



THE COURT OF APPEAL

**Birmingham P.
Edwards J.
Gearty J.**

Neutral Citation No.: [2021] IECA 159

Record No: 2019 No 262 EXT

COA: 2020/162

**IN THE MATTER OF AN APPLICATION PURSUANT TO S. 22(7) OF
THE EUROPEAN ARREST WARRANT ACT, 2003, AS SUBSTITUTED BY S. 80 OF THE
CRIMINAL JUSTICE (TERRORIST OFFENCES) ACT, 2005**

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

-V-

NAOUFAL FASSIH

APPELLANT

JUDGMENT delivered by Mr Justice Edwards on the 27th of May, 2021.

Background to the appeal

1. The appellant is a person who was previously surrendered by this State to the kingdom of the Netherlands for prosecution in respect of various offences on foot of three European arrest warrants, dated the 21st of April, 2016, the 14th of July, 2016, and the 26th of September, 2016, respectively, ("the 2016 EAWs"). The executing judicial authority that made these surrender orders was the High Court (Donnelly J.). The offences to which the 2016 EAWs related involved money laundering offences, assault and attempted murder. The appellant was convicted following a trial upon his return to the Netherlands and was sentenced in April 2018 to a total of eighteen years' imprisonment.
2. Subsequently, in August 2019, a request was received by the Irish High Court for waiver of the rule of specialty and consent to the further criminal prosecution or execution of a custodial sentence or detention order in respect of the appellant in the kingdom of the Netherlands for the further offence specified in a document described as a "*new additional European arrest warrant*", and dated the 18th of July, 2019, which accompanied the said request. Provision is made for the making of such a request in Article 27(4) of Council Framework Decision 2002/584/JHA on the European Arrest Warrant and the Surrender Procedures between Member States ("the Framework Decision"), which has been transposed into Irish domestic law by s. 22(7) of the European Arrest Warrant Act, 2003 ("the Act of 2003") as substituted by s. 80 of the Criminal Justice (Terrorist Offences) Act, 2005.

3. It appears from the s. 22(7) request that the further offence is one in respect of which Article 2.2 of the Framework Decision is invoked, on the basis of a certification by the issuing judicial authority that it qualifies as murder/grievous bodily harm in the Article 2.2 list.
4. It requires to be noted that the appellant has already been tried, convicted and sentenced in the Netherlands for the said further offence, and has received a sentence of life imprisonment. Be that as it may, in light of the decision of the CJEU in Case C-388/08 *Leymann & Pustovarov* [2008] E.C.R. I-8983 the appellant raises no issue in relation to the fact that the Dutch authorities have already proceeded to conviction in respect of the offence the subject matter of the s. 22(7) request. At paragraph 76 of the judgment in *Leymann & Pustovarov*, the CJEU had observed:

"...the exception in Article 27 (3) (c) of the Framework Decision, must be interpreted as meaning that, where there is an 'offence other' than that for which the person was surrendered, consent must be requested, in accordance with Article 27 (4) of the Framework Decision, and obtained if a penalty or a measure involving the deprivation of liberty is to be executed. The person surrendered can be prosecuted and sentenced for such an offence before that consent has been obtained, provided that no measure restricting liberty is applied during the prosecution or when judgment is given for that offence..."

The effect of paragraph 76 of the judgment in *Leymann & Pustovarov* was noted previously in *Minister for Justice and Equality v Sliwa*, both in the judgment of the High Court, [2016] IEHC 185, and in that of this Court, [2016] IECA 130.

5. The case before us involves an appeal against the judgment and Order of the High Court (Binchy J.) of the 27th of July, 2020, granting the requested waiver and consent pursuant to s. 22(7) of the Act of 2003.
6. The document described as a "*new additional European arrest warrant*", and dated the 18th of July, 2019, was not an actual European arrest warrant ("EAW"), but rather was the presentation of information concerning the further offence in respect of which consent was sought in the form of a European arrest warrant. The Points Of Objection filed on behalf of the respondent at first instance (i.e., the present appellant) had included an objection to the form of the s. 22(7) request on the basis that it had been characterised as being a "*European arrest warrant*" when it was no such thing.
7. The High Court had previously ruled in two other cases, i.e., *Minister for Justice and Equality v Trepiak* [2011] IEHC 287 and *Minister for Justice and Equality v Zymslowski* [2011] IEHC 286, respectively, in which the same expedient had been employed, that to use the form of an EAW for making a s. 22(7) request was unobjectionable. In circumstances where it was recognised that the High Court in this case was *prima facie* bound to follow the decisions in those earlier cases, the objection was given what might be colloquially described as "*a light rub*" and was not pressed in submissions, although it was made clear it was not being abandoned.

8. However, it gained no traction with the High Court judge who observed that it was logical to use the expedient of presenting information about an offence the subject matter of a request for consent under s. 22(7) of the Act of 2003 in the same format as would be used for the issuance of an EAW, in circumstances where Article 27(4) of the Framework Decision specifies that a request for such consent "*shall be submitted to the executing judicial authority accompanied by the information mentioned in Article 8(1)*", and where Article 8(1) of the Framework Decision, reflected in s. 11 of the Act of 2003, prescribes the information that must be contained in a European arrest warrant.
9. In the interval between the surrender of the appellant on foot of the 2016 EAWs, and receipt of the request for consent the granting of which is the subject matter of this appeal, there was an important development in European arrest warrant law. As outlined in paragraph 3 of the judgment of the High Court, [2020] IEHC 369, the Court of Justice of the European Union ("CJEU") handed down judgment on the 27th of May, 2019, in the conjoined cases of *O.G.* (C-508/18) and *P.I.* (C-82/19 PPU). The *O.G.* and *P.I.* cases were specifically concerned with whether the Public Prosecutor's office of Lübeck, and the Public Prosecutor's office of Zwickau, respectively, in Germany could validly act as issuing judicial authorities, in a situation where they were potentially subject to directions or instructions in a specific case from the executive of the issuing state. In its judgment the CJEU determined that the autonomous concept of "*issuing judicial authority*" within the meaning of Article 6(1) of the Framework Decision, must be interpreted as not including Public Prosecutors' Offices of a Member State which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, in connection with the adoption of a decision to issue a European arrest warrant.
10. Since the judgment in the High Court, the CJEU has had cause to consider, in the course of an application for a preliminary ruling, the position of Dutch public prosecutors specifically, in a case of *Criminal Proceedings against A.Z.* Case C-510/19. In that case the issue concerned whether such a prosecutor could validly act as an "*executing judicial authority*". The CJEU held that, just as it had found in *O.G.* and *P.I.* that an "*issuing judicial authority*" was an autonomous concept of EU law, so too was the concept of an "*executing judicial authority*". It held that the status and the nature of the judicial authorities referred to in Article 6(1) and 6(2) of the Framework Decision are identical, although those judicial authorities exercise separate functions connected with, first, issuing a European arrest warrant and, secondly, executing such a warrant. In either case the relevant judicial authorities must be able to participate in the administration of justice acting independently of the executive in the exercise of their responsibilities and under a procedure which complies with the requirements inherent in effective judicial protection. The evidence before the CJEU (see paragraph 69 of the judgment) was that under Article 127 of the Dutch law on the organisation of the courts a public prosecutor may be subject to instructions in specific cases from the Netherlands Ministry of Justice. In the case of the relevant Dutch public prosecutor, who had previously surrendered A.Z. to Belgium on foot of an EAW while acting as an executing judicial authority, and from whom consent was now sought by Belgium for the purposes of Article 27(4) of the Framework Decision with a

view to bringing further criminal proceedings against A.Z., the CJEU considered that there was no effective shield against the risk that his or her decision on whether or not to grant consent for the purposes of Article 27(4) would “*be subject to an instruction ... from the Netherlands Ministry of Justice.*”

11. Returning to the present case, it was common case that the 2016 EAWs had each been issued by an issuing judicial authority who would not have qualified within the terms of the CJEU’s later rulings in the *O.G.*, *P.I.* and *A.Z.* cases. In the case of two of them, they had been issued by the Amsterdam District Public Prosecutors Office, and in the case of the third it was issued by the Dutch National Prosecutor’s Office, North Randstad Unit. It was accepted before the High Court that these authorities were not valid issuing judicial authorities within the meaning of Article 6(1) of the Framework Decision (albeit that this was not recognised as being the position at the time) and that this was so notwithstanding the fact that no express objection had been raised before the High Court on behalf of the present appellant about the status or validity of either of the relevant issuing judicial authorities, and further notwithstanding the fact that the High Court judge (Donnelly J.) had characterised the two EAWs that had been issued by the Amsterdam District Public Prosecutors Office as having been issued by a “*competent judicial authority*”; and might implicitly be taken as having extended that endorsement to the third warrant, i.e., that issued by the Dutch National Prosecutor’s Office.
12. It was further accepted by the parties before the High Court that, as a general proposition, decisions of the CJEU have retrospective effect, and that the circumstances in which they might not have retrospective effect did not arise in this case. The general rule has been put beyond any doubt in the judgment of the CJEU in *Criminal Proceedings against A.Z.* (see paragraphs 72 to 74 of the judgment, dealing with “*Temporal limitation of the Present Judgment*”).
13. However, it has also been held in *Asturcom Telecommunications S.L. v. Nogueira* [2009] ECR I-9579 that:

“Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of a provision of Community law, regardless of its nature on the part of the decision at issue ...”.

This was an unsurprising finding as it was consistent with judicial pronouncements by the CJEU in a series of other cases, cited in the *Asturcom* judgment, which had sought to emphasise the importance of the principle that judicial decisions which had become definitive after all rights of appeal had been exhausted, or after expiry of the time limits provided to exercise those rights, should no longer be capable of being called into question. The cases in question were Case C 224/01 *Köbler* [2003] ECR I 10239, paragraph 38; Case C 234/04 *Kapferer* [2006] ECR I 2585, paragraph 20; and Case C 2/08 *Fallimento Olimpiclub* [2009] ECR I 0000, paragraph 22).

14. The court below noted that the decision in *Asturcom* was applied by Ní Raifeartaigh J., while in the High Court, in the case of *Cronin v Dublin City Sheriff* [2018] 3 I.R. 191 and that she had observed (at para 29 of her judgment in that case):

""The ECJ's own interpretation of the finality principle makes it clear that it is not necessary to disapply domestic rules on finality merely because there has been a misapplication of EU law.""

15. There was no issue of the present s. 22(7) request itself falling foul of the ruling in the OG, P.I. and A.Z. cases as Dutch law has been amended with effect from the 13th of July, 2019, in order to overcome, at least prospectively, the difficulty created by the judgments in those cases for the valid issuance of EAWs, and related requests, in the Netherlands; the amendment in question facilitating the appointment of an investigating judge in EAW matters as the *"issuing judicial authority"* for the purposes of the Surrender of Persons Act under Dutch law. We understand that the said Surrender of Persons Act to be the domestic legislation that transposes the Framework Decision into Dutch law. The s. 22 (7) request in the present case emanates from an investigating judge lawfully authorised under the amended Dutch law to deal with the appellant's file as an issuing judicial authority for the purposes of the European arrest warrant and related issues. Although nothing now turns on it, there had been an earlier s. 22(7) request in similar terms emanating from a Dutch public prosecutor, but it was conceded on behalf of the applicant (the respondent to this appeal, i.e. the Minister), before Coffey J. in the High Court, that it was not a validly issued request from an *"issuing judicial authority"* within the meaning of Article 6(1) of the Framework Decision. Coffey J. refused to grant s. 22(7) consent in those circumstances. However, the application was subsequently renewed in the form of the present application, but this time it emanated from an investigating judge acting as *"issuing judicial authority"*, following the previously referred to amendment to Dutch law.
16. The request for s. 22(7) consent was opposed in the High Court on various grounds that may be summarised as follows:
- a) As it was accepted that the decision in the *O.G.* and *P.I.* cases had retrospective effect, it was said to follow that the 2016 EAWs were not issued by an issuing judicial authority within the meaning of Article 6(1) of the Framework Decision. Moreover, it is clear from the Act of 2003 that a request for s. 22(7) consent can only be validly made by a member state that was an *"issuing state"* in respect of an EAW (or as in this case EAWs) on foot of which the subject person has already been surrendered. As the expression *"issuing state"* is defined in s. 2 of the Act of 2003 as meaning in relation to an EAW *"a Member State designated under section 3, a judicial authority of which has issued that European arrest warrant"* it was said that the Kingdom of the Netherlands did not qualify as an *"issuing state"* competent to make a s. 22(7) request in the circumstances of this case.
 - b) It was also argued that it was not open to the Minister to contend that the issue of whether or not the 2016 EAWs had been issued by an issuing judicial authority within the meaning of Article 6(1) of the Framework Decision was *res judicata* on

the basis of Donnelly J.'s characterisation of them as having been issued by "a competent judicial authority". It was said that *res judicata* could not apply where there had been no resolution of an actual judicial controversy. Moreover, it was suggested, the court was being asked to expand the concept of *res judicata* in a radical way to extend its application beyond judicial determinations made in resolution of adversarial contests to inquisitorial findings made by an executing judicial authority, on issues in respect of which there had not been controversy, in the exercise of the *sui generis* procedure associated with applications for surrender on foot of a European arrest warrant.

- c) Further, it was said that although the Minister had sought to rely on domestic procedural rules on finality of judgments (specifically those developed by the Supreme Court in *A v Governor of Arbour Hill Prison* [2006] 4 I.R. 88, and applied in the criminal law context by the Court of Criminal Appeal in the slightly later case of *DPP v Cunningham* [2013] 2 I.R. 631) to suggest that notwithstanding the misapplication of EU law in respect of the 2016 EAWs, the orders for surrender made on foot of those EAWs remained valid and unassailable, counsel on behalf of the requested person (i.e. the appellant) contended that the Minister should not be allowed to do so as it would mean that the decision of the CJEU in *O.G.* and *P.I.* would operate *ex nunc* (i.e., only from now on) as opposed to *ex tunc* (i.e., from the outset) which, it was suggested, the CJEU could not have intended.

How the High Court resolved the legal issues

17. With respect to point (a) which related to whether, for the purposes of s. 27(7) of the Act of 2003, the appellant was "a person who has been surrendered to an issuing state under this Act", the High Court judge took the view (at para 37 of his judgment) that it was not appropriate to treat the s. 22(7) as a stand-alone application and to ignore:

"...the underlying reality that this application arises as a direct consequence of the order of surrender made by Donnelly J and as such is a continuum of a process. An application under s. 22 of the Act of 2003 arises as a direct consequence of an earlier application made for the surrender of a requested person pursuant to s. 16 of the Act of 2003, during the course of which a party has an opportunity to raise any objection he or she wishes (within the parameters of the Act of 2003 and the Framework decision) to his/her surrender, and during the course of which the Court also considers whether or not the requirements of the Act of 2003 generally have been satisfied."

18. In the circumstances, the High Court judge considered that the most appropriate way of proceeding would be to first consider points (b) and (c), which raised somewhat related issues, i.e., whether the Minister could rely on *res judicata*, and/or invoke domestic procedural rules on finality of judgments to defend against what was arguably a collateral attack on Donnelly J.'s surrender orders. The logic of this approach was that if the Minister were to succeed in his arguments it would be dispositive of all facets of the

objection to the provision of s. 22(7) consent, and it would be unnecessary to specifically address point (a).

19. The High Court judge ultimately ruled in favour of the Minister on both points. I will come back momentarily to review the detail of what he said in that regard. However, before doing so, it is necessary to record that having ruled in favour of the Minister, he went on to express a view, acknowledging that it would be regarded as obiter dictum, concerning point (a). In regard to that, he said (at para 42 et seq):

"... it is arguable, in my view, that the interpretation contended for by the respondent is not in accordance with a straightforward interpretation of that section. As noted above, the definition of 'judicial authority' as set out in s. 2 of the Act of 2003 means:

'the judge, magistrate or other person (my emphasis) authorised under the law of the Member State concerned to perform functions the same as or similar to those performed under section 33 by a court in the State.'

43. *The respondent's arguments in opposition to this application are premised on a series of definitions in the Act of 2003, which, it is claimed, must now be read in the light of the decision of the CJEU in OG as regards the characteristics of judicial authorities for the purpose of the Framework Decision, as well as the subsequent acceptance by the Dutch authorities that the prosecutors who had hitherto carried out the function of issuing judicial authority, in the Netherlands, and who were responsible for the issue of the 2016 warrants, did not meet the requirements of a 'judicial authority' as now interpreted by the CJEU. Accordingly, the argument goes, there was no 'judicial authority' to issue the 2016 warrants, and therefore no issuing state for the purpose of s. 22 of the Act of 2003 and, therefore, the respondent is not, for the purposes of s. 22 of the Act of 2003, a person who has been surrendered to an 'issuing state', as defined.*
44. *In my view there must be considerable doubt that this is a correct interpretation of s. 22 of the Act of 2003. No one would doubt that in such circumstances such judicial authorities could not continue to issue European arrest warrants after the decision in OG, but that does not mean, on a straightforward interpretation of s. 22 of the Act of 2003, in accordance with the ordinary meaning of the words used, and by reference to the various definitions relied upon by the respondent, that there was no judicial authority at all: there were judicial authorities, as defined in s. 2 of the Act of 2003, each being an 'other person' i.e. the prosecutors. They did not meet the requirements of the Framework Decision, but were, nonetheless, the nominated judicial authorities. If that interpretation is correct then there was, for each warrant, indeed a 'judicial authority' and the respondent was surrendered to an 'issuing state' for the purpose of s. 22 of the Act of 2003. Even allowing for the retrospective effect of the subsequent determination of the CJEU in OG, it is difficult to see how that decision could impact upon an interpretation of the statutory definition of 'judicial authority' in s. 2 of the Act of 2003, that is based upon the*

ordinary meaning of the words used, in the manner contended for by the respondent. While I appreciate that there are contrary arguments, such an interpretation of the definition of 'judicial authority' in s. 2 of the Act of 2003, must, as I have said above, be at least arguable."

20. On the related issues of *res judicata* and the applicability of domestic procedural rules on finality of judgments, the High Court judge said (at paras 38 to 41 inclusive):
 - "38. ... the linkage between this application and the order for surrender is clear; it is the very fact that an order for surrender has been made and implemented in respect of other offences than that to which this application relates, that gives rise to the need for this application, and so it is, in my view, much too simple an approach to take to assert that this is, in all respects, a stand-alone application, as though nothing has happened previously.
 39. Applications for surrender made under the Act of 2003 are made following an inquisitorial, not an adversarial, hearing. The 'section 16 Hearing' is the hearing at which the requested person is afforded the opportunity to challenge the application for his/her surrender, and to put to the test the issue of the warrant and all or any matters required for the issue of a valid warrant. Once the Court is satisfied that the requirements of the Act of 2003 have been met, and that surrender is not prohibited for any of the reasons provided for in the Act, the Court is obliged to make an order for surrender. It follows from this that when a court makes an order for surrender, it has been satisfied that the requirements of the Act of 2003 have been met in all respects, including that the relevant European arrest warrant has been issued by a judicial authority as defined in the Act of 2003, and this is so whether or not the judgment of the High Court expressly states that to be the case, and whether or not any objection has been raised under this heading. This is consistent with the approach taken by the Supreme Court in *A v. Governor of Arbour Hill*. In this case, as it happens, the judgment of Donnelly J., para 37 expressly refers to the Amsterdam District Public Prosecutors Office as being a "competent judicial authority".
 40. As this application evolved, the question as to whether or not the status of the authorities that issued the 2016 warrants is *res judicata* moved centre stage. However, the Court was referred to just one relevant authority in this regard, namely that of *A v. Governor of Arbour Hill*. The passage from that case, quoted above, appears to me to be apposite. When proceedings have concluded, it is not open to a party to raise an issue he or she could have raised at the original hearing. Once the Court declares itself satisfied in respect of the requirements for the making of an order for surrender, and proceeds to make that order, it is not possible to reopen that order or the matters giving rise to it, whatever the context (save, obviously, by way of appeal). I agree with the submission of counsel for the applicant that an objection to the application now before the Court on the basis that the 2016 warrants were not issued by issuing judicial authorities within the

meaning of the Framework Decision or the Act of 2003, is a collateral attack on the decision ordering surrender, and that it cannot be sustained.

41. *I also accept the submissions of the applicant that the retrospective effect of the decisions of the CJEU does not override the application of domestic rules and procedures on the finality of decisions. While counsel for the respondent did submit that the effect of the applicant's argument, if accepted, was that the decision of the CJEU in OG would only be effective ex nunc, he did not take issue with the proposition that the retrospective application of judgments of the CJEU does not have the effect of disapplying domestic rules on the finality of decisions. For all of these reasons I will make an order granting the application sought by the applicant herein."*

Issues on this appeal

21. The parties have each furnished us with helpful written submissions, for which we are grateful. In the appellant's written submissions, he raises yet again the previously mentioned objection to the form of the s. 22(7) and seeks to press it with somewhat more vigour than in the court below, in circumstances where, unlike the High Court, this Court is not bound to follow the approach adopted in the earlier cases of *Trepiak* and *Zymslowski*. That said, we were informed at the outset of the oral hearing of the appeal that counsel would not be addressing this issue in oral submissions and was content to rest on his written submissions.
22. The written submissions complain about what is characterized as "*patent ambiguity on the face of the documentation*", in which it is said that on the one hand the documents request surrender and purport to be an arrest warrant whilst on the other hand they suggest that their purpose is to seek consent to further prosecution or execution of a custodial sentence or detention order. It is contended that these are manifestly inconsistent purposes and it is not possible to actually resolve the ambiguity.
23. Moreover, it is suggested that the rulings in *Trepiak* and *Zymslowski*, respectively, to the effect that the expedient of presenting relevant information in the same format as is used for an actual EAW was unobjectionable, must be regarded as wrong in the light of dicta of the Supreme Court in a number of subsequent cases which have sought to emphasise that in European arrest warrant matters there can simply be no room for ambiguity. The cases of *Minister for Justice and Equality v Herman* [2015] IESC 49 and *Minister for Justice and Equality v Connolly* [2014] IESC 34 were relied upon as providing support for this submission. It was suggested that given the rights that are engaged pursuant to the rule of specialty it is imperative that there be absolute clarity in relation to any purported request, and it was submitted that the request in this case lacked the necessary clarity.
24. The arguments summarised at paragraph 16(a) above, concerning whether, for the purposes of s. 27(7) of the Act of 2003, the appellant was "*a person who has been surrendered to an issuing state under this Act*", were reprised both in the appellant's written submissions and at the appeal hearing, as were the arguments in relation to *res judicata*, and the application of domestic procedural rules on finality of judgments in the

circumstances of the case. The appellant's objections to the granting of the requested consent were in turn vigorously opposed by counsel for the respondent to the appeal (i.e. the Minister) in submissions both written and oral which, again, largely reprised arguments put forward at first instance. I will refer to each side's submissions to the extent considered necessary to explicate my decisions on the issues raised.

Decisions on the issues raised

The form of the s. 22(7) request

25. I have not been impressed by the arguments advanced on behalf of the appellant in respect of the form of the s. 22(7) request, and in particular with the criticisms made concerning the presentation of relevant information in the same format as that prescribed for use in the issuance of an actual European arrest warrant. I regard the suggestion that the use of this expedient created an ambiguity in the circumstances of this case as being fanciful.
26. To suggest this is not to gainsay the importance of clarity, and absence of ambiguity, in EAW matters as emphasised by the Supreme Court. However, whether documentation is or is not ambiguous as to its purpose is a question of fact and interpretation.
27. In my view the documentation comprising the request, read as a whole, is entirely clear as to what its purpose is. There were three relevant documents in all. First there was a letter to the Irish Central Authority dated the 30th of July, 2019, from a public prosecutor at the Dutch National Prosecutor's Office which says (*inter alia*):

"We refer to the enclosed additional EAW and request for the consent (under article 27 of the Framework Decision on the European Arrest Warrant) of the Irish High Court to prosecute Naoufal Fassih for the offences set out in the EAW".

Accompanying this letter were two further documents, i.e., the document which had been referred to as "*the enclosed additional EAW*" (and which is referred to elsewhere in the letter as the "*new additional European arrest warrant*" to distinguish it from an earlier version forwarded before the amendment to Dutch law alluded to at paragraph 15 above, and which it was replacing), and another document entitled "*National Public Prosecutor's Department, Request for issuing an (additional) European Arrest Warrant (EAW)*", and dated the 17th of July, 2019. This latter document recites the fact of the appellant's surrender to the Netherlands pursuant to the earlier (2016) EAWs (specifically referencing the judgment of the Irish High Court of the 2nd of February 2017), proffers a draft document referred to as a "*concept additional EAW*", and then presents a request from the public prosecutor at the National Public Prosecution's Department to the investigating judge, in the following terms:-

"The Public Prosecutor at the National Public Prosecutions Department ...

Requests that the investigating judge issues an (additional) EAW against the individual as referred to above, in order to obtain the additional permission as laid down in article 27 paragraph 4 of the Framework Decision to prosecute and bring to trial with sentencing in the Netherlands pursuant to the allegations as described in the concept additional EAW."

28. This request elucidates precisely the purpose for which the document which became "*the enclosed additional EAW*", otherwise the "*new additional European arrest warrant*", was intended. It was requested, and issued by the investigating judge, for the purpose of obtaining the consent required from the Irish High Court by the Dutch authorities under article 27(4) of the Framework Decision to validate further criminal proceedings against the appellant in the Netherlands. I am completely satisfied that the document which the investigating judge was being asked to issue and which, he having done so, was variously referred to in the request subsequently forwarded to the Irish High Court as "*the enclosed additional EAW*" and as a "*new additional European arrest warrant*", was intended to do no more than present relevant information in the same format as that prescribed for use in the issuance of an actual European arrest warrant, in circumstances where Article 27(4) of the Framework Decision specifies that a request for such consent "*shall be submitted to the executing judicial authority accompanied by the information mentioned in Article 8(1)*", and where Article 8(1) of the Framework Decision prescribes the information that must be contained in a European arrest warrant. Moreover, the adoption of this expedient also served to pellucidly demonstrate that the s. 22(7) request was being made with the knowledge, *imprimatur* and authority of the investigating judge concerned in his capacity as an issuing judicial authority within the meaning of Article 6(1) of the Framework Decision.
29. It is manifest from the documentation read as a whole that the requested person was already in the Netherlands; that he had previously been surrendered to the Netherlands on foot of earlier EAWs by order of the Irish High Court; and that, by virtue of the express reference to the consent required under Article 27(4) of the Framework Decision, the Dutch authorities were asking the Irish High Court to waive of the rule of specialty and consent to the further criminal prosecution or execution of a custodial sentence or detention order in respect of the appellant in the kingdom of the Netherlands for the offence described and particularised in the document variously described as the "*the enclosed additional EAW*" and the "*new additional European arrest warrant*".
30. In the circumstances I have no hesitation in rejecting any suggestion of ambiguity and in dismissing the objection to the form of the s. 22(7) request.

Whether the appellant was "a person who has been surrendered to an issuing state under this Act"

31. Counsel for the appellant described this as being his "*core argument*" at the oral hearing of the appeal. To properly consider it requires setting out the relevant statutory provisions.

32. Section 2 of the European Arrest Warrant Act, 2003 ('the 2003 Act') defines a 'European Arrest Warrant' as:

"...a warrant, order or decision of a judicial authority of a Member State, issued under such laws as give effect to the Framework Decision in that Member State, for the arrest and surrender by the State to that Member State of a person in respect of an offence committed or alleged to have been committed by him or her under the law of that Member State".

33. Article 1 of the Framework Decision defines it in very similar terms:

"1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order."

34. It goes on to provide the following additional definitions, which are relevant for the purpose of this appeal.

"'Judicial authority' is defined as 'the judge, magistrate or other person authorised under the law of the Member State concerned to perform functions the same as or similar to those performed under section 33 by a court in the State'."

'Issuing state ', in relation to a European Arrest Warrant, is defined as "a Member State designated under section 3, a judicial authority of which has issued that European Arrest Warrant".

'Issuing judicial authority', in relation to a European Arrest Warrant, means "the judicial authority in the issuing state that issued the European Arrest Warrant concerned".'

35. Although the Framework Decision does not define a judicial authority or an issuing judicial authority it provides as follows in respect of the designation of same at Article 6(1):

"1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State."

36. Section 22 of the Act of 2003 as amended provides as follows in relation to the procedure for making a request for consent to prosecute for further offences:

"(7) The High Court may, in relation to a person who has been surrendered to an issuing state under this Act, consent to -

(a) proceedings being brought against the person in the issuing state for an offence,

- (b) *the imposition in the issuing state of a penalty, including a penalty consisting of a restriction of the person's liberty, in respect of an offence, or*
- (c) *proceedings being brought against, or the detention of, the person in the issuing state for the purpose of executing a sentence or order of detention in respect of an offence,*

upon receiving a request in writing from the issuing state in that behalf

- (8) *The High Court shall not give its consent under subsection (7) if the offence concerned is an offence for which a person could not by virtue of Part 3 be surrendered under this Act."*

37. Article 27(4) of the Framework Decision makes the following provision as regards requests for consent for prosecution of other offences:

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

38. Counsel for the appellant argues that in order for s. 22 (7) to be engaged, and in order for the statutory proofs to be satisfied, it has to be shown that the person who was surrendered was surrendered to an "*issuing state*", within the meaning of the definition in the Act of 2003; and in turn that means a state the "*issuing judicial authority*" of which, again within the meaning of the definition in the Act of 2003 has issued a European arrest warrant in respect of the requested person. It was submitted that that condition was simply not met in this case. The argument, in substance, is that because the purported "*issuing judicial authority*" who issued the 2016 EAWs would not, in the case of any of those warrants have qualified as an "*issuing judicial authority*" within the autonomous meaning of "*issuing judicial authority*" subsequently explicated in the *O.G.*, *P.I.* and *A.Z.* cases, there were no valid EAWs before Donnelly J. in 2017. No valid EAWs having been issued, there could have been no surrender, to an "*issuing state*".

39. In reply, counsel for the respondent (i.e., the Minister) says that as a plain matter of fact (and indeed logic) it is difficult to see how the appellant is anyone other than a person who was surrendered to an issuing state under the EAW Act. He was arrested on foot of three European arrest warrants that had been endorsed by the High Court for execution and was duly brought before the Court. Having heard his objections to surrender, the Court made orders pursuant to section 16 surrendering him to the issuing state. He was then duly surrendered. These are, it is suggested, plain, incontrovertible facts. Accordingly, he is a person who was surrendered to the Netherlands under the EAW Act.

It was submitted that if one adopts this manifestly logical and common sensical approach, this ground of appeal should be dismissed *in limine*.

40. I do not agree that the point raised is one that requires to be dismissed *in limine*. On the contrary, I consider that a serious point has been raised. However, I am ultimately persuaded by the respondent's arguments, reflected in the judgment of the trial judge, that the s. 22(7) application, is not to be regarded as a "*stand alone*" application, divorced in reality from the decision of Donnelly J. to surrender the appellant on foot of the 2016 EAWs. It is therefore inappropriate in my view to consider the merits of this objection in a compartmentalised fashion and separate from the issues of *res judicata*, and the applicability of domestic procedural rules on finality of judgments. The full circumstances of the case require to be considered.
41. Further, in a situation where counsel on both sides have not considered it necessary to specifically address the views expressed *obiter dictum* by the trial judge concerning the correct interpretation of s. 22 of the Act of 2003, I do not propose to do so either. I do not consider it essential to do so to determine the issues at the heart of this appeal.

Res Judicata

42. Regarding the reliance by the respondent to this appeal (i.e., the Minister) on the doctrine of *res judicata*, counsel the appellant contends that the position adopted by the respondent makes little sense. It was submitted that it doesn't comply with the most basic requirements of the doctrine, namely the need to demonstrate, *per* McDonald J. in *George v AVA Trade (EU) Limited* [2019] IEHC 187, that:
- (a) a judgment was given by a court of competent jurisdiction;
 - (b) it was a final decision on the merits;
 - (c) the judgment determined a question which is raised in the subsequent litigation; and
 - (d) the parties to the subsequent litigation are the same as the parties in the previous litigation.
43. It was suggested on behalf of the appellant that the point at issue was not raised, considered or determined in the original proceedings, and that that is fatal to the trial judge's conclusion in relation to *res judicata*.
44. It was further contended that in any event it is well recognised that the principle of *res judicata* does not apply in extradition/rendition type proceedings.
45. In reply to these points, counsel for the respondent has argued that the principle of *res judicata* does apply. The issuance of a European Arrest warrant is in no sense a rubber-stamping exercise. Although the surrender procedure is *sui generis*, involving elements of both adversarial procedure and inquisitorial procedure, it is not the case that a proof not

contested may be taken as having been necessarily established. Even where an objection has not been raised or contested adversarially, an executing judicial authority is independently obliged, before making an order for the surrender of a requested person pursuant to an EAW to be satisfied that the statutory preconditions to a valid surrender are met. This involves the executing judicial authority examining the EAW on foot of which the requested person is being sought and satisfying herself that it is in the correct form, including that it has been issued by a competent judicial authority, and inquiring into whether the statutory preconditions set out in s. 16 of the Act of 2003 have been met. It was submitted that Donnelly J. had done precisely that in all cases, and had expressly observed with respect to two of the three EAWs before her that they had been issued by “*a competent judicial authority*”. The respondent contends, and it has not been seriously challenged, that this finding, offered in the context of a judgment relating to three EAWs in total in respect of all of which the High Court judge had ultimately been satisfied to make orders for surrender, and in the absence of anything in that judgment to suggest a contrary view, may be taken as having been implicitly extended to cover the third warrant also.

46. On the issue of whether *res judicata* can apply at all in extradition/rendition cases, counsel for the respondent points to a distinction drawn in a learned textbook on the subject, notably that of the late Paul Anthony McDermott entitled “*The Law on Res Judicata and Double Jeopardy*”(1999 : Bloomsbury Professional), and alluded to by the former Chief Justice in his judgment in the Supreme Court in the case of *Minister for Justice, Equality and Law Reform v Tobin (No 2)*[2012] 4 IR 147, between cause of action estoppel and issue estoppel. The respondent’s position, which appears to be borne out on the authorities, is that while cause of action estoppel cannot be invoked in extradition/rendition cases, the same is not true in respect of issue estoppel. The respondent to this appeal relies squarely on issue estoppel in advancing his objection based on *res judicata*. The respondent’s position is that the s. 22(7) request arises in an on-going legal process; that earlier in that on-going legal process the issue of whether the 2016 EAWs had been issued by competent judicial authorities was finally determined by Donnelly J., as had been the issue of whether it was appropriate to surrender the appellant to the Netherlands on foot of the 2016 EAWs; and that by reason of issue estoppel her determinations in that regard cannot now be revisited. Counsel for the respondent contends that the trial judge had been right in his determination that a s. 22(7) application represents the “*continuum of a process*” (*sic*), by which he had meant, as he went on to explain, that there is a “*linkage between this application and the order for surrender*”, rendering it “*much too simple an approach to take to assert that this is, in all respects, a stand-alone application, as though nothing has happened previously*”.
47. Having carefully considered the arguments on both sides I am satisfied that the submissions made on behalf of the respondent concerning the *res judicata* objection are correct. The relationship between the present application and the proceedings in which the appellant was surrendered to the Netherlands on foot of the 2016 EAWs is a nuanced one, and it is not appropriate to present it in the starkly disconnected way that the

appellant seeks to do. The trial judge was right in my view to suggest that it was too simple to regard the s. 22(7) application as standing alone.

48. I further reject the applicant's submission that the point as to whether the 2016 EAWs had been issued by competent judicial authorities was not raised, considered or determined in the original proceedings. It may not have been the subject of an objection, or of any adversarial contest, but I am satisfied that it was considered inquisitorially as part of the judge's function during the s. 16 hearing and that a determination was made by Donnelly J. that the 2016 EAWs had, in each case, been issued by a competent judicial authority.
49. I am further satisfied that the four criteria listed in *George v AVA Trade (EU) Limited* [2019] IEHC 187 were met in this case, in so far as the issue as to whether the 2016 EAWs had, in each case, been issued by a competent judicial authority is concerned. That issue was finally determined by Donnelly J. and I am satisfied that an issue estoppel arises in those circumstances which precludes either a direct challenge to her finding in that regard, or a collateral attack on the surrender orders made by her. The issues as to whether the 2016 EAWs had, in each case, been issued by a competent judicial authority, and as to whether the appellant was liable to be surrendered to the Netherlands on foot of those EAWs, are *res judicata* in the circumstances, as contended by the respondent to this appeal, and I uphold the finding of the High Court in that regard.

Applicability of domestic procedural rules on finality of judgments

50. Counsel for the appellant conceded before us that EU law does not require a national court to disapply domestic rules of procedure conferring finality on a decision. However, he submitted, the CJEU had the implicit power to limit the retrospective effect of its decisions in *O.G.* and *P.I* but it had not done so. Moreover, in the *A.Z.* case the CJEU had been expressly asked to do so by the Netherlands, but had declined to do so, as indeed it had also declined to do in yet another case of *Kovalkovas* C-477/16 PPU, cited in the section of its judgment in *A.Z.* dealing with the request to temporally limit the effect of its judgment. Counsel for the appellant maintains that the unwillingness of the CJEU to contemplate a temporal limitation is an important circumstance that this Court must now take into consideration, in determining whether it is appropriate in all the circumstances of the case to seek to disapply domestic rules of procedure conferring finality on a decision. The case is made that the CJEU's refusal to place any temporal limitation on the application of its said judgments reflects a strong view on its part as to the importance of the requirement that EU law should be applied in a consistent and uniform manner.
51. The appellant further contends that the High Court appeared to have afforded no weight to the importance of the concept of a judicial authority as an autonomous concept of EU law, and the desirability, indeed necessity, that such a concept should be interpreted and applied uniformly and in a consistent manner across the Union, both temporally and geographically.

52. Replying to these submissions, counsel for the respondent argued that the principle that a preliminary ruling sets out the correct interpretation *ex tunc* does not prevent the application of national rules regarding the legal effect of previous national court rulings. In recognition of the importance of procedural autonomy, legal certainty and the principle of *res judicata*, EU law will allow a national judgment to stand despite it being based on an understanding of the law which is subsequently overtaken by a preliminary ruling.

53. Counsel referred us to the decision of the CJEU in *Asturcom* (cited earlier), and in particular to the following passages from the judgment in that case:

"36. *Indeed, the Court has already had occasion to observe that, in order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided to exercise those rights can no longer be called into question (Case C-224/01 Köbler [2003] ECR I-10239, paragraph 38; Case C-234/04 Kapferer [2006] ECR I-2585, paragraph 20; and Case C-2/08 Fallimento Olimpiclub [2009] ECR I-0000, paragraph 22).*

37. *Consequently, according to the case-law of the Court, Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of a provision of Community law, regardless of its nature, on the part of the decision at issue (see, inter alia, Case C-126/97 Eco Swiss [1997] ECR I-3055, paragraphs 47 and 48; Kapferer, paragraph 21; and Fallimento Olimpiclub, paragraph 23).*

38. *In the absence of Community legislation in this area, the rules implementing the principle of res judicata are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States."*

54. We were also referred to *Cronin v Dublin City Sheriff* (previously cited) where Ní Raifeartaigh J. stated:

"In Kapferer v. Schlank & Schick GmbH (Case C-234/04) [2006] E.C.R. I- 2585, as set out at para. 11 above, the ECJ specifically said that community law did not require a national court to disapply domestic rules or procedures conferring finality on a decision, even if to do so would enable the national court to remedy an infringement of community law. Having regard to Köbler v. Republic of Austria (Case C-224/01) [2003] E.C.R. I-10239, Kapferer v. Schlank & Schick GmbH (Case C-234/04) and Amministrazione dell'Economia e delle Finanze v. Fallimento Olimpiclub S.r.l. (Case C-2/08) [2009] E.C.R. I- 7501, it might be argued, the matter begins and ends; the ECJ's own interpretation of the finality principle makes it clear that it is not necessary to disapply domestic rules on finality merely because there has been a misapplication of EU law."

55. It may be observed that Ní Raifeartaigh J.'s interpretation of the finality principle was recently cited with approval by the Supreme Court in *Pepper Finance Corporation (Ireland) DAC v Cannon* [2020] IESC 2.
56. Counsel for the respondent has submitted that the application of domestic rules on finality is subject to the proviso that the rules implementing the principle of *res judicata* must not be less favourable than those governing similar domestic actions (the principle of equivalence), nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by community law (the principle of effectiveness). This is the "context" which must be considered when applying national rules of finality in litigation. He points out that no submission has been made by the appellant that the principles of effectiveness or equivalence would be breached by the application of domestic rules on the finality of judgments to this case.
57. Once again, having considered the arguments advanced on both sides I am satisfied to accept the submissions made on behalf of the respondent as correct. I can see no reason to disapply domestic rules on the finality of judgments in this case. Those rules are encapsulated in the decision of the Supreme Court in *A. v Governor of Arbour Hill Prison* [2006] 4 I.R. 115, in which Murray C.J. said:

"...the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position.

No one has ever suggested that every time there is a judicial adjudication clarifying or interpreting the law in a particular manner which could have had some bearing on previous and finally decided cases, civil or criminal, that such cases be re-opened or the decisions set aside.

It has not been suggested because no legal system comprehends such an absolute or complete retroactive effect of judicial decisions. To do so would render a legal system uncertain, incoherent and dysfunctional. Such consequences would cause widespread injustices."

58. This approach was applied in the criminal context by the Court of Criminal Appeal in the case of *DPP v Cunningham* [2013] 2 IR 631, where Hardiman J., giving judgment on behalf of that court, and speaking of the consequences of a declaration of constitutional invalidity, remarked (at para 73):

"Naturally, as we have just observed, the established jurisprudence from The State (Byrne) v. Frawley [1978] I.R. 326, Murphy v. The Attorney General [1982] I.R. 241 through to A. v. Governor of Arbour Hill Prison [2006] IEHC 169, [2006] IESC 45 [2006] 4 I.R. 88 shows that this does not necessarily mean that all actions, decisions and transactions taken in good faith on foot of that unconstitutional law must be unravelled, even if that invalidity operates ab initio. Any other conclusion would simply represent the triumph of abstract logic over the dictates of justice and the practical administration of society. Such a consequence is, in any event,

contraindicated by a range of defences – ranging from prescription, estoppel, change of position, acquiescence and res judicata– which have evolved over the centuries, the very point which was central to the judgment of Henchy J. in Murphy v. The Attorney General.”

59. In my view the jurisprudence requires the application of domestic procedural rules on finality of judgments in the circumstances of the present case. I consider that no sufficiently good reason for not doing so has been advanced. While the principle of uniformity in application of the law is an important tenet of EU law, so too is the principle that there should be legal certainty and stability following upon final judicial determinations. I consider that in the circumstances of this case the need to respect the latter principle tips the scales in favour of the respondent. I would therefore uphold the ruling of the High Court judge which seeks to apply domestic procedural rules on finality of judgments to the circumstances of this case and his finding (at paragraph 40) that:

“an objection to the application now before the Court on the basis that the 2016 warrants were not issued by issuing judicial authorities within the meaning of the Framework Decision or the Act of 2003, is a collateral attack on the decision ordering surrender, and that it cannot be sustained.”

Conclusion:

60. In circumstances where I have not been persuaded that there is merit in any of the appellant’s grounds of appeal, I would dismiss the appeal.

Birmingham P: I concur with the judgment of Edwards J., and agree that the appeal should be dismissed.

Gearty J: I also concur and agree that the appeal should be dismissed.