[2020] IEHC 369

THE HIGH COURT

[2019 No. 262 EXT]

BETWEEN

MINISTER FOR JUSTICE & EQUALITY

APPLICANT

AND

NAOUFAL FASSIH

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 27th day of July, 2020

1. On 2nd February, 2017, this Court (Donnelly J.) ordered the surrender of the respondent to the Netherlands pursuant to three European arrest warrants (dated 21st April, 2016, 14th July, 2016, and 26th September, 2016, respectively, and hereafter together referred to as the "2016 warrants"). The first and second of these warrants were issued by the Amsterdam District Public Prosecutor's Office, and the third warrant was issued by the National Prosecutor's Office, North Randstad Unit, as the issuing judicial authorities. Following the order of the High Court for his surrender, the respondent was surrendered to the Netherlands on 22nd February, 2017. Thereafter, the respondent was convicted and sentenced to a total of 18 years' imprisonment in respect of the offences to which those warrants relate.

2. On 1st May, 2019, the National Prosecutor's Office of Amsterdam sent a letter entitled "*Request for consent*" requesting this State to give its consent to the bringing of charges for additional acts (other than those described in the three European arrest warrants referred to above), particulars of which were set out in a document described as "*an additional European arrest warrant*" concerning the respondent.

3. In the joined cases of OG (C-508/18) and PI (C-82/19 PPU) the Court of Justice of the European Union ("CJEU"), determined that the autonomous concept of "*issuing judicial authority"* within the meaning of Article 6(1) of Council Framework Decision 2002/584/JHA of 13th June, 2002, on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26th February, 2009 (hereinafter together referred to as 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. These decisions were handed down on 27th May, 2019.

4. On 23rd July, 2019, the request for consent to the bringing of additional charges against the respondent in the Netherlands was brought before this Court for determination. On that occasion, counsel for the applicant conceded that the person purporting to make the request (i.e the national prosecutor's office) was not a "*judicial authority*" within the meaning of the European Arrest Warrant Act 2003 (as amended) (the "Act of 2003"), in light of the decision of the CJEU in the joined cases of *OG* and *PI*.

5. On 30th July, 2019, the National Prosecutor's Office of Amsterdam sent a further request for the consent of this Court to prosecute the respondent for the offences set out in what is described as a "*new additional EAW*". This request was sent under cover of a letter of 30th July, 2019, which states that:

> "*The new additional EAW was issued according to the new law adopted on 9th July by the Senate and entered into force on July 13th.*
>
> *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."*

6. Enclosed with the cover letter of 30th July, 2019, were the following documents:

    1. Request for issuing an (additional) European arrest warrant (EAW). This document comprises a request from the Public Prosecutor to the investigating judge in Amsterdam to issue an additional EAW against the respondent in order to obtain the permission required by Article 7(4) of the Framework Decision to prosecute the respondent and bring him to trial in connection with the additional charges.

    2. The decision of the investigating judge, dated 17th July, 2019, whereby he considered and granted the request of the prosecutor. In his decision on the matter (entitled "*Disposition*") the investigating judge referred to a number of documents that had been submitted to him with the application of the prosecutor, including what he described as "*a template of an additional EAW which has been filled out".*

    3. The document described as an "*additional European arrest warrant*", dated 18th July, 2019, in the opening paragraph of which the following is stated:

        > "*In addition to the European arrest warrants which were sent before on 21st April, 2016, 14th July, 2016, and 26th September, 2016, I kindly request you to grant the surrender of the individual as referred to below with the purpose of criminal prosecution or execution of a custodial sentence or detention order for the commission of two additional indictable offences."*

7. The additional European arrest warrant was issued under the signature of the investigating judge. At para. (B) thereof, under the heading "*Arrest warrant or judicial decision having the same effect*" the following is stated:

> *"In this case, a request for detention is not in question. Suspect Fassih is already in detention for another criminal case. This EAW only serves to request additional permission that the suspect who has been surrendered be prosecuted, sentenced and, if necessary, to punish him for the indictable offences to be referred to hereafter."*

8. Points of objection to this request were filed on behalf of the respondent by a notice of objection dated 25th September, 2019. This notice raises two objections. However, before addressing the objections I should first address, briefly, the contents of the additional European arrest warrant. The person with whom the warrant is concerned is identified as the respondent. He is clearly the same person identified in the three European arrest warrants that issued in 2016, and which resulted in his surrender to the Netherlands. This was not disputed at the hearing of this application.

9. At para. 4 of the warrant it is stated that it concerns two indictable offences, the first being described as murder in association on 15th December, 2015, and the second being failed incitement to murder in the period from 1st November, 2015, up until and including 25th November, 2015. Particulars of the acts giving rise to the offences, and the alleged involvement of the respondent in those offences are provided. At para. E(I) of the warrant, the box for "*murder, grievous bodily injury*" has been ticked, and so it is not necessary to demonstrate correspondence in relation to the offences, as it has clearly been ticked in relation to both offences. Minimum gravity is established, because it is stated that the first offence carries a sentence of life imprisonment, and the second carries a sentence of up to 20 years' imprisonment.

10. None of the foregoing was disputed. The two objections raised on behalf of the respondent in response to this application are as follows:

    1. The Netherlands is not an "*issuing state*" within the meaning of ss. 2 and 22(7) of the European Arrest Warrant Act 2003 as amended, in that no European arrest warrant in respect of the respondent has been issued by a "*judicial authority*" of that country. None of the European arrest warrants on foot of which the respondent was surrendered in February 2017 was issued by a "*judicial authority*".

    2. The "*additional European Arrest Warrant*" dated 18th July, 2019, does not constitute a "*request in writing from the issuing state*" as required by s. 22(7) of the European Arrest Warrant Act 2003 as amended.

11. I will first address the second of these objections. Section 22(7) of the Act of 2003 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."

12. *In s. 22(1) of the Act of 2003, "offence" is defined for the purposes of the section as meaning: "an offence (other than an offence specified in the European arrest warrant in respect of which the person's surrender is ordered under this Act), under the law of the issuing state, committed before the person's surrender, but shall not include an offence consisting, in whole, of acts or omissions of which the offence specified in the European arrest warrant consists in whole or in part."*

13. It is apparent that s. 22(7) of the Act of 2003 does not prescribe any procedure to be followed when an issuing state seeks consent to prosecute a surrendered person for an offence not referred to in the European arrest warrant that resulted in the surrender. Nor is any procedure for this purpose prescribed elsewhere in the Act of 2003. Some guidance is to be found in the Framework Decision which provides, at Article 27(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."*

14. Article 8 of the Framework Decision is reflected in s. 11 of the Act of 2003, and prescribes the information that must be contained in the European arrest warrant. So, therefore, it is apparent that a request for consent must contain the same information that is to be contained in a European arrest warrant. It is therefore entirely logical that the form of European arrest warrant should be used for this purpose.

15. These provisions came under scrutiny in the decision of Edwards J. in the case of the *Minister for Justice & Equality v. Pawel Trepiak* [2011] IEHC 287. While there were also other issues engaged in those proceedings, Edwards J. had this to say about the manner in which the request for consent was submitted in that case:

> *"For the avoidance of doubt the Court is satisfied that that request is lawfully and validly made, and contained within, the two documents (which must be read together) consisting of (i) the document entitled 'Additional European arrest warrant' dated 30th of December 2010 and relating to the respondent; and (ii) the accompanying letter, also dated 30th December 2010 from the Public Prosecutor for the District of Hertogenbosch addressed to the Irish Central Authority."*

16. In these proceedings, the respondent accepts that the decision of Edwards J. in *Trepiak* represents the current state of the law on this issue, but the respondent persists with the objection in order to keep the issue open in the event of an appeal. On behalf of the applicant it is submitted that the Court can be satisfied that it has received a request in writing from an issuing state in accordance with s. 22(7) of the Act of 2003, and therefore

that the Court should make an order consenting to the bringing of further proceedings against the respondent.

17. I am satisfied, beyond any doubt, that the manner in which the request has been presented meets the requirements of both s. 22(7) of the Act of 2003, and Article 27(4) of the Framework Decision. The letter of the Public Prosecutor of 30th July, 2019, expressly requests the consent of this Court to prosecute the respondent for the offences set out in the *"new additional EAW",* which is enclosed with the letter. The investigating judge granted the request of the prosecutor to issue the new European arrest warrant in relation to the offences in respect of which consent is sought. It is difficult to see how any of this could be regarded as not being in compliance with either s. 22 of the Act of 2003 or Article 27 of the Framework Decision. In my view, the letter making the request, of 30th July, 2019, coupled with the additional European arrest warrant, comprise *"a request in writing from the issuing state"* as required by s. 22(7) of the Act of 2003. Accordingly, this ground of objection must be rejected.

18. As regards the first ground of objection, it is submitted that the application should be refused because s. 22(7) refers to a person who has been surrendered "*to an issuing state".* The term "*issuing state*" is defined in s. 2 of the Act of 2003 as follows: *"'issuing state' means, in relation to a European arrest warrant, a Member State designated under section 3, a judicial authority of which has issued that European arrest warrant".*

19. In turn, "*judicial authority*" as also defined in s. 2 means: "*the judge, magistrate or other person authorised under the law of the Member State concerned to perform functions the same as or similar to those performed under section 33 by a court in the State".*

20. It is submitted that, in the light of the decision of the Court of Justice of the European Union in the joined cases of *OG* (C-508/18) and *PI* (C-82/19 PPU) (which I will refer to together hereafter as "*OG*"), none of the three warrants on foot of which the respondent was surrendered to the Netherlands on 2nd February, 2017, two of which were issued by the Amsterdam District Public Prosecutor's Office and the third of which was issued by the National Prosecutor's Office, North Randstad Unit, were issued by a judicial authority. Accordingly, it follows, as a matter of law, that the respondent was not surrendered "*to an issuing state*" for the purposes of s. 22(7) of the Act of 2003, and this Court should not, therefore, consent to the application. This is because of the interrelationship between the definition of "*issuing state*" and "*judicial authority*".

21. In support of this argument, the respondent relied upon an affidavit of a Mr. Tomasz Kodryzcki, a lawyer admitted to the Dutch Bar, in which he exhibits a letter from the Dutch Minister for Justice & Security dated 28th May, 2019, following upon the decision of the CJEU in *OG*, to the President of the Dutch House of Representatives of the State's General. In this letter, the Minister informs the President of the Dutch House of Representatives that, having regard to the aforementioned decisions of the CJEU, that *"the actions of the Public Prosecutor as an issuing judicial authority seem to be incompatible with the explanation of the court of the term 'issuing judicial authority', whereas the Surrender of Persons Act does entrust the Public Prosecutor with this task."*

The Minister then goes on to explain that as a result, he proposes to introduce a legislative amendment.

22. That legislative amendment was introduced in the Netherlands on 10th July, 2019, with effect from 13th July, 2019, the effect of which is to appoint an investigating judge as the "*issuing judicial authority*" for the purposes of the Surrender of Persons Act under Dutch law.

23. In addition to relying upon these conclusions and the legislative changes in the Netherlands, the respondent also relies upon the fact that, on 8th July, 2019, in an *ex tempore* decision, this Court (Burns J.) in the case of *Minister for Justice & Equality v. McArdle*, refused the surrender of the respondent in that case to the Netherlands on the basis that the warrant seeking the surrender of the respondent had been issued by a prosecutor attached to the Dutch Public Prosecution Service. The State did not oppose the submission on behalf of the respondent in that case.

24. It is submitted therefore that it follows from all of the above that the respondent is not a person who has been surrendered to an issuing state (as defined in the Act of 2003) and that this request should be refused.

25. In response to these arguments, it is submitted that the respondent could have made any objections that he wished in opposition to the application which led to his surrender. That application was heard and considered by this Court, and the Court was satisfied as to the form and content of the 2016 warrants, and that they had each been issued by an issuing judicial authority. In making an order under s. 16 of the Act of 2003, the Court is certifying compliance with the Act. Therefore, it is submitted, it follows that the respondent was surrendered to an issuing state within the meaning of the Act of 2003.

26. It is further submitted that there is nothing in the decision of the CJEU in OG to suggest that it invalidates all previous European arrest warrants that were issued by an issuing judicial authority that was subsequently found not to meet the requirements of the Framework Decision. In that regard, all that can be said is that the CJEU took the opportunity in that case to clarify the criteria which must be met by a public prosecutor in order to be deemed an issuing judicial authority for the purposes of the Framework Decision. The Court was urged to follow the approach taken by the Supreme Court in the case of *A v. Governor of Arbour Hill Prison* which I address below.

27. In reply to these arguments, it is submitted that the rule of specialty may not be waived if the conditions prescribed by s. 22 of the Act of 2003 cannot be satisfied. In other words it is not open to this Court to consent to this application unless it is satisfied that the requirements of that section have been met. It is further submitted that the applicant has not engaged with the precise terms of the Act of 2003.

28. On the question of the retrospective effect of the decision of the CJEU in *OG*, it is submitted that there is a presumption that Article 264 of the Treaty on the Functioning of the European (the Article by which the CJEU may declare an Act void) operates

retrospectively. Moreover, it is submitted that it cannot be open to Member States across the European Union to come to their own conclusions as regard whether or not the decision in *OG* has retrospective effect, since this could lead to different outcomes in different jurisdictions in what is an autonomous concept of European law.

29. Following upon the initial hearing of this matter, I invited the parties to make further and comprehensive submissions regarding the retrospectivity of decisions of the CJEU. While there had appeared to be a difference between the parties on this issue at the hearing of the application, it transpired that the parties were in fact in agreement on this issue, and that the applicant accepted that, as a general proposition, decisions of the CJEU have retrospective effect. To the extent that they do not, the applicant accepted that the circumstances in which they may not have retrospective effect did not arise in this case. However, in the submission of the applicant, the European Court of Justice ("ECJ") has recognised that the retrospective application of its decisions does not require national courts to disapply domestic rules of procedure conferring finality on a decision. Counsel for the applicant relied upon the decision of the ECJ in *Asturcom Telecommunications S.L. v. Nogueira* [2009] ECR I-9579 in which case it stated:

> *"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] ECRI 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).*
>
> *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…"*

30. The decision of the ECJ in *Asturcom Telecommunications S.L. v. Nogueira* was followed by this Court (Ní Raifeartaigh J.) in the case of *Cronin v. Dublin City Sheriff* [2018] 3 I.R. 191 in which she stated (at para. 29) that:

> *"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."*

31. In the submission of the applicant, the domestic law on this question is governed by the decision of the Supreme Court in *A v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88. In that case the Supreme Court held, at para. 125:

"In a criminal prosecution where the State relies in good faith on a statute in force at the time and the accused does not seek to impugn the bringing or conduct at the prosecution, on any grounds that may in law be open to him or her, including the constitutionality of the statute, before the case reaches finality, on appeal or otherwise, then the final decision in that case must be deemed to be and to remain lawful notwithstanding any subsequent ruling that the statute, or a provision of it is unconstitutional."

32. It is the applicant's position that the decision of Donnelly J. whereby she ordered the surrender of the respondent in February, 2017 is a final decision. The respondent did not, during those proceedings, raise any question regarding the lawfulness of the designation of the prosecutors in the Netherlands as judicial authorities for the purposes of the Framework Decision. By raising that issue now, it is argued that the respondent is engaged in a collateral attack on the decision of this Court to order the surrender of the respondent. That issue is, in the submission of the applicant, *res judicata* and the decision of this Court to surrender the respondent in February, 2017 remains valid, notwithstanding the decision of the CJEU in OG. That decision (of this Court, to surrender the respondent) included a finding by Donnelly J. that the requirements of the Act of 2003 had been met, as regards the application for the surrender of the respondent. Her decision expressly referred to the Amsterdam District Public Prosecutors Office as being a "*competent judicial authority*" and by making the order for the surrender of the respondent, this Court also implicitly accepted that the National Prosecutor's Office, North Randstad Unit was also a competent judicial authority to issue a European arrest warrant. These are conclusions of this Court which are final and binding and cannot now be reviewed.

33. In response to a suggestion made by the respondent that, if need be, this Court should make a preliminary reference to the CJEU on the issue or issues raised by this application, it is submitted that this is not appropriate in circumstances where the matter to be decided involves the interpretation of provisions of domestic law and the application of domestic rules of procedure in respect of the finality of decisions.

34. In response to this, counsel for the respondent argues that the respondent is not seeking to challenge the decision of the High Court to surrender him in 2017. However, it is submitted that, in making that decision, the High Court made no determination to the effect that the two prosecutor's offices that issued the 2016 warrants fulfilled the requirements of a "*judicial authority*" within the meaning of the Act of 2003, or the Framework Decision. Furthermore, in *McArdle*, this Court (Burns J.) refused surrender of the respondent in that case to the Netherlands on the basis that the warrant had been issued by a prosecutor attached to the Dutch Public Prosecution Service (see para. 23 above). So, therefore, it is clear that this Court, when it has been called upon to address the issue, has concluded that warrants issued by the Dutch Public Prosecution Service did not meet the requirements of the Act of 2003 or the Framework Decision.

35. In circumstances where the issue was neither raised nor argued before Donnelly J., it is submitted that this Court is being asked by the applicant to expand upon the concept of *res judicata* in a radical way. Not only that, the practical effect of the arguments being advanced on behalf of the applicant, if they were to be accepted, is that the decision of the CJEU operates *ex nunc*, as opposed to *ex tunc*, meaning that the decision of the CJEU would not have retrospective effect, even though the applicant concedes that the decision of the CJEU in *OG* is a decision that, as a matter of EU Law, has retrospective effect.

Discussion and decision

36. At the conclusion of the second hearing, I asked counsel for both parties if they agreed that the decision of this matter hinges upon whether or not the Court takes the view that the matter is *res judicata*? Counsel for both parties agreed that this is the nub of the issue. So therefore, on that view, the net question for determination by this Court is whether or not, by her decision of 2nd February, 2017 ordering the surrender of the respondent pursuant to the 2016 warrants, Donnelly J. decided that the prosecutor's offices that issued those warrants were issuing judicial authorities for the purposes of the Act of 2003 and the Framework Decision?

37. Before addressing that question, I think it is helpful to recall the context in which the application now before the Court arises. While counsel for the respondent has argued that this is a stand-alone application, and should be treated by the Court accordingly, I think that this approach ignores 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.

38. Section 22 of the Act of 2003 implements Article 27 of the Framework Decision. Under the heading of "*Possible prosecution for other offences*", the latter provides for the circumstances in which a person may or may not be tried for an offence other than that for which he or she was surrendered. These circumstances include where a Member State has notified the general secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution (Article 27(1)). It was not suggested that this exception has any application to this case. There are then other circumstances set out in Article 27(3), the only relevant one of which is that the executing judicial authority which surrendered the person gives its consent in accordance with Article 27(4). So 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.

42. However, I would like to make an observation regarding the interpretation of s. 22 of the Act of 2003, as contended for by the respondent. Since what follows was not argued, it

forms no part of the ratio of my decision, but nonetheless I think it worthwhile to observe that 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.