AN CHÚIRT UACHTARACH

THE SUPREME COURT

Record No. 2021/76

MacMenamin J.

Charleton J.

O'Malley J.

Baker J.

Hogan J.

IN THE MATTER OF AN APPLICATION PURSUANT TO S.22(7) OF THE EUROPEAN ARREST WARRANT ACT 2003 (AS AMENDED)

Between/

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

And

NAOUFAL FASSIH

Appellant

Judgment of Ms. Justice Iseult O'Malley delivered the 18th of February 2022

Introduction

1. The appellant was surrendered to the Kingdom of the Netherlands in 2017, on foot of three European Arrest Warrants. He was tried and convicted in respect of the offences to which those warrants related, and sentenced to 18 years imprisonment. The Dutch authorities have since sought the consent of the High Court of Ireland, in its capacity as the executing judicial authority, to the further prosecution and imprisonment of the appellant on foot of two further charges that were not the subject of any of the original EAWs. The giving of such consent, which involves a waiver of the rule of specialty, is provided for in Article 27 of the Council Framework Decision of 13th June 2002 *("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 consent is necessary before the sentence of deprivation of liberty can be executed.

2. The dispute in the case arises from the fact that the 2016 EAWs were issued by public prosecutors (two by the Amsterdam public prosecutor's office and one by a unit of the national prosecutor's office). No objection was raised in the 2017 proceedings concerning the status of those officials under the Framework Decision or the Act. However, subsequent judgments of the Court of Justice of the European Union have made it clear that the public prosecutors of the Netherlands do not have a sufficient degree of independence from the executive to be regarded as "judicial authorities" for the purposes of the Framework Decision. It follows that they do not have that status for the purposes of the Act.

3. The request for consent now before the Court was issued by a judge, but that fact does not resolve the question over the effect of the original EAWs on the statutory consent to waiver of specialty. For the purposes of the s.22(7) procedure, the request must come from the "issuing State", and the "issuing State" is defined as being the State, the "judicial authority" of which issued the EAW.

4. The appellant argues 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" and the requirements of s.22(7) are therefore not

fulfilled. The respondent ("the Minister") does not dispute the statutory interpretation put forward by the appellant, but contends that any issue there might have been concerning the prosecutors' competence must be taken as having been definitively determined by the High Court in 2017. She accepts that the decision of the CJEU must be taken to have retrospective effect, but submits that the operation of national rules of issue estoppel is not affected by that retrospective effect. It is argued that an estoppel arises in this case such that the issue as to competence cannot now be reopened. The appellant disputes the applicability of issue estoppel in the circumstances of the case.

The statutory context

5. A European arrest warrant is defined in 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 "*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 Lűbeck and Zwickau)* (C-508/18 and C-82/19PPU) ("*OG and PI")*, the concept of an "*issuing judicial authority*" is an autonomous concept of EU law.

6. Article 27 of the Framework Decision deals with the rule of specialty as it applies to a person who has been surrendered. It is open to Member States to notify the General Secretariat of the Council that it consents to waiver of the rule. Where that option is not taken, the general rule, subject to the exceptions set out in the Article, is that such 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. The exception of relevance to the instant appeal is that referred to in paragraph 3(g) of Article 27, 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.

7. 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*".

8. 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.*

9. 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 within the State based on the same acts alleged against the requested person, the age of criminal responsibility, extraterritoriality, and trials *in absentia*.)

Background to the appeal

10. The original three EAWs were issued on various dates in 2016, seeking the surrender of the appellant for trial on charges relating to, *inter alia*, money laundering, assault, and attempted murder. Various 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. Fassih* (unreported, delivered on the 2nd February 2017). It is clear that no objection was raised in relation to the fact that the warrants had been issued by prosecutors. In the course of her analysis, Donnelly J. expressly referred to the two Amsterdam warrants as having been issued by "*a competent judicial authority*". There is no express reference to the status of the national prosecutor's warrant, but, equally, there is no indication that Donnelly J. saw it as having a different status to the other two. 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.

11. 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.* 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.

12. The request for consent came before the High Court on the 23rd July 2019. It was conceded in court on that occasion that the Dutch national prosecutor was not a "judicial authority", and it appears that, for that reason, the application was either withdrawn or refused. However, a few days later another EAW was received making the same request for consent. This had been issued by a court of the Netherlands, 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.

13. Apart from an unsuccessful argument about the form of the request, the appellant objected to it on the basis that the Netherlands could not be regarded as an "*issuing State*", with the consequence that the appellant was not, for the purposes of s.22(7), a person who had been surrendered to an issuing State. The principal argument was, as referred to above, that for the purposes of the section, the definition in the Act of an "*issuing State*" refers to the State, the "*judicial authority*" of which had issued the original EAW. As a matter of law, the EAWs in this case had not been issued by a judicial authority. The rule of specialty could not be waived unless the conditions prescribed by s.22(7) had been met.

14. The parties agreed that the general proposition that CJEU decisions have retrospective effect was applicable in the circumstances of the case. They also agreed that, in principle, such retrospectivity did not require the disapplication of national procedural rules conferring finality on a domestic decision, even if that decision had involved a mis-application of European Union law. It was argued by the Minister that the decision in *OG and PI* did not have the effect of invalidating previous EAWs that had been issued by authorities subsequently found not to meet the requirements of the Framework Decision, and that domestic rules of procedure conferred finality on the decision of the High Court in 2017. The argument, at that stage, centred on the concept of *res judicata*, with the respondent submitting that to permit the status of the judicial authority to be raised at this stage would be to permit a collateral attack on the order of surrender. She argued that the decision to surrender involved a finding that the requirements of the Act had been met, and that issue was *res judicata* under national procedural rules.

15. In response, the appellant stated that he was not seeking to challenge the decision to surrender him and there was, therefore, no collateral attack. He argued, firstly, that the original order of the High Court did not involve a determination that the prosecutors fulfilled the criteria for a "*judicial authority*". Further, he submitted that the consent procedure was a "*stand-alone*" matter so that he was free to raise any argument directed to the validity of the request, and that *res judicata* could not be extended

beyond judicial determinations made in adversarial contests to inquisitorial findings on an issue in respect of which there had been no controversy. The point had not been raised, considered or determined in respect of the 2016 warrants. He also submitted that, in any event, under Irish law *res judicata* had no application in extradition proceedings. To permit the respondent to rely upon it in this context would be to give *OG and PI* a prospective effect only, and it could not be open to the courts of different Member States to come to their own potentially differing conclusions, by application of domestic procedural rules, as to the effect of that decision.

16. The parties were thus agreed, at that stage, that the question whether the matter was *res judicata* was the nub of the issue. The appellant's arguments were rejected by the High Court (Binchy J. – see *Minister for Justice and Equality v. Fassih* [2020] IEHC 369). Binchy J. considered that it was not appropriate to treat the request before the court as a "*stand-alone*" application, as to do so would in his view be to ignore the underlying reality that it arose as "*a direct consequence*" of the order of surrender. Applications for surrender were made in an inquisitorial hearing, with the opportunity being afforded to challenge the warrant on any ground relating to its validity. A court could not make an order for surrender unless satisfied that the requirements of the Act had been met in all respects, including the requirement that the warrant had been issued by a judicial authority. That was so, even if the High Court judge did not make an express finding on that aspect.

17. This, in Binchy J.'s view, was consistent with the approach taken by the Supreme Court in *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88 ("*A. v. Governor of Arbour Hill Prison")*, to the effect that when proceedings had concluded it was not open to a party to raise an issue he or she could have raised at the original hearing. The order for surrender having been made, it was not possible to reopen that order or the matters giving rise to it. To allow an objection to the consent request on the basis of the status of the 2016 warrants would be to permit a collateral attack on the decision ordering surrender. The retrospective effect of decisions of the CJEU did not override the application of domestic rules and procedures relating to the finality of decisions.

The judgment in *AZ*

18. By the time the instant case 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. It should be noted that *AZ* was also a case about the waiver of specialty. The facts and some of the arguments dealt with in the judgment are of potential significance in this appeal, and it is convenient to summarise them here.

19. AZ was surrendered to Belgium from the Netherlands by order of an Amsterdam court acting on foot of a Belgian EAW. Subsequently, a Belgian court requested consent to his further prosecution on additional offences. Purported consent was given by the public prosecutor for the Amsterdam district. AZ appealed against the ensuing conviction, arguing that the consent had not been given by an "*executing judicial authority*". The appellate court referred a number of questions to the CJEU as to whether *inter alia* the Amsterdam public prosecutor came within the concept of a "*judicial authority*"; whether it was permissible to have a procedure whereby the initial surrender decision was made by a court, before which the defendant's rights were protected, but the supplementary surrender was assigned to a public prosecutor before whom the defendant did not have a guaranteed right to appear or right of access to the courts; and whether the public prosecutor was to be seen as the "*executing judicial authority*" which surrendered the requested person and which could grant consent.

20. In arguing against the admissibility of the reference, the German government submitted that the questions were not relevant to the dispute in the main proceedings. The Netherlands surrender and consent procedure had been the subject of a definitive decision by the Netherlands authorities. In circumstances where AZ had already been surrendered, it was not open to the Belgian judicial authorities to review that decision and it could be challenged only in the Netherlands courts. To authorise the re-examination by the Belgian court of the validity of the consent would be contrary to the principle of mutual trust between Member States. To review the procedure for

execution of an EAW that had already been completed in an issuing State would also be contrary to the objective of the Framework Decision.

21. The CJEU ruled that the reference was admissible, stating *inter alia* that the effectiveness and proper functioning of the EAW procedure was based on compliance with the requirements laid down by the Framework Decision. It was apparent from the terms of Article 27 that the consent given in accordance with paragraph 4 must be given by an authority that had the status of "*executing judicial authority*" within the meaning of Article 6(2). The questions were relevant, because the case before the Belgian court gave rise to a question about the recognition of the effects in the Belgian legal order of the consent that had been given.

22. The Court went on to hold that the concept of the "*executing judicial authority*" was, like that of "*issuing judicial authority*", an autonomous concept that required independence from the executive and an effective level of protection of the person's rights. The intervention of a judicial authority was also required in respect of the consent procedure. The Court observed that, while the requested person would already have been surrendered, such consent was liable to prejudice the liberty of the person concerned and was liable to lead to a heavier sentence. The Amsterdam prosecutor could be subject to instructions in specific instances from the Ministry of Justice, and therefore did not satisfy the necessary conditions to be characterised as an "*executing judicial authority*".

23. The Belgian Public Prosecutor's Office had requested the CJEU to limit the temporal effects of its judgment should it find that an authority such as the Amsterdam prosecutor was not covered by the concept of "*executing judicial authority*." It submitted that prior to the judgment in *OG and PI* there had been no reason to question the view that the actions of a public prosecutor were consistent with the provisions of the Framework Decision. The Court referred, in paragraph 73 of the judgment, to its own settled case-law, according to which a judgment on an Article 267 request clarified and defined the scope of the rule in question "*as it must be, or ought to have been, understood and applied from the time of its coming into force*."

> *"It follows that the rule as thus interpreted may and must be applied by the courts to legal relationships arising and established before the delivery of the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing before the courts having jurisdiction an action relating to the application of that rule are satisfied…"*

24. The phrasing in this sentence reflects the terminology used by the CJEU over the course of several decades.

The Court of Appeal

25. Similar submissions to those in the High Court were made by the parties in the Court of Appeal. The appellant submitted, in reliance on the judgment of McDonald J. in *George v. AVA Trade (EU) Limited* [2019] IEHC 187 ("*George"*), that the criteria for *res judicata* had not been met. The point at issue had not been raised, considered or determined in the original proceedings. In any event, the principle of *res judicata* did not apply in extradition or rendition proceedings.

26. The Minister contended that *res judicata*, in the form of issue estoppel rather than cause of action estoppel, did apply. It was accepted that the EAW surrender procedure was *sui generis*, but the executing judicial authority was obliged to be satisfied that all of the statutory preconditions were met before making an order of surrender. That involved examination of the warrant so that the judge could be satisfied that it was issued by a competent judicial authority, even if no point had been raised on that aspect. The High Court judge had stated that she was satisfied in respect of two of the warrants, and must be taken as having the same view in respect of the third. The s.22(7) application was part of an ongoing legal process, but the competence of the issuing authorities had been finally determined in the earlier part of the process.

27. The Court of Appeal considered that a serious point had been raised, that could not be dismissed *in limine*. However, ultimately, it accepted the argument put forward by the Minister to the effect that the s.22(7) application was not a "*stand-alone*" procedure, divorced from the decision to surrender, the merits of which could be considered in a

compartmentalised fashion separate from the issue of *res judicata*. There was a *"nuanced"* relationship between the present application and the surrender proceedings.

28. The Court also agreed with the respondent that while the point now raised might not have been argued, it had been considered "*inquisitorially*" by the original 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. Therefore, the issues as to the competence of the issuing authorities and the liability of the appellant to be surrendered were *res judicata*.

29. The Minister's argument that national rules on the finality of judgments were not displaced by the CJEU decisions was accepted. It was acknowledged that the CJEU had 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 *("Asturcom")*, 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. The Court saw the rules in question as being encapsulated in the following passage from the judgment of Murray C.J. in *A. v. Governor of Arbour Hill Prison*:

> *"…the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position.*
>
> *No one has ever suggested that every time there is a judicial adjudication clarifying or interpreting the law in a particular manner which could have had*

some bearing on previous and finally decided cases, civil or criminal, that such cases must be re-opened or the decisions set aside.

It has not been suggested because no legal system comprehends such an absolute or complete retroactive effect of judicial decisions. To do so would render a legal system uncertain, incoherent and dysfunctional. Such consequences would cause widespread injustices."

30. The discussion of the consequences of a declaration of constitutional invalidity in the judgment of the Court of Criminal Appeal in *People (Director of Public Prosecutions) v. Cunningham* [2013] 2 I.R. 631 *("Cunningham")* was cited to the same effect. In that case, the Court had noted that *A. v. Governor of Arbour Hill Prison* and the previous jurisprudence of the Supreme Court showed that such a declaration did not necessarily mean that all actions, decisions and transactions taken in good faith on foot of the unconstitutional law must be unravelled, even if the invalidity operated *ab initio*:

"Any other conclusion would simply represent the triumph of abstract logic over the dictates of justice and the practical administration of society. Such a consequence is, in any event, contraindicated by a range of defences – ranging from prescription, estoppel, change of position, acquiescence and res judicata *– which have evolved over the centuries…"*

31. Accordingly, the Court of Appeal held that the application of domestic procedural rules on the finality of judgments was required in the instant case, in the interests of legal certainty and stability. It concluded by endorsing the finding of the trial judge that the objection now made by the appellant was a collateral attack on the decision ordering surrender.

Submissions in the appeal

The appellant

32. The appellant maintains his argument that he is not "*a person who has been surrendered to an issuing state*" within the terms of the Act. The prosecutors who issued the 2016 warrants were not judicial authorities within the definition of that autonomous concept of EU law, and it follows that the warrants were not European arrest warrants and the Netherlands was not an issuing State. The conditions for the grant of consent under s.22(7) have therefore not been met.

33. The appellant accepts that, absent an extension of time to appeal (which, he agrees, cannot sensibly occur subsequent to surrender) a direct challenge to the 2017 order would be precluded by national law. He submits, however, that the fact that the case now made necessarily involves an assumption that the previous ruling was incorrect does not mean that he is attempting to undo that ruling. The situation is not the same, therefore, as that in *A. v. Governor of Arbour Hill Prison* and the Court of Appeal erred in laying so much emphasis on that case.

34. It is accepted that EU law does not, in principle at least, preclude the application of the principles of *res judicata* and/or issue estoppel. The CJEU has, in such cases as *Asturcom.*, made it clear that national courts are permitted to apply their own domestic rules in the nature of *res judicata*. At a practical level this may very well mean that it will not be open to a given litigant to invoke the effect of a (retrospective) judgment of the CJEU in circumstances where proceedings have already attained finality.

35. However, it is submitted that in *Asturcom* the CJEU was quick to point out that such domestic rules may not "*be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law (principle of effectiveness)".* As such, the application of domestic rules in relation to *res judicata* and issue estoppel are not entirely disconnected from considerations of EU law. In that regard, the appellant submits that the position contended for by the Minister is radical and extreme – namely that the Irish courts should, in a subsequent proceeding relating to entirely different offences, operate on a premise that is known to be unarguably incorrect. It is said that such a position goes beyond making it difficult or impossible to exercise the relevant rights conferred by EU law and requires the Irish courts to adopt a position that is entirely contrary to those rights.

36. The core issue in the appeal is described as being "*the extent to which* res judicata *(or, more correctly, issue estoppel) applies in the context of extradition proceedings and, additionally, how that falls to be determined as between the original determination in relation to surrender under the 2016 warrants and a subsequent Section 22 application*". While the appellant accepts that the distinction was not really debated in the courts below, it is submitted that, strictly speaking, this is a case of issue estoppel rather than *res judicata*, since, in particular, the issue is one raised by way of defence rather than being asserted as a cause of action. However, the submissions address both *res judicata* and issue estoppel in extradition and EAW proceedings.

37. In those circumstances the appellant submits that the principles concerning collateral attack have no relevance. He submits that, while the concept of collateral attack has not been the subject of precise definition by the courts, it necessarily involves the active invocation of court proceedings for the express or secondary purpose of setting aside the effect of a prior court decision, where the person engaged in the collateral attack is the moving party. The fact that the appellant in these proceedings was the respondent to the proceedings at first instance is said to be of considerable relevance, since he did not institute an abusive set of proceedings. The argument he raises in these proceedings is legally incapable of setting aside the proximate effect of the 2017 judgment – namely his surrender. The extent of what he seeks to be permitted to do is to raise an argument which, he says, is unarguably correct in substance (i.e. that the 2016 EAWs were not issued by a judicial authority).

38. Reliance is placed on *Minister for Justice v. Tobin* [2012] 4 I.R. 147 (*"Tobin")*, and the authorities cited therein, for the general proposition that *res judicata* does not apply in cases of this nature. However, it is accepted that issue estoppel may arise. In this regard, the appellant refers in detail to the analysis of Hunt J. in *Minister for Justice v. Bailey* [2017] IEHC 482 ("*Bailey (No.2)*"). In that case, it was held that *res judicata* could not apply so as to preclude consideration of a second warrant. However, a conclusive determination of an issue of law or fact in earlier proceedings would be binding on the parties in subsequent proceedings in the absence of "a material change in the factual or legal circumstances". Consequently, Hunt J. considered that the Minister was estopped from re-litigating the interpretation of the

statute (in relation to extraterritoriality) given in earlier proceedings, or the application of that interpretation to the same salient facts, where those issues had been finally and conclusively determined by the Supreme Court in those earlier proceedings. An estoppel arose, and covered those matters which the prior judgment and order "necessarily established as the legal foundation or justification" for the order made.

39. The appellant relies upon the reference by Hunt J. to a "material change" in the legal circumstances in making the submission that it would be perverse to preclude new arguments when there has been a change in the law. It is submitted that the judgment of the CJEU in *OG and PI* represents a significant change in circumstance that not only permits, but requires, a reconsideration of the premise underpinning the prior decision. It is suggested that the Court of Appeal applied the principle of issue estoppel in a "*somewhat rigid*" manner without considering whether it was just or appropriate to do so, in circumstances where the earlier decision must, objectively, be viewed as having been incorrect and as having been made without any detailed examination. The High Court had proceeded on the premise that the Dutch public prosecutors had been judicial authorities in 2016, although this was now known to be incorrect.

40. Reference is made to the analysis of the reasons underlying the doctrine of *res judicata* in the judgment of Kearns J.in *Lynch v. Moran* [2006] 3 I.R. 389 (where this Court held that it did not apply to criminal trials). The principal interest identified was the public interest in bringing finality to litigation, along with the closely allied principle that the correctness of verdicts must be accepted. There was an interest in avoiding conflicting decisions and preventing costly and time-consuming re-litigation. The appellant submits that the public interest in finality may be seen as diluted in a context where it is open to State authorities to make repeat applications for surrender. He also argues that the issues of conflicting decisions and the requirement that verdicts be regarded as correct are entirely notional in the context of the current case. There is now an unavoidable conflict in relation to the status of prosecutors in the Netherlands.

41. The appellant submits that the rules of *res judicata* and allied principles such as issue estoppel are derived from the nature of adversarial litigation, and have the purpose of

protecting the broader integrity of the administration of justice in that context. By contrast, a court dealing with an EAW must engage in an inquisitorial process with a view to determining whether or not the statutory criteria are fulfilled. That decision must be made regardless of what issues are argued or conceded by the parties. The value of finality is not as compelling in this context, since it is well established that repeat applications for surrender may be made on the basis of fresh warrants. In that context, issue estoppel can have only a limited role.

42. Finally, the appellant contends that the Court of Appeal was incorrect in rejecting the argument that the s.22(7) application should be regarded as a "*stand-alone*" process. It is noted in this regard that a respondent to such an application has, under s.22(8), the potential benefit of all of the bars to surrender applicable in the context of a surrender application. While there is, certainly, a relationship between the two procedures they cannot be seen as part of a continuum. If, in the alternative, the request for consent is in fact to be seen as a continuation of the earlier proceedings, a respondent should be entitled to rely upon developments in the law that have occurred in the intervening period (as in *Cunningham*).

43. The appellant submits that the observations of the CJEU in *AZ* are largely dispositive of the Minister's argument to the effect that an application for consent/waiver of specialty should be regarded as part of a continuum of the original surrender proceedings. In that regard the CJEU considered the fact that such a decision might prejudice the liberty of the person as being the relevant factor:

> *"62. …However, the decision on that consent, like that on the execution of the European arrest warrant, is liable to prejudice the liberty of the person concerned, given that it concerns an offence other than that for which he or she was surrendered and it is liable to lead to a heavier sentence for that person."*

44. It appears that in *AZ* consent was sought for the prosecution of further similar offences, and the practical impact of such additional charges may have been open to debate. However, consent can be given (as in the present case) for entirely unrelated

charges. Therefore, the issue is the possibility of a new sentence and the potential further loss of liberty.

45. The appellant says that a decision on consent/waiver of specialty is, to all intents and purposes, a new EAW and calls for a consideration of all of the same statutory bars to surrender. To identify it as part of a procedural continuum with the original surrender decision is said to be little more than a device. But for the circumstances of the appellant having been previously surrendered the form of the request would be that of an EAW. In that regard, an analogy is suggested with the situation of a person who is the subject of two separate EAWs, one of which was dealt with prior to the judgment in *OG and PI* and one of which fell to be determined after that decision. It is submitted that it could not credibly be argued that such a person could not raise an argument as to the status of a public prosecutor as judicial authority merely because he had not raised the point in the earlier proceedings.

The respondent

46. The Minister sees the appeal as raising, primarily, the question whether issue estoppel can, as a matter of principle, arise in extradition proceedings. If it can, further questions arise as to the circumstances in which it applies and the relevance of a change in the facts of a case or in the law.

47. It is submitted that the Court of Appeal was correct in holding that an issue estoppel arose in this case. It is acknowledged that there is a contrast between cause of action estoppel (seen as creating an absolute bar to the re-litigation of any point that had to be decided in order to establish the existence of a cause of action) and issue estoppel (where material changes in factual or legal circumstances may prevent an estoppel from arising). The Minister also accepts that cause of action estoppel does not apply in the context of surrender or extradition proceedings.

48. The Minister notes that this Court has not definitively ruled on the applicability of issue estoppel in this context. However, in *Attorney General v. Gibson* [2004] WJSC-SC 528 Keane C.J. had stated (in the context of the extradition regime established

under the Extradition Act 1965) that if a District Judge had made a final and binding adjudication on a point, the doctrine of *res judicata* could well arise in relation to that point in any subsequent case between the parties. In *Tobin*, Murray J. (who was in the minority as regards the outcome of the case) noted the general principle that the doctrine of *res judicata* did not apply but added that this should not be confused with the subsidiary principle of issue estoppel, which could apply. Denham C.J. stated that it would depend on the circumstances of the case. Determination of an issue such as delay, in the context of a surrender application, could govern a subsequent application. O'Donnell J. made a similar comment in respect of the possibility that a determination on an issue of correspondence could create a *res judicata* on that issue.

49. The Minister also relies on the analysis of Hunt J. in *Bailey (No.2)* and that of Burns J. in *Minister for Justice and Equality v. Bailey* [2020] IEHC 528 ("*Bailey (No 3).*"). The argument, therefore, is that *res judicata* in the form of issue estoppel applies and arises in extradition and surrender proceedings, and that there is no principled basis or public policy rationale precluding its application. It arises in the same manner, and is subject to the same criteria, as in other proceedings.

50. The elements necessary to give rise to an issue estoppel are those identified by Keane C.J. in *Sweeney v. Bus Átha Cliath* [2004] 1 I.R. 576 ("*Sweeney"*): -

> *"…first, that the same question has been decided, - that the judicial decision which is said to create the estoppel was final and that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies."*

51. The decision in *Sweeney* was that no estoppel arose where the previous case had concluded with a settlement. The court had had no involvement beyond making an order striking out the proceedings.

52. The criteria were recently described by McDonald J. in *George* as being:

> (a) That judgment was given by a court of competent jurisdiction;
> (b) That it was a final decision on the merits;

(c) That the judgment given determined a question which is raised in the subsequent litigation; and
(d) That the parties to the subsequent litigation are the same as the parties to the previous litigation.

53. The Minister also refers to a passage, cited in *George*, from the judgment of Diplock LJ in *Thoday v. Thoday* [1964] 1 A.E.R 341, where it was noted that many causes of action require a plaintiff to prove that one or more conditions have been fulfilled. At p. 352 of the report, Diplock LJ said: -

> *"If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends on the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."*

54. Applying the above principles to the instant case, the respondent asserts that the judgment of Donnelly J. was a final judgment of a court of competent jurisdiction, involving the same parties. The determination that the Dutch prosecutors were judicial authorities cannot be viewed as incidental to the decision to surrender, since Donnelly J. was obliged to satisfy herself that the statutory requirements had been met before making the order for surrender, and it was not necessary that there should be an express finding in the judgment in respect of each warrant. The finding that the relevant EAWs had been properly issued was clearly intended to be a final and definitive determination of that issue.

55. It is argued that in those circumstances, the appellant was a person who had been surrendered under the Act and the provisions of s.22 were therefore applicable. The two processes were inextricably linked.

56. The appellant's objection to the present section 22(7) application is described as being entirely based upon the status of the authorities which issued the relevant warrants. The Minister submits that the appellant is therefore attacking the fundamental findings upon which the earlier judgment was based, despite having not appealed it. It is submitted that to allow him to do so would be contrary to the principles relating to the proper administration of justice and legal certainty which underpin the legal norm in this jurisdiction.

57. A distinction is drawn between new or altered circumstances which change the factual or legal elements of a previously decided issue (and which, therefore, in fact create a new issue) and new or altered circumstances which do not affect those elements but instead simply show that the earlier decision was wrong. It is submitted that the instant case falls into the second of these categories. While a change in legal circumstances can have the effect of defeating a claim that an issue is subject to issue estoppel it is necessary, in the circumstances, that the party seeking to re-litigate the point must convince the court that considerations of justice require the re-opening of the issue – that is, that for some good reason the estoppel should not be enforced. The decision of the House of Lords in *Arnold v. Westminster Bank plc* [1991] 2 A.C. 93 ("*Arnold*") is cited as an example.

58. In *Arnold*, Lord Keith referred to the principle that one of the purposes of estoppel is to work justice between the parties. It was therefore open to the courts to recognise that "*in special circumstances*" an inflexible application of an estoppel could have the opposite result. One such special circumstance arose where:

> "*there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings*."

59. The Minister notes that, in *Arnold*, the fact that there could not have been an appeal against the original decision (which had since been shown to have been wrong) was a major consideration.

60. It is observed that a decision that is wrong can, in most cases, be appealed. If a later judgment demonstrates that the decision was indeed wrong, in that it did not properly reflect the law at the time, the effect of that later judgment does not amount to a "*change*" in the law. Further, even where there is indeed a change in the law, that is not in itself sufficient to establish the existence of "*special circumstances*" such that re-litigation of the point should be permitted. There must be other exceptional circumstances that tip the balance away from adherence to the usual rule. This, according to the Minister, sets a high threshold.

61. Accordingly, the Minister argues that neither *OG and PI* nor *AZ* changed the law. Rather, they clarified it. In the circumstances, the decision of Donnelly J. is said to have amounted to an error within jurisdiction, rather than a correct determination followed by a change in the law. The appellant did not seek leave to appeal it. That being so, the considerations of justice do not demand that he should now be allowed to reargue a previously determined technical point. On this aspect, the Minister emphasises that the appellant did not, in the High Court or Court of Appeal, raise any question as to whether the application of issue estoppel would breach the principle of effectiveness.

62. The Minister contends that the principles concerning collateral attack remain relevant to the appeal, despite the acceptance by the appellant that he cannot seek to have the 2017 order set aside. It is submitted that issue estoppel prohibits parties from taking issue with a conclusive and necessary finding by a competent court in previous proceedings between the same parties. That doctrine exists in conjunction with other legal concepts, such as abuse of process by way of collateral attack on a previous judgment, which are designed to encourage finality of litigation and legal certainty. These rules prevent the re-litigation of issues which have been decided or could have been decided if they had been raised in earlier proceedings. In *Dalton v. Flynn* (2004 WJSC-HC 2704), the High Court (Laffoy J.), referred to the branch of abuse of process which prevents collateral attacks on earlier judgments as being "*quasi res judicata".* The respondent relies on the articulation of the rationale behind the collateral attack jurisprudence by Clarke C.J. in paragraphs 38 and 39 of *Sweetman v. An Bórd Pleanála* [2018] I.R. 250 (*"Sweetman")*:

"The rationale behind the collateral attack jurisprudence is clear. A party who has the benefit of an administrative decision which is not challenged within any legally-mandated timeframe should not be exposed to the risk of having the validity of that decision subsequently challenged in later proceedings which seek to quash the validity of a subsequent decision on the basis that the earlier decision was invalid. Like consideration would apply to a State decision maker who has rejected an application or similar decisions.

The requirements of legal certainty make clear that a person who has the benefit of a decision which is not challenged within whatever time limit may be appropriate is entitled to act on the assurance that the decision concerned is now immune from challenge subject to very limited circumstances such as fraud and the like".

63. Reference is also made to paragraph 143 of the judgment of McKechnie J. in *An Taisce v. An Bórd Pleanála* [2020] IESC 39 (*"An Taisce v. An Bórd Pleanála")*. McKechnie J. described the concept of collateral attack as having its roots in the effective administration of justice, in litigation fairness and in legal certainty. It was said to be a member of a wider family to the same effect, such as delay and time limits, estoppel, *res judicata*, and the rule in *Henderson v. Henderson*. Its overall aim was designed to protect the integrity of the legal norm.

64. *Kenny v. Trinity College* [2020] IESC 54 ("*Kenny"*) is cited as an example of a case where this Court found that it was an abuse of process for the appellant to attempt to re-litigate an issue that had been previously determined against him, despite the matter not strictly being *res judicata*. Such an attempt was seen as representing a collateral attack on the previous determination.

65. In paragraphs 50 and 51 of *Sweetman* Clarke C.J. described the role of the collateral attack principles in the following terms:

"[The] collateral attack jurisprudence should only be deployed to prevent a substantive case being heard in circumstances where it is clear, on a proper analysis of the relevant scheme, that an earlier decision taken at some point in

the process in question is intended to be final and definitive concerning the issue in question. In such a case it will follow that an attempt to challenge the validity of the earlier decision, as grounds against the validity of a subsequent decision in the same process, outside of the time limit for challenging the original decision, amounts to an impermissible out of time collateral challenge to the decision earlier made and is in breach of the principle of legal certainty.

However, for the reasons already noted, such a course of action is only appropriate in a clear case…"

66. The Minister submits that since an issue estoppel arises in the present matter, there is no requirement for the Court to refer to the "*quasi res judicata*" concept of collateral attack. However, were the Court to find that the matter did not come within the strict confines of issue estoppel, it would nonetheless be appropriate to find that the appellant was engaged in a collateral attack on the judgment of Donnelly J. and that such attack constitutes an abuse of process.

67. It is acknowledged that the consent procedure concerns a new offence or offences and consequently, as the CJEU noted in *AZ*, potentially leads to a heavier sentence for the individual concerned. However, it is argued that this fact does not have implications for the dispute as to whether the consent procedure is a "stand alone" process or a continuation of the surrender process. An application under s.22(7) can only arise where there has been an earlier decision to surrender, and it would therefore be wholly artificial to regard the applications as unrelated. As part of the continuum, the court considering the section 22(7) application must engage in a proper consideration of the merits of the application to satisfy itself that the offence is one for which the surrendered person could, in fact, be surrendered and that none of the mandatory or optional grounds for refusal of surrender apply. These are the protections afforded in recognition of the fact that a section 22(7) application has potentially serious consequences, namely the imposition of a heavier sentence on an already surrendered person. However, such consequences do not serve to separate a section 22(7) application from the section 16 application from which it flows. It is the resulting

legal and factual linkages between the applications which forms the basis of the "nuanced" connection recognised by the Court of Appeal, and not any suggestion that a section 22(7) application is an application of minor effect.

68. The Minister submits that the principle that a preliminary ruling by the CJEU sets out the correct interpretation of EU law *ex tunc*, and has retrospective effect, does not prevent the application of national rules regarding the final legal effect of previous national court rulings. In the instant case, this means that the appellant cannot rely upon an issue which was the subject of a conclusive and necessary finding by Donnelly J. in the surrender application. Issue estoppel – as a national rule regarding finality - prevents redetermination of the issue by the domestic courts.

Discussion

69. The EU legal order emphasises the need to ensure "*both the stability of the law and legal relations and the sound administration of justice*" (*Kapferer v. Schlank*, Case C-234/04, ECLI:EU:C:2006:178; *Impresa Pizzarotti & C. SpA v. Commune di Bari* Case C-213/13 ECLI:EU:C:2014:2067). Accordingly, the value attributed by EU law to the principle of *res judicata* entails an acceptance of the fact that, in some circumstances, national rules of procedure may have the effect of rendering an infringement of EU law irremediable. It is therefore necessary for the Court to address, in the first instance, the question whether national law has the consequence urged by the Minister in this case, before turning to the relevant EU law principles. For that purpose, the Court must determine whether the rules of national procedure embodied in the concepts of *res judicata* and issue estoppel have, as a matter of national law, a role in the context of the European Arrest Warrant process, and, if so, the extent and effect of such application in the circumstances of the instant case. It may thereafter be necessary to consider the impact of such concepts upon the obligation to provide effective judicial protection to persons who are the subject of EAW applications.

70. It is, perhaps, best to start by referring to the terminology to be used in this judgment. The case has been argued by reference to the principles of *res judicata*, issue estoppel

and collateral attack. *Res judicata* is usually translated as *"the thing has been decided"*, and the point of the principle in the legal context is that when a case has been decided neither the parties nor their privies may seek to relitigate it in the hopes of getting a different result. The common law takes a similar approach to EU law in the reasons underlying the principle – the twofold justification lies in the public interest in the finality of judgments and the protection of parties from oppressive litigation. As McKechnie J. said in the judgment in *An Taisce v. An Bórd Pleanála* (referred to above), a family of legal principles can be identified which have the same objective but which operate in varying ways in different contexts.

71. Different subheadings have developed within the broad heading of *res judicata*. As McDermott pointed out in *The Law on Res Judicata and Double Jeopardy* (Butterworths, 1999), the terminology used in relation to those subheadings has not always been deployed in a consistent manner in textbooks or judgments. Since there is, in this case, agreement between the parties that the only relevant subheading is that concerned with issue estoppel, I will not attempt here the task of reconciling the authorities and producing a unified theory. However, it may be necessary to clarify the sense in which particular words are used for the purposes of this judgment.

72. A judgment that creates a *res judicata* will have the effect of preventing the successful party from bringing a fresh suit on the same cause of action. It will also be conclusive as against the unsuccessful party, in the absence of any feature such as fraud or lack of jurisdiction. This is sometimes referred to as "cause of action estoppel". There can be no doubt but that the decision of the High Court to surrender the appellant is *res judicata* in this sense. It cannot be re-opened or reversed, despite any error that may now be identified.

73. In private law litigation, an issue estoppel will arise in the circumstances set out in *Sweeney* and *George*. However, different considerations can arise in litigation that involves interpretation of a statute or a constitutional provision. The judgment of the majority of this Court in *Kildare County Council v. Keogh* [1971] I.R. 330 ("*Keogh*") makes it clear that an estoppel on such an issue would be contrary to public policy, since the meaning of a statue cannot depend on concessions made by parties or errors made by judges. That judgment was concerned with a demand for rates, in a case

where the High Court had held some years prior to the demand, on the construction of a statute, that the premises in question were exempt from rates.

74. The judgment in *Keogh* points out that, of course, a litigant may lose on the basis of the doctrine of precedent, since the point argued may be covered by a decision of a court of co-ordinate or higher jurisdiction. It is also stressed that the litigant who lost in the original proceedings cannot re-open the original decision with a view to setting it aside. However, where the proceedings before the court were different proceedings, based on a different claim, relating to a different period of time, the situation was different. Liability for rates for one year was always to be treated as inherently different to liability for another year, even though there might be the same question of law involved.

75. *Keogh* has been followed on a number of occasions in a context where, similarly, recurring claims such as claims for payment of taxes or other public charges are made under a statute. Each such claim will be different, insofar as it relates to a different time period or a different amount, and neither party can be precluded by previous acquiescence, or even a previous ruling of a court of competent jurisdiction, from mounting an argument as to the proper interpretation of the statute in question. (See for example the judgment of Carroll J. in respect of a claim for water charges in *Clare County Council v Mahon* [1995] 3 I.R. 193, where it was held that a decision of the Circuit Court to the effect that the defendants could claim the benefit of certain terms in a lease did not create an estoppel in subsequent claims in subsequent years.) The crucial point is that in cases of this nature a party is not debarred from arguing that an earlier decision was incorrect in law, whether or not the same arguments were raised in the earlier proceedings.

76. It may also be relevant to mention *Fingal County Council v. William P. Keeling & Sons Ltd.* [2005] 2 I.R. 8, although the argument for an estoppel in that case did not arise from an earlier decision of any court. A development commenced without planning permission, and three applications for retention were unsuccessful. The planning authority then sought an order under s.27 of the Local Government (Planning and Development) Act 1976 (the predecessor to s.160 of the Planning and Development Act 2000). The only question to be determined by this Court was

whether the developer could be permitted to defend the proceedings by arguing that the development was exempt. That question was answered in the following terms:-

> "*If a proposed development is, in fact and in law, an exempted development, no principle has been identified whereby the owner of land should be estopped from asserting the exemption merely by reason of the fact, and by nothing more, that he or she has made a perfectly proper and lawful application for planning permission. That would be to deprive him of a right at law by reason of his exercise of a different right, which would require cogent justification.*"

77. The issue in the instant appeal does not, of course, turn on the interpretation of the statute. The error of the High Court in 2017 was not based on the meaning of any words in the Act or the Framework Decision, but on an assumption, shared by the parties and the trial judge, that persons holding the office of public prosecutor in the Netherlands were entitled under EU law to act as issuing judicial authorities. However, the jurisprudence on the non-applicability of estoppel rules in the context of recurring claims under a statute may be relevant if the application for surrender and the application for consent are seen as "stand-alone" procedures, in which every aspect may be re-argued, as opposed to both being on a "continuum", or having a "nuanced relationship" that permits estoppel to operate.

78. Before turning to that aspect, it may be convenient to deal here with the debate relating to "collateral attack". I am satisfied that this concept is not of assistance in this appeal.

79. The collateral attack issue in *Sweetman v. An Bórd Pleanála* [2018] 2 I.R. 250 ("*Sweetman"*) also arose in the context of the two-stage procedure for the grant of development consent in respect of certain quarries that was introduced to replace the previous system of retention permission. At the first stage, the local planning authority had decided to direct the developer to apply to the Board for substitute consent. There was no challenge to that decision. At the second stage, the Board granted consent, and the applicant initiated proceedings challenging the lawfulness of that decision. The Board applied to have the proceedings struck out on the grounds

that they were, in reality, an impermissible collateral attack on the decision of the planning authority. That argument was rejected by this Court.

80. Giving the sole judgment, Clarke C.J. referred to the earlier jurisprudence on collateral attack, including *Nawaz v. Minister for Justice, Equality and Law Reform* [2013] 1 I.R. 142 ("*Nawaz"*). He noted that the rationale behind the jurisprudence was clear:-

> *"A party who has the benefit of an administrative decision which is not challenged within any legally mandated timeframe should not be exposed to the risk of having the validity of that decision subsequently challenged in later proceedings which seek to quash the validity of a subsequent decision on the basis that the earlier decision was invalid….*
>
> *The requirements of legal certainty make clear that a person who has the benefit of a decision which is not challenged within whatever time limit may be appropriate is entitled to act on the assurance that the decision concerned is now immune from challenge subject to very limited exceptions such as fraud and the like."*

81. However, it was also noted that the application of this general principle could be complex in the case of a decision making process involving more than one stage. In such circumstances, it was necessary to analyse the process concerned for the purpose of determining whether it was the overall intent of the scheme in question that the relevant issue or question be definitively and finally decided at the first stage, with no capacity to revisit the issue at any subsequent stage. Having considered that question, the Court determined that it was not sufficiently clear, for the purposes of the collateral attack jurisprudence, whether the issue upon which the applicant relied was a matter to be decided at the first or second stage. It was therefore not possible to decide whether or not there was a collateral attack, and the substantive case should proceed.

82. The issue in *An Taisce v. An Bórd Pleanála* also arose in the context of substitute consent for a quarry, in which a different statutory pathway had been utilised to that in

Sweetman. The challenge was against the decision of the respondent Board to grant substitute consent for a quarry. No challenge had been brought against its earlier decision, made some two years previously, to grant the developer leave to seek substitute consent. The High Court found that the complaint raised by An Taisce, despite the fact that it was in form directed to the consent decision, was in substance a complaint that leave to apply for consent should not have been granted. It was, accordingly, engaged in an out-of-time collateral attack based on grounds that could have been raised against that earlier decision.

83. It is important to note that McKechnie J. (with whom the other members of the Court agreed) commenced his discussion of this issue by observing (in paragraph 141) that if the national procedural rules associated with collateral attack, such as statutory time limits, were found to be applicable it would then become necessary to ask whether this involved a breach of any principle of EU law including the principles of equivalence and effectiveness.

84. The judgment refers to that of Clarke J. in *Sweetman* and to the more recent judgment of McKechnie J. in *P.N.S. v. Minister for Justice and Equality* [2020] IESC 11 ("*P.N.S.*"). In *P.N.S.* he had set out the applicable principles as follows:

> *(i) It is common case that subject to the following, a 'collateral attack', properly so classified, should be regarded as the equivalent of a direct attack on the subject measure for, inter alia, procedural purposes.*
>
> *(ii) In deciding upon the question, the Court looks at the gist and essence of the proceedings and in particular at the substance of the reliefs claimed. The phraseology used in the pleadings is not determinative: neither is a submission that there is no 'per se' challenge to the captured measure: substance prevails over form.*
>
> *(iii) It is an oversimplification to pitch the test only as being whether the purpose or motivation, object or effect of the proceedings is to mount a challenge to the measure in question. Purpose and motive alone may be sufficient: but on many occasions will not be: object together with effect will almost always be sufficient.*

(iv) *If an applicant can assert a right, either legally or constitutionally based, which is independently sourced, from that which underpins the validity of a deportation order, whether within the asylum process or otherwise, such a right should be given effect to even if there is consequential effect for the enforcement of the order: either conditioned in terms of time, steps or measures: such may arise in a variety of circumstances.*

85. Having examined the process in question, in accordance with *Sweetman*, McKechnie J. concluded that the submission made by the Board was well-founded in the circumstances of the particular case. Once a decision was made on the leave application, that decision was ring-fenced and could not be further reviewed or reversed at the substantive stage. Furthermore, those entitled to participate, and the information required, were different for each stage.

86. McKechnie J. considered that the submission that An Taisce had no issue with the leave decision did not bear scrutiny. He was particularly concerned, on this aspect, by the consequences of a finding in An Taisce's favour on the point raised by it – it would leave in place a decision, that was valid and had not been quashed, directing the addressee to apply for substitute consent. However, that decision would be "*devoid of effect and incapable of performance: it would be rendered meaningless and would stand in an utter vacuum hopelessly impotent*". For the purposes of this issue, therefore, the two decisions had to be regarded as being inextricably linked.

87. Next, McKechnie J. considered the issue within the context of EU environmental law. He noted that EU law did not, in principle, preclude the setting of reasonable time limits for challenges and that the statutory process under examination did not have the effect of rendering development projects lawful simply by expiry of the time limit for challenges. He observed that, in granting leave to appeal, the Supreme Court had anticipated that the influence of EU law on the area of substitute consent might require a particular approach to the application of the collateral attack jurisprudence in at least some cases. However, on the facts of the case it was not necessary. He concluded by saying:

"In the context of any future discussion however, it can be said at a general level that the doctrine of collateral attack is of course judge made and driven, and thus is capable of some adaptation or relaxation if a particular situation demands it. It is not, and not intended to be applied in some mechanical or formulistic way. In addition, a legislative challenge on constitutional grounds or where an issue of EU law arises could well attract different considerations from those which apply to an administrative law decision where a statute or the rules of court have provided for a certain timeframe. Such questions however, will have to remain for another day."

88. Turning to the procedures and facts of the instant case, I should initially say that I would not entirely agree with the submission of the appellant to the effect that a "collateral attack" can only arise in the context of repeated applications made by the same moving party, and that the prohibition therefore cannot be deployed where an issue is raised as a defence. There are many examples of two-stage procedures where a defendant could be debarred from arguing, at the second stage, a point upon which he or she has conclusively lost at the first stage. So, for example, a defendant in proceedings brought to enforce a court order may not be permitted to argue that the order was wrongly made, on the basis of arguments that were not made, or that failed, in the original proceedings and were not successfully appealed. There are also many examples of cases where a losing party in the initial proceedings launches separate proceedings that may, in form, be directed to a different issue but that in substance seek to remove the basis for the original decision.

89. However, it does seem to me that the cases in which a "collateral attack" was found have a particular feature in common. This is that the point now made, if successful, would have the effect of not simply casting doubt upon the earlier decision but of reversing its consequences. The party in question would either gain the benefit, or avoid the liability, at issue in the original proceedings. Thus, in *An Taisce v. An Bórd Pleanála*, success in such an argument would have meant that the developer could not have acted on the decision to commence the substitute consent process. In *Nawaz*, the challenge to the legislation would have had the effect of nullifying the deportation decision that had not been successfully challenged. In *Kenny*, the s.160 order sought by the appellant would have necessitated an effective reversal of the previous decision

that the compliance decision was valid, and would have given the appellant the benefit that he would have derived if he had been successful in the first place. In *A. v Governor of Arbour Hill Prison*, the appellant sought, in effect, the vacation of his plea of guilty and the consequent sentence of imprisonment.

90. It is true that the analysis of McKechnie J. leaves open the possibility that motive and purpose may be enough, but I cannot see that that would be so in this case. Here, there is no question of reversing or formally invalidating the earlier decision. A finding in favour of the appellant would have no legal impact whatsoever on that decision and could not be said to render it devoid of effect. Not only is it *res judicata*, but it has already been fully implemented. While a finding in favour of the appellant would certainly cast doubt upon its correctness, that result has already come about as an inevitable result of the CJEU decisions in *OG and PI* and *AZ.* The argument the appellant now makes is aimed, not at the earlier decision, but against a separate statutory procedure which has different and significant consequences for him if he loses. I consider, therefore, that the considerations underlying the collateral attack principles do not truly arise.

91. Next, then, comes the question of the role of issue estoppel in the EAW process. Proceedings under both the Extradition Act 1965 and the European Arrest Warrant Act 2003 have traditionally been described as unique, or *sui generis*, with the emphasis in this respect being on the inquisitorial role of the judge. Although cases may, as a matter of fact, be conducted in an adversarial fashion, the proceedings cannot be directly compared to either a criminal trial or normal *inter partes* litigation. The distinction is discussed in the judgments of Murray C.J. and Denham J. in *Attorney General v. Parke* [2004] IESC 100, an appeal under the Extradition Act 1965. The issue in the appeal arose from the fact that in the High Court, counsel for the State, in attempting to establish correspondence of certain drug offences specified in the warrants with offences under Irish law, had simply referred the court to those provisions of the Misuse of Drugs Act 1997 that create the offence of contravening a regulation, and had failed to actually produce the relevant Irish regulations. (By reason of the structure and wording of the Act, this would be considered an essential step to be taken by the prosecution in a criminal trial.) The High Court judge held that

the onus was on the Attorney General to satisfy the court that the regulations had been made and were in force, and refused to order surrender in the absence of such proof.

92. On appeal, this Court accepted that the trial judge had been correct in considering that the regulations had to be produced in order to establish the offence under Irish law. However, Murray C.J. and Denham J. (with both of whom McCracken J. agreed) were satisfied that, while the regulations should have been produced by counsel, it had also been the duty of the trial judge to enquire as to their existence and determine whether there was a corresponding offence under Irish law. This duty arose from the reciprocal nature of the bi-lateral or multi-lateral treaties upon which extradition was based, and the obligation of the State to give effect to a lawful request once that request was determined to meet the relevant legislative provisions. When the State authorities brought a person before the court, it was for the court to enquire as to whether all requirements for making an order had been fulfilled.

93. In that context, Murray C.J. said that it was clear that such proceedings could not be viewed through the concept of adversarial proceedings *inter partes*.

> *"For example, all the factual matters on which the High Court judge must be satisfied for the purpose of determining whether or not an order should be made pursuant to s.47 could not be done simply by means of a mere consent or admission unless such admissions are themselves evidence of a fact or the consent is expressly authorised by statute. It is the judge himself or herself which must be satisfied.*
>
> *In other words the Court hearing an application for extradition is put on an inquiry and the proceedings have an inquisitional nature. That is so even though the responsibility for bringing before the Court the necessary material or evidence necessary to demonstrate to the Court that all factual elements required by the statute, including evidence where necessary as to foreign law, lies with the State."*

94. Denham J. also stressed the unique role of the trial judge in proceedings of this nature.

"The hearing is not a criminal trial, in the adversarial sense where the State must prove the guilt of the accused beyond all reasonable doubt. Nor is it a civil case between two parties. It is a unique procedure where the court holds an inquiry as to whether the criteria set out in the Extradition Act 1965, as amended, has been met. Further, this law has been established against the backdrop that the State has entered into an agreement with the requesting State that there be extradition arrangements between the two States. Thus these cases are founded on the comity of nations and the comity of courts.

I am satisfied that there is a duty on a trial judge in an extradition case to make such inquiries of counsel as are relevant…."

95. As Murray C.J said in *Minister for Justice and Equality v. Sliczynski* [2008] IESC 73, the same principles apply to EAW proceedings. One of the issues in that appeal concerned the provisions of s. 20 of the European Arrest Warrant Act 2003 (which deals with requests from the executing judicial authority for further information from the issuing judicial authority), and Murray C.J. stated that the section highlighted the inquisitorial nature of the proceedings. Again, it was pointed out that the rules of evidence to be applied are not those of a criminal trial. In carrying out its function, the task of the court was to ensure that no one in this jurisdiction would be surrendered pursuant to the Act unless the court was satisfied that all criteria laid down by the Act and, where specified, in the Framework Decision, had been satisfied and that there was no other lawful bar to the making of the order.

96. It must also be borne in mind that the "*unique procedure*" is, without doubt, a *judicial* procedure rather than an administrative one. That was so under the Extradition Act 1965, and it remains the case in the context of the European Arrest Warrant Act 2003. The concept of the independent "*judicial authority*" is at the heart of the EAW scheme and is the main guarantee of effective protection for the rights of the individual.

97. The authorities concerning the applicability of *res judicata* and issue estoppel must, therefore, be considered with the unique nature of the EAW process in mind. Principles intended to assist in the just determination of adversarial disputes may not

always be appropriate to proceedings where the emphasis must be on the inquisitorial role of the court and the obligation to comply with commitments made to other States.

98. The first relevant decision is, I think, the decision of this Court in *McMahon v. Leahy* [1984] I.R. 525 ("*McMahon")*. The appellant in that case had been a member of the IRA and was one of a number of men who escaped from prison in Northern Ireland. On their recapture, they were charged with the offence of escape from lawful custody. During the course of those proceedings, the appellant escaped again, and he and four others made their way to this jurisdiction. The other four were arrested here within a matter of weeks and extradition proceedings were commenced. The four applied for their release in the High Court, on the argument that the offence in respect of which their rendition was sought (the escape from lawful custody) was a political offence or an offence connected with a political offence. While the record of what happened next is not entirely clear, the orders made reflect the fact that in at least two of the cases the State conceded the political nature of the offence. If the other two were opposed, the opposition was unsuccessful, and the State did not appeal.

99. Mr. McMahon was not arrested until 1983, by which time the approach of the courts to the political offence provision had changed significantly as a result of the decision in *McGlinchey v. Wren* [1982] I.R. 154 ("*McGlinchey")*. In accordance with this new approach, the High Court held against him in his application for release, on the basis that he had failed to discharge the burden of demonstrating that his offence was politically motivated. The appeal was unanimously allowed by this Court.

100. The judgment of Henchy J. records that one of the arguments made by counsel for the appellant was to the effect that, in view of the ambivalent and discriminatory attitude of the State, the Court should extend the law of estoppel by *res judicata* so as to debar the State from opposing his claim.

> *"He concedes that the orders made in the earlier proceedings against the four escapers seven years ago were not judgments in rem and that, consequently, he cannot bring the plaintiff's case within the accepted scope of estoppel by res judicata because the parties to the present proceedings are not the same as the parties to any of the earlier proceedings."*

101. This concession may require some clarification. Briefly, a judgment *in rem* is a judgment on the status of a person or thing, and is binding on all persons, and not merely those who participated in the litigation. Counsel in *McMahon* was acknowledging that extradition proceedings were *in personam* rather than *in rem*. In those circumstances, the traditional rules of *res judicata* held that the principle could be applied only where the earlier proceedings involved the same parties, and Mr. McMahon had not been a party to the cases of the other four men.

102. The argument that the scope of *res judicata*, as such, should be extended to cover cases of this sort does not appear to have gained any traction in the Court. It is not further analysed by Henchy J. or referred to in the other judgments. The appeal was allowed on the ground, in summary, that the State should not be permitted to adopt a stance that, if successful, would lead to the making of different orders in respect of persons who were in an identical position, since they were charged with identical offences committed in identical circumstances. To do so would be a breach of the constitutional guarantee set out in Article 40.1º, that all persons should be held equal before the law. Thus, while the end result was the same – the State was not permitted to make a case that it had not pressed in the earlier cases – the reasoning was grounded firmly in constitutional principles rather than the common law rules of *res judicata*.

103. In *Bolger v. O'Toole* (*Ex tempore,* Unreported, Supreme Court, 2nd December 2002) ("*Bolger*")) the applicant had, in the District Court, successfully relied upon certain defects in warrants as constituting a bar to an order for rendition under the Act of 1965. New warrants were issued, which sought to deal with those defects. The applicant argued that this was an unlawful attempt to retry the proceedings. He submitted that the issue determined in the first proceedings was not the defective nature of the warrants but was, rather, whether or not an order of rendition should be made. This would also be the issue in any second proceedings. On his argument there was, therefore, an "identity of cause of action" (and, obviously, the same parties were involved) giving rise to *res judicata.*

104. This argument was rejected in an *ex tempore* judgment delivered by Denham J. on behalf of the Court. The Court held that the warrants were new, and that therefore any issues raised would be new. The fact that the applicant had previously been discharged by the District Court on foot of a previous set of warrants did not exclude a fresh set of warrants from being produced. Denham J. did, however, note that it could be possible, depending on the circumstances of the case, to raise an argument that the subsequent application was an abuse of process.

105. *Bolger* was cited in another *ex tempore* judgment in *Attorney General v. Gibson* (*Ex tempore*, Unreported, Supreme Court, 10th June 2004) ("*Gibson*") (also a case dealt with under the Act of 1965). A District Judge had refused to make an order for extradition on the basis that the warrant did not provide sufficient detail, for the purpose of establishing correspondence, of the acts alleged against the respondent. An offer by the judge to state a case to the High Court was not taken up by the Attorney General. A fresh warrant was issued, setting out the alleged acts in greater detail, and the matter came before the High Court. It was argued unsuccessfully that the doctrine of *res judicata*, or alternatively abuse of process, applied and that the High Court should not re-open the matter. In delivering judgment in the appeal, Keane C.J. stated (with reference to *Bolger*) that it was clear beyond argument that the mere fact that a warrant had been issued earlier in respect of the same offence, and had been adjudicated upon by a court of competent jurisdiction, did not, without more, preclude a subsequent application to a court of competent jurisdiction on the basis of a new warrant.

106. It was noted that there might be cases where a second application for an order, in reliance on the same warrants, might be met by a defence of *res judicata* or abuse of process. *Res judicata* would arise where a final decision had been made, that was binding as between the parties and their privies. "*But where they are different warrants the law is as stated in the Bolger case that it is then a matter for the court which is asked to extradite the person concerned to consider whether the statutory requirements have been met*." The two courts would not be dealing with the same issue, since the question each time would be whether an order should be made in respect of the warrant or warrants before the court.

107. The application for surrender in *Minister for Justice v. Tobin* [2012] 4 I.R. 147 gave rise to several important issues, most of which are not of relevance here. An earlier application for the surrender of Mr. Tobin had been rejected on the basis that the wording of the European Arrest Warrant Act 2003, as originally enacted, required the person concerned to have "*fled*" the issuing State. Following an amendment to the Act, a fresh application was made on foot of what was otherwise substantially the same warrant. A majority of this Court (Hardiman, Fennelly and O'Donnell JJ) considered that, while technically there was no *res judicata* in the case, surrender should nonetheless be refused. Denham C.J. and Murray J. dissented. The approaches taken in the five judgments vary somewhat and it may be helpful to consider them individually.

108. In her dissenting judgment, Denham C.J. stressed, again, the *sui generis* nature of the EAW process, the fact that it was based on agreement with other States and the fact that it did not determine any civil or criminal issue. She referred to *Bolger* and *Gibson*, and stated that the issue that had been determined in relation to the previous warrant in *Tobin* had been whether or not the person had "*fled*". There was now a new warrant, and that issue did not arise. While a determination on an issue such as delay could govern a subsequent warrant, a ruling based on a discrete issue such as the "*fled*" point did not preclude the issuing of a new warrant where that point did not arise.

109. Denham C.J. noted that the amendment to the Act brought it into conformity with the Framework Decision and so could not be considered to be an abuse of process on the part of the Oireachtas. The request for surrender by the authorities of the issuing State was in keeping with the scheme of the European Arrest Warrant Act 2003 and, equally, was not an abuse of process. Neither was the application to the court made by the Minister. Since the issuing of a further warrant after the rejection of a previous one was not *per se* an abuse of process, some further element had to be present to ground a finding of abuse. She did not accept that there was any such element.

110. Murray J. (also dissenting) agreed with Denham C.J. that there was no abuse of process. He referred to the *res judicata* issue in the following obiter remarks: -

> *"On the question of* res judicata *I would observe that no issue concerning the application of that doctrine arises in this case, the parties having acknowledged the established principle that the doctrine does not apply to extradition cases (the general application of the doctrine of* res judicata *should not be confused with the subsidiary principle of issue estoppel, which would apply, or with other issues)."*

111. Hardiman J. accepted that it was well established that the dismissal on "*technical*" grounds of an application for extradition did not create a *res judicata.* He focused, rather, on the availability of the defence of abuse of process, as left open in *Bolger*. It is noted in the judgment that counsel for the Minister submitted that the abuse of process jurisprudence should not be applied to the EAW process, arguing that it was a difficult concept to reconcile the wide-ranging nature of the jurisdiction concerned and the absence of the doctrine of *res judicata*. Hardiman J. rejected this argument in round terms, having regard to the decision in *Bolger*. Ultimately, he based his decision on a finding that the prolonged nature of the proceedings in the case, including what he saw as the unjustified and lengthy pursuit of the first application through the appellate process, amounted to unjust oppression.

112. Fennelly J., although disagreeing with many aspects of the approach taken by Hardiman J., agreed with him insofar as he found that the appellant had been put through the same judicial process twice in circumstances that had exposed him to unnecessary hardship, distress and expense.

113. O'Donnell J. noted that counsel for Mr. Tobin had, in making his arguments on the abuse of process ground, recognised that the doctrine of *res judicata* did not apply to "proceedings such as this". He saw this concession as having been wisely made and almost inevitable in the light of decided authority. Disagreeing with Hardiman and Fennelly JJ on this aspect, he accepted the case made by the Minister to the effect that the abuse of process argument, being based on no more than a generalised assertion of unfairness, was impossible to reconcile with the principle that a prior unsuccessful application was normally no bar to a subsequent, successful application. Even assuming that the jurisdiction to prevent an abuse of process could apply to bar surrender in this context, the normal remedy would be to strike out or stay the

proceedings. In any event the matters put forward by the appellant could not either individually or cumulatively constitute such abuse.

114. It is of relevance here to note that, while the appellant did not rely upon *res judicata*, he did argue that the previous decision in his favour gave him the benefit of a judicial determination with which, as a matter of constitutional principle, the Oireachtas could not interfere. He combined this with a submission, based on the passage already cited above from *A. v Governor of Arbour Hill Prison*, to argue that the finality accorded to judicial decisions meant that the perceived exclusion of the concept of *res judicata* from extradition matters should be construed more narrowly. The judgment in *McMahon* was cited in this context.

115. O'Donnell J. observed that the argument upon which the plaintiff in *McMahon* had succeeded depended on an assumption that the four other escapers could not have been extradited after the change in the law brought about by *McGlinchey*.

> *"If it had been possible to renew the application for their extradition it would not have been possible for the plaintiff in McMahon v. Leahy to argue that his treatment was invidious discrimination. Therefore it can be said that McMahon v. Leahy itself rests upon at least a presumption that notwithstanding a change in the law, it was not possible to revisit the question of the extradition of persons who had been the subject of a final binding judicial determination on a matter of substantive law. Of course to derive that conclusion from McMahon v. Leahy was to lay considerable weight on what was no more than an assumption,…"*

116. He noted that there did not appear to have been any recorded case, before the introduction of the EAW system, where a second attempt was made to extradite a person following a change in the applicable law. However, he considered that the correct position was that while the original decision could not be reversed, that did not mean that a law could not be changed. The original decision in Mr. Tobin's favour did not grant him permanent immunity, and to hold that it did would run counter to the established case law establishing that there can be repeated applications. On this aspect, O'Donnell J. concluded that cases such as *McMahon* should be seen as being

consistent with a view that the determination of a court of competent jurisdiction was "a matter of some legal significance", but fell short of establishing a principle that success on a point of law brought with it a form of permanent immunity from surrender.

117. It will be seen, therefore, that all members of the Court accepted that the principle of *res judicata* had no role to play, while leaving open the possibility that issue estoppel could arise. Three judges relied upon the established principle, that repeat applications for surrender were possible, in rejecting the contention that there had been an abuse of process.

118. In *Minister for Justice and Equality v. Bailey* [2012] IESC 16, [2012] 4 I.R. 1, this Court refused to order the surrender of Mr. Bailey to France on a charge of murder, on the basis *inter alia* of the analysis by a majority of the provisions of s.44 of the Act of 2003. That section deals with cases involving extraterritorial jurisdiction. A fresh warrant was issued by a French issuing authority in 2017. This was the subject of a High Court judgment in *Minister for Justice and Equality v. Bailey (No.2*) [2017] IEHC 482 (*"Bailey (No. 2)"*) .

119. It was submitted on behalf of Mr. Bailey that *res judicata* and/or issue estoppel applied so as to prevent the Minister from re-litigating the matter of surrender. The Minister argued that *res judicata* did not apply in extradition, and that to apply it could preclude a Member State from complying with its obligations under EU law. The placing of a fresh warrant before the court gave rise to a fresh application to be determined, and the *prima facie* obligation to surrender arose.

120. Hunt J. was satisfied that there was a critical distinction to be drawn between the refusal of surrender in earlier proceedings and the conclusive determination of an issue of law or fact as part of that refusal. The latter remained binding, on the basis of issue estoppel rather than *res judicata*, in the absence of a material change to the legal or factual circumstances. In the case before him there was neither – despite the Minister's dissatisfaction with this Court's interpretation of s.44, the legislation had not been amended.

121. While the Minister stressed that he was not seeking to re-open the issue of the validity of the first warrant, Hunt J. felt that this was beside the point. The second warrant was different and had to be assessed individually, but there was no relevant change in circumstances that would allow the High Court to take a different view on the extra-territoriality issue to that reached by the Supreme Court in relation to the first warrant. The High Court could not adopt the view of the minority on the issue. In the circumstances, he considered that the bringing forward of the second warrant was an abuse of process, amounting to an unjustified attack on the final and binding decision of the Supreme Court.

122. The Minister sought to persuade Hunt J. to refer a question to the CJEU as to the correct interpretation of the underlying provision of the Framework Decision. Hunt J was satisfied, *inter alia*, that the necessity for such a reference did not arise, as the issue concerned the interpretation of domestic law and had been conclusively determined in the earlier proceedings.

123. A third warrant seeking the surrender of Mr. Bailey was issued in 2019, leading to the decision in *Minister for Justice and Equality (No. 3)* [2020] IEHC 528. This followed upon his conviction for murder in a trial conducted *in absentia* in France, with the requisite guarantee of a right to a re-trial being offered. Before the High Court, the Minister relied upon the argument that the Irish provisions relating to extraterritoriality had been amended, with consequent effects for the reasoning underlying the decision of the Supreme Court. Counsel for Mr. Bailey argued that the case would still be decided the same way, notwithstanding the amendments. Having considered the judgments carefully, Burns J. concluded that s.44 continued to preclude surrender.

124. The question of the applicability of issue estoppel was part of the debate. In addressing this aspect, Burns J. noted that it was now well-established that *res judicata* did not apply to extradition or surrender proceedings, in that a refusal of surrender on foot of a particular warrant was not, of itself a bar to a subsequent request with a fresh warrant. It was also well established that this did not mean that an issue estoppel might not arise. Burns J. noted that the decision of Hunt J. in *Bailey*

(No. 2) had not been appealed. It was therefore binding on the parties as regards the issues determined by it.

Conclusions

125. It seems to be clear from all of the foregoing that issue estoppel can, in principle, arise in the context of EAW proceedings. It will not prevent consideration of a new warrant, after a refusal to surrender in respect of an earlier one, for the purpose of determining whether or not the respondent should be surrendered. However, it may, in the absence of a change in the relevant legal or factual circumstances, determine the outcome of an issue sought to be raised in relation to that new warrant. I would consider, in this context, that a distinction between "technical" and "substantive" issues may not be particularly helpful. However, it seems that a conclusive ruling on a legal issue that is not specific to the terms of the individual warrant before the court may in principle be binding on the parties to the litigation in which the ruling was given, in the absence of any material change to the law. Similarly, it would seem that a refusal to surrender based on a factual finding that will not change (for example, in relation to the age of criminal responsibility) could be binding. However, a decision that arises from the terms of the warrant itself may not have the same effect, since each new warrant can give rise to new issues and must be given full consideration.

126. In the instant case, there can be no doubt but that Donnelly J. must be taken to have determined that the three warrants before her had been validly issued by competent judicial authorities. She said so expressly in respect of two and it is, I think, certainly implicit in relation to the third. Equally, there can be no doubt about the fact that these were, as a matter of law, essential findings if an order for surrender was to be made on each warrant. I do not think it appropriate for a court considering a subsequent application under s.22(7) to engage in a dissection of the submissions made, or the terms of the judgment, with a view to determining the exact degree of scrutiny applied in reaching her expressly stated conclusions.

127. The next question, then, is whether, and if so how, the principles of issue estoppel apply in this appeal. If this case concerned matters of purely private law, the domestic authorities on issue estoppel as summarised in *Sweeney* and, more recently, *George*

suggest that the criteria for an estoppel in this case have been met. If the case turned on the construction of a statute, issue estoppel could not preclude the court from finding that an interpretation advanced in earlier proceedings was wrong. However, the matter is somewhat more complex.

128. There are, I think, strong arguments on each side of the debate, which must be considered while bearing in mind the unique nature of the EAW process. What the Court is concerned with here is not a typical two-stage process in adversarial litigation (of either a public or private law nature) of the kind that the courts here deal with fairly frequently. Although the necessity for an application for an order of consent can, by definition, only arise if there has previously been an order of surrender (since otherwise the provisions relating to the rule of specialty have no relevance), the application made by the Minister for an order of surrender on foot of an EAW is in no sense to be seen as a step towards the objective of obtaining an order of consent to the waiver of specialty. If successful, it achieves the objective of the warrant – the surrender of the respondent for trial and/or enforcement of a sentence for the offence(s) specified. A subsequent application for consent, while necessarily predicated on the fact of surrender, is geared towards prosecution and/or punishment for entirely separate matters and will, if successful, expose the respondent to entirely separate liabilities. Further, the statute expressly provides that any of the arguments that could be raised in an EAW process can be raised in objection to the granting of consent.

129. A further important consideration is that domestic law, while attributing high value to the principles of finality in litigation, does not entirely preclude the retrospective effect of a judicial decision that sets a precedent in law. As Murray C.J. said in *A. v Governor of Arbour Hill Prison*, such a decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or a similar wrong "*provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law such as a statute of limitations*." Significantly, he added the following:

> *"It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally*

determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position."

130. Applying this analysis, then, if the High Court was correct in describing the s.22(7) application as part of a "continuum" with the original EAW proceedings, that might in fact support the argument that the appellant is entitled to rely upon a judgment delivered before his litigation had finally concluded. That was the outcome in *Cunningham*, where an appellant before the Court of Criminal Appeal was held to be entitled to rely upon a Supreme Court decision given between his trial and the hearing of his appeal.

131. However, in my opinion the "continuum" analysis is mistaken. It would, I think, be highly artificial to see a final, executed order for surrender as only a stage in the litigation in this jurisdiction. Applications for consent to waive the rule of specialty are neither a consequence of the order for surrender nor an automatic, or even a frequent, sequel to surrender, and they must in principle be justified on their own terms.

132. It is also essential, as McKechnie J. emphasised, to bear in mind the EU law context for the debate. I note here that the case made by the Minister could have some unexpected consequences for the operation of the EAW system. Consider the following hypothetical scenario. An Irish judge is presented with two EAWs issued, respectively, by Official A and Official B. The judge decides that warrant A is valid, but that Official B is not a competent issuing authority. The individual will then be surrendered on warrant A but not on warrant B. The CJEU then delivers a judgment that makes it clear that officials in the position of Official B are indeed competent for the purpose. Official B then seeks the consent of the Irish court, under s.27(7), in order to proceed in relation to the offences specified in warrant B. If the Minister's argument is correct, and issue estoppel applies notwithstanding the fact that the earlier decision was clearly wrong in law, then consent must be refused.

133. It is worth noting here that in *Amministrazione dell'Economia e delle Finanze and Agenzia delle entrate v. Fallimento Olimpiclub S.r.l. C-2/08*(one of the judgments cited in *Cronin v. Dublin City Sheriff* [2018] 3 I.R. 191), the CJEU discussed the role

of a national rule of *res judicata* in the context of a decision made by an administrative agency when interpreting EU law in relation to an agreement about tax. The Court agreed that the domestic rule of finality did not require to be disapplied with the effect of reopening the decision. However, it stated that the decision could not be given binding effect in relation to subsequent years, if it was in breach of EU law. This appears to indicate that a national court should, when considering a matter that is related to previous proceedings but requires a separate decision, apply the correct law as found by the CJEU rather than continuing with the mistaken view, even if national procedural rules would favour the latter. As it happens, the domestic law (as discussed in *Keogh* and the other authorities mentioned above) would lead to the same conclusion in a similar context.

134. While EU law respects national rules of procedure, and in particular respects the legal principles underlying the concept of the finality of judgments, it also enjoins Member States to ensure that the principles of effectiveness and equivalence are observed. Equivalence is not in issue here, but effectiveness may well be impeded in circumstances where the application of the national rule could result, not alone in a clearly-justified refusal to reopen a past decision, but in a more questionable refusal to apply the correct EU rule to a decision that has yet to be made.

135. On the other hand, a strong argument can be made that to find for the appellant would be to grant him a windfall, brought about by his own failure to raise the point about the issuing authorities in the 2016 proceedings. Had that argument been made at the time, it must, ultimately, have been successful although a reference to the CJEU would presumably have been required. Had that happened, surrender on the warrants before the court would have been refused, but there is no reason to suppose that fresh warrants would not have been issued by a judge of the Netherlands acting under the amended law of that State. But, given what has actually occurred, the mistake would now, if the appellant is correct, be irremediable under any process. I do not suggest that this situation has come about as the result of a planned strategy – the likelihood is that all concerned were under the impression that the earlier jurisprudence of the CJEU simply required an issuing authority to be involved in the administration of justice and to be authorised by national law. Nonetheless, the effect would be that the

appellant would now be permanently immune from the consequences of conviction for offences considered to merit a life sentence.

136. The issue comes down, in my view, to the correct legal analysis of the relationship between the order for surrender and the subsequent application for consent to the waiver of the rule of specialty. There is no pre-existing Irish law on this question, because under the Extradition Act 1965 waiver of specialty was a matter for the executive.

137. In terms of domestic law, the extradition process is considered unique. This is due to, amongst other things, the acknowledgement by the courts of the fact that extradition legislation is passed on foot of an agreement between States, by which this State undertakes certain obligations. The inquisitorial nature of the proceedings means that the judge-made litigation rules applicable in other contexts do not always apply, or may apply in a different way. The outcome of a case is less dependent on the evidence and arguments raised by the parties, since the judge has an independent power to seek relevant information and to point out omissions. The two processes involved here – a request for surrender and a subsequent request for consent – cannot, therefore, necessarily be categorised for the purposes of the rules of issue estoppel in quite the same way that other litigation may be.

138. Ultimately, it seems to me that the legal relationship between the procedures is a matter to be determined by EU law, since the national legislation is aimed at the implementation of the Framework Decision and the key concepts involved have been held to be autonomous concepts of EU law.

139. The significant decision here is *AZ*, where the CJEU rejected an argument to the effect that the Belgian court could not examine the validity of the surrender and consent procedures established under the law of the Netherlands, despite the fact that that argument was based on the objectives of the Framework Decision and the obligation of mutual trust between Member States. That aspect of the ruling was grounded upon the significance of the consequences of the consent process for the individual concerned. In those circumstances it would seem anomalous if a national court were to refuse to consider the correctness of a finding made in the course of a

decision within its own jurisdiction for the purpose, not of reversing or otherwise invalidating the order for surrender, but of permitting the subject of the warrant to argue that the consent procedure should not be implemented.

140. When asked to limit the temporal effect of its ruling the CJEU said, as it has said in many previous judgments over the years, that when it clarifies and defines the meaning and scope of a rule as it must, or ought to have been, understood and applied from the time of its coming into force, "*it follows that the rule as thus interpreted may and must be applied by the courts to legal relationships arising and established before the delivery of the judgment* …" provided that the rules for bringing the issue before a court of competent jurisdiction are otherwise satisfied.

141. In applying this analysis to the case, I would describe the "issue" sought to be brought before the court as being the effect, for the purposes of an application for consent to the waiver of specialty, of an intervening ruling by the CJEU to the effect that the original warrants were issued by officials who did not have the legal status of "issuing authority". The relevant rule which might prevent the appellant from bringing the issue before the court is the national procedural rule of issue estoppel which can debar a litigant from raising a point that must be taken to have been determined in the earlier proceedings in this jurisdiction between the same parties. Whether that rule applies in these circumstances depends on the legal relationship between the two procedures.

142. It seems to me that the definition of that legal relationship depends upon the correct interpretation of the Framework Decision, in the light of the judgments of the CJEU in *OG and PI* and *AZ*, and is thus a matter of EU law, and that it is not *acte clair*. Primarily, the question is whether the two procedures are so closely linked that a matter necessarily determined for the purposes of a surrender order must be taken as having been determined for the purposes of any subsequent request for waiver of the rule of specialty, or whether they are separate and "stand alone" procedures.

143. In my view it is necessary for this Court to refer certain questions on this issue to the CJEU under Article 267 of the Treaty on the Functioning of the European Union. I propose that the reference should be made in the terms set out in a separate document to be circulated with this judgment, and that the parties should be given a period of

seven days to make observations on the text of that document. It must be emphasised that the decision which I propose should be made by this Court would definitively determine that there should be a reference and would also definitively determine the broad issues that require to be addressed. The observations of the parties, in that context, should be confined to matters of detail or issues concerning the precise wording. I would propose that having received any such observations as are received within that timeframe the Court should then finalise the document and arrange for its transmission to the CJEU.

144. In view of the need for clarity as to the legal status of the appellant under the law of the Netherlands, I would also propose that the CJEU be requested to apply the expedited or urgent rules of procedure.