection (3A)" because of circumstances beyond the control of the State or the issuing state, and can fix a new time for surrender.

30. Without prejudice to the appellant's primary submission that the plain meaning of subsection (3A) permits a second application for an extension of the time for surrender to be made, the Court is asked to note that s.5 of the Interpretation Act 2005 (hereinafter the Act of 2005) permits a purposive approach to interpretation to be taken when construing any provision of an Act, other than *"a provision that relates to the imposition of a penal or other sanction".* It was submitted that the purposive approach has been applied repeatedly to the Act of 2003, as amended, and *Minister for Justice v. Altaravicius* [2006] 3 I.R. 148 is cited as an example in that regard.

31. Section 5 of the Act of 2005, permits that purposive approach to be taken to any provision (a) that is obscure or ambiguous or (b) where a literal interpretation would be absurd or would fail to reflect the plain intention of the Oireachtas. In the case of either such difficulty, the provision shall be given the construction that reflects the intention of the Oireachtas, where that intention can be ascertained from the Act as a whole.

32. The appellant referred this Court to the case of *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27 as an example of a recent case in which s.5 of the Act of 2005 had been applied in interpreting a provision affecting personal liberty. In *Kadri* the Supreme Court applied s.5 of the Act of 2005 in aid of interpreting s.5(1) of the Immigration Act, 1999, as amended, which provides for the arrest in certain circumstances of a person in respect of whom a deportation order is in force and detention for a period or aggregate periods of up to eight weeks. Ultimately in that case the statutory provision at issue was found not to be obscure or ambiguous. The *Kadri* case is nevertheless relied upon by counsel for the appellant as supporting her contention that in the present case this Court can, if necessary, call in aid s.5 of the Act of 2005.

33. It was submitted that it would be absurd, and it could never have been the intention of the legislature, to allow a situation where a lawful order of the High Court would effectively be set at naught by obstruction by a person the subject of it. An equally absurd situation could arise if such a lawful order could be irredeemably frustrated by circumstances of inclement weather, an industrial dispute or the illness of the requested person where this rendered him or her unfit to travel. It was submitted that to allow such a situation would be contrary to the purpose of the Act of 2003, which is to give effect to the Framework Decision, which is itself designed to introduce a simplified system of mutual surrender between Member States of the European Union, based on mutual trust and confidence in each other.

34. Responding to the suggestion in the respondent's statement of opposition that the Oireachtas must be regarded as having set its face against more than one extension of time with a view to preventing indefinite detention, counsel for the appellant makes the point that no such potentially indefinite detention could arise on the interpretation of the statute contended for by her client as extensions of time may only be granted by the High Court upon it being satisfied of certain matters, i.e., that surrender did not take place within the time previously permitted by the statute or by the High Court pursuant to subsection (5)(a) for reasons beyond the control of the State and the issuing state. The provision for application to the High Court pursuant to subsection (5)(a) is clearly designed to prevent indefinite detention, and to ensure that further necessary detention due to unforeseen circumstances beyond the control of

this State or the issuing state is subject to judicial authorisation and strict judicial oversight and regulation.

35. Finally, the appellant contends that the High Court judge appears to have misunderstood s.16(5A) of the Act of 2003, including its relationship with s.16(5), and its place and significance within the overall scheme of s.16 of the Act of 2003. The appellant does not dispute that subsection (5A) requires the discharge of a requested person if surrender has not been effected within the time limit pointed to in that subsection. However, that subsection applies to a person "to whom an order for the time being in force under subsection (5)(a) applies," and requires that surrender would take place not later than 10 days after such an order takes effect. That begs the question as to whether an order under subsection (5)(a) is in force. However, it says nothing about the jurisdiction to make such an order in the first place, or about the jurisdiction to make any further such order in substitution for the one for the time being in force.

36. Counsel for the appellant has submitted that if the interpretation contended for by her client is accepted by this Court, it means that further applications to the High Court can be made and time can be extended more than once, provided the matters specified in s.16(5)(a) are established to the satisfaction of the High Court. Unless a fresh order is made, then subsection (5A) will require discharge of the person in respect of whom an order has been made under subsection (5)(a). The interpretation contended for by the Minister does not prevent the operation of subsection (5A) in the manner which was intended by the Oireachtas.

Additional Submissions on behalf of the Appellant following

the CJEU's judgment of the 27th of October 2017 in Case c-640/15 Thomas Vilkas, EU:C:2017:39

37. In supplemental submissions filed on behalf of the appellant, and amplified in oral argument at a resumed hearing, following the CJEU's judgment of the 27th of October 2017 in Case c-640/15, *Thomas Vilkas*, EU:C:2017:39, counsel for the appellant has argued that the judgment of Court of Justice has confirmed the correctness of the initial submissions made to this Court on behalf of the appellant concerning the correct interpretation of Article 23(3) of the Framework Decision.

38. It was submitted that the CJEU had considered the questions together, interpreting them as asking, in essence, whether Article 23 of the Framework Decision must be interpreted as precluding, in a situation such as that at issue in the main proceedings, the executing and issuing judicial authority from agreeing on a new surrender date under Article 23(3) where the repeated resistance of the requested person has prevented his surrender within 10 days of a first new surrender date agreed on pursuant to that provision.

39. It was submitted that the CJEU had rejected the argument of the respondent that a literal interpretation of Article 23 was such that only one new date could be agreed between the authorities concerned: there is no express limit on the number of new surrender dates that may be agreed on between the authorities concerned where the surrender of the requested person within the period laid down is prevented by circumstances beyond the control of one of the Member States.

40. It was further submitted that the CJEU had, in paragraph 33 of its judgment, held in effect that Article 23(3) required to be afforded a purposive interpretation permitting agreement of a new date for surrender where, due to circumstances beyond the control of one of the Member States, surrender within 10 days of a first new surrender date agreed pursuant to Article 23(3) was prevented. Otherwise, the obligation of Member States pursuant to the Framework Decision would be impossible to fulfil, and as such, would not contribute in the slightest to the objective pursued of accelerating judicial cooperation.

41. The provisions of Article 23(5) also supported this interpretation, according to the CJEU, because otherwise a person would necessarily have to be released if he were still being held in custody, irrespective of the circumstances of the case, simply because the time limit referred to in Article 23(3) had not been complied with. That would limit appreciably the effectiveness of the procedures provided for by the Framework Decision, and would undermine the full achievement of the objective pursued by it.

42. In paragraph 38 of its judgment the CJEU had held that, not to so interpret it, could in fact lead to the release of the requested person even where the duration of this detention had not resulted from a lack of diligence on the part of the executing authority and where the total duration of his detention was not excessive in the light, in particular, of any contribution on his part to the delay in the procedure, of the sentence potentially faced by him and of the existence, as the case may be, of a risk of absconding.

43. Therefore, Article 23(3) was to be interpreted as requiring the authorities concerned to agree on a new surrender date under that provision where the surrender of the requested person within 10 days of a first new surrender date agreed on pursuant to that provision is prevented by circumstances beyond one of the Member States' control.

44. The CJEU had held in paragraph 43 of its judgment that such an interpretation was not in conflict with fundamental rights provisions, including Article 6 of the Charter of Fundamental Rights (CFR), because an executing judicial authority would be able to decide to hold the requested person in custody only in so far as the surrender procedure had been carried out in a sufficiently diligent manner and in so far as, consequently, the duration of the custody was not excessive.

45. It was submitted that as subsections (3) to (5A) inclusive of s. 16 of the Act of 2003, as amended, are together designed to give effect to Article 23 the Framework Decision, the CJEU's interpretation of Article 23(3) of the Framework Decision indicates the correctness of the interpretation of the provisions at issue, using both a literal and a purposive approach, contended for by the appellant.

46. It was submitted that the reference in subs.(4)(c) to *"time for surrender under sub-section (3A)"*, is a reference to the subsection as a whole and the various time periods contemplated in it. As a consequence, the entire subsection must be looked at. This provides for a general 10 day time limit, but expressly makes it subject to subsections (5) and (6). The *"time for surrender under subsection (3A)",* therefore, is on the facts of this case, the time as extended by the Order of the 31st July, 2015.

47. The natural and ordinary meaning of the relevant sections is such that the respondent had not been surrendered within the *"time for surrender under subsection (3A)"*. Accordingly when he was brought to the High Court on 14 August, 2015, he was brought there *"pursuant to subsection (4)(c)."* As a result, the High Court had jurisdiction to extend the time and to make a fresh order pursuant to s.(5)(a), and erred in declining jurisdiction.

48. It was further submitted, without prejudice to the submission just described, that it would plainly be absurd to allow a person the subject of an order of the High Court to frustrate its operation in the way that the respondent had sought to do, and that indeed many other absurd situations could arise if the interpretation favoured by the High Court were upheld. It was suggested that as the facts of this case demonstrate, the consequence of a finding that no further application can be made pursuant to subsection (5)(a) is

that the person could obtain an immunity from that particular order for surrender (though not a further order made on a fresh warrant). It was submitted that this cannot have been the intention of the legislature.

49. It was argued that because the CJEU has confirmed that Article 23 permits for multiple applications for new agreed surrender dates, s.16(3) to s.16(5A) must in so far as possible be given a conforming interpretation, if that can be done in a way that is not *contra legem*, so as to allow for fresh surrender dates. It was submitted that such a conforming interpretation is both possible and appropriate in the circumstances of this case.

50. In the circumstances, it was submitted that the Orders of the 14th August 2015 should be set aside and the application for a second agreed surrender date remitted to the High Court for determination in accordance with the principles set out in the judgment of the CJEU, i.e., whether the circumstances giving rise to the second application under s.16(5) amounted to *force majeure*. In that regard, the CJEU has not ruled out that a second act of obstruction by the respondent could amount to *force majeure*. No evidence was tendered before the High Court as the learned judge declined jurisdiction to hear the application so, counsel submitted, it seems appropriate that the matter would now be remitted so that evidence can be heard and a determination made as to whether the situation is one justifying the setting of a new surrender date.

Initial Submissions on behalf of the Respondent.

51. It was submitted by counsel for the respondent that the High Court judge was correct in his ruling because, he contends, s.16(5)(a) of the Act of 2003, in its object and in its effect, permits the High Court to entertain one, and only one, application for an extension of the time period specified in the original surrender Order. Such an application was brought in the instant case on the 31st July of 2015.

52. Counsel for the respondent further submitted that it is clear from the express terms of s.16(5A) that the High Court has no jurisdiction to hear a further extension application once an Order has been made pursuant to s.16(5)(a) extending time for surrender. This is because the person who is the subject of the s.16(5)(a) Order must either be surrendered within the time period designated in that Order or else discharged once the extended time period has expired.

53. The respondent seeks to emphasise that s.16(5A) states that *'a person to whom an order for the time being in force under subsection (5)(a) applies (a) shall be surrendered to the issuing state concerned not later than 10 days after the new date fixed under that subsection, or (b) if surrender under paragraph (a) has not been effected, shall be discharged'*. The respondent's case is that he was a person in respect of whom an application under s.16(5)(a) was made, successfully, on the 31st July 2015. Accordingly, it was contended, the wording of s.16(5A) prohibited the Court from hearing a further extension application.

54. Counsel for the respondent has submitted that the wording of s.16(5A) is clear and unambiguous. It does not lead to an absurdity and it is not incompatible with a purposive interpretation of the statute. S.16(5A) was enacted, as a safeguard, to prevent the potentially indefinite detention of a respondent on foot of repeated extension Orders.

55. In development of his argument that the direction within s.16(5A) that a person who has not been surrendered pursuant to s.16(5)(a) within the time period provided for must be discharged is entirely dispositive of the issue to be determined on this appeal, counsel for the respondent has sought to trace the interaction of this subsection with the other relevant parts of s.16, in order to demonstrate that the terms of subsection (5A) apply in the circumstances of the present case.

56. He submits that subsections (1) to (4) of s.16 set out the relevant procedure and the jurisdiction of the High Court to hear and determine a contested European arrest warrant case and to make a surrender order. If surrender is being ordered by the High Court pursuant to subsection (1), there are express time limits for this surrender, which are provided for in subsections (3) and (3A). Upon ordering surrender, the Court directs that the person shall be detained pending surrender for a period not exceeding 25 days from the making of the surrender Order. Therefore, surrender will occur not before the 15 days provided for in subsection (3) and not later than the 10 days thereafter, as provided for in (3A).

57. Subsection (4)(c) of s.16 of the Act of 2003 sets out that, when making the s.16(1) Order, the High Court shall direct that the person be brought back before them if not surrendered within the 25 days provided for in the surrender order. It was submitted on behalf of the respondent that from a consideration of the various subsections as a whole, it is clear that this 4(c) direction is to be made as part of, and contemporaneously with, the s.16(1) surrender Order. And in practice, this is how the High Court has always proceeded.

58. The Orders of Donnelly J. of the 9th of July and the 31st of July reference the extension procedure contained in s 16. The Order of the 31st of July records that the respondent was before the Court pursuant to that procedure, for an extension hearing pursuant to s.16(5)(a).

59. In that regard, s.16(5)(a) provides that *'where a person is brought before the High Court pursuant to subsection (4)(c)'*, the High Court shall determine whether to extend time or else to discharge. The respondent contends that, as he has previously submitted, subsection 4(c) represents a power of the High Court which is exercised as part of the s.16(1) surrender order. Subsection 4(c) makes no reference to a jurisdiction to direct that a person be brought back before the Court for a further extension hearing. The respondent has submitted that when the appellant brought the respondent to Court on the 31st of July 2015 it was on foot of the express direction of the High Court.

60. It was further submitted that when Donnelly J. extended time on the 31st of July 2015 she did not make a further direction that the respondent could be brought back before the Court pursuant to s. 16(4)(c). The respondent contends that this was because the Court had no jurisdiction to make such an order.

61. Counsel for the respondent has urged upon this Court that when one considers s.16(5)(a), it is clear that the subsection provides for the final step in the procedure which begins with the making of a s.16(1) order for surrender. To prevent ambiguity arising about this procedure, the Oireachtas took the further step of including subsection (5A), which makes clear that the person must be discharged if the procedure provided for in s.16(5)(a) has not resulted in a successful surrender.

62. It was further submitted that while the appellant relies on s.16(3A) of the Act of 2003 as providing a basis for multiple applications for an extension, this subsection is qualified as being *'subject to subsections 5 & 6'*. In this regard, subsection (5A) states that a respondent who has not been surrendered by the end of the extension period provided for in s.16(5)(a) *'shall be discharged'*. Accordingly, the respondent submitted, s.16(3A) cannot be understood or applied in the manner contended for by the appellant, as it would contradict the plain and unambiguous direction contained in s.16(5A).

63. It was urged upon this Court that nothing in subsection (3A) or in any other part of s.16 of the Act of 2003 operates, or was intended by the Oireachtas to operate, so as to override the imperative set out in s.16(5A) of that Act.

64. Counsel for the respondent has submitted that s.16(3A) merely sets out the time period for surrender, after the 15 day period contained in subsection (3) has passed. It was further submitted that it does not provide a latent power for the High Court to make indefinite extension Orders. The question therefore arises: where is the power to make repeated extension Orders to be found? It cannot be contended that such a power *must* exist, and that it can therefore be read in, simply because its absence would lead to what the appellant believes would be an unsatisfactory result.

65. It was submitted that it is hard to see what significance the appellant can attach to the fact that subsection 5(a) refers back to the period of 10 days contained in section (3A). It does so, but merely in the context of reciting that the person is back before the High Court in circumstances where that initial (3A) surrender time period could not be complied with. It was submitted that it is also clear that the extension order made by the Court under subsection (5)(a) is not the same 'order' referred to in subsection (3A). The order to which the subsection (3A) time period of 10 days relates is expressly set out in that subsection: *'a person to whom an order for the time being in force under subsection (1) or (2) applies shall be surrendered to the issuing state concerned not later than 10 days after the order takes effect.'*

66. By contrast, s.16(5)(a)(ii) expressly sets out a new time period for surrender, in the event that an extension is being ordered. This period is also one of 10 days, but it would be wrong, the respondent contends, to equate this with the period contained in subsection (3A). The respondent argues that it is a separate time period and a separate order altogether: one which subsection (5A) directs can only be made once.

67. In summary, the respondent's case is that subsections (3) and (3A), together, set out a time period for surrender. Subsection (5) permits this time period to be extended in certain circumstances. Subsection (6) effectively stays this time period, pending an appeal or a habeas corpus application. While subsection (3A) is stated to be subject to subsection (5) & (6), this means nothing more than that a person subject to the subsection (1) surrender Order does not have to be surrendered within the 10 day period if any of the eventualities referred to in subsections (5) or (6) occur. Moreover, where an extension is granted under s.16(5)(a), it can only granted once by virtue of subsection (5A).

68. Counsel for the respondent further submits that if the Oireachtas had intended to provide for multiple extensions, they would have been obliged to do so expressly. It is clear that there is no express provision in the section setting out an extension procedure. The respondent relies on the case of *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27, and on certain comments of Clarke J. in that case in respect of the absence of a clearly delineated procedure, as support for the proposition that the Oireachtas would not have used an incoherent and vaguely-defined route to legislate for an onerous procedure affecting the liberty of the person. It was submitted that even if they had attempted to do so, the lack of clear words delineating such a jurisdiction and such a procedure would be fatal to the attempt.

69. Although the respondent's primary contention is that the meaning of the legislation is clear and that there is no ambiguity in any of the relevant provisions, it is submitted on his behalf that if the Court were to be of the contrary view it must apply what is characterised as a uncontroversial principle of statutory interpretation, namely that where there is an ambiguity that cannot otherwise be resolved in a provisions affecting personal liberty, the provision must be strictly construed in favour of the affected person so as to prevent 'doubtful penalisation'. In support of this position the respondent has referred this Court to certain dicta of O'Higgins J. in *Mullins v. Harnett* [1998] 2 ILRM 304 and of MacMenamin J. in *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27. Referring to principle at issue, O'Higgins J. in the *Mullins* case stated at p. 312: *'It would appear that the principle applies not only to criminal offences but to any form of detriment'*, while MacMenamin J., in his judgement in Kadri, stated at para. 6: *'There is the fundamental issue of the ri.ght to liberty at stake, where, whatever the applicant's merits, he is entitled to rely on a literal interpretation of the statute.'*

70. The respondent contends that it is not necessary for the Court to engage in a purposive interpretation of s.16 of the Act of 2003 since the section is clear as a whole and in the interaction of its constituent parts. It does not lead to absurdity.

71. Finally, the respondent seeks to refute any suggestion a literal interpretation of subsection (5A) is inconsistent or incompatible with the purpose of the Act of 2003 or with the Framework Decision. Undoubtedly, those instruments are designed to ensure that wanted persons are surrendered between participating States, quickly and efficiently. However, the respondent submits, that overall goal could not be viewed as precluding the Irish legislature from seeking to protect such persons from an arbitrary or open-ended detention. It is contended that the Oireachtas has done that by enacting s.16(5A) of the Act of 2003.

Additional Submissions on behalf of the Respondent following

the CJEU's judgment in Case c-640/15 Thomas Vilkas

72. Following the CJEU's judgment additional submissions were also made on behalf of the respondent. In summary these re-iterated the arguments made at the initial hearing that the appeal ought to be refused because:

(i) The literal meaning of the provisions at issue provides for one extension only.

(ii) The section impinges on liberty and it must therefore be strictly construed in favour of the affected person. An interpretation which protects liberty must be preferred.

(iii) The section, in its plain and ordinary meaning, does not contain a express procedure providing for multiple extensions. A provision impacting on liberty must be absolutely clear in its terms and in its effect. If it is not, then another valid interpretation which protects liberty must be preferred.

(iv) The appellant's own interpretation is implausible and incoherent. It is stretching credulity to suggest that the Oireacthas would choose to legislate in such an oblique manner. The interpretation urged by the appellant, if correct, would be unconstitutional by reason of the uncertainty of its effect.

(v) The fact that Article 23 of the Framework Decision permits multiple extensions does not impact on the foregoing principles.

(vi) To interpret s.16 of the 2003 Act as allowing for multiple extensions would be to act contra legem.

73. The respondent accepts that the CJEU judgment is binding on this Court in respect of the interpretation of Article 23. The respondent further expressly accepts that the relevant sub provisions of s.16 of the Act of 2003 were intended to faithfully transpose Article 23 and must, in so far as possible be interpreted to conform with Article 23. Therefore if those provisions can **validly** be interpreted to permit multiple extensions, they must be so interpreted.

74. In summary, the respondent's case is that the controversial provisions cannot be validly interpreted in the manner advocated by the appellant, and to do so would be to afford them an interpretation that is *contra legem*. The situation, it is said, is not unprecedented, even in respect of Article 23. The same difficulty arose in *Rimsa v. The Governor of Cloverhill Prison* [2010] IESC 47, and the Supreme Court held that the domestic provision took precedence.

75. The respondent's arguments as to the true construction of controversial sub-provisions of s.16 of the Act of 2003, as amended, as advanced in his initial submission, were reprised. Counsel has further submitted that the interpretation of those provisions urged by the appellant is incoherent, implausible, circular and in any event, would be entirely insufficient as a procedure regulating liberty. In support of this submission our attention was drawn to the words of the trial judge, after an exchange with counsel for the appellant, as to the meaning, and combined effect, of s.16(3A) and s.16(4)(c). It is suggested that they encapsulate the insurmountable difficulties with the appellant's interpretation of s.16:

> *COUNSEL FOR THE APPELLANT: But I think Mr Lynam's argument is that simply this boils down to 'you're not before the Court pursuant to subsection 4(c)' but I'm saying that I am properly before the Court.*
>
> *JUDGE: You were. You're not now. You can't be. I mean, you simply can't be. I just can't strain the words of the subsection to read it in that way, as endlessly circular. Before we come on to its being a penal provision.'*

76. It was again submitted on behalf of the respondent that s.16 of the Act of 2003 impacts on liberty, and accordingly must be afforded a strict literal interpretation, and where there is an ambiguity it must be construed in favour of the affected person so as to prevent "doubtful penalisation." We were again referred to Mullins v. Harnett [1998] 2 ILRM 304 in support of this submission.

77. It was pointed out that as noted by Advocate General Bobek in his opinion given in the context of the preliminary reference, Article 23 of the Framework Decision does not itself map-out the procedure for multiple extensions. The procedure must therefore be 'clearly defined' in domestic law, he therefore stated:

> *"50. … [A]ny deprivation of liberty according to Article 5(1)(f) of the ECHR must be 'lawful'. This entails that detention should be in compliance with 'a procedure prescribed by law', as provided for by Article 5(1) of the ECHR. It must comply with the substantive and procedural rules of national law, and should be in keeping with the purpose of protecting the individual from arbitrariness. To assess the 'lawfulness' of detention, the general principle of legal certainty plays a paramount role. The requirement of 'lawfulness' therefore also relates to the 'quality of the law': 'it is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application …'.*
>
> *51. Considering this, it is noted that Article 23(3) offers a legal framework to justify continued pre-surrender detention. However, that provision does not define the specific conditions for the deprivation of liberty.*
>
> *52. In line with the arguments put forward by Advocate General Sharpston in N., the examination of whether the limitations to the right to liberty comply with the conditions of lawfulness and 'quality of the law' must take into account not only the provision of EU law at issue, but also of national law. Indeed, when assessing the requirement of 'lawfulness', the ECtHR has accepted that instruments of international cooperation may serve as a legal basis for detention with a view to extradition. However, when addressing the criteria of 'quality of the law' (the need for accessibility, precision and foreseeability), the ECtHR has found that the lack of a comprehensive regulation of the procedure to be followed in those instruments made it necessary to examine domestic law.*
>
> *53. This has a very concrete consequence for a rerun of Article 23(3) of the Framework Decision. The requirement of the 'quality of the law' means that a measure of detention can only be lawfully continued on the basis of repeated 'circumstances beyond the control of any of the Member States' if the combination between the provisions of the Framework Decision and the implementing national provisions complies with the requirements of accessibility, precision and foreseeability."*

78. The respondent has submitted that the absence from s.16 of an express extension procedure which is characterised by '*accessibility, precision and foreseeability'*, would amount to a breach of Article 5 ECHR. It urged upon us that such an interpretation must be rejected for this reason.

79. Moreover, it is said, if s.16 is interpreted as mandating multiple extensions and detention during this procedure, this would have implications for the constitutionality of the section. It was submitted that an enactment effecting liberty characterised by such a lack of 'accessibility, precision and foreseeability' would be liable to challenge under Article 40.4.3 of the Constitution by any person detained on foot of it.

80. Finally, the arguments made previously as to why the plain words of s.16 do not lead to absurdity were again re-iterated.

Analysis and Decision

81. Applying the well established general rules of statutory interpretation I am required to consider the controversial subsections on their own in the first instance, taking account of their place within the overall scheme of s.16 of the Act of 2003, as amended; further taking account of s.16 as a whole within the overall scheme of the part of the Act in which it appears, i.e., in Part 2, Chapter 1 entitled *"European Arrest Warrant Received in State"*; and taking into account the expressed purpose of the Act as stated in the long title and the overall scheme of the legislation. This is with a view to seeing if the natural and ordinary meaning and effect of the provisions is clear, or if there is ambiguity.

82. The respondent maintains that the plain and ordinary meaning and effect of the controversial subsections is clear, namely that once an order for surrender comes into effect under s.16(3), and time begins to run in respect of it under s.16(3A), that if surrender within the time limit either proves impossible, or is thought likely to be impossible due to circumstances beyond the control of the State or the issuing state concerned, the person concerned may be brought back before the High Court pursuant to s.16(4)(c), with

a view to the High Court potentially fixing a new date for the surrender of the person concerned with the agreement of the issuing judicial authority under s.16(5)(a)(i), but that by virtue of the provisions of s.16(5A) this can only be done once. The trial judge agreed with this view and, as indicated already, expressed his belief in trenchant terms that to interpret them in any other way would involve straining the words of the section to authorise a potentially endlessly circular procedure. The respondent's case is that literally interpreted the meaning of the provisions at issue is clear and unambiguous.

83. The appellant's contention on the other hand is that they are ambiguous, and admit of an alternative interpretation that allows the executing authorities, on a second or subsequent frustration of an attempt to give effect to the surrender order, to again bring the person concerned back before the High Court pursuant to s.16(4)(c), with the possibility of the High Court fixing a further new date for the surrender of the person concerned with the agreement of the issuing judicial authority under s.16(5)(a)(i), subject of course to it being satisfied that the new or re-occurring circumstances that have prevented surrender constitute in themselves a new instance of *force majeure*. The appellant acknowledges the circularity of the procedure on this interpretation, but maintains that that there can be no legitimate concerns about potential abuses in circumstances where the procedure is expressly subject to judicial oversight, requires active judicial involvement, and in circumstances where the whole system which the Act of 2003 is designed to give effect to is predicated on presumed good faith in circumstances where the member states have entered into the mechanism of the European arrest warrant on the basis of a high level of confidence between them, and on the basis that fundamental rights will be respected.

84. I have considered the arguments on both sides, and I am satisfied that the ambiguity identified by the appellant does exist. That having been said, I must also acknowledge that on a strict literal construction of the provisions at issue, the interpretation contended for by the respondent appears somewhat more cogent than that contended for by the appellant, but not to such an extent as to resolve the issue in my mind. I therefore remain of the view that the ambiguity contended for does exist.

85. What then are the consequences of my having so found? Am I bound to adopt the literal construction favourable to the respondent, or can I proceed to consider what was the intention of the legislature, with a view to affording the provisions at issue a purposive interpretation?

86. Section 5 of the Interpretation Act 2005 (the Act of 2005) requires to be considered in this context. It provides:

> 5.—(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—
>
> (a) that is obscure or ambiguous, or
>
> (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—
>
> (i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or
>
> (ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,
>
> the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole.

87. Counsel for the respondent has argued before us that s.5 of the Act of 2005 does not apply in this case both because of the excluding proviso contained within it, namely that it does not apply in the construction of a provision that relates to the imposition of a penal or other sanction, and because of a long standing common law rule of statutory interpretation, namely that where there is an ambiguity that cannot otherwise be resolved in a statutory provision affecting personal liberty, the provision must be strictly construed in favour of the affected person so as to prevent 'doubtful penalisation'.

88. It is suggested that the excluding proviso in s.5 of the Act of 2005 simply reflects and gives statutory recognition to the aforementioned common law rule.

89. That having been said, it is conceded that the provisions at issue in this case do not in their express terms relate *to "the imposition of a penal or other sanction"*. However, reliance is placed on dicta from a number of judgments of the High Court and Supreme Court, and in particular those of O'Higgins J. in *Mullins v. Harnett* [1998] 2 ILRM 304 and MacMenamin J. in *Kadri v. Minister for Justice and Equality* [2012] IESC 27, cited earlier in my review of the arguments, suggesting that certainly the common law rule (which the respondent contends is reflected in s.5 of the Act of 2005) applies not just to fines or periods of imprisonment or detention, or other measures, imposed either as a criminal or administrative sanction, but to any form of analogous detriment, including any measure whether or not strictly speaking it is correctly to be characterised as a sanction, in which the subject person's right to liberty is at stake. The respondent maintains that on that basis this Court is obliged to strictly construe the controversial provisions under consideration in this case, and uphold the interpretation contended for by the respondent.

90. The appellant maintains that s.5 of the Act of 2005 does apply, and that it affords this Court an entitlement to consider the intention of the legislature in construing the provisions at issue and to afford them a purposive interpretation. It is suggested such doing so would resolve the ambiguity apparent on a strict literal approach in favour of the interpretation contended for by the appellant.

91. The first thing to be observed is that *Mullins v. Harnett* [1998] 2 ILRM 304 was decided well before the Act of 2005 was enacted, and does not purport to offer an interpretation of the scope of the proviso contained in s.5 of that Act. It does confirm the long standing existence, amongst the common law canons of construction of statutes, of the principle against doubtful penalisation, and that according to this principle nobody should suffer a detriment by application of a doubtful law.

92. In the course of his judgment in *Mullins v. Harnett* [1998] 2 ILRM 304 O'Higgins J. cites with approval certain passages from Maxwell on the Interpretation of Statutes (12th ed) and from Bennion on Statutory Interpretation (2nd Ed), as follows:

> "According to Maxwell, 12th ed. pp. 239 to 240 'The strict construction of a penal statute seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly the words setting out elements of an offence; in requiring the fulfilment of the letter of the statutory conditions precedent to the infliction of punishment; and in insisting on a strict observance of technical provisions concerning criminal procedure and jurisdiction'.

It would appear that the principle applies not only to criminal offences but to any form of detriment. At p. 572 of Bennion the nature of the principle is stated thus:

'Whenever it can be argued that an enactment has a meaning requiring infliction of a detriment of any kind, the principle against doubtful penalisation comes into play. If the detriment is minor, the principle will carry little weight. If the detriment is severe, the principle will be correspondingly powerful. As Staughton L.J. said in relation to penalisation through retrospectivity, it is 'a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended'. However it operates, the principle requires that persons should not be subjected by law to any sort of detriment unless this is imposed by clear words.'"

93. *Mullins v. Harnett* [1998] 2 ILRM 304 does appear to me to be authority for the proposition that the doubtful penalisation principle does not just apply to detriment in the sense of a penalty or a sanction imposed by the criminal law, but that it applies in fact to any form of detriment which is required to be inflicted, whether criminally or civilly by a court, or administratively by some other person or entity, in consequence of an enactment. However, it bears remarking upon that this principle was formulated at a time that long pre-dates the creation of the European Union, and its predecessors, (the European Communities collectively, and individually the ECSC, the EEC and Euratom) and when the concept of domestic legislation intended to transpose supranational legislation enacted by supranational institutions was unheard of. Arguably, it is highly desirable that the construer of transposing legislation should have an ability to have regard to the instrument intended to be transposed, and where necessary to be able to afford the domestic transposing legislation a purposive and teleological interpretation consistent with the instrument intended to be transposed. S.5 of the Act of 2005 was enacted in circumstances where the need to construe transposing legislation is now routine and commonplace. It may therefore be of significance that the excluding proviso in s.5 refers only to *"the imposition of a penal or other sanction"*, and is ostensibly narrower in its scope that the pre-existing common law canon of construction based on the principle of doubtful penalisation.

94. The decision in *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27 involved a three judge bench of the Supreme Court, involving Fennelly J., Clarke J. (as he then was), and MacMenamin J. It should be stated at the outset that s.5 of the Immigration Act 1999 (the Act of 1999) is concerned with the arrest, detention and removal of non-nationals. Subsection (1) of s.5 as substituted provides for a power of arrest and detention where, inter alia, a person who is the subject of a deportation order has failed to comply with it, or has failed to comply with a Notice under s.3(3)(b)(ii) (requiring him/her to leave the State on or before a specified date). Yet another basis for such an arrest and detention is where the person concerned intends to avoid removal from the State. However, subsection 6 of s.5 of the Act of 1999 provides that where a person is arrested and detained under s.5 *"a person shall not be detained under this section for a period or periods exceeding 8 weeks in aggregate."*

95. Mr Kadri was the subject of a deportation order dated the 20th of August 2009. A Notice was served upon him pursuant to s.3(3)(b)(ii) of the Act of 1999 requiring him to leave the State on or before a specified date. He failed to comply with that Notice and went to ground. He was eventually located and arrested on the 8th of February 2012 pursuant to s. 5(1) of the Act of 1999 as substituted and detained pending deportation. An attempt was made to deport him on the 29th of March 2012. Fennelly J., who gave the leading judgment, described what occurred in these terms:

"13. On 29th March Detective Garda O'Halloran and two other members of the GNIB went to Cloverhill Prison for the purpose of transporting him to Dublin Airport as the first stage of his return to Algeria. It is unnecessary to recount in great detail the graphic account given by Detective Garda O'Halloran of the appellant's behaviour. Suffice it to say that he physically resisted in the most extreme way the efforts of the Gardaí. He resisted all Garda attempts to move him; he shouted that he would be killed and asked the Gardaí to shoot him; he threatened to kill himself; he forced himself to vomit on the Gardaí in the garda car; he attempted to injure himself by butting his head against a car window and then on the ground in the Airport.

14. Detective Garda O'Halloran concluded that it would be impossible to deport the appellant. It was obvious that he would not travel unescorted from Gatwick to Algiers as had been envisaged. He believed that, if the appellant was left unsupervised in the airport for a moment he would inflict injury on himself.

15. Detective Garda O'Halloran arrested the appellant at Dublin Airport and conveyed him to Wheatfield Prison … a prescribed place of detention."

96. The re-arrest and subsequent detention was again pursuant to s.5(1) of the Act of 1999, as substituted. On the 13th of April 2012, it being more than eight weeks in aggregate since his initial arrest and detention on the 8th of February 2012, Mr Kadri applied unsuccessfully to the High Court for relief under Article 40.4 of the Constitution. The High Court refused him relief on the basis that s.5(6) of the Act of 1999 did not require to be interpreted literally, but rather in circumstances where a literal interpretation would fail to meet the clear legislative intent and would indeed negate the intention behind the legislation, it was amenable to a purposive interpretation, allowing for a new eight week period whenever there was a new act of resistance to deportation.

97. The Supreme Court disagreed and reversed the High Court's decision. Fennelly J., who gave the principal judgment, stated at para. 31:

"…there is nothing in subsection 6 to permit a Court to extend or prolong the eight week period on the grounds of new acts of resistance. The eight-week aggregate limit is expressed in unqualified terms. The Court cannot adopt a flexible or purposive interpretation of a provision designed to protect personal liberty, all the more so when such an interpretation would do violence to the clear language of the Oireachtas. I agree with the judgment about to be delivered by Clarke J insofar as it discusses s. 5 of the Interpretation Act, 2005."

98. Clarke J. said, with reference to s. 5 of the Interpretation Act 2005:

"3.3 There are a number of features of that section which seem to me to be of some importance. First, it should be noted that no argument was addressed which suggested that s.5 had no application to this case because of the exclusion of "penal" provisions from its ambit. That does not, of course, mean that the Court may not be more circumscribed in the scope of its interpretative remit in cases, such as this, which involve personal liberty.

3.4 Second, s.5 is a section which speaks of the court giving a construction or interpretation to relevant provisions. It must be borne in mind, therefore, that the mandate given to the courts by s.5 is one to engage in construction or interpretation rather than rewriting.

3.5 In that context it is, perhaps, of some relevance (without pushing the analogy too far) to consider the extent to which the court has a jurisdiction to correct obvious mistakes in contracts. In considering that area of law in Moorview Developments Limited & ors v. First Active plc & ors [2010] IEHC 275, I noted, at para. 3.5 of my judgment, the following:-

"This aspect of the case concerns what has, in some of the case law, (see for example East v. Pantiles (Plant Hire) Ltd (1981) 263 E.G. 61) been described as "correction of mistakes by construction". As is clear from East and from the speech of Lord Hoffman in Investors Compensation Scheme Ltd v. Bromwich Building Society [1998] 1 W.L.R. 896, two conditions must be satisfied in order for such a correction to occur. First, there must be a clear mistake. Second, it must be clear what the correction ought to be."

3.6 It seems to me that there is at least a broad similarity between that area of jurisprudence and the intent behind at least aspects of s.5(1) of the Interpretation Act, 2005. It is important to note that the construction which that section requires is one that "reflects the plain intention of (the legislature) where that intention can be ascertained from the Act as a whole". It is clear, therefore, that it not only is necessary that it be obvious that there was a mistake in the sense that a literal reading of the legislation would give rise to an absurdity or would be contrary to the obvious intention of the legislation in question, but also that the true legislative intention can be ascertained. There may well be cases where it may be obvious enough that the legislature has made a mistake but it may not be at all so easy to ascertain what the legislature might have done in the event that the mistake had not occurred.

3.7 Third, it is worth noting that the first part of s.5(1) concerns ambiguity or obscurity. For the reasons advanced by Fennelly J. it seems to me that the wording in this case is clear and does not admit of any ambiguity or obscurity. The second part of the section concerns mistakes in the sense addressed in the previous paragraph. It may well be that there is a difficulty with the fact that the legislation, does not address what is to happen in circumstances such as arose in this case where a detained person, in the latter part of an eight week period, so strenuously resists deportation that it proves impossible to give effect to deportation within the eight week period. That the legislature might have wished to make some provision for such a situation could well be considered likely. However, it seems to me that the construction argued for on behalf of the governor in this case falls foul of s.5(1) in two respects.

3.8 First it does not seem to me that the literal construction is absurd. There were sound policy reasons for imposing a time limit on a form of detention that might, if it could be open-ended, be considered unjust and, possibly, unconstitutional. The reason for imposing a time limit on the aggregate amount of detention was, as Fennelly J. has pointed out and as I agree, for the reasons set out by Herbert J. in the High Court, (unreported, High Court, Herbert J., 30th September, 2003) in Okorafor being to prevent the use of multiple periods to get round the eight week limit. Neither does the imposition of such an eight week limit appear to be contrary to obvious legislative intent.

3.9 This is not, therefore, a case where a literal construction of the legislative measure is absurd or fails to reflect the clear legislative intent. Rather this is a case where it may well be that, had the Oireachtas properly addressed its mind to the question, it might have considered including some additional provisions in the Act to allow the eight week period to be extended in appropriate circumstances. However, it is by no means clear as to what precise provisions would have been included by the Oireachtas had it so addressed that question."

99. Finally, MacMenamin J. in his judgment added:

"6. … . On the literal interpretation of the section, if an individual so conducts himself towards the end of a detention period as to prevent his deportation, what, precisely, are the State authorities to do? Is he simply to be released? Moreover, the contingencies in these situations may not always be clear-cut, or allow for easy categorisation. The Act does not answer these questions. Nonetheless, I too, am now persuaded by the appellant's argument. There is the fundamental issue of the right to liberty at stake, where, whatever the applicant's merits, he is entitled to rely on a literal interpretation of the statute.

7. As is pointed out by my colleagues, remediation of the situation must be a matter for the legislature. … ."

100. It does seem to me, however, that despite a superficial similarity between the circumstances in *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27 and those in the present case, there are also significant differences and *Kadri* is capable of being meaningfully distinguished.

101. First and foremost, the Immigration Act of 1999, section 5 of which was the subject of judicial interpretation by the Supreme Court in *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27, was a domestic statute that was not designed to transpose or give effect to an international instrument. In this case, however, we are concerned with the interpretation of a statute the express purpose of which, as expressed in the long title thereto, is *"to give effect to Council Framework Decision of 13 June 2002 [i.e Framework Decision 2002/584/JHA], on the European arrest warrant and the surrender procedures between member states; to amend the extradition Act 1965 and certain other enactments, and to provide for other matters."* To the extent that some of the provisions in controversy in this case were inserted in the Act of 2003 by an amendments effected by the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act of 2012 (the Act of 2012), the long title to that Act is expressed in terms that its purpose is, inter alia, *"to give effect to Article 2 of Council Framework Decision 2009/299/JHA amending Framework Decision 2002/584/JHA".*

102. Secondly, the provision at issue in *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27 itself contained the primary safeguard against potential abuse of a measure provided for in the Act of 1999 allowing the possible detention of a subject person pending their deportation from the State on immigration policy grounds. The safeguard took the form of an eight week limit on cumulative detention. It was clearly a protective measure expressly enacted by the Oireachtas in defence of the right to liberty, and in the context of the possible detention of a subject person pending their deportation from the State on immigration policy grounds, but not on the basis that the subject person was accused of, or alleged to be guilty of, any criminal offence. It clearly required to be strictly interpreted in those circumstances.

103. In contrast, the provisions at issue in the present case do not represent the primary safeguard against potential abuse of the procedure in the Act of 2003, as amended, which allows for the fixing of a new surrender date in the event of the frustration of an earlier attempt or attempts at surrender on foot of a European arrest warrant, and the detention of the subject person pending the making and carrying into effect of the new arrangements. Rather the primary safeguard against potential abuses of that procedure is the fact that the Oireachtas has made it subject to express judicial oversight by a High Court judge. Moreover, that there should be

such judicial oversight is expressly envisaged in Article 23 of the Framework Decision, as amended, which is the measure that the Oireachtas was required to transpose in this context. In addition, further reassurance, if it were needed, is to be found in the fact that the entire procedure is predicated on presumed good faith on the part of the member states concerned in circumstances where the member states have entered into the mechanism of the European arrest warrant on the basis of a high level of confidence between them, and on the basis that fundamental rights will be respected.

104. Moreover, the existence of a specific, and additional, statutory safeguard in s.16(5A) is not inconsistent with the views just expressed. S.16(5A) represents a safeguard for the benefit of "a person to whom an order **for the time being under subsection 5(a) applies"** (my emphasis), i.e., a person who has moved beyond the point of being subject to direct High Court supervision and whose surrender is imminent. However, if, within the ten days that s.16(5A) provides for, the matter is brought back to the High Court again in accordance with the s.16(4)(c) direction, the existing subsection 5(a) order is liable to be vacated, resulting in a situation that it no longer "for the time being applies". Once the High Court expresses itself satisfied that the new or re-occurring circumstances having prevented surrender constitute in themselves a new instance of *force majeure*, it is to be expected that it would be asked by the Central Authority to vacate its previous subsection 5(a) order, pending the agreement of a new surrender date with the issuing judicial authority and the making of a new subsection 5(a) order. It is to be expected that such an application would be acceded to. In that situation the subject person would again be protected against any potential abuse of their right to liberty, and indeed other rights, by the statutory requirement for direct supervision of the process by the High Court, which could relied upon not to tolerate any undue delay.

105. Prior to the introduction of the European Arrest Warrant Act 2003, it had been held by the Supreme Court in *Aamand v. Smithwick* [1995] 1 ILRM 61 that extradition statutes were properly to be regarded as penal statutes affecting the rights and liberties of those who were subject to their provisions. In his judgment in the matter, with which the other four members of the court concurred, Finlay C.J. stated at p. 68:

> "It is clear and of importance in this case that the Act of 1965 and the statutory instrument made pursuant to it incorporating the convention is a penal statutory code involving penal sanctions on an individual and must therefore be construed strictly as is contended in the sense that not by anything other than unambiguous provision should a person be subjected to detention and extradition"

The Convention referred to was the European Convention on Extradition, 1957, a multilateral extradition treaty to which Ireland is a party.

106. Is the European Arrest Warrant Act 2003 to be regarded any differently? I believe that it is. In my view it is to be construed in accordance with the Interpretation Acts 1937 to 2005. S.5 of the Act of the 2005, which is a modern enactment added to the statute book in times when legislation intended to transpose non directly applicable European Union legislation into Irish domestic law is now commonplace, demands that the Act of 2003, as amended, should be construed strictly in so far as any of its provisions provide for *"penal or other sanctions".* By the same token I am equally satisfied that it is not appropriate to apply the pre-existing common law canon of construction based on the principle of doubtful penalisation, which in addition requires strict construction where there is any wider form of detriment which is required to be inflicted, whether criminally or civilly by a court, or administratively by some other person or entity, in consequence of an enactment, to this type of transposing legislation which was wholly unknown at the time when this principle was developed.

107. I find support for my view in that regard in the well regarded work on *The European Arrest Warrant in Ireland* by Remy Farrell, Senior Counsel, and Anthony Hanrahan, Barrister at Law (Clarus Press, Dublin, 2011). The authors state (at para 1-42) that:

> "The briefest perusal of the various judgments arising subsequent to the introduction of the 2003 Act reveals that the strict interpretative approach has all but been abandoned in favour of the principle of conforming interpretation. In *Minister for Justice, Equality and Law Reform v. Biggins* [2006] IEHC 351 the court acknowledged that whilst a strict interpretation had been applied to extradition statutes in the past the provisions underlying the European Arrest Warrant Act 2003 gave rise to a different approach in that the guarantees in respect of fundamental rights were contained in the relevant provisions and they were in any event informed by an explicit mutual trust and understanding:
>
> > *'the obligation to strictly construe penal statutes or statutory provisions which have the capacity to deprive a person of his or her liberty must be kept in context. While I appreciate that some of the decisions refer specifically to an extradition context, it must be recalled that such context was at a time prior to 01 January 2004, when the European Arrest Warrant Act 2003 came into law giving effect to the new surrender arrangements set forth in the Framework Decision. That Framework Decision has introduced a fundamental change in the nature of the process undertaken when one Member State seeks the surrender of a person resident in another Member State. Those arrangements have replaced former extradition procedures with a process of surrender for the purpose of mutual recognition of arrest warrants issued in the requesting Member State. In doing so, fundamental rights are respected, and certain safeguards have been included in order to protect the constitutional and Convention rights of persons whose surrender is sought. But it is expressly stated in the Preamble to the Framework Decision at Recital (10) that "the mechanism of the European arrest warrant is based on a high level of confidence between Member States" and "that its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles of Article 6(1) of the Treaty on European Union …" This cannot be simply regarded as an empty formula. The Framework Decision is to be referred to when interpreting and construing the legislation.' "*

108. I am satisfied that the provisions at issue in this case do not create penal or other sanctions within the meaning of that phrase as it is used in s.5 of the Act of 2005. It therefore seems to me to be open to this Court, in circumstances where the provisions at issue are ambiguous, and applying s.5(1)(a) of the Act of 2005, to afford them a construction that reflects the plain intention of the Oireachtas, where that intention can be ascertained from the Act as a whole. Moreover, in circumstances where the clear purpose of the legislation is to faithfully transpose the Framework Decision, any purposive or teleological interpretation must of necessity have regard to the terms of that instrument to the extent relevant.

109. In this instance we are concerned with Article 23 of the Framework Decision, which is now itself the subject of an interpreting judgment by the CJEU. That judgment makes clear that Article 23(3) of the Framework Decision does not preclude the agreement of a new date for surrender on more than one occasion where the surrender of the requested person within 10 days of a first new surrender date agreed on pursuant to that provision proves impossible on account of the repeated resistance of that person, in so far as, on account of exceptional circumstances, that resistance could not have been foreseen by the relevant authorities and the consequences of the resistance for the surrender could not have been avoided in spite of the exercise of all due care by those

authorities, which is for executing judicial authority to ascertain.

110. The provisions of the act of 2003 in controversy in this case must be given a comforming interpretation with respect to Article 23, providing that it is possible to do that in a manner that is not *contra legem*. I am satisfied that it is entirely possible to do so, and that this is achieved by means of affording them the interpretation contended for by the appellant.

111. The appellant's contention is that if there is a new or repeated frustration of an attempt to give effect to an order for surrender there is nothing on the face of it in s.16(5A) to prevent the case being brought back before the High Court judge again, as long as it is within the ten days provided for in s.16(5A), in accordance with the direction given under subsection (4)(c) at the time of the making of the original surrender order. While subsection (4)(c) does refer to the time for surrender under subsection (3A), the time limit in subsection (3A) itself is qualified as being "subject to subsections (5) and (6)", and subsection (5)(a)(i) expressly allows for the setting of a new surrender date. The combined effect of subsection (5)(a)(i) and subsection (5A) is, it is said, to create a new time for surrender under subsection 3(A). I agree that this is the appropriate and correct interpretation of the provisions in controversy. It is consistent with the purpose of the legislation as ascertained by me from the Act of 2003 viewed as a whole, namely that it was to give faithful transposition to Article 23 of the Framework Decision.

112. I would therefore allow the appeal.