

THE HIGH COURT

[2022] IEHC 145
[2021 No. 312 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ZDENEK KALEJA

RESPONDENT

JUDGMENT of Ms. Justice Caroline Biggs delivered on the 17th day of January, 2022

1. By this application, the applicant seeks an order pursuant to Section 22(7) of the European Arrest Warrant Act 2003, as amended, ("the Act of 2003"), seeking to disapply the rule of specialty. The letter of request, dated the 30th of September 2021, was issued by Mgr. Bc. Lenka Prýcová, Judge of the District Court in Plzeň-město, as the issuing judicial authority. The respondent is a person who was previously surrendered by this state to the Czech Republic for sentence in relation to various offences on foot of two European arrest warrants dated the 21st of September 2018 and the 12th of October 2018. The executing judicial authority that made these surrender orders was the High Court (Burns J.).
2. The letter of request seeks to allow the issuing state, the Czech Republic, to serve a further sentence order on the respondent to enforce an additional five month sentence of imprisonment imposed upon the respondent on the 15th day of October 2018.
3. I am satisfied that the person before the court, the respondent, is the person in respect of whom the letter of request was issued. No issue was raised in that regard.
4. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. The sentence in respect of which surrender is sought is in excess of four months' imprisonment.
5. I am satisfied that correspondence can be established between the offences referred to in the European arrest warrant ("the EAW") and offences under the law of this State, that is offences contrary to Section 38 of the Road Traffic Act 2010, as amended.
6. **Is the surrender prohibited by section 11 of the 2003 Act – Lack of clarity**
The history of this case is complex. The respondent, Mr Kaleja, was the subject of three previous EAW proceedings:
 - I. The first EAW proceedings, bearing record No. 2019/252 EXT, arose from an EAW dated the 22nd of November 2018. Binchy J. refused surrender in an *ex tempore* judgment on the 19th of November 2019, as the EAW in question purported to be one issued for prosecution, but related to a conviction and sentence which had already been imposed, although it had not become final as it had yet to be served on Mr Kaleja. In fact, that conviction was the same one to which the current request for consent under section 22 of the Act of 2003 relates, i.e. the judgment of the District Court in Plzeň-město of the 15th of October 2018, imposing a

sentence of 15 months' imprisonment in respect of two driving-related offences, committed on the 16th of February 2018 and the 15th April 2018 respectively.

II. The second and third EAW proceedings, bearing record Nos. 2020/204 EXT and 2020/205 EXT, were heard together, with Burns J. delivering separate judgments and ordering surrender in each set of proceedings on the 25th of March 2021. The more relevant proceedings to the current request is 2020/204 EXT, which related to an EAW dated the 12th of October 2018 issued in respect of a conviction by the District Court in Tachov of the 12th of July 2018, imposing a sentence of 10 months' imprisonment in respect of a driving-related offence committed on the 15th of April 2018, i.e. one of the two offences to which the current request for consent under section 22 relates. The respondent submits that there is an impermissible lack of clarity in relation to the number of offences for which he is sought.

7. The requirement for clarity under section 11 of the Act of 2003 has been considered in a number of cases:

In *Minister for Justice & Equality v Herman* [2015] IESC 49, the Supreme Court stated at para. 17;-

"17. At the core of this appeal is the issue of clarity; or the lack of it. It is essential when a court has before it a request in a European arrest warrant that there be clarity as to the offences for which surrender is sought, and as to any proposed sentencing."

8. In *Minister for Justice and Equality -v- Connolly* [2014] IESC 34, [2014] 1 IR 720, Hardiman J. stated at paragraphs 30 and 31;-

"[30] This matter is of the greatest importance since the ability of the requesting State to put the respondent on trial is limited to the offences specified in the warrant. It is a mandatory requirement of the European arrest warrant procedure that there be unambiguous clarity about the number and nature of the offences for which the person sought is so sought. Presumably, the Spanish authorities know for how many offences they intend to put him on trial. I cannot understand why this has not been made clear. The relevance of this requirement, contained in s. 11 of the Act of 2003 is particularly clear in the present case because the objection was one to which s. 44 of the Act applies, and therefore one that requires a very specific knowledge of the precise Spanish offences for which delivery is sought. Minister for Justice v. Bailey [2012] IESC 16, [2012] 4 I.R. 1 emphasises the need to consider the issue of reciprocal offences which cannot be done without the specific knowledge of the Spanish offences referred to. This specific and unambiguous information is also required, as several citations above make clear, for the purpose of the implementation of the rule of specialty."

[31] I consider it to be an imperative duty of a court asked to order the compulsory delivery of a person for trial outside the State to ensure that it is affirmatively and unambiguously aware of the nature of the offences for which it is asked to have him forcibly delivered, and for which he may be tried abroad, and of the number of such offences. I would, therefore, dismiss the appeal and decline to make an order for the delivery of the respondent."

9. In *Minister for Justice, Equality and Law Reform -v- Desjatnikovs* [2008] IESC 53, [2009] 1 IR 618, the Supreme Court indicated at para. 35;-

"[35] The fact that there is a precise description of the facts of the case is important, even though the issue of double criminality is not required to be considered. It is important that there be a good description of the facts. An arrested person is entitled to be informed of the reasons for his arrest and of any charge against him in plain language which he can understand. Also, in view of the specialty rule, the facts upon which a warrant is based should be clearly stated."

10. In *Minister for Justice and Equality -v- AW* [2019] IEHC 251, Donnelly J. indicated at paragraphs 48 and 49;-

*"48. The respondent has also claimed that his surrender is prohibited because the information does not set out the degree of participation of the respondent in the offences. The information in the EAW has already been set out. This does not list the names of the people he conspired with. The requirement for detail in the EAW is set out in the Framework Decision and in the Act of 2003. The Superior Courts in a number of cases have examined the reasons for the giving of details. These are to permit the High Court to carry out its functions under the Act of 2003 of endorsing the EAW and establishing correspondence and also to permit the respondent to challenge his surrender on grounds such as the rule of speciality (s.22), ne bis in idem and extraterritoriality (See *Minister for Justice and Equality v Cahill* [2012] IEHC 315 and *Minister for Justice Equality and Law Reform v Desjatnikovs* [2008] IESC 53). The respondent also has the right to know the reason for his arrest.*

*49. In the present case, any claimed lack of detail by the respondent, does not affect any of those items. The respondent has not indicated any real difficulty and therefore his complaints about lack of detail are only theoretical in nature. The issuing judicial authority is not required to give every single detail as to the degree of participation. (*Minister for Justice, Equality and Law Reform v Stafford* [2009] IESC 83). The details required are those which relate back to the reasons why such detail is required."*

11. In this jurisdiction the rule of specialty applies unless, in response to a request in writing from the issuing judicial authority, it is waived by the High Court pursuant to the provisions of s.22(7) and (8) of the Act of 2003. The requirements of the Act of 2003 that would allow for a waiver are set out as follows:

"S. 22(7) and (8) of the 2003 Act provide respectively:

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

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

(b) the imposition in the issuing state of a penalty, including a penalty consisting of a restriction of the person's liberty, in respect of an offence, or

(c) proceedings being brought against, or the detention of, the person in the issuing state for the purpose of executing a sentence or order of detention in respect of an offence, upon receiving a request in writing from the issuing state in that behalf.

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

12. The corresponding relevant provisions of the underlying Council Framework

Decision of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) (" the Framework Decision") are contained in Article 27 thereof, and in particular in Article 27(4). Article 27 (to the extent relevant) is in the following terms:

- "1. Each Member State may notify 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, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.*
- 2. Except in the cases referred to in paragraphs 1 and 3, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.*
- 3. Paragraph 2 does not apply in the following cases:*
 - (g) where the executing judicial authority which surrendered the person gives its consent in accordance with paragraph 4.*
- 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."

Article 3 of the Framework Decision sets out the grounds for mandatory non-execution of the European arrest warrant and all of these are incorporated in Part 3 of the Act of 2003. Article 4 of the Framework Decision sets out the grounds for optional non-execution of the European arrest warrant, some of which, but not all of which, the Oireachtas has opted to also include within Part 3 of the Act of 2003.

Article 8(1) of the Framework Decision provides:

"1. The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex:

- (a) the identity and nationality of the requested person;*
- (b) the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority;*
- (c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2;*
- (d) the nature and legal classification of the offence, particularly in respect of Article 2;*
- (e) a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;*
- (f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;*
- (g) if possible, other consequences of the offence."*

13. In relation to 22(7) and in *Minister for Justice and Equality -v- Trepiak* [2011] IEHC 287, Edwards J. stated;-

"There is no prescribed form in which a s.22(7) request must be framed. However, it [is] clear from a reading of ss.22(7) and (8) of the Act of 2003 and Article 27(4) of the [Framework] Decision that at a minimum (a) it must be in writing, (b) it must be made on behalf of the issuing State, and (c) it must be submitted to the executing judicial authority and (d) it must be accompanied by the information mentioned in Article 8(1) of the Framework Decision and a translation as referred to in Article 8(2)."

14. In this case, the information upon which the request is based is set out in a letter from the issuing judicial authority dated the 30th of September 2021, a copy of the judgment of the Plzeň-město Court on the 15th of October 2018, and a Section 20 response dated the 3rd of December 2021. While it was not an easy task to extract the relevant facts from the documentation, it was nonetheless a task that could be achieved.
15. From the foregoing, the following is the chronology of relevant events and relevant offences:
- (i) The District Court in Tachov file No. 2 T 120/2013, banned the respondent from driving for a period of 18 months on the 20th of November 2013.
 - (ii) This ban did not commence until the 10th of November 2017 when the respondent was released from custody.
 - (iii) The respondent received a ten-month sentence in relation to an offence of driving while been prohibited from doing so on the 12th of July 2018, the offence occurred on the 15th of April 2018.
 - (iv) On the 15th of October 2015, this sentence was extended to a period of 15 months for a similar driving offence had been committed that occurred on the 16th of February 2018.
 - (v) By way of background information, the issuing judicial authority also gave information in relation to other offences dated the 7th of May 2018 and offences committed on the 15th of September 2018.
 - (vi) Both sentences on the 15th of April 2018 and the 16th of February 2018 were the subject matter of EAW no 1 that came before Binchy J. bearing record number 2019/252 EXT. As noted above surrender was refused.
 - (vii) The respondent was then sought by way of two further EAWs bearing record numbers 2020/204 EXT and 2020/205 EXT. Delivering separate judgments, Mr Justice Burns surrendered the respondent to serve a twelve-month sentence on 2020/205 EXT and, as noted already, 2020/204 EXT related to the 10-month sentence imposed on the 12th of July 2018 and for the offence dated the 15th of April 2018."
16. Further, by way of a request for additional information dated the 1st of December 2021, this Court sought further information from the issuing judicial authority in the following terms:

"3. Mr Kaleja was on 29th July 2021 surrendered from Ireland to the Czech Republic based on two European Arrest Warrants. The first of these ("EAW 1") was dated the 21st September 2018, bearing file reference 8T 138/2018 and related to a sentence of 12 months imprisonment imposed by the District Court in Tachov on 9th September 2018 in respect of a driving-related offence committed on 7th

August 2018 in Tachov. The second European Arrest Warrant ("EAW 2") was dated the 12th October 2018, bearing File reference 8T 79/2018 and related to a sentence of 10 months imprisonment imposed by the District Court in Tachov on 12th September 2018 in respect of a driving-related offence committed on 15th April 2018 in Tachov (which appears to be the same as one of the offences to which your request for consent relates). We note that your letter of request for consent of 30th September 2021 refers to EAW 1, but not to EAW 2, and we further note that paragraph 3 of the reasoning in the judgment of the District Court in Plzeň-město of 15th October 2018 states, "the court regards the sentence increased by 5 months compared to the originally imposed 10 months from the judgment of the District Court in Tachov, file No. 8 T 79/2018]." In these circumstances, please clarify:

- (a.) Is Mr Kaleja currently serving the sentence of 10 months imprisonment imposed by the District Court in Tachov on 12th September 2018, in respect of which his surrender was sought in EAW 2, and in respect of which he was surrendered from Ireland to the Czech Republic on 29th July 2021?*
- (b.) If the request for consent in relation to the sentence of 15 months imprisonment imposed by the District Court in Plzeň-město on 15th October 2018 is granted by the High Court, will Mr Kaleja also be required to serve the sentence of 10 months imprisonment imposed by the District Court in Tachov on 12th September 2018?*
- (c.) If the request for consent in relation to the sentence of 15 months imprisonment imposed by the District Court in Plzeň-město on 15th October 2018 is refused by the High Court, will Mr Kaleja then be required to serve the sentence of 10 months imprisonment imposed by the District Court in Tachov on 12th September 2018?*
- (d.) In circumstances where the sentence of 15 months imprisonment imposed by the District Court in Plzeň-město on 15th October 2018 appears to have been in respect of two offences, committed on 16th February 2018 and 15th April 2018, and in circumstances where Mr Kaleja was previously surrendered from Ireland to the Czech Republic on 29th July 2021 in respect of EAW 2, which related to the same 15th April 2018 offence, please clarify what effect the judgment of the District Court in Plzeň-město on 15th October 2018 will have on the judgment of District Court in Tachov on 12th September 2018 when the former judgment is served on Mr Kaleja."*

17. The Court received a response dated the 3rd of December 2021, stating as follows:

"3a.) At the present time, defendant Zdenek Kaleja has been serving the sentence of 10 months imprisonment imposed by the District Court in Tachov on 12th September 2018 because on July 29, 2021 the Irish judicial authority granted its consent to extradition to the Czech Republic.

3b.) If the Irish High Court grants consent to the request of the District Court in Plzeň-město in relation to the sentence of 15 months imprisonment imposed by the

judgment of 15th October, 2018, the defendant will have to serve only five months more because the sentence imposed by the District Court in Tachov is included into the sentence of 15 months imprisonment.

3c.) If the Irish High Court refuses the request in relation to the sentence of 15 months imprisonment imposed by the judgment of 15th October, 2018, the defendant will have to serve the sentence of imprisonment in the term of 10 months imposed by the District Court in Tachov on 12th September 2018, anyway.

3d.) According to the Criminal Code of the Czech Republic, in case that the offender continues in committing the same crime in close time period as it was in the case of the defendant who repeatedly drove a motor vehicle although it was prohibited to him by the competent authorities, a so-called joint sentence is imposed. A joint sentence means that the court that decides later (in this case it is the District Court in Plzeň-město) cancels the statement determining the guilt and the specifying sentence in the judgment of the previous court (in this case it is the District Court in Tachov) and in the new judgment it will give the description of both acts (in this case it also is the act of 15th April 2018) and impose one so-called joint sentence for both such acts that must be more severe than the previous sentence (in this case it was an increase by five months, i.e. from ten to fifteen). Therefore, if the defendant has already served partially the sentence of 10 months imposed by the judgment of the District Court in Tachov, this served sentence will be included in the newly imposed sentence)."

18. As a consequence of this information, it is clear that the position is that the 10-month sentence for which Mr Kaleja was surrendered in 2020/204 EXT was later extended to 15 months' imprisonment due to the incorporation of an additional offence (i.e. the 16th of February 2018 driving-related offence). In the Court's view, there is now no ambiguity in relation to the s.22(7) request, and the information required under the Act of 2003 and the Framework Decision has been furnished. I dismiss this ground of objection.
19. Is surrender of the respondent prohibited by Section 45 of the Act of 2003. The respondent submits that it is not sufficiently clear from the warrant that he was summonsed and aware of the scheduled trial date. He indicates that he did not receive notification of the date of trial. Again, the court sought clarity in relation to this matter by way of a section 20 request dated the 1st of December 2021 in the following terms:

"2. It has been indicated that Mr Kaleja was not present for the hearing before the District Court in Plzeň-město on 15th October 2018. Zdenek Kaleja has instructed his legal representatives: i.) that he was not aware of the date of the trial resulting in the decision; and, ii.) that he did not instruct or otherwise personally mandate a lawyer to represent him at the trial resulting in the decision. It is thus respectfully requested that you please provide the following information:

- (a). Please confirm that 15th October 2018 was the date of the trial resulting in the decision.*

- (b) *Please complete the table at part (d) of the standard form European Arrest Warrant (as inserted by Article 2(3) of Council Framework Decision 2009/299/JHA) in respect of the said hearing of 15th October 2018.*
- (c) *Please give further, specific detail as to how Zdenek Kaleja was either personally served notice of the date of the trial resulting in the decision, or how Zdenek Kaleja was otherwise unequivocally aware of the date of the trial resulting in the decision.*
- (d) *If he was represented by a lawyer at the trial resulting in the decision, please indicate whether that lawyer was personally mandated/instructed by Zdenek Kaleja, or whether that lawyer was automatically assigned in his absence."*

20. This request was answered on the 3rd of December 2021 in the following terms:

"1a) Defendant Zdenek Kaleja has the right of remedial measure, i.e. an appeal, by operation of law. If the defendant does not agree with the pronounced judgment, he may lodge an appeal against the statement determining the guilt as well as against the statement specifying punishment within eight days after the service of the judgment of the district court. After that, a decision on the appeal will be made by the Regional Court in Plzen. Up to the present time, the judgment has not been served on the defendant because it is necessary to wait for the consent of your authority. However, the court informed the defendant about the content of the decision of this court, namely during the examination on August 27, 2021.

1b) If the defendant or his defence lawyer decide to lodge an appeal, the superior court will review the original judgment in a public hearing in the presence of the defendant and his defence lawyer and will also deal with the facts given by the defendant in the appeal or with the adduced evidence. The Court of Appeal may reverse the judgment of the first instance court.

1c) The court has already commented on the time limit for lodging an appeal under item 1a). The time limit runs for the defendant and for his defence lawyer separately.

2a) On 15th October 2018, the trial resulting in the judgment was held.

2b) The requested facts will be filled in the table at part (d) of the European Arrest Warrant form and sent to the Irish authorities.

2c) The summons for the trial held on 15th October 2018 was served on the defendant on 7th September 2018 by means of the police.

2d) At the trial, the defendant was not represented by a defence lawyer because he did not choose him/her and by operation of law there were not any grounds for so called mandatory engagement of a defence lawyer, it means that the law did not require the presence of a defence lawyer."

Para 3.4 of the EAW states:

"3.4. the person concerned was not personally served with the decision, but

(a) The person concerned will be personally served with this decision without delay after the surrender, and

(b) When served with the decision, the person concerned will be expressly informed of his or her right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and

(c) The person concerned will be informed of the time frame within which he or she has to request a retrial or appeal, which will be ... days."

21. In this respect, Mr Kaleja's objection based on s.45 of the Act of 2003 (which is in Part 3 of the 2003 Act and thus applies in this context, by virtue of s.22(8) of the Act of 2003) must fail in circumstances where an unambiguous guaranteed right to an appeal is available, and the quality of that appeal is consistent with what is required by s.45 of the Act of 2003. Though Part D does not contain the time limits applicable, the letter from the issuing judicial authority indicated clearly that the Respondent would have 8 days following surrender to lodge his appeal. This point of objection is dismissed.

22. Right to be heard

The issue of the respondent's right to be heard was raised by the applicant and the applicant submitted that the recent decision of the Court of Justice of the European Union in the joint cases C-428/21 PPU and C-429/21 PPU HM and TZ indicates that a person in Mr Kaleja's position; -

"...enjoys the right to be heard by the executing judicial authority when the latter is seised, by the issuing judicial authority, of an application for consent under those provisions of that framework decision, that hearing being able to take place in the issuing Member State..."

It was submitted that it appears clear from paragraphs 71 and 72 of the decision in particular that it is not essential, or perhaps even envisaged, that the person participates directly in the proceedings (e.g. by way of video link).

"71. In the event that the executing judicial authority considers that it does not have sufficient evidence, in particular as regards the position of the person concerned, to enable him to take his decision on the request for consent in question in full knowledge of the facts – and with full respect for the latter's rights of defence, it will be for it to have recourse, by analogy, to the provisions of Article 15(2) of that Framework Decision, by inviting the issuing judicial authority to provide it with additional information on the position of the person concerned as a matter of urgency.

72 However, it is for the executing judicial authority and the issuing judicial authority to ensure that such a request for additional information and its implementation do not undermine the objective of Framework Decision 2002/584 to facilitate and speed up surrender procedures and, more specifically, that the decision on the request for consent can be taken by the executing judicial authority within the period, provided for in Article 27(4) of that Framework Decision and In Article 28(3)(c) thereof."

The respondent accepts, and this Court agrees that his rights to be heard have been fully adhered to and in fact the respondent indicates through the affidavit of his solicitor, Ms Kate McGhee, that he is satisfied not to be produced before the High Court by way of video link for the purpose of a section 22(7) hearing.

23. Is surrender prohibited on the grounds of an abuse of process

The respondent submits that the court's jurisdiction to refuse surrender on abuse of process grounds is broad and can be based on a number of different factors. The respondent further submits, it is not always necessary to show excessive delay, or oppression, or a serious interference with a requested person's private and family life rights.

24. The respondent referred the court to the case of *The Minister for Justice & Equality -v- Downey* [2019] IECA 182, wherein Peart J. made the following comments in relation to the court's abuse of process jurisdiction in an EAW context:

"19. It is clear from J.A.T (No. 2) that there can be circumstances which justify the High Court refusing an application for surrender on the basis of abuse of process. But it is equally clear firstly that such cases require some exceptional circumstance to justify such refusal, but, and critically, that the abuse asserted to exist must be of the processes of the High Court here dealing with the application for surrender, and therefore must relate to the application for surrender itself, and not to the prosecution of the offences which the respondent will face if he/she is surrendered. The different question whether there might be an abuse of process were the respondent put on trial for the offences for which surrender is sought is not a matter for determination in this jurisdiction on an application for surrender. Absent any suggestion that there is no possibility of a fair hearing of any application to have his trial on these offences stayed, and there has been no such suggestion made by the appellant, it is in my view clear that any such question of abuse of process will be a matter to be pursued by the appellant before the courts in the requesting jurisdiction.

25. The respondent further refers the court to the case of *Minister for Justice and Equality -v- Bailey* [2017] IEHC 482 wherein surrender was principally refused by Hunt J. on section 44 issue estoppel grounds. However, the court also invoked its abuse of process jurisdiction:

"60. I remain satisfied that the combination of factors identified above compel a finding of abuse of process in this case. I emphasise that there is nothing in the terms of s.13 of the Act that obliged the Minister to adopt an active or any course of action in the subsequent and separate s.16 inquiry. The finding of abuse of process rests in large part on the activities (or inactivity) of the French authorities, the very particular litigation history of the case, the approach of a previous Minister to the earlier appeal, excessive and unexplained delay, and in much smaller part on the voluntary approach of the Minister to the present s.16 inquiry. This finding has nothing to do with the proper discharge by the Minister of her obligations under s.13(1) of the Act in relation to the second warrant in this case."

26. In the proceedings bearing record number 2019/252 EXT, surrender was refused, by order of the High Court (Binchy J.) for the subject matter of this current Section 22(7) request on the 29th of November 2019. The respondent suggests in his written submissions that, in those circumstances, and in light of the rule of specialty and the lack of clarity surrounding this request for surrender, that the issuing judicial authority's decision to wait to make the request for consent for prosecution rather than issue a further EAW calls for explanation. This court has already ruled upon and dismissed the submission that there is a lack of clarity in relation to the section 22(7) request.
27. To assist the court in understanding the abuse of process submissions, the court sought from the Digital Audio Recording the ruling of Binchy J. in relation to the *ex tempore* judgment regarding the previous extradition proceedings bearing record number 2019/252 EXT, delivered on the 29th day of November 2019. Mr. Justice Binchy refused surrender in the following terms:

"The court cannot countenance the idea that somebody has, [...] either intentionally or, I suspect, unintentionally, [devised] a hybrid procedure that is not contemplated by the Act and the Framework Decision. What has been presented to the court for execution here is a warrant, on the face of it, that seeks the arrest of Mr Kaleja for the purposes of bringing proceedings against him, but which it is clear from information contained later on in the warrant, and also further information, is in fact a warrant that is intended to require him to serve a sentence arising out of a conviction already imposed upon. As a result of presenting the warrant in that way, Part D of the warrant has not been completed. And while it is possible for the court to take all of the information presented and, as it were, to reassemble it in the manner in which it should have been presented, that would not, in my view, be an appropriate procedure for the court to embark on. The procedures that have been prescribed by both the Framework Decision and the Act of 2003 here have been very carefully considered, they apply across all Member States, all Member States are expected to comply with them. And while it is well established that flexibility is permissible, to allow this application to succeed is not just an exercise in flexibility, but an exercise in reconstruction of the procedure as contemplated by the Framework Decision and the Act of 2003. It may well be that in practical terms, the court has, between the EAW and the additional information, all the information that

it requires to dispose of the application, but that cannot be certain, and it is not just undesirable for the court to proceed on the basis of an application that is presented for one purpose but then used for another, it is also impermissible and the court would be exceeding its jurisdiction by doing so. I am going to refuse the application."

28. Following on from this judgment, the central authority in this jurisdiction wrote to the issuing judicial authority in the Czech Republic on the 7th of February 2020 stating:

"In delivering his judgment, the Judge concluded that the warrant was presented by way of a hybrid procedure in that it seeks arrest of the respondent for the purpose of bringing proceedings against him but is in fact a warrant intended for him to serve a sentence for a conviction which will only be enforceable after he is served with the judgment. As a result of presenting the EAW in this way, Part D is not completed and while the court noted that the procedures as described by the Framework Decision and the 2003 Act allow for flexibility in this matter it amounts to a reconstruction and this is not an appropriate procedure for the court to embark upon.

The court has dismissed the application , as it is presented for one purpose but then used for another and is outside the court's jurisdiction.

Please be advised that there is no legal impediment to issuing a new warrant seeking the surrender of Mr. Kaleja provided the sentence is immediately enforceable against the respondent."

29. In light of the foregoing, it is clear and accepted by both the applicant and the respondent that the refusal to surrender was based on a decision that related to the form as opposed to the substance of the warrant. The respondent concedes that no issue of estoppel arises and that the central authority properly invited the issuing judicial authority to issue another warrant, albeit a conviction warrant. However, the respondent submits in oral submissions that the letter to the issuing judicial authority dated the 7th of February 2020 was in very clear terms and the issuing judicial authority knew the reasons for refusing surrender, that they were invited to make a request in the ordinary way, i.e. by issuing an European arrest warrant and did not. He submits that it is an abuse of process to have waited 18 months after the respondent had been returned on other matters to the issuing state.

30. The respondent relies upon the Judgment of Burns J. in *Minister for Justice -v- Lach* [2021] IEHC 632, a case where Mr. Justice Burns refused surrender and stated:

"44. Bearing in mind the reasoning of the Supreme Court in J.A.T. No. 2, the facts of the present case must be taken cumulatively in order to ascertain whether same can reasonably be regarded as exceptional and constitute a rare case where surrender should be refused on grounds of abuse of process. In that regard, the following matters are of significance:-

- *inordinate and inexplicable delay/lapse of time between the initial failure to effect surrender and the application for an order for surrender before this Court (approximately 11 years);*
- *the failure of the Polish authorities to transmit the EAW issued in 2016 to Ireland for execution, despite the fact that the respondent, to their knowledge, had been residing in Ireland at the time of the failure to effect surrender under the first European arrest warrant, and a simple enquiry with An Garda Síochána would have confirmed his continued residence in Ireland;*
- *the detention of the respondent in this jurisdiction on foot of the earlier EAW for approximately six months prior to the failure to give effect to the order for surrender;*
- *the respondent's changed family circumstances, although these are not particularly strong in this case; and - the fact that the respondent on a number of occasions following the failure to effect surrender made applications to the Polish courts in respect of the sentence, the subject matter of this EAW."*

31. While there are many factual differences that can differentiate the facts in *Lach* to the facts in this case, the glaring difference is that the delay in the case of *Lach* between the initial failure to effect surrender and the application for surrender was 11 years. In this case, Binchy J's refusal was dated the 29th of November 2019, the issuing judicial authority was informed of same on the 7th of February 2020, and the letter of request is dated the 30th of September 2021, a delay of approximately 18 months arises in this matter since the issuing judicial authority was informed of Mr Justice Binchy's refusal.
32. It is worth remembering in this regard the case of *The Minister for Justice and Equality - v- Smits* [2021] IESC 27, wherein the Supreme Court stated;-
- "74. I think it necessary to observe that a lawfully issued EAW in respect of a sentence does not somehow become legally invalidated by subsequent delay. The presumption that guides the courts of the executing State is that a sentenced person has enjoyed all necessary guarantees in the process leading to the imposition of the sentence and that the decision to issue the warrant involved an assessment of proportionality, with appropriate judicial protection. If that presumption is not rebutted, the decision to issue the warrant must be seen as valid. A valid order does not, by passage of time, "become" either incorrect, unlawful or void. Use of the word "stale" does not assist with the legal analysis. It is well established that delay is not, in itself, a ground for refusal of surrender unless it is so egregious that the application for surrender amounts to an abuse of process."*
33. It is also worth remembering in this regard paras 41 and 42 of Mr Justice Burns judgment in *Lach*, previously mentioned at para 29 of this judgment, wherein he stated:

"[41] It is undoubtedly the case that the issuing of a second warrant, where the initial warrant had been unsuccessful due to some technical defect, does not of itself amount to an abuse of process. Similarly, the re-transmission of a warrant where surrender has failed to take place is not in and of itself an abuse of process. Indeed, the Court of Justice of the European Union in Vilkas (Case C-640/15) has made it clear that Member States should persevere with attempts to surrender where the surrender was not effected due to circumstances beyond control of the states, even if the requested person had been released from custody. This is undoubtedly so. However, the issue of the second EAW and the application for surrender on foot of same must be considered along with, and in the light of, all relevant surrounding circumstances and must be assessed on a cumulative basis with such circumstances. Bearing in mind the reasoning of the Supreme Court in J.A.T. No. 2, I consider that the facts of the present case, taken cumulatively, are exceptional and constitute a rare case where surrender should be refused on grounds of abuse of process.

[42] An entitlement or obligation to persevere with attempts to effect surrender does not mean that issuing states or executing states are absolved from any obligation to act with expedition and treat applications for surrender as matters of urgency. There is a significant difference between (a) lapse of time between the date of commission of an offence or imposition of sentence and the commencement of a process seeking surrender in respect thereof, on the one hand, and (b) significant lapse of time within the course of an application for surrender or the execution of an order for surrender, on the other hand."

34. Unlike the situation that pertained in *Lach*, the respondent in this case was not able to point to any real or actual prejudice caused to him by the issuing judicial authority who elected to proceed by way of section 22(7), and not by issuing a further EAW before his surrender on the 29th of July 2021. Had the issuing judicial authority proceeded in that manner, as invited by the central authority, namely issuing a conviction warrant for the fifteen-month sentence on the 29th of July 2021, the respondent would still serve the very same sentence for which he is currently being sought. The respondent submits in oral submission that, had the issuing judicial authority utilised a conviction EAW, he may have been able to challenge same on the same basis as the challenge brought before Binchy J. This, in the court's view, is an entirely speculative submission.
35. The court has further considered the judgment in *Minister for Justice and Equality -v- DE* [2021] IECA 188, the Court of Appeal stated at para. 67 that; -

"67. The questions certified by the High Court were as follows: "In the context of proceedings under the European Arrest Warrant Act 2003 as amended, where a respondent objects to surrender on the basis that same is precluded by s. 37 of the said Act as it would be in breach of the respondent's rights under art. 8 ECHR and having particular regard to the provisions of art. 8(2) ECHR:

1. *Can personal or family circumstances, in and of themselves, provide a basis upon which surrender might be precluded by s. 37 of the Act of 2003?*
2. *What is the appropriate test to be applied by the Court in determining whether such an objection is sustained and that surrender should be refused?*
3. *In so far as exceptionality may be a relevant factor in determining such an objection, what is the appropriate test to be applied by the Court in determining whether the circumstances found to exist are so exceptional as to justify refusal of surrender”*

For the reasons set out in this judgment, it is appropriate to answer all three questions by repeating the principles set out at para 59 above:

- (i) *In an application for surrender, the court is not carrying out a general proportionality test on the merits of the application. The court should apply the specific terms of the 2003 Act, albeit subject to a careful consideration of whether, if necessary, applying a proportionality test to Article 8 Convention rights, to order surrender would involve a violation of that ECHR right to the extent of being incompatible with the State’s obligations under the Convention. (Vestartas).*
- (ii) *Surrender (or extradition) presupposes an impact on the personal or family life of a requested person. Having regard to Article 8(2), surrender (or extradition) carried out pursuant to legislation is in principle an acceptable interference with the right to respect for those rights. (Ostrowski, JAT (No. 2), Vestartas).*
- (iii) *When faced with an Article 8 objection to surrender, the function of the Court is to decide if the surrender is incompatible with the State’s obligation under the European Convention on Human Rights. That requires a very high threshold. Any inquiry must bear in mind that s. 10 requires a court to surrender in accordance with the provisions of the 2003 Act and s. 4A of that Act obliges the court to presume that the issuing state has complied and will comply with its fundamental rights obligations. (Vestartas).*
- (iv) *The evidential burden of proving incompatibility lies on the requested person. (Rettinger and Vestartas).*
- (v) *The assessment of the claimed impact of surrender on personal and family rights must be a rigorous one. (Rettinger and JAT (No. 2)).*
- (vi) *The evidence must be cogent and must reach the level of incompatibility (Vestartas).*
- (vii) *Exceptionality is not the test for incompatibility, but it will only be in a truly exceptional case that surrender will be found to be incompatible with the*

State's obligations under Article 8 of the Convention. (JAT No. 2 and Vestartas).

- (viii) For an Article 8 objection to succeed, there must be clear cogent evidence sufficient to rebut the presumption in s. 4A of the 2003 Act. (Vestartas).*
- (ix) No elaborate factual analysis or weighing of matters is necessary unless it is clear that the facts come close to a case which would be truly exceptional in nature thereby engaging the possibility that surrender may be incompatible with the State's obligations under the Convention. (JAT (No.2)).*
- (x) The requirement that the circumstances must be shown to render the order for surrender incompatible with the State's obligations under Article 8 necessitates that the incursion into the private and family rights referred to in Article 8(1) is such as to supervene the limitations on the right contained in Article 8(2), and over the significant public interest thresholds set by the 2003 Act itself. (Vestartas).*
- (xi) Where the facts, assessed as set out above, come close to being truly exceptional in nature thereby engaging the possibility that surrender might be incompatible with the State's obligations, the Court will engage in a proportionality test of whether the high public interest in the prevention of disorder and crime (and the protection of the rights of others) is overridden by the personal and family circumstances (taken where appropriate with all the cumulative circumstances) of the requested person. That is a case-specific analysis which will be required in very few cases."*

36. I accept that the Court's jurisdiction to refuse surrender on abuse of process grounds is broad and can be based on a number of different factors. However, I have determined that there is an absence of any significant, much less egregious, delay in this matter. I have determined that there is an absence of any evidence of any actual unfairness or prejudice to the respondent. I am satisfied that there is no clear cogent evidence sufficient to rebut the presumption in Section 4A of the 2003 Act. The matters put by the respondent to the court do not go beyond the norm. In my view that this is not a rare and exceptional case where surrender should be refused on the grounds of abuse of process. The objection based on the assertion that the section 22(7) letter of request amounts to an abuse of process is dismissed.
37. It, therefore, follows that this Court will make an order pursuant to s. 22(7) of the Act of 2003.