Neutral Citation Number: [2008] IEHC 125

THE HIGH COURT

Record Number: 2008 No. 355 SS

IN THE MATTER OF ARTICLE 40.4 OF THE CONSTITUTION
AND IN THE MATTER OF THE HABEAS CORPUS ACT, 1782
AND IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT, 2003, AS AMENDED

BETWEEN

SERGEJS RIMSA

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON, IRELAND AND THE ATTORNEY GENERAL

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 2nd day of May 2008

1. This is an application by the applicant for his release on the basis that his current detention is unlawful. He is currently held in custody on foot of an order for his committal to prison pending his surrender to Latvia under a European arrest warrant.

2. Before addressing the legal submissions made on behalf of the applicant in this regard, it is necessary to set out the relevant background to the applicant's present detention.

3. By order of this Court dated 13th December 2007 it was ordered that the applicant be surrendered to the Republic of Latvia pursuant to a European Arrest Warrant dated 6th September 2007 and that he be committed to prison pending the carrying out of his surrender. That order was made pursuant to the provisions of section 16 (1) of the European Arrest Warrant Act, 2003 (as amended), and took effect, as provided by section 16 (3) of the Act, 15 days thereafter on 28th December 2007. It should be noted that the applicant did not request, as he was entitled to do, that the order should take effect sooner than fifteen days.

4. The Committal Warrant on foot of which the first named respondent holds the applicant directs his detention for the period of not less than 15 days (i.e. the period leading up to the taking effect of the surrender order), "*and any further period as may be necessary under law*" (my emphasis).

5. The date by which his surrender must be implemented is provided for in section 16(5) of the Act, but subsections (6) and (7) of that section have relevance also. These provisions are as follows:

> *(5) Subject to subsection (6) and section 18, a person to whom an order for the time being in force under this section applies shall be surrendered to the issuing state not later than 10 days after—*
>
> > *(a) the order takes effect in accordance with subsection (3), or*
> >
> > *(b) such date (being a date that falls after the expiration of that period) as may be agreed by the Central Authority in the State and the issuing state.*
>
> *(6) Where a person makes a complaint under Article 40.4.2° of the Constitution, he or she shall not be surrendered to the issuing state while proceedings relating to the complaint are pending.*
>
> (7) *A person (to whom an order for the time being in force under this section applies) who is not surrendered to the issuing state in accordance with subsection (5), shall be released from custody immediately upon the expiration of the 10 days referred to in that subsection unless, upon such expiration, proceedings referred to in subsection (6) are pending.*" (my emphasis)

6. These provisions can be seen as the manner in which the Oireachtas has chosen to give effect to the provisions of Article 23 of the Framework Decision which provides:

> **"Article 23 Time limits for surrender of the person**
>
> > *1. The person requested shall be surrendered as soon as possible on a date agreed between the authorities concerned.*
> >
> > *2. He or she shall be surrendered no later than 10 days after the final decision on the execution of the European arrest warrant.*
> >
> > *3. If the surrender of the requested person within the period laid down in paragraph 2 is prevented by circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.*
> >
> > *4. The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. The execution of the European arrest warrant shall take place as soon as these grounds have ceased to exist. The executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.*
> >
> > 5. *Upon expiry of the time limits referred to in paragraphs 2 to 4, if the person is still being held in custody he shall be released.*" (my emphasis)

7. In the present case, following the taking of effect of the order for surrender on the 28th December 2007, the surrender of the applicant should have been completed not later than midnight on the 6th January 2008 in accordance with the provision of section 16(5)(a) of the Act, *or, if not*, within ten days of such later date as was agreed by the Central Authority here and the issuing state as provided by s. 16(5)(b) of the Act.

8. In the present case the situation is that as the 7th January 2008 was approaching, the authorities in Latvia corresponded with the Central Authority here to the effect that it would not be possible for them to collect the applicant by the 7th January 2008 as no travel tickets were available for flights from Latvia to Dublin. It was indicated that the collection could be made on the 9th January 2008 and the Central Authority agreed to that date for surrender. Having agreed that date as the date for surrender, it follows that the applicant would have to have been released if surrender had not taken place by the 19th January 2008.

9. However, on the 8th January 2008 the applicant applied for an order of release under Article 40.4 of the Constitution on the basis that after midnight on the 6th January 2008 his continued detention became unlawful. It appears from the judgment of Hedigan J. following that application, that the basis for the submission that the applicant's detention was unlawful was that his detention after midnight on the 6th January 2008 and until the 9th January 2008 was not "*necessary under law*" as stated in the Committal warrant to which I have referred, since, according to certain evidence exhibited in an affidavit of Bill O'Rourke sworn on behalf of the applicant, there were in fact flights available from Ireland to Riga in Latvia prior to the 7th January 2008. It was apparently submitted that a postponement of surrender beyond the 6th January 2008 could not be justified on the basis of mere convenience of the Latvian authorities, such convenience not constituting a "necessity".

10. On that application, the release of the applicant was refused, the learned judge being of the opinion that the evidence of Mr O'Rourke was "not convincing" as it related only to flights from Ireland to Riga, and not to the required flights in both directions. He concluded that there were circumstances of necessity requiring the arranging of a later date for surrender. In his judgment he referred to the fact that s. 16(5) of the Act does not itself refer to the existence of necessity being a requirement before a later date can be agreed between the Central Authority and the issuing state, even though the committal warrant itself directs detention for fifteen days and any further period "necessary under law". He referred also to Article 23(3) of the Framework Decision, set forth above, and which provides:

> *"3. If the surrender of the requested person within the period laid down in paragraph 2 is prevented by circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed."*

11. The order of Hedigan J. refusing the application for the applicant's release has been appealed to the Supreme Court and has not yet been determined. Accordingly, under the provisions of s. 16(6) of the Act, the applicant's surrender cannot take place until such determination, and he remains in custody here pending that outcome. He has not applied for bail pending the determination of that appeal by the Supreme Court.

12. In the present application, the applicant's release is sought on the basis now that given the findings of Hedigan J. on the first application for release, s. 16(5) of the Act must be found to be unconstitutional since it permits of the indefinite detention of a person whose surrender has been ordered, since there is no outer limit specified in the section to any further date which the Central Authority and the issuing state might agree between themselves as a date for surrender beyond the date prescribed by s. 16(5)(a) of the Act, and in circumstances where there is no provision for the Court's supervision of or involvement in any such agreed date.

13. Dr Michael Forde SC for the applicant has referred to the provisions of Article 23.3 of the Framework Decision which I have already set out above. He has referred to the fact that this Article refers to "*circumstances beyond the control of any of the Member States* " as justifying an extension of the surrender date, and that, accordingly, the provisions of s. 16(5)(b) of the Act go further than what was required in order to give effect to that provision, by not limiting the circumstances in which such a later date may be agreed between the Central Authority and the issuing state to such circumstances. In his submission it permits of a purely executive decision resulting in the detention of the applicant, that this amounts to permitting a curtailment of a person's liberty without any justification being required for so doing, and that as such it is unconstitutional.

14. Dr Forde has referred to the comment in the judgment of Hedigan J. that notwithstanding that he was of the view in this case that there were grounds of "necessity", that he "*[did] not think that Section 16(5) makes any requirement of necessity in order to ground an extension, although it is clear the surrender should be effected as soon as possible*".

15. Dr Forde made reference to other legislation where the Oireachtas has made statutory provision for the curtailment of liberty, such as under s. 14 of the Mental Heath Act, 2001, s. 142 of the Children Act, 2001, s. 12 of the Child Care Act, 2001, and under s. 5 of the Immigration Act, 1999, in each of which, he submits, there is a mechanism provided in the legislation whereby the period of detention is strictly limited and subject to a review procedure by a court.

16. Dr Forde has relied upon the judgment of Keane CJ in *DK v. Crowley* [2002] 2 IR 744 wherein it was held, inter alia, that s. 4(3) of the Domestic Violence Act, 1996 was unconstitutional given that the procedures provided by that section failed to provide a fixed period of relatively short duration during which an interim barring order made *ex parte* during which it was to continue in force , and deprived the respondents to such applications of the protection of the principle of *audi alteram partem* in a manner and to an extent which was disproportionate, unreasonable and unnecessary. He has referred to a passage on p. 757 of this judgment, as follows:

> *"While the Oireachtas in upholding other constitutional rights – in this case the rights of spouses and dependent children to be protected against physical violence – is entitled to abridge the constitutional right to due process of other persons, the extent of that abridgement must be proportionate, i.e. no more than is reasonably necessary in order to secure that the constitutional right in question is protected and vindicated …… In reaching a decision as to whether that constitutional balance has been achieved in the legislation under consideration, it is of paramount importance to bear in mind the consequences of the order made. Thus, in the present case it results in the forcible removal of the applicant from the family home and the society of his child on the basis of allegations in respect of which he has no opportunity of being heard, treats him as having committed a criminal offence resulting in a custodial sentence in the event of his non-compliance with the order and makes him liable to arrest by a garda without a warrant if the latter entertains a reasonable suspicion that he has failed to comply with the order.*
>
> *The applicant, accordingly, is arguably deprived of the protection of one of the two central maxims of natural justice – audi alteram partem – in proceedings which may have profoundly serious consequences for him in his personal and family life. The issue in this case is not as to whether the Oireachtas would be entitled to abridge, even in a relatively drastic fashion, the right of the applicant to be heard, in order to protect spouses and dependent children from violence. That the legislature was entitled to effect such an abridgement of the rights of individual citizens in order to deal with the social evil of domestic violence is beyond dispute. The question for resolution in this case is as to whether the manner in which the abridgement of the right to be heard has been effected is proportionate in the sense already indicated."*

17. By way of conclusion, the learned Chief Justice stated at p.760:

> *"… the failure of the legislation to impose any time limit on the operation of an interim barring order, even when granted ex parte in the absence of the respondent, other than the provision that it is to expire when the application for an interim barring itself is determined, is inexplicable. While in the present case, the District Judge fixed the hearing of the application for a barring order for a date three months into the future, the court notes that the statute nowhere imposes on the District Court any obligation, when granting an interim order, to limit its duration in time. If no date is fixed for the hearing of the application for the barring order itself, as distinct from the interim barring order, it would be a matter for the applicant for a barring order to bring the matter before the District Court again. Manifestly, he or she will have little incentive to do so while the interim barring order remains in force.*
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> *It is undoubtedly the case that the respondent may apply to the court at any time to have the interim order discharged or varied. No reason has been advanced, however, presumably because there is none, as to why the legislature should have imposed on respondents, in this particular form of litigation, with all its draconian consequences, the obligation to take the initiative in issuing proceedings in order to obtain the discharge of an order granted in his or her absence which, it may be, should never have been granted in the first place. It has not been demonstrated that the remedy of an interim order granted on an ex parte basis would in some way be weakened if the interim order thus obtained were to be of limited duration only, thus requiring the applicant, at the earliest opportunity, to satisfy the court in the presence of the opposing party that the order was properly granted and should now be continued in force……*
>
> *The Court is accordingly satisfied that the procedures prescribed by s. 4(1), (2) and (3) of the Domestic Violence Act, 1996 in failing to prescribe a fixed period of relatively short duration during which an interim barring order made ex parte is to continue in force, deprived the respondents to such applications of the protection of the principle of audi alteram partem in a manner and to an extent which is disproportionate, unreasonable and unnecessary."*

18. Dr Forde has referred also to a Canadian case, *Air Canada v. Attorney General of Canada*, 222 D.L.R. (4th) 385. In that case the Canadian Commissioner of Competition had pursuant to powers given under the impugned provision of the Competition Act, made a temporary order prohibiting the appellant, a dominant carrier, from offering discount, or similar, fares on specified routes. That order endured in accordance with the statutory provision for a period of eighty days, and was made in circumstances where the party affected had no prior opportunity to make representations, and without any judicial authorization. This power was found to lack required procedural safeguards and did not allow affected persons a fair hearing in accordance with the principles of fundamental justice.

19. Dr Forde highlights the fact that, unlike even the impugned statutory provision in the Domestic Violence Act, 1996 referred to in *DK v. Crowley* (supra), the power vested in the Central Authority to continue the detention of a person who is the subject of an order for surrender under s. 16 of the European Arrest Warrant Act, 2003, as amended, results in detention other than by order of any court, and without any definition of precise circumstances in which that power may be exercised, albeit that the Framework Decision refers to circumstances "*beyond the control of any of the Member States*". Accordingly it is submitted that the provisions of s.16(5)(b) provides a power which is beyond what is necessary to give effect to the Framework Decision i.e. the surrender of the applicant to the issuing state, and that it is a power which deprives the person detained of judicial scrutiny of the decision to detain him indefinitely simply on the basis of an agreement between the Central Authority here and the issuing state.

20. Feichín McDonagh SC on behalf of the respondents has submitted at the outset that the lawfulness of the applicant's detention after the 6th January 2008 and until the 9th January 2008 has already been determined by Mr Justice Hedigan in his decision on the first application for release referred to. He has referred to the finding of fact by the learned judge that his further detention beyond the 6th January 2008 was 'necessary'. He submits that the lawfulness of the applicant's detention is therefore '*res judicata*', and that the doctrine of issue estoppel applies to the question of whether the applicant's detention beyond the 6th January 2008 was necessary. In his submission, the applicant cannot now be permitted to re-open the issue of whether the detention of the applicant is more than is necessary, since, in the absence of some new facts emerging and which are absent on this application, the applicant seeks to do so on a hypothetical basis only.

21. In fact, he submits that even if there were to be new facts relied upon in the present case, the applicant should more properly seek leave from the Supreme Court on the appeal filed against the order of Hedigan J. to adduce that new evidence, and that it cannot be dealt with by simply bringing a further application for release on the same facts as previously.

22. He submits also that in so far as Hedigan J. commented that s. 16(5) of the Act does not make any requirement of necessity as justifying a longer period of detention than the 10 days referred to in s. 16(5)(a) of the Act, those comments must be seen as *obiter*.

23. Mr McDonagh has referred to a passage from *Res Judicata and Double Jeopardy*, McDermott, Butterworths, 1999 where at paras. 4.04 and 4.10 the author refers to res judicata applying where, respectively, the matter has been decided by a court of competent jurisdiction and where the decision is "final and conclusive" in the sense that it cannot be varied by the court which has made it, as opposed to a decision which is simply subject to an appeal. He submits that both criteria are met in relation to the finding made on the first application for release by Hedigan J, already referred to. He refers also to a passage at para. 7.01 in relation to issue estoppel where the author states:

> *" A judicial determination directly involving an issue of fact or law disposes once and for all of the issue so that it cannot afterwards be raised between the same parties or their privies. Costello J adopted the following definition in D v C:*
>
> > *"A party is precluded from contending the contrary of any precise point which having once been distinctly put in issue has been solemnly and with certainty determined against him."*

24. Mr McDonagh submits that, accordingly, the issue of necessity for the two additional days detention has been finally determined against the applicant and cannot be re-opened on the present application, and that no new issue has been raised by the applicant to justify a further application for release. Mr McDonagh is not submitting that the constitutional issue has already been disposed of by virtue of this finding of fact by Hedigan J., but simply the issue of necessity for further detention for two days.

25. In so far as Dr Forde is relying on the fact that s. 16(5)(b) of the Act is open-ended as far as further detention is concerned and without any provision for judicial scrutiny, for his submission that s.16(5)(b) of the Act is unconstitutional, Mr McDonagh submits that this submission is affected by the fact that on the earlier application this detention was found to be lawful, and therefore deprives the applicant of locus standi to challenge the provision in question.

26. Mr McDonagh has referred also to the judgment of Henchy J. in *Cahill v. Sutton* [1980] 1 IR. 269. He referred to the fact that the plaintiff in that case was unsuccessful because it was held that even if the section 11(2)(b) of the Statute of Limitations Act, 1957 was such as to deprive a potential plaintiff who was unaware of facts giving rise to a cause of action until after the expiration of the limitation period, the facts of that plaintiff's case were such that she was not such a person since she had been aware of such facts before the expiration of that period and therefore could never have been adversely affected by the impugned provision. He submits that the applicant herein is in a similar position since he is already the subject of a finding that his detention under the section was necessary, and that he therefore lacks standing to challenge the constitutionality of the section.

27. Mr McDonagh also submits that a further obstacle is in the way of the applicant succeeding, namely the presumption of constitutionality and double construction rule as expressed by Walsh J. in *East Donegal Co-operative Livestock Mart Ltd v. The Attorney General* [1970] 1 IR. 317 where the learned judge stated:

> *" Therefore, an Act of the Oireachtas, or any provision thereof, will not be declared to be invalid where it is possible to construe it in accordance with the Constitution; and it is not only a question of preferring a constitutional construction to one which would be unconstitutional where they both may appear to be open but it also means that an interpretation favouring the validity of an Act should be given in cases of doubt. It must be added, of course, that interpretation or construction of an Act or any provision thereof in conformity with the Constitution cannot be pushed to the point where the interpetation would result in the substitution of the legislative provision by another provision with a different context, as that would be to usurp the functions of the Oireachtas. In seeking to reach an interpretation or construction in accordance with the Constitution, a statutory provision which is clear and unambiguous cannot be given an opposite meaning. At the same time, however, the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained and corrected by the Courts."*

28. Mr McDonagh submits accordingly that where the Central Authority agrees with the issuing state to a date for surrender of a person who is subject to an order made under s. 16(1) of the Act, which is outside the ten day period from the taking effect of the order, it is to be presumed that it will exercise its discretion only in accordance with the principles of constitutional justice, and in the light of the objectives and aims of the Act, and in good faith. He submits that the applicant has failed to establish in any way that the power of the Central Authority to agree the 9th January 2008 as the date for the applicant's surrender has been exercised by it in a way which offends against these principles. He seeks to distinguish the present application from the case of *DK v. Crowley* relied upon by Dr Forde where the statutory power to grant an interim barring order until the final determination of the case was found to be unconstitutional, since in that case the District Judge had no discretion under the impugned section in relation to the duration of that interim order made in the absence of the person affected by it.

Conclusions

29. Firstly, in relation to the question of whether the detention of the applicant was necessary, I am satisfied that that issue has been determined as a matter of fact in this case by the judgment of Hedigan J. referred to. However, as I interpret the submissions of the applicant in the present application, he is not contending that this question is still open. In fact the contrary seems to be the position, as Dr Forde is in fact saying that by reason of that very finding, the applicant is somebody who is adversely affected by the provisions of s. 16(5)(b) of the Act, since it has been interpreted by Hedigan J. as meaning that the Central Authority can extend and has extended the applicant's period of detention where that was deemed necessary by the Central Authority.

30. He relies on that finding to escape the possibility that he lacks standing to argue that the provision under which he continues to be held is unconstitutional. I take the view that the applicant is not seeking to re-open this finding of fact, even though the grounding affidavit on this application exhibits a faxed communication from Ryanair dated 18th January 2008 which contains information on seat availability on flights not just from this country to Riga, but also from Riga to Dublin. Presumably that information was obtained in order to address the finding by Hedigan J. that he found the evidence of seat availabilty on the first application to be "unconvincing"on the basis that it dealt only with availability on flights from Ireland to Riga, whereas availability in both directions would be necessary in order to effect the applicant's surrender. In fairness to Mr McDonagh, the grounds put forward in the application for the applicant's release on the present application included that "*there was no compelling reason why the Latvian authorities could not have come to Dublin by that time [6th January 2008]: There were sufficient air and other modes of transport between the two countries in early 2008 to bring the applicant to Riga by 6th January 2008*".

31. As I have said, I regard the applicant as relying on the finding of Hedigan J. regarding necessity. It is worth repeating, especially since this additional information could have been made available on the first application, that this question has already been the subject of a finding of fact and is *res judicata*.

32. But the issue of whether s. 16(5)(b) of the Act is unconstitutional is one which, in my view, the applicant is entitled to argue on this application, even though, he could have included it as an issue to be determined on the first application in the event that the Court on that occasion was of the view that his continued detention was necessitated by the circumstances prevailing. The failure to make that argument then does not preclude him seeking now to challenge the statutory provision which enabled his detention to be continued beyond the 6th January 2008 based on that necessity so found. Even though his detention has been found to have been necessary, he is a person nevertheless who could benefit from a finding that the section was unconstitutional, and is therefore in a different position to the plaintiff in *Cahill v. Sutton* [supra], who could never have benefited from a finding of unconstitutionality of s. 11(2)(b) of the Statute of Limitations, 1957.

33. In so far as the applicant seeks to argue that the provision could in theory be used by the Central Authority to detain a person other than the applicant for some period beyond what was necessary, I am of the view that the applicant has no standing to so argue, given that such a scenario is hypothetical and falls to be argued by some other applicant on the facts of any such case which may arise in the future. To that extent I am in agreement with Mr McDonagh's submission as to locus standi.

34. The issue which must be determined on this application is simply whether the detention of the applicant beyond the 6th January 2008 and to the 9th January 2008 is unlawful by reason of the fact that it is permitted, as so found, by the provisions of s. 16(5)(b) of the Act; and, more specifically, by reason of the fact that this provision which has resulted in his being so held, is constitutionally invalid having regard to the fact that the power to so detain him beyond the 6th January 2008 is a power exercisable at the sole discretion of the Central Authority, a member of the Executive, rather than the High Court.

35. In order to determine this issue, it is necessary to look not only at the precise words of the impugned section of the Act, but also to relevant provisions of the whole Act, and, in this case, to the provisions, objectives and aims of the Framework Decision itself to

which the Act gives effect. The Framework Decision not only provides the details of the new surrender arrangements, and basis upon which same have been adopted by the State on the 13th June 2002, but it is necessary, in accordance with the judgment of the Court of Justice in *Pupino*, to interpret the Act in conformity with the aims and objectives of the Framework Decision provided that by so doing an interpretation 'contra legem' does not result.

36. Article 23 of the Framework Decision has already been set forth above. Paragraph 3 of that Article clearly envisages undefined situations where following the making of an order for surrender of a requested person, practical arrangements must be put in place in order to achieve that surrender to another Member State. Paragraph 1 thereof provides that surrender is to take place "*as soon as possible on a date agreed between the authorities*". Paragraph 2 thereof can be seen as expressing the desire that such arrangements should be put in place not later than ten days from the date on which the surrender is finally ordered. Given the provisions of Paragraph 3, that ten day period is to an extent aspirational, and dependent on practical considerations such as the availability of necessary personnel to effect the surrender or perhaps the availability of suitable flights or other travel arrangements. Other practical considerations may be relevant also. I choose those two simply as obvious examples of such practical considerations. Paragraph 3 thereof is clearly intended to afford a margin of appreciation or discretion to Member States to make appropriate arrangements in the context of the overall aim and expressed intention that surrender take place "as soon as possible". The word "possible" is not in my view intended to be an absolute term in the sense that only in the absolute impossibility of arrangements being put in place within ten days may the surrender be delayed beyond that time. It should be interpreted as meaning "as soon as reasonably possible" or "as soon as reasonably practicable". It is clearly envisaged that circumstances could arise where surrender takes place outside a period of ten days from the date of the final decision on surrender. Paragraph 3 speaks of "*circumstances beyond the control of any of the Member States*"as justifying a delay in the surrender beyond that ten day period to a date agreed by the executing and issuing judicial authorities. An outer limit of ten days beyond any such new agreed date is provided for, after which the requested person must be released. Circumstances beyond the control of any Member State might include a genuine difficulty in having the necessary or relevant personnel available to collect the requested person from the executing Member State, or simply the unavailability of suitable flights to or from the executing Member State within the ten day period referred to in paragraph 1 of Article 23.

37. The Oireachtas has enacted s. 16(5) in order to give effect to these provisions of the Framework Decision. The Act stands to be interpreted as far as possible in conformity with these provisions. To that end, it is clearly provided in the first instance that surrender shall take place not later than ten days from the date upon which the order for surrender takes effect. There is nothing in the Framework Decision which required the Oireachtas to provide that unless the requested person requests the order to take place sooner, the order will take effect fifteen days following the date upon which it is made. That 15 day period would appear to have been included in order to permit a situation to exist, as it had done in the 1965 Act whereby a person whose extradition had been ordered by the District Court (and as later amended, by the High Court) could make an application for his/her release under Article 40.4 of the Constitution, and he could not be surrendered until this opportunity had been afforded to him.

38. No person in the State requires legislative permission to bring an application for release under Article 40.4 of the Constitution. Such a right exists at all times. But s.16 (6) and (7) of the Act requires that when such right has been exercised, as in this case, he/she shall not be surrendered while such an application remains pending. That is an important provision for the protection of somebody detained in the State, and in my view protects against the possibility that a person is detained beyond a period considered necessary, in the broad sense of that word, namely beyond what is reasonably required in order to effect his surrender as soon as possible, or as soon as practicable. As I have said, a margin of appreciation must be allowed to those persons whose delegated function it is to make or agree to appropriate arrangements for surrender.

39. The Framework Decision states at Recital 9 that "*the role of central authorities in the execution of a European arrest warrant must be limited to practical and administrative assistance*".

40. In this State the Central Authority is the Minister for Justice, Equality and Law Reform, and the High Court is the judicial authority. In the present case it is the High Court which has made the decision that the applicant be surrendered and that he be committed to prison for fifteen days while the order takes effect and for such further period as may be necessary law.

41. The arrangements by which the surrender of the applicant is actually implemented are practical or administrative arrangements which must be made between this State and the requesting state, and it is entirely appropriate, and in conformity with the Framework Decision, albeit a recital thereto rather than a particular Article thereof, that in this case it was the Central Authority which in correspondence with the requesting state agreed the 9th January 2008 as the date on which that surrender should happen. Section 16(5) of the Act specifically enables the Central Authority to make that agreement as to the later date for surrender.

42. However, it is not the case that the applicant is detained on foot of an executive decision rather than a judicial decision. It was the order of this Court which ordered his detention "pending the carrying out of his surrender". That order is made by the Court in full knowledge that his surrender may not actually occur within ten days following the taking effect of the surrender order, since the possibility of some later date thereafter being the date of actual surrender taking place is envisaged by the other provisions of s. 16 of the Act to which I have referred. It is for that reason that the Committal Warrant which was signed by the Court following the making of the order for surrender and committal to prison specifically authorises the Governor of Cloverhill Prison to detain the applicant for the period of fifteen days while the order takes effect and "such further period as may be necessary under law". This means that it is the High Court which has ordered that the applicant be detained in effect for such period as is reasonably necessary for appropriate and suitable arrangements to be put in place for the carrying out of the surrender.

43. It is of course a necessary presumption inherent in the presumption of constitutionality of the Act, following *East Donegal Livestock Mart Ltd v. The Attorney General* [supra], and *McDonald v. Bord na gCon* [supra], that those in whose power or discretion it is to make those administrative arrangements necessary for surrender to take place, will exercise that power and exercise that discretion in good faith and in accordance with constitutional principles, such as that the detention will be for no period longer than is reasonably necessary for the purpose of achieving a successful surrender.

44. The submissions of the applicant ignore that presumption which provides a fundamental protection to the applicant, and it follows that where an applicant can establish that the power or discretion has been exercised in a way which constitutes an unlawful abuse of that power, resulting in the applicant's detention for any period beyond what could be reasonably regarded as necessary, and allowing a reasonable margin of appreciation in that regard bearing in mind the type of arrangements which must be put in place between the respective authorities, then such an applicant has at all times a right of access to the High Court in order to seek an inquiry into the lawfulness of his detention, as occurred in this case. But it is not the case that the detention of the applicant beyond the 6th January 2008 to the 9th January 2008 is on foot of an executive decision. It is on foot of the Court's order made in the knowledge that his detention may need to be beyond the 6th January 2008 and until some later date reasonably necessary for appropriate arrangements to be put in place. That is the meaning to be given to the Court's direction in the Committal Warrant that

he be detained "… *and for such period as may be necessary under law*".

45. In these circumstances, I am satisfied that the provisions of s. 16(5)(b) are not invaild having regard to the provisions of the Constitution, and that the detention of the applicant is in accordance with law.