Neutral Citation: [2016] IEHC 185

THE HIGH COURT

[2013 No. 22 EXT]

IN THE MATTER OF THE EUROPEAN ARREST WARRENT ACT 2003

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

JAROSLAV SLIWA

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered the 11th day of April 2016.

1. On 6th October, 2014, the High Court ordered the surrender of the respondent in respect of four separate European arrest warrants ("EAWs") to Poland. Two of those EAWs related to offences for which he was sought for prosecution, the other two EAWs were for the purpose of serving two separate sentences of six months in prison. Since his surrender to Poland, the High Court has received seven separate requests emanating from judicial authorities in Poland seeking permission either to prosecute him for offences pre-dating his surrender, or, to execute sentences which have already been imposed since his surrender for such offences. Pursuant to s. 22 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), the High Court is permitted to consent to such prosecutions being brought or to the imposition of a penalty or to proceedings being brought for the purposes of executing a sentence or order of detention.

2. This judgment concerns five of the seven requests. Referring to the order of receipt of the requests in this jurisdiction, the fourth request and the seventh request will be left for further consideration. As regards the fourth request, further consideration of whether consent is prohibited by the terms of s. 45 of the Act of 2003 required additional enquiry by both parties. As regards the seventh request, this was only received by the Court recently and time was needed by the respondent's solicitor to make contact with his client for the purpose of taking instructions.

3. The respondent objected to consent being given to his further prosecution or to the infliction of punishment in Poland. The respondent submitted that the High Court is prohibited from giving consent by virtue of a breach or a prospective breach of s. 22 of the Act of 2003 as well as prospective breaches of Part 3 of the Act of 2003.

Part 3 of the Act of 2003

4. Section 22 ss. 8 of the Act of 2003 states that the High Court shall not give its consent under s. 20 ss. 7 if the offence concerned is an offence for which a person could not, by virtue of Part 3, be surrendered under this Act. Section 37, contained within Part 3, prohibits surrender where surrender would violate fundamental rights.

5. In the *Minister for Justice and Equality v. Strzelecki* [2015] IESC 15, the Supreme Court confirmed that respondents to s. 22 requests are permitted to raise breaches of their fundamental rights. At para. 45, the Supreme Court concluded *"[t]he issue of fundamental rights is not excluded for consideration by the courts on a request for consent for further prosecution of a person who is being surrendered. Thus, the issue may be raised and considered by a court. However, it may be in accordance with our jurisprudence, that such issue is determined by the Court to be a matter for litigation in the requesting state."*

Section 38

6. One of the sections contained in Part 3 of the Act of 2003 is section 38. That section prohibits the surrender of a person to an issuing state unless the offence either (a) corresponds to an offence in this jurisdiction and (i) is an offence punishable by a minimum of 12 months imprisonment in the issuing state or (ii) or a term of imprisonment of not less than 4 months has been imposed, or, (b) is an offence to which Article 2 para. 2 of the Framework Decision of 13th June, 2002 on the European Arrest Warrant and surrender procedures between Member States ("the 2002 Framework Decision") applies and is punishable in the issuing state by a minimum period of imprisonment of three years.

7. With respect to each of these five requests, I am satisfied that the surrender is not prohibited by section 38. No argument was put forward on behalf of the respondent that such consent was prohibited by s. 38 but for the sake of completeness, I find as follows:

> First request III kop 47/14 (29th January. 2015).
>
> The three offences are theft/fraud offences and the issuing judicial authority has ticked the swindling box in point E 1 of the request. That is not manifestly incorrect and therefore correspondence does not have to be established. These are offences of appropriate minimum gravity in the issuing state.
>
> Second request III kop 69/15 (26th June, 2015).
>
> These refer to two offences of deceitfully obtaining money or items. The acts described correspond in this jurisdiction with the offence of making gain or causing loss by deception contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 ("the Act of 2001"). The minimum gravity requirements have been met in the issuing state.
>
> The third request III kop 147/15 (5th August, 2015).
>
> This relates to four offences which are indicated as fraud offences by the issuing judicial authority under point E 1 of the EAW. This is not a manifestly incorrect designation and the requirements of minimum gravity have been met.

The fifth request II kop 31/15 (6th October, 2015).

He is sought in relation to two offences of deceit similar to those in the second request. The acts described correspond with an offence contrary to s. 6 of the Act of 2001. They also are offences reaching the required minimum gravity in the issuing state.

Sixth request XXI kop 42/15 (11th December, 2015).

This is a similar type offence of deceit as previous and it also corresponds with the offence of s. 6 of the Act of 2001. The offence meets the required minimum gravity in the issuing state.

Section 37
Prison conditions

8. The respondent submitted that consent should be refused as there is a real risk of inhuman and degrading treatment by virtue of the conditions of detention in Poland in which the respondent finds himself; this includes the physical conditions and also the manner in which the issuing state has disregarded his right to liberty, the rule of specialty, and has delayed processing the various s. 22 petitions which has caused prejudice to him. The Court will deal with the issue of prison conditions first. The other matters, e.g. his right to liberty and the rule of specialty and delay in processing s. 22 petitions more properly fall to be considered under s. 22 of the Act of 2003.

9. The respondent, through his solicitor, has put before the Court a number of letters as regards the conditions he experiences in Polish prisons. He has also put before the Court what is titled a "deposition"; this was apparently given to his Polish solicitor while in prison in Poznan. The respondent has solemnly sworn that his written statement is true, but the jurat is not in accordance with the rules concerning an Irish affidavit. Furthermore, the affidavit does not appear to be sworn in accordance with the rules for affidavits sworn outside the jurisdiction. No real issue was taken with this and I am prepared to receive it as evidence in all the circumstances.

10. The respondent's counsel has set out a succinct statement of the complaints that the respondent makes. These are:

a) Losing 20kg in weight due to inadequate nutrition

b) Overcrowding, in cells routinely with over four persons, and no more than three square metres per person

c) Damp, cold conditions, with largely unheated cells, even in winter

d) Lice ridden ancient dirty mattresses and inadequate bed linen

e) Being only permitted to shower twice or even only once a week

f) Limited hygiene products

g) Inadequate access to medical or dental services

h) Disgusting food not fit for human consumption

i) Bullying and physical violence from prison guards

j) Repeated transfers from prison to prison since October, 2015; he has been transferred seventeen times at least

k) Violation of the rule of specialty; disregard for his legal rights adds to the inhumanity and degradation.

11. On the evidence before the Court, the prison transfers appear mainly to be related to requests for the respondent to renounce the specialty rule. The respondent objects to being subjected to that process, but he also submits that it has a knock on effect on other aspects of his detention. The respondent states that the transfers around the country for the purpose of these court hearings make it difficult to make arrangements to see medical specialists, interfere with the ability of his partner and young child to plan to come to Poland to see him in prison and also to make phone calls, that he suffers substandard conditions in prison transfer vans for days at a time as the distances involved are long and that he has to undergo an arrival protocol at a new prison, sometimes every few days, which involve personal searches amongst other procedures. The respondent also complained about bullying by other prisoners and not obtaining a proper response from any of his lawyers and that his applications for release were frustrated by deliberate violations of the rule of specialty.

12. The respondent accepted that the test for prohibition of surrender under s. 37(1)(c) of the Act of 2003 has been set out in the case of *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] 3 I.R. 783, and applied in numerous other cases in the High Court such as *Minister for Justice and Equality v. Tagijevas* [2015] IEHC 455. The respondent seeks to distinguish himself from other cases concerning Poland, and more recent cases involving Lithuania, on the basis that the facts of his case are more akin to the situation that prevailed in *Minister for Justice and Equality v. McGuigan* [2013] IEHC 216. In *McGuigan*, that respondent submitted that the court had the benefit of a "live feed" as to the facts on the ground in the particular prisons at issue. Counsel in the current case submitted that the uncontested averments of the respondent indicate a prison system which is inhuman and degrading.

13. A particular distinguishing feature heavily relied upon by the respondent is that he has been subjected to numerous prison transfers. In that respect, the respondent has relied on the case of *Khider v. France* (App. No. 39364/05, 9th July, 2009, Section V), a decision of the European Court of Human Rights ("ECtHR"). What has been presented to the Court is a summary of the decision of the ECtHR. It seems that the original decision is available only in French. In *Khider*, it appears that the repeated transfers of that particular applicant, combined with other conditions of confinement including lengthy solitary confinement, all added up to inhuman and degrading treatment within the meaning of Article 3 of the European Convention on Human Rights ("ECHR"). The respondent submitted that the evidence placed before the Court at least puts the Court on inquiry.

14. From all of the evidence before the Court, it appears that this respondent has been transferred on a number of occasions from penitentiary prisons and to detention centres. It appears to be accepted by the respondent, albeit implicitly from his various

statements made in this case, that many of these transfers relate to his attendance at court for the purpose of, as he puts it, "nagging me to renounce the rule of specialty" or, as may be more correctly termed, for the purpose of prosecuting him in relation to these alleged offences. In that sense, it cannot be said that these transfers are without foundation or are arbitrary.

15. Moreover, under the provisions of s. 22(6)(d) of the Act of 2003, it is envisaged that a person may consent to being tried in an issuing state subject to giving voluntary, informed consent before a competent judicial authority. The process of enquiry as to whether consent will be given may require the presence of a respondent before court. I am satisfied that that appears that his transfers serve a legitimate aim, i.e. the prosecution of offences. Therefore, of themselves, the prison transfers do not amount to inhuman and degrading treatment.

16. Furthermore, the hardships of which he complains by virtue of these transfers do not reach a minimum threshold to reach the level that there are substantial grounds for believing that he is at real risk of inhuman and degrading treatment. His complaints about difficulties with attending medical specialists are generalised complaints and do not amount to cogent evidence that he is being treated inhumanely. Similarly, the arrival procedures, while unpleasant, do no attain the minimum threshold to show substantial grounds for believing that he is at real risk of inhuman and degrading treatment. He has not provided any concrete evidence of difficulty with thwarted plans for visits by his partner and child nor indeed with his ability to keep in touch with his partner and child and has not detailed how this amounts to inhuman and degrading treatment in his specific circumstances. Therefore, as regards his transfers from prison to prison, I am not satisfied that a threshold has been reached where this amounts to inhuman and degrading treatment.

17. Some of his complaints regarding his treatment while in prison are entirely subjective; such as receiving disgusting food not fit for human consumption. His loss of weight may be related to his subjective response to the food. More importantly he has not indicated details of his weight before and after his imprisonment so as to provide a real context for his complaint that the inadequate food amounts to inhuman and degrading treatment.

18. The respondent has relied upon two reports to back up his complaints regarding prison conditions. In the first place, he has relied upon the European Prison Observatory Report entitled "Prison Conditions in Poland" and dated September, 2013. He has also relied upon the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment ("CPT") Report to the Polish Government on the visit to Poland in June 2013. This report was published on 25th June, 2014.

19. In relation to nutrition, the CPT Report does not appear to deal with that at all. The Prison Observatory Report says that they received many complaints about the quality and quantity of food. However, again this is merely reporting what is being stated subjectively by the prisoners. With respect to the quantity of food, no independent evidence has been put forward that what is being served is inadequate to feed an adult male sufficiently. The subjective nature of what the respondent says regarding the quality of the food, requires corroborative evidence before the presumption that the issuing state will comply with the provisions of the Framework Decision will be overcome. No such corroborative evidence is before the Court to require the Court to be put on its enquiry any further into this aspect of the case.

20. The CPT Report encourages Polish authorities to allow male prisoners at least two showers per week in accordance with the revised European Prison Rules. This respondent complains about only being permitted to shower twice a week (although he says at some occasions he only showers once a week). While in an ideal world more frequent showering may be desirable, this does not in any way violate accepted European norms on prison hygiene and certainly does not violate his Article 3 ECHR rights.

21. In relation to the damp, cold conditions, it is striking that it is only in one prison that he gives details as to leaking or dropping water on the walls while the temperature outside was cold. He suggests that many of the Polish prisons are old with no proper ventilation and that the heating is barely recognisable. It is also of note that the CPT Report does not appear to make this problem of lack of heating a major issue and neither does the European Prison Observatory.

22. As regards the dirty mattresses and inadequate bed linen, this is not a complaint that is born out in the reports that have been filed on his behalf. The position with limited hygiene products does not appear to be an issue of widespread concern within the Polish prison system. His complaint regarding inadequate access to medical or dental services is also not borne out in general in the reports. His own complaints appear to be an entirely subjective view of inadequate treatment e.g. "or I am sent to any doctor that just gives me tablets that don't help". He also complained about a particular doctor who rejected his complaint about being unable to travel. These complaints do not amount to cogent evidence that he is at real risk of inhuman and degrading treatment should the requested consent be given. While it is accepted that some complaints are made by the CPT about certain aspects of the healthcare provided, these inadequacies do not approach a threshold where Article 3 ECHR rights are engaged. I have already dealt with the issue of access to medical specialists as a result of his transfers.

23. With regard to the prison cell overcrowding and his complaint that no more than three squared metres per person is available, the European Prison Observatory Report upon which he relied records that this is the space provided for by Polish law. The CPT Report recommends that cell occupancy rates be reduced with a view to offering a minimum of four metres squared of living space per person in multi-occupancy cells. That is the minimum optimal amount and certainly all authorities are encouraged by the CPT to provide that level of space. This on its own is not necessarily indicative of a situation of inhuman and degrading treatment. Furthermore, it appears Poland has been reducing its prison population and that not every prison has such a high occupancy rate that only three metres squared of space per prisoner is available.

24. His complains with regard to bullying and physical violence from prison guards are quite generalised. Indeed, it is not entirely clear that he is complaining about violence against himself, as he states "discrimination is happening on the day to day basis by the Prison Officer. Mostly this is mental humiliation, bullying and scoffing, ridiculing but sometimes physical violence. Nobody would talk about it, admit it nor make complaints as this would disqualify you from earlier possible release." The respondent then specifically talks about himself and other prisoners being locked quite often in one room by "the Prison Officer on duty" while everything in their cell is tossed and scattered. In circumstances where this Court must be forward looking and must have regard to the presumption that the Polish authorities will comply with the provisions of the 2002 Framework Decision, these complaints do not meet a minimum threshold to put this Court on further enquiry regarding his complaints of being subjected to inhuman and degrading treatment under this particular heading.

25. While certain aspects of Polish prisons, like certain aspects of prisons in many countries, are sub-optimal, from the above it can be seen that those conditions, either individually or collectively, do not reach a level of inhuman and degrading treatment. I therefore reject the point of objection raised by the respondent in relation to his prison conditions.

The rule of specialty

26. The respondent makes a number of complaints under this heading. Initially, his complaint was focused on an allegation that he had in fact been subjected to, and had served sentences for, offences pre-dating his surrender contrary to the rule of specialty. Over the course of these proceedings, through the service of further s. 22 requests and the provision of further information by the issuing judicial authorities as to the position in Poland, it now appears that no particular sentence can be pointed to as having been served by him in respect of any other matter. At its highest, it appears that one sentence against him was repealed and the proceedings discontinued.

27. What is most centrally an issue is that the Polish authorities have prosecuted him, including up to the point of sentencing him, for offences which pre-date his surrender. He submitted that this is contrary to the rule of specialty as applied by Ireland in s. 22 of the Act of 2003. Furthermore, it was submitted that by proceeding against him in relation to these other matters, there has been an effect on his liberty in that he was not released from his current sentence as might otherwise have happened if he could have been so prosecuted.

The provisions of Section 22 of the Act of 2003

28. Section 22 ss.2 provides that the High Court shall refuse surrender if it is satisfied that (a) the law of the issuing state does not provide that a person who was surrendered to it pursuant to an EAW shall not be proceeded against, sentenced or detained for the purposes of executing a sentence or detention order or otherwise restricted in his or her personal liberty in respect of an offence and (b) the person will be proceeded against, sentenced or detained for the purposes of executing a sentence or detention order, or otherwise restricted in his or her personal liberty in respect of an offence. Subsection 3 provides for certain presumptions. Subsections 4, 5 and 6 provides for specific situations where surrender is not to be refused.

29. Section 22, ss.7, provides as follows: "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."

30. Finally, s. 22 ss. 8 provides the High Court shall not give its consent under ss. 7 if the offence concerned is an offence for which a person could not by virtue of Part 3 be surrendered under the Act of 2003.

The Minister's primary argument – only s. 22(7) to be considered

31. On behalf of the minister, a simple proposition is put forward. In counsel's submission, ss. 7 is the procedure which covers an application to disapply the rule of specialty. That, and only that subsection of s. 22, is relevant to the Court's determination. In particular, counsel pointed to ss. 8 and submitted that it is only considerations arising from Part 3 of the Act that the Court must consider in a s. 22 request. Section 22 is not found in Part 3 of the Act of 2003 and therefore no other subsection in s. 22 is relevant other than ss. 7. It is submitted this is consistent with the interpretation in the Supreme Court decision of *Minister for Justice and Equality v. Strzelecki.*

32. The issue of specialty, according to Farrell and Hanrahan in the "European Arrest Warrant in Ireland" at para. 14.03 is, "more appropriately regarded as a policy which informs a majority of extradition agreements rather than a rule as such. It should not be regarded as a general right which the requested person is entitled to invoke as deriving either from international law or domestic law but rather an exception to surrender that can only be considered in the specific terms of the statute or agreement that gives rise to it. The version of the rule which appears in the Framework Decision and the European Arrest Warrant Act 2003 is subject to a significant number of exceptions and a waiver procedure which can be invoked subsequent to surrender."

33. Thus, counsel submitted if the Oireachtas had meant to include the general provision in relation to s. 22, it could have done so. If one proceeds on that basis, counsel's submission is that ss. 7 should be given a literal interpretation as to do so does not lead to an absurdity. In those circumstances, counsel submitted, the wording of ss.7 does not prohibit anything but it is permissive in nature. In particular, it does not prohibit the issuing state proceeding with a case up to but falling short of the point of imprisonment and then seeking consent. In short, it was submitted that the Court may grant its consent in the three instances set out in the subsection. It is submitted that the disjunctive "or" permits the High Court to give its consent to any of those three instances.

34. Counsel for the minister submitted that this is entirely in conformity with the 2002 Framework Decision provisions regarding rule of specialty in the case of *Leymann and Pustovarov* (1st December, 2008) (Case C/388/08PPU) which at para. 76 states *"…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…".*

35. Counsel for the respondent submitted that if the minister is correct in her primary submission, there will be an inequality of treatment between a requested person in the State and a person who has already been surrendered.. Counsel submitted that no reason is put forward for this inequality. Counsel also submitted that the context of any statutory provision is very important, particularly the section in which a subsection is contained.

36. Reliance was also placed on the decision of the Supreme Court in *Minister for Justice and Equality v. Strzelecki*. In counsel's submission, the Supreme Court found that the High Court had not been correct in focussing on the word "offence" in section 22 ss. 8. The Supreme Court said at para. 51: "In essence, the request for consent to prosecute him on two further offences is a request that his surrender also applies to the two additional offences set out in the request for consent by Poland.". In the respondent's submission, the request ought to be treated in the same way as if it was a request for a surrender. He refers to the reference in para. 35 of the judgment: *"Further, the word "surrender" is applicable where there is an application for consent from a requesting state to prosecute a person for additional offences to those for which he has already been surrendered: the request is in essence for consent for the surrender to cover the additional offences".*

The Court's analysis and determination

37. Subsection 7 and subsection 8 of s. 22 set the criteria for the High Court's assessment of whether to give consent to a request by an issuing state. The High Court may give its consent in one of three situations:

a) consent to proceedings being brought (this would cover the situation where proceedings were to be commenced)

b) consent to the imposition of a penalty (this appears to be where proceedings as regard conviction has been completed but sentence is yet to be decided or imposed), or

c) consent to proceedings that are for the purpose of execution of a sentence.

Subsection 8 makes consent subject to the same considerations under Part 3 of the Act of 2003 that might prohibit surrender.

38. In the view of the Court, s. 20 ss. 7 provides in its plain and ordinary meaning that the Court has the power to consent to the request in each or any of the situations that may apply under the subsection. The restriction on that power is, on the plain and ordinary meaning of the subsection, only limited by subsection 8. Indeed, the respondent does not contest that this is the literal meaning of ss. 7 and ss. 8, his complaint is that this would be an incorrect interpretation because an entirely open-ended and unfettered discretion to the court was not intended by the legislature.

39. The respondent's submission that because the subsection forms part of the overall s. 22, all the other subsections of s. 22 are to be applied to this subsection is not axiomatic. It is correct that statutory words are to be read in their legal context. The legal context at its most fundamental includes the Act as a whole. In "Statutory Interpretation in Ireland" (Dodd, Tottel Publishing, 2008), relied upon by the respondent, the author identifies a number of ways in which consideration of the Act as a whole may assist in interpretation. In general, the assistance may be from a logical or linguistic perspective, to permit the court to identify the scheme envisaged by the enactment, to identify the enactment's purpose or to ascertain the legislative intention where that is not specifically expressed in the statutory words at issue.

39. The respondent relied upon the reasoning in *Strzelecki* in an attempt to demonstrate that the other provisions of s. 22 apply to a consideration under ss. 7 as it is to be treated as if it was a surrender. The Court is of the view that the Supreme Court in *Strzelecki*, was dealing with the specific point at issue in that case, i.e. the applicability of all of Part 3 to determination of requests under s. 22 ss. 7 by virtue of s. 22 ss. 8 of the Act of 2003. The judgment did not purport to deal with the matter at hand. Furthermore, the reference to surrender, in para. 35 of that judgment, was made in the context of the use of the word "surrender" in s. 37 of the Act. In doing so, the Supreme Court explained that the word must also encompass a request made for the purpose of seeking prosecution. The specific context of the case was the applicability of Part 3 (including s. 37) to requests made under ss. 7 by virtue of the provisions of ss. 8 of the Act of 2003. The decision, or the rationale behind it, does not require or indeed assist in the determination of the present issue.

40. The Court agrees with what is stated by the authors of "The European Arrest Warrant in Ireland" at para. 14.03. The rule of specialty is not a general rule but it is dependent on the specific terms of the statute. The Oireachtas has chosen to phrase the rule with respect to further consent in a particular way. There may indeed be good reason for the difference in approach. Indeed, the need for the Court to engage in a process once again under s. 22 may have been considered otiose since it will have made the enquiry as to specialty previously. Moreover, the fact that the issuing state is seeking permission before taking further steps is indicative that the issuing state is abiding by the prohibitions generally contained in the specialty rule.

41. Furthermore, it must be recalled that the original prohibitions against other prosecution or punishment set out in the rule of specialty, still apply by virtue of the original surrender. At all material times while the respondent is in the issuing state involuntarily, no prosecution can be brought, or punishment imposed on him for, an offence which occurred prior to surrender. The Court has taken into consideration that ss. 6 (c) (i) refers to a period of 45 days from the date of his release on the offence for which he is surrendered but that is subject to ss. 6(c)(ii) which requires him to be free to leave during that period and therefore if he is not free to leave the issuing state he cannot be prosecuted or punished for earlier offences. Therefore, even if a situation is reached whereby the only proceedings in being against a respondent, requiring him or her to be in the issuing state, are other than the matters for which he was originally surrendered, the rule of specialty will still apply.

42. In this case, it is implicit in the argument of the respondent that Polish law does not comply with the requirements of s. 22 as regards the rule of specialty. The Court deals with that matter further below. However, the Court must, for the purpose of interpreting the true meaning of s. 22 ss. 7 and ss. 8, proceed on the basis that surrender will only have been granted in circumstances where it was not prohibited by s. 22 of the Act of 2003. The Court, in interpreting statutory words, cannot be required to take into account that previous decisions may have been made erroneously. To do so would amount to assuming uncertainty when in fact the law assumes certainty in both the legislative and judicial processes.

43. Furthermore, the need for the protections under Part 3 of the Act of 2003 may be viewed as entirely separate to the need to reinvestigate the question of specialty. All the sections from 38 to 46 are clearly referable to the new "offence" for which consent to prosecute or punish is required and a fresh consideration of whether surrender/consent is prohibited for those offences is necessary. For example, the question of correspondence, minimum gravity or whether the new offence is a list offence will require consideration to see if surrender (or now consent) would be prohibited under s. 38 of the Act of 2003. Section 37 applies to fundamental rights and those rights are self-evidently deserving of protection as the situation on the ground may have changed in the intervening time, or indeed there may be something of note about the particular offence that requires a further consideration of fundamental rights issues.

44. The respondent submitted that a constitutional interpretation required ss. 7 to be read as requiring full consideration of all s. 22 issues on the basis that his constitutional rights, especially as regards equality, would be violated as he would not be treated the same as if he was present in this State and his surrender was being requested. That argument fails to recognise that a) he has not lost any protection as s. 22 still covers the situation with regard to his original surrender and b) there is good reason for not requiring a court to enter into an otiose reconsideration of the rule of specialty.

45. The respondent also relied upon s. 20 ss. 6(a) of the Act of 2003 in submitting that by providing "proceedings will not be brought against the person in respect of an offence" without the consent of the High Court being obtained, the Oireachtas intended to protect a person from being proceeded against in the manner in which the Polish authorities had acted in this case. The full context of ss. 6(a) will be considered in the context of the minister's alternative submission. It is only necessary to say that ss. 6 on its face deals with the consideration of the surrender of a respondent. It is not directly relevant to the issue of requests being made under s. 22 ss. 7 of the Act of 2003. The Oireachtas has chosen to legislate in a different manner by means of s. 22 ss. 7 and ss. 8 for requests to disapply the rule of specialty.

46. Although the minister relied upon the decision of the CJEU in *Leymann and Pustovarov* in arguing for a literal interpretation, its relevance to the interpretation is more peripheral than central. Importantly, however, in the application of the plain and ordinary interpretation of s. 22 ss. 7 to the present facts, there would be no conflict with the provisions of Article 27 of the 2002 Framework Decision. As set out above, the Court of Justice of the European Union has held in the *Leymann and Pustovarov* case that "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.". Therefore, there was nothing contrary to Article 27 in the approach of the issuing state and there is nothing on the face of ss. 7 which expressly prohibits such an approach to specialty.

47. In all the circumstances, the Court is of the view that s. 22 ss. 7 should be given its plain and ordinary meaning, or what has been termed in this case, a literal interpretation. To do so does not lead to an absurdity or indeed fail to reflect the intention of the Oireachtas. All the rights of the requested person are fully respected under the new position, but the Court is absolved from the requirement to consider afresh what will have been or should have been considered at the surrender stage. In addition, the rule against specialty is not so much a general right belonging to a particular person but is only granted to the extent required by the particular legislation. This was an option the Oireachtas was entitled to take in making provision for the rule of specialty.

48. In those circumstances, there being no ground to refuse surrender of the respondent, I give the requested consent to the issuing judicial authority in respect of the first, second, third, fifth and sixth requests.

49. The Court will also consider the minister's submission that there is no breach of the rule of specialty in proceeding against him up to the point of sentence. The reason the Court will do so is because the respondent claims that the apparent breaches of the rule of specialty have had an impact on his fundamental rights in the particular circumstances of this case.

The Minister's alternative argument – proceeding to point of sentence is permitted

50. Counsel for the minister made an alternative argument in the event that the Court were to find that the other provisions of s. 22 applied to a request to disapply specialty. In this regard, counsel pointed to ss. 6 which provides that surrender shall not be refused if the High Court is satisfied of certain matters. Under ss. 6(a), counsel on behalf of the minister submitted that the word "and" contained between ss. 6(a) (ii) and ss. 6(a)(iii) must be read as effectively providing that surrender shall not be refused unless the Court is satisfied that the person would be detained or otherwise restricted in his or her personal liberty for the purposes of an offence without the issuing judicial authority first obtaining the consent thereto of the High Court.

51. Counsel for the minister also submitted that the interpretation of ss. 2 of s. 22 must be read as only prohibiting surrender where there is a danger where the person will be deprived of liberty for another offence. It was submitted that the phrase "proceeded against, sentenced, or detained for the purposes of executing a sentence or detention order" is immediately followed by the phrase "or otherwise restricted in his or her personal liberty" and their repetition in both ss. 2(a) and ss. 2(b) requires the first phrase to be interpreted in the context of a deprivation of personal liberty. Finally, the Minister also referred to ss. 3 with regard to the presumptions and submitted that those must be read conjunctively and not disjunctively notwithstanding the use of the word "or" because of the reference to "otherwise restrict him or her in his or her personal liberty".

52. Counsel for the respondent submitted that s. 22 ss. 6 (a)(i) put beyond doubt that the Oireachtas had intended to protect a requested person from being "proceeded against" and that "proceeding against" meant proceedings being brought against a person, irrespective of penalty or restriction of liberty. He pointed to the use of the phrase "proceeded against" in s. 41 of the Act of 2003 which is a double jeopardy provision and submitted that this clearly means being prosecuted, regardless of whether liberty is restricted thereby. The use of the same phrase elsewhere in the Act ought to inform the interpretation of that phrase in s. 22 of the Act.

53. Counsel also submitted that, although the interpretation was not directly at issue in the cases, the courts have previously operated on the basis that "proceeded against" meant the bringing of proceedings. He pointed to the Supreme Court in *Minister for Justice, Equality and Law Reform v. Dundon* [2005] 1 I.R. 261, concerning undertakings in the context of specialty, ordered surrender and said it appears that no one suggested that prosecution without restriction of liberty could be done without consent from this state. He pointed in particular to Adams v. DPP [2001] 1 I.R. 47. In that case, the Supreme Court, having quoted s. 39 of the Extradition Act, 1965, which uses a similar phrase as found in s. 22 (2)(a), i.e. "proceeded against…..or otherwise restricted in his or her person liberty.." stated that a relevant certificate from the U.K. was required before the Director of Public Prosecutions "was permitted to prosecute the applicant for the [relevant offences]."

54. Counsel for the respondent also relied upon Farrell and Hanrahan's "The European Arrest Warrant in Ireland" at para. 14.28 in which, with reference to the request in writing, it is indicated that most requests follow the format of the EAW and that "[s]uch an approach makes sense when one considers that the criteria which the court will apply to such a request are in effect the same as apply to a request for surrender under s. 16". The authors go on to say that the court will have to examine the application for consent in much the same way as it would approach an application for surrender under section 16.

Court's analysis and determination

55. Subsections 2 to 6 inclusive of s. 22 of the Act of 2003 provide for the application of the rule of specialty to requests for surrender. There is merit in the submission that, the approach of the High Court to the interpretation of the rule of specialty in the context of an application for surrender is to consider all the relevant subsections of s. 22 of the Act of 2003. This is because they are clearly intended to be interrelated; ss. 2 prohibits surrender in certain situations but ss. 4 to 6 limit that prohibition further, whereas ss. 3 provides for certain presumptions.

56. The Court also accepts that the submission that the use of the word "and" between the ss. 6 (a) means that they must be read conjunctively. This is the ordinary and natural meaning of the word "and" and while there may be a situation where "and" is to be interpreted as disjunctive, there is nothing in the Act of 2003 that compels such an interpretation.

57. Indeed, if the subclauses were to be read disjunctively, the use of the word "penalty" in s. 22 ss. 6(a)(ii) would appear to set it at odds with what is contained in s. 22 ss. 4(b) which states that "the High Court is satisfied that, where upon such conviction he or she is liable to a term of imprisonment or detention and such other penalty as does not involve a restriction of his or her personal liberty, the said other penalty only will be imposed if he or she is convicted of the offence.". If read disjunctively, ss. 4(b) would permit surrender where only a financial penalty is to be imposed, whereas ss. 6(a)(ii) would prohibit surrender in those circumstances. The Oireachtas cannot have intended to enact contradictory sub-sections. Similarly, ss. 5 permits surrender where a financial penalty is to be imposed but the person could be subject to deprivation of liberty for refusal to pay that penalty. That would be an unnecessary subsection if ss. 6 (a) (ii) prohibits the imposition of any penalty without consent.

58. The Court is satisfied that the interpretation proffered by counsel for the minister with respect to s. 20 ss. 2 is also correct. The phrases in each of the sub clauses, namely "proceeded against, sentenced or detained for the purposes of executing a sentence or detention order" are immediately followed by the phrase "or otherwise restricted in his or her personal liberty." The use of the word

"otherwise" acts as a qualifier to the words in the prior clause. Thus, being "proceeded against" is to be viewed as involving a deprivation of liberty. Again, in respect of subsection 3, which provides for presumptions and thus does not of itself prohibit surrender, the use of the word "or" before the reference to "otherwise restrict him or her personal liberty" is a qualifier on the interpretation of "proceed against". Being proceeded against means being proceeded against where there is a deprivation of liberty involved.

59. In the view of the Court, the reliance on dicta in other cases, which did not concern the particular interpretation of either this subsection or of the particular phrases at issue, cannot be regarded as dispositive of the interpretation. Even in the Adams case, which is the closest authority, the issue before the court concerned a challenge to a certificate by the U.K. Home Secretary. The interpretation of "proceeded against" was not argued and was not in issue. Therefore, the dicta of the Supreme Court could not or should not be taken as binding.

60. Furthermore, the Act of 2003 is now subject to another canon of interpretation, namely that of conforming interpretation as set out in the well known passage of the former Chief Justice in Minister for Justice, Equality and Law Reform v. Altaravicius [2006] IESC 23 at para. 29 as follows:

> *"When applying and interpreting national provisions giving effect to a Framework Decision the Courts "…must do so as far as possible in the light of the wording and purpose of the Framework Decision in order to attain the result which it pursues…" (C-105/03 Pupino ECJ 16th June, 2005). The principle of conforming interpretation is limited, as the Court of Justice has pointed out in Pupino and other cases, to the extent that it is possible to give such an interpretation. It does not require a national court to interpret national legislation contra legem. If national legislation, having been interpreted as far as possible in conformity with community legislation to which it purposes to give effect, but still falls short of what is required by the latter, a national Court must, as a general principle, apply that legislation as interpreted although there may be other consequences for a Member State which has failed to fully implement a Directive or Framework Decision."*

61. As Fennelly J. observed in *Minister for Justice and Equality v. Bailey* [2012] 4 I.R. 1, there is no reason to exclude the principle of conforming interpretation from a measure because it implements an opt-out. Thus, the principle applies to the rule of specialty although it is not a mandatory ground for refusal of surrender. The CJEU has ruled in *Leymann and Pustovarov* that Article 27(3)(c) of the 2002 Framework Decision must be interpreted as meaning that, in relation to an offence other than that which the person was surrendered, consent must be requested and obtained if a penalty or a measure involving the deprivation of liberty it to be executed. The CJEU held that a person surrendered can be prosecuted and sentence for such an offence before consent is obtained, provided that no measure restricting liberty is applied during the prosecution or when judgment is given for that offence.

62. Even if there was a doubt as to how s. 22 was to be interpreted in so far as a prohibition on proceeding against a person up to the point of sentence is concerned, the conforming interpretation requires this Court to interpret the section and in particular the relevant subsections in accordance with the relevant provisions of Article 27. It is not *contra legem* to interpret the relevant provisions of s. 22 as permitting an issuing State to prosecute and sentence a person provided that no measure restricting liberty is applied during the prosecution or when judgment is given.

63. In so far as the respondent makes a complaint that in fact what occurred here was a breach of specialty as he has been deprived of his liberty, he has placed little more than mere assertion before the Court in support of that contention. In particular, there is no evidence before the Court, that in proceeding as they have done that the Polish authorities have restricted the respondent in his personal liberty. The Court notes that the respondent complains that this is so in particular in reliance on the act that his release from his current sentences has been impeded by virtue of these cases. The respondent appears to submit that he did not receive a type of temporary release because of these prosecutions. The Court does not have to determine whether a restriction on temporary release amounts to "a measure restrict liberty during the prosecution" because in the present case, despite having the benefit of a Polish lawyer, nothing has been put before the Court by way of expert evidence, that the existence of the prosecutions as a matter of law and of fact restricted his liberty in Poland. The height of his lawyer's statement was that two summons' were issued without his consent to do so and "it may cause more difficult for him to be released on bail." Such a vague statement does not constitute proof that by permitting prosecution up to the point of serving the sentence, Polish law permits deprivation of liberty.

64. The Court is of the view that the reliance placed upon para. 14.28 of "The European Arrest Warrant in Ireland" is misplaced. The correct interpretation of the relevant provisions of s. 22, both in their plain and ordinary meaning and indeed when subjected to a confirming interpretation with Article 27 of the 2002 Framework Decision, is that their surrender is not prohibited where a person will be proceeded against and indeed sentenced but no measure restricting his or her personal liberty will be applied in the issuing state. Furthermore, on the evidence before the Court no measure restricting his liberty has been applied.

Conclusion

65. For the reasons set out in this judgment, the Court is satisfied that there are no grounds for refusing consent to these section 22 requests on a) the basis that such consent is prohibited by Part 3 of the Act of 2003 and b) that the rule of specialty has been or will be violated.