SUPREME COURT

S:AP:IE:2021:000076

IN THE MATTER OF ARTICLE 267 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION AND IN THE MATTER OF A REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION

MR JUSTICE MacMENAMIN

MR JUSTICE CHARLETON

MS JUSTICE O'MALLEY

MS JUSTICE BAKER

MR JUSTICE HOGAN

Court of Appeal No. A:AP:IE:2020:000162
High Court 2019 No. 262 EXT

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

AND IN THE MATTER OF OE (DOB: 9th day of September 1980)

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

OE

RESPONDENT

ORDER DATED THE 25th DAY OF FEBRUARY 2022
FOR REFERENCE TO THE
COURT OF JUSTICE OF THE EUROPEAN UNION PURSUANT TO
ARTICLE 267 OF THE TREATY

The Notice of Appeal by the Respondent filed on the 6th day of July 2021 by way of appeal from the Judgment and Order of the Court of Appeal (The President Mr Justice Edwards Ms Justice Gearty) given and made on the 27th day of May 2021 which dismissed the Respondent's Appeal from the Judgment and Order of the High Court (Mr Justice Binchy) given and made on the 27th day of July 2020 that the motion of the Applicant be allowed and the High Court provide its consent to proceedings being brought against the Respondent in the issuing state of The Netherlands in respect of the following offences as listed on page 3 paragraph 4 of the document entitled "Additional European Arrest Warrant" dated the 18th day of July 2019 namely: *'Article 289 of the Dutch Criminal Code: murder in association on 15 December 2015 Article 46a together with article 289 of the Dutch Criminal Code: failed incitement to murder in the period from 1 November 2015 up till and including 25 November 2015'* and for an Order setting aside the said Judgment and Order on the grounds and as set forth in the said Notice of Appeal having come on for remote hearing before this Court on the 2nd day of December 2021

Whereupon and having read the Determination of this Court dated the 22nd day of September 2021 granting leave to appeal herein the said Notice of Appeal the said Orders the documents therein referred to the judgments of the Court of Appeal and of the High Court and the written submissions filed on behalf of the respective parties and having heard Counsel for the Respondent and Counsel for the Applicant

IT WAS ORDERED that the case should stand for judgment

And the matter having been listed for judgment on the 18th day of February 2022 and judgment having been delivered electronically on that date and the parties having been given an opportunity to make observations on a draft Order for Reference

And It Appearing that the facts and proceedings are as set forth and included in the Order for Reference annexed hereto

And it further appearing to this Court that the determination of the issues between the parties on this application raise questions concerning the correct interpretation of certain provisions of European Union Law namely in respect the interpretation of Article 27 of the Council Framework Decision 2002/584/JHA of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p.1) as implemented in Irish law by the provisions of the European Arrest Warrant Act 2003 (as amended)

THE COURT HAS DECIDED TO REFER to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union as set out in the said Order for Reference the questions:

1. Should Article 27 of the Framework Decision be interpreted as meaning that a decision to surrender a person creates a legal relationship between him, the executing State and the requesting State such that any issue taken to have been finally determined in that decision must also be taken to have been determined for the purposes of the procedure for obtaining consent to further prosecution or punishment for other offences?
2. If the answer to Question 1 is that Article 27 does not require that interpretation, does a national procedural rule breach the principle of effectiveness if it operates so as to prevent the person concerned from relying, in the context of the consent application, upon a relevant judgment of the Court of Justice of the European Union delivered in the period of time after the order for surrender?

AND IT IS ORDERED that the further hearing of this Appeal do stand adjourned until after the said Court of Justice of the European Union shall have given its preliminary ruling on the said questions or until further Order in the meantime

JOHN MAHON

REGISTRAR

28/2/2022

MR JUSTICE MacMENAMIN

PRESIDENT OF THE COURT

Perfected this 28th day of February, 2022

AN CHÚIRT UACHTARACH

THE SUPREME COURT

Record No. 2021/76

MacMenamin J.

Charleton J.

O'Malley J.

Baker J.

Hogan J.

Between/

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

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

-and-

OE

Appellant

Order for Reference by the Court of certain questions on the interpretation of European Union law to the Court of Justice of the European Union under Article 267 of the Treaty on the Functioning of the European Union dated the 28th day of February, 2022.

Introduction

1. The appeal before the Supreme Court concerns the interpretation of Article 27 of the Council Framework Decision 2002/584/JHA of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p.1) as implemented in Irish law by the provisions of the European Arrest Warrant Act 2003 (as amended).

2. The appellant has been surrendered to the Kingdom of the Netherlands on foot of three European arrest warrants. That decision is *res judicata* as a matter of Irish law, and the appellant has been tried, convicted and sentenced in respect of those matters under the law of the Netherlands.

3. The High Court of Ireland, the executing judicial authority, has received a request for consent to his further prosecution and imprisonment in relation to other, separate offences. He objects to such consent being given, on the basis that the persons who issued the three original warrants did not, as a matter of EU law, have the status of "*issuing judicial authorities*". Although there is no question, under Irish law, of now reopening the decision to surrender, he argues that consent to further prosecution cannot be given if the warrants giving rise to that decision were not validly issued.

4. Essentially, the question to be determined by the Supreme Court is whether the appellant should be permitted to make that argument, and for that purpose to rely upon the retrospective effect of certain judgments of the Court of Justice of the European Union, or whether he can be debarred from so doing by a national rule of procedure. The national rule upon which the dispute now centres is known as issue estoppel, which is a subcategory within the broader principles of *res judicata*.

Background

5. There is no dispute between the parties as to the facts of the case and the background may be easily summarised here. In 2017 the appellant was surrendered to the Kingdom of the Netherlands, by order of the High Court, on foot of three European Arrest Warrants ("EAWs") received from that State. The EAWs, which were issued

on various dates in 2016, sought surrender for trial on charges relating to, *inter alia*, money laundering, assault, and attempted murder. Two of the warrants were issued by the Amsterdam public prosecutor's office and one by a unit of the national prosecutor's office. Objections to surrender were raised on behalf of the appellant, all of which were rejected by the High Court (Donnelly J. – see *Minister for Justice v. OE* (unreported, delivered on the 2nd February 2017). It is clear that no objection was raised at that time in relation to the fact that the warrants had been issued by public prosecutors. In the course of her analysis, the High Court judge expressly referred to the two Amsterdam warrants as having been issued by "*a competent judicial authority*". There is no express reference in the judgment to the status of the national prosecutor's warrant, but, equally, there is no reason to suppose that the court saw it as having a different status to the other two warrants. At a number of points in the judgment, reference was made to responses given by the public prosecutors to requests for further information, and reliance was placed on those responses.

6. The appellant did not seek to appeal the judgment and was surrendered to the Netherlands. He was tried and convicted in respect of the offences to which the warrants related, and sentenced to 18 years imprisonment.

7. The Dutch authorities have since sought the consent of the High Court, in its capacity as the executing judicial authority, to the further prosecution and imprisonment of the appellant on foot of further charges that were not the subject of any of the original EAWs. The giving of such consent, which involves a waiver of what is referred to in national law as the rule of specialty, is provided for in Article 27 of the Framework Decision, implemented in this jurisdiction by s.22(7) of the European Arrest Warrant Act 2003, as amended. The appellant has already been tried, convicted and sentenced to life imprisonment on the new charges, but the consent of the executing judicial authority is necessary before that further sentence of deprivation of liberty can be executed.

8. The original request for consent in this case, initiating the s.22(7) procedure, was sent by the Dutch national prosecutor to the High Court on the 1st May 2019. On the 27th May 2019 the CJEU issued its judgment in *OG and PI (Public Prosecutor's Office in Lübeck and Zwickau)* (C-508/18 and C-82/19/PPU – "*OG and PI*"). It ruled that

public prosecutors could not be considered to be "*issuing judicial authorities*" for the purposes of the Framework Decision if they were subject, directly or indirectly, to a risk that their decision-making power in connection with EAWs was subject to external directions or instructions, in a specific case, from the executive.

9. The request for consent came before the High Court on the 23rd July 2019. It was conceded in court by the respondent ("the Minister") on that occasion that the Dutch national prosecutor was not a "*judicial authority*", and it appears that, for that reason, the application was withdrawn and no order was made. However, a few days later, another request for consent was received. This had been issued by an investigating judge in Amsterdam, on the application of the prosecutor. It appears that new legislation had been introduced in the Netherlands, with effect from the 13th July 2019, providing that EAWs were to be issued by judges.

The statutory context

10. A European arrest warrant is defined in Article 1 of the Framework Decision as "*a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order*". The "*issuing judicial authority*" is defined in Article 6 as "*the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State*". As established in *OG and PI (Public Prosecutor's Office in Lübeck and Zwickau)* (C-508/18 and C-82/19/PPU – "*OG and PI*"), the concept of an "*issuing judicial authority*" is an autonomous concept of EU law.

11. Article 27 of the Framework Decision deals with the possible prosecution of the person who has been surrendered for offences other than those specified in the EAW grounding the surrender. Paragraph 2 of the Article sets out a general rule that a person 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. Under paragraph 1, it is open to Member States to notify the General Secretariat of the Council that it consents to waiver of the rule. Ireland has

not taken that option and therefore the general rule applies, subject to the exceptions set out in paragraph 3. The exception of relevance to the instant appeal is that referred to in paragraph 3(g), which envisages consent being given by the executing judicial authority. Paragraph 4 provides that a request for consent is to be submitted to the executing judicial authority. Consent is to be given, or refused, on the same basis as in a case of an application for surrender – that is, by reference to the grounds set out in Articles 3 and 4.

12. Similar definitions are found in the European Arrest Warrant Act 2003 as amended. An EAW is "*a warrant, order or decision of a judicial authority*". A "*judicial authority*" is "*the judge, magistrate or other person authorised under the law of the Member State concerned to perform functions the same or similar to those performed under s.33 by a court in the State*" (that is, the function of issuing EAWs). The "*issuing judicial authority*" is "*the judicial authority in the issuing State that issued the relevant warrant concerned.*" The "*issuing state*" is "*a Member State...a judicial authority of which has issued that European arrest warrant*".

13. Section 22 of the Act of 2003 was replaced in its entirety by virtue of s.80 of the Criminal Justice (Terrorist Offences) Act 2005. Section 22(7) now provides:

> *(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.*

14. Subsection (8) (as substituted by s.15 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012) provides that consent under subs. (7) is to be refused if the offence concerned is one for which a person could not, by virtue of Part 3 of the Act, be surrendered. (Part 3 sets out the provisions concerning fundamental rights, correspondence, double jeopardy, prosecutions against the requested person within the State based on the same alleged acts, the age of criminal responsibility, extraterritoriality, and trials *in absentia*.)

15. It may be relevant to note that before the introduction of the European arrest warrant regime, the courts in Ireland did not have the power to waive the rule of specialty – that was reserved (under the provisions of the Extradition Act 1965) to the Minister for Justice. That continues to be the case in respect of non-EU related extraditions.

The proceedings

16. The appellant's objections to the consent request were unsuccessful in the High Court, where the issue was seen as being whether or not the principle of *res judicata* applied. The Court held that the argument he sought to make was precluded by national rules conferring finality on the 2017 decision (see *Minister for Justice and Equality v. OE* [2020] IEHC 369). He appealed. By the time the matter came before the Court of Appeal, the CJEU had given a ruling in *Criminal Proceedings against AZ* (C- 510/19 – "*AZ*") to the effect that Dutch public prosecutors could not be regarded as "judicial authorities" for the purposes of the Framework Decision.

17. The Court of Appeal agreed with the Minister's submission that while the point now raised might not have been argued in the original High Court EAW proceedings, it had been considered "*inquisitorially*" by the High Court judge and a determination had been made by her. In the circumstances an issue estoppel arose that precluded either a direct challenge to her finding in that regard or a collateral attack on the surrender order.

18. The Minister's argument that national rules on the finality of judgments were not displaced by the CJEU decisions was also accepted. The Court of Appeal

acknowledged that the CJEU had expressly declined to limit the temporal effects of its decisions in *OG and PI* and in *AZ*. However, it had in many cases, including *Asturcom Telecomunicaciones S.L. v. Nogueira* [2009] E.C.R. I-9579, emphasised the importance of the principle that judicial decisions that had become definitive, after all rights of appeal had been exhausted or the time limits for appeal had expired, could not be called into question. EU law did not require the disapplication of procedural rules regarding that principle, even if to do so would enable a national court to remedy an infringement of a provision of EU law. This principle was, in turn, subject to the principles of effectiveness and equivalence but there was no submission by the appellant that those principles would be breached by application of the rules on the finality of judgments in this case. Accordingly, the Court of Appeal dismissed the appeal (see *Minister for Justice and Equality v. OE* [2021] IECA 159).

19. On the 22nd September 2021 the Supreme Court granted leave for a further appeal. It considered that the case raised matters of general public importance in relation to the interpretation of the European Arrest Warrant Act 2003; the relationship between the original order for surrender and a request for consent for further prosecution and imprisonment; the effect of the decisions of the CJEU on that relationship; and the question of the extent, if any, to which the concepts of *res judicata* and issue estoppel might arise in EAW proceedings (see [2021] IESCDET 108).

20. The appellant accepts that the decision to order his surrender in 2017 is, as a matter of Irish law, *res judicata* and that EU law would not require it to be reopened. His primary objection to the giving of consent (and the only one still being maintained) is based on the statutory terms governing the consent procedure. For the purposes of s.22(7), the request for consent must come from the "*issuing State*", and the "*issuing State*" is defined as being the State, the "*judicial authority*" of which issued the original EAW. The argument is that since the public prosecutors who issued the EAWs were not, as a matter of EU law, "*judicial authorities*" it follows that the Netherlands cannot be regarded as the "*issuing State*".

21. The appellant relies upon decisions of the national courts for the proposition that the principles of *res judicata* do not apply to extradition cases. It is accepted that issue estoppel may arise, but the argument in this respect is that it cannot apply where there

has been a material change in the legal circumstances. The judgment in *OG and PI* is said to represent a significant change in this respect. It is submitted that the consent procedure, although related to the surrender procedure, is nonetheless a "stand-alone" matter in which the appellant is as free to raise any argument directed to the validity of the request as he would be if it was an ordinary EAW. Reliance is placed, in particular, on the judgment in *AZ* and the observation that the consent is liable to prejudice the liberty of the person concerned because it is liable to lead to a heavier sentence. It is further submitted that to permit the Minister to rely upon the principles of *res judicata* and issue estoppel in this case would mean that the Irish courts should, in a subsequent proceeding relating to entirely different offences, operate on a premise that is unarguably incorrect under EU law.

22. The Minister does not dispute the interpretation of the Act put forward by the appellant, or suggest that the Framework Decision requires a different interpretation. She contends, however, that any issue that there might have been concerning the Dutch prosecutors' competence to act as "*issuing judicial authorities*" must be taken as having been definitively determined by the High Court in 2017, and that issue estoppel applies to that definitive determination such that the issue as to their competence cannot now be reopened. Although there is no Irish authority directly on the point, the Minister relies upon *dicta* in a number of judgments to the effect that issue estoppel can, in theory, arise in the extradition context in the same manner, and subject to the same criteria, as in ordinary civil litigation.

23. The Minister accepts that the decisions of the CJEU must be taken to have retrospective effect. However, she submits that under EU law the operation of the national rule of issue estoppel is not affected by that factor, provided that the principles of effectiveness and equivalence are not thereby breached. It is argued that the judgments in *OG and PI* and *AZ* did not change the law, but simply clarified it. They did not, therefore, bring about a material change in the legal circumstances. The original decision to surrender the appellant should therefore be seen as an error within jurisdiction that cannot now be reargued.

Judgment of the Supreme Court

24. The Court has delivered a judgment (see [2022] IESC 10), which deals with the relevant principles of national and EU law.

25. The national law on *res judicata* and issue estoppel is not without complexity (not least because the terminology is not always used consistently). The following summary does not deal with the related concepts of collateral attack, abuse of process or the rule that parties must bring forward the whole of their case in the first proceedings, and may not hold back a ground in their favour for the purpose of raising it in fresh proceedings aimed at overturning a negative decision.

26. In principle, a matter can give rise to an issue estoppel where

    (i) A judgment has been given by a court of competent jurisdiction;

    (ii) The decision was a final decision on the merits;

    (iii) The judgment determined a question which a party is attempting to raise in the subsequent proceedings; and

    (iv) The parties were the same persons (or their privies) as the parties in the proceedings in which the estoppel point is argued.

27. The above criteria are derived from the decisions of the Supreme Court in *Belton v. Carlow County Council* [1997] 1 I.R. 172 and *Sweeney v. Bus Átha Cliath* [2004] 1 I.R. 576, and were discussed recently in the judgment of McDonald J. in *George v. AVA Trade (EU) Limited* [2019] IEHC 187.

28. However, it is important to state that, leaving aside matters such as fraud (which clearly does not arise here), the role of issue estoppel is subject to a number of limitations. One such limitation is the potential effect of a judicial decision which sets a precedent in law. It will not permit a litigant whose case has been disposed of to reopen proceedings, but it can be relied upon in matters or cases not yet finally determined even if an earlier decision on the point, in a separate case, went against the

person concerned. Similarly, it is possible that a legislative change will preclude the raising of an estoppel.

29. In the public law context, estoppel cannot be relied upon where the issue is the correct interpretation of a statute or a provision of the Constitution. It would be contrary to public policy to allow such a matter to be determined by concessions or admissions by parties, or by an error of a judge. Thus, where the issue concerns the interpretation of a statute authorising the collection of a tax or other public charge on a recurring basis, the fact that a court has previously determined liability on the basis of a judge's interpretation of the relevant provision may render the decision in which that interpretation was given *res judicata* so far as the claim made in those proceedings is concerned. However, it will not prevent a party from rearguing the question in the context of a subsequent claim (although, depending on the circumstances, the party may lose by virtue of the doctrine of precedent, because the point has already been decided by a court of higher or coordinate jurisdiction).

30. Issue estoppel has no role in criminal trials.

31. Extradition has traditionally been described as a unique area in Irish law. That was so before the introduction of the European arrest warrant system, and was generally attributed to the fact that the court dealing with extradition proceedings had a more inquisitorial role than in normal, adversarial proceedings. This feature has been seen as continuing in the EAW context, and is underlined by the right of the court to seek information from the requesting State if such is considered necessary. The decision of the court is therefore less dependent upon the evidence and arguments put forward by the parties than might otherwise be the case.

32. It has sometimes been said that the principles of *res judicata* have no role in extradition. However, on closer examination it is apparent that this is something of an oversimplification. A decision to order or to refuse surrender will become *res judicata* when it has the status of a final judgment. However, it is well established by numerous decisions that a decision to refuse surrender because of defects in the warrant grounding the request is no bar to consideration of a fresh warrant. There are *dicta* in some of the relevant judgments to suggest that it is however possible that an

estoppel might arise in respect of a particular issue that was determined in the earlier proceedings. So, for example, where a refusal was based on a finding on a particular matter, and the subsequent warrant did not address that matter, the executing judicial authority might find that an estoppel arises (or that the second application for surrender is an abuse of process).

33. The Supreme Court is concerned that, if it were to decide that an estoppel arises in this case, that conclusion might limit the retrospective effect of judgments of the CJEU, permit the perpetuation of a legal error and lessen the effectiveness of the judicial protection in the EAW process to an impermissible extent. On the other hand, if it decides that no estoppel arises, the appellant will gain a windfall that he could not have obtained had he argued the point in the earlier litigation on the issue of surrender. That conclusion follows from the fact that such an argument would inevitably have had to succeed at that stage, even if a reference to the CJEU was necessary. However, there would then have been no bar under Irish law to consideration of a fresh warrant issued by a judge after the change in the relevant Dutch law. Given the sequence of events as they actually occurred, if the appellant succeeds now, the situation appears to be irremediable.

34. It is the view of the Supreme Court that the answer to the question whether the appellant should now be permitted to rely upon an argument about the status of the original warrants depends upon the correct legal characterisation of the relationship between the surrender process and the consent process. If they are properly to be seen as separate, "stand-alone" procedures, where any point of objection that was open to the person concerned in the surrender application may be open to new argument, or to further argument, in the consent application, then no estoppel can arise. If, on the other hand, they are seen as so closely linked that an issue that was necessarily determined in the surrender decision must be taken as having been determined for the purposes of the consent decision, the appellant will not be permitted to rely at this stage upon an argument about the status of the "*issuing judicial authority*".

35. As the consent process is governed by legislation that implements Article 27 of the Framework Decision, the Court considers that this is a matter to be determined by EU law. The Court further considers that it is not *acte clair*. Having had regard to the

judgments in *CILFIT* C-283/81 EU:C:1982:335 and *Consorzio Italian Management and Catania Multiservizi* C-561/19 EU:C:2021:779, and to its own obligations as a court against whose decisions there is no remedy under national law, the Court therefore considers it necessary to seek a ruling from the CJEU pursuant to Article 267 of the Treaty on the Functioning of the European Union.

Request for expedited or urgent procedure

36. The appellant is in custody in the Netherlands, and the authorities of that State are naturally concerned to clarify his legal status there as a matter of urgency. In those circumstances the Supreme Court requests that the CJEU consider utilising either the expedited or urgent procedures provided for in its rules of procedure.

Questions referred

1. **Should Article 27 of the Framework Decision be interpreted as meaning that a decision to surrender a person creates a legal relationship between him, the executing State and the requesting State such that any issue taken to have been finally determined in that decision must also be taken to have been determined for the purposes of the procedure for obtaining consent to further prosecution or punishment for other offences?**

2. **If the answer to Question 1 is that Article 27 does not require that interpretation, does a national procedural rule breach the principle of effectiveness if it operates so as to prevent the person concerned from relying, in the context of the consent application, upon a relevant judgment of the Court of Justice of the European Union delivered in the period of time after the order for surrender?**