

**THE HIGH COURT**

[2021] IEHC 572

**Record No. 2018/225 EXT**

**BETWEEN**

**MINISTER FOR JUSTICE AND EQUALITY**

**APPLICANT**

**AND**

**GIEDRIUS GUSTAS**

**RESPONDENT**

**JUDGMENT of Ms. Justice Donnelly delivered this 12th day of May, 2021**

1. The surrender of the respondent is sought by a judicial authority of the Republic of Lithuania pursuant to a European Arrest Warrant ("EAW") dated the 24th May, 2018. His surrender is sought to serve the remaining portion, amounting to 1 year, 7 months and 24 days, of a 4 year and 6 months sentence imposed upon him by a Court in Norway for the offence of possession of 4.6kg of methamphetamine which he had transported from Sweden into Norway in the exhaust pipe of a car. According to the EAW that imprisonment sentence imposed by the Norwegian court "was recognized in the Republic of Lithuania by the decision of the District Court [in a region of Lithuania]". An appeal against that recognition took place in Lithuania but was dismissed. He commenced serving his sentence in Lithuania. A Lithuanian court subsequently released the respondent on parole on certain conditions. The EAW states that he failed to comply with these conditions and his parole was reversed thereby rendering him liable to serve the remaining portion of the sentence set out above.

**Preliminary Reference to the Court of Justice of the European Union**

2. This Court made a preliminary reference to the Court of Justice of the European Union (CJEU) in respect of issues arising in this case. The CJEU, in a decision of the 17th March 2021 (Case-488/19, entitled *JR*), answered those questions. The matter has now returned to this Court for determination as to whether an order for surrender should be made. The respondent does not accept that the answers of the CJEU are dispositive of the case.
3. In order to understand the issues before me it is helpful to repeat much of the information contained in the preliminary reference that this Court made to the Court of Justice. The particulars of the EAW are as follows:
  - (i) An EAW in proceedings 2018/225 EXT issued for the purpose of executing a sentence of imprisonment for a single offence of unlawfully storing, transporting, forwarding, selling or otherwise distributing "a very large narcotic or psychotropic substance". The EAW is accompanied by additional information dated the 16th October 2018; additional information dated the 14th March 2019; and additional information dated 18th March 2018.
  - (ii) The respondent is a Lithuanian national. He was detected in the Kingdom of Norway with around 4.6kg of methamphetamine, hidden in the exhaust pipe of the car he was driving. In Lithuania he had agreed to the proposal to deliver the drugs to Norway for a reward of €570. He transported the drug from Lithuania by driving

across a number of international borders and eventually crossing into Norway from Sweden. He was stopped at a fuel station five kilometres from the border.

- (iii) He was convicted and sentenced for "unlawful delivery of a very large quantity of narcotic substances" in Norway. He was sentenced to 4 years and 6 months of imprisonment.
  - (iv) The conviction and sentence were recognised by Lithuania. Following this, the respondent was transferred as a sentenced person from Norway to serve the remainder of his sentence of imprisonment in Lithuania. Whilst released on conditional parole subject to conditions of intense supervision, the respondent fled the issuing state. He was arrested in Ireland, the executing member state on foot of the within EAW. An immediately enforceable sentence of imprisonment of 1 year, 7 months and 24 days remains to be served.
4. At the initial hearing before me, the respondent objected to his surrender in submitting that:-
- a) only the judicial authority of the member state where he was convicted is entitled to request his surrender (his conviction being in Norway, a non-member state) and his surrender is prohibited by s. 10(d) of the European Arrest Warrant Act, 2003 as amended ("the Act of 2003") and/or the 2002 Framework Decision on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) ("the Framework Decision"); and
  - b) the offence of which he was convicted is an extraterritorial offence, and his surrender is prohibited by s. 44 of the European Arrest Warrant Act 2003 as amended ("the Act of 2003"), which gives effect to Article 4.7(a) and (b) of the Framework Decision.
5. The Minister responded by submitting that the respondent's surrender was sought in reliance on a sentence of imprisonment recognised and duly ordered by the issuing member state, by virtue of a valid bilateral agreement. The Minister submitted that this was sufficient to bring the request for surrender within the terms of the Framework Decision and the Act. In the circumstances, the Minister submitted that an extraterritoriality prohibition on surrender does not arise in the face of the issuing state's immediately enforceable order for a sentence of imprisonment.
6. In the alternative, the Minister submitted that the description of facts stated in the EAW demonstrate that the respondent could hypothetically be prosecuted in Ireland for the domestic offence of conspiracy to possess controlled drugs for the purpose of sale or supply. Thus, surrender is not prohibited on the basis of extraterritoriality. It was within that context that the Court made a request for a preliminary ruling.

**Questions Referred for Preliminary Ruling:**

7. This Court posed the following questions for the CJEU:

- A. Does the Framework Decision apply to the situation where the requested person was convicted and sentenced in a third state but by virtue of a bilateral treaty between that third State and the issuing state, the judgment in the third state was recognised in the issuing state and enforced according to the laws of the issuing State?
- B. If so, in circumstances where the executing member state has applied in its national legislation the optional grounds for non-execution of the European arrest warrant set out in Article 4.1 and Article 4.7(b) of the Framework Decision, how is the executing judicial authority to make its determination as regards an offence, which is stated to be committed in the third state, but where the surrounding circumstances of that offence display preparatory acts that took place in the issuing state?

### **The Answers to the Questions**

8. The CJEU answered those questions as follows:

- a) Article 1(1) and Article 8(1)(c) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as meaning that a European arrest warrant may be issued on the basis of a judicial decision of the issuing Member State ordering the execution, in that Member State, of a sentence imposed by a court of a third State where, pursuant to a bilateral agreement between those States, the judgment in question has been recognised by a decision of a court of the issuing Member State. However, the issuing of the European arrest warrant is subject to the condition, first, that a custodial sentence of at least four months has been imposed on the requested person and, second, that the procedure leading to the adoption in the third State of the judgment recognised subsequently in the issuing Member State has complied with fundamental rights and, in particular, the obligations arising under Articles 47 and 48 of the Charter of Fundamental Rights of the European Union.
- b) Article 4(7)(b) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, must be interpreted as meaning that, in the case of a European arrest warrant issued on the basis of a judicial decision of the issuing Member State allowing execution in that Member State of a sentence imposed by a court of a third State, where the offence concerned was committed in the territory of the latter State, the question whether that offence was committed 'outside the territory of the issuing Member State' must be resolved by taking into consideration the criminal jurisdiction of that third State – in this instance, the Kingdom of Norway – which allowed prosecution of that offence, and not that of the issuing Member State.

### **The Remaining Issues for Determination in this Judgment**

9. The parties made further written submissions to the Court following the decision of the CJEU on the 21st March, 2021. At the continued hearing on the 30th April, 2021, the

parties made further oral submissions. The respondent confirmed that his objection to surrender was based upon his contention that his surrender was prohibited by the relevant provisions of the Act of 2003. To that extent he argued that the decision of the CJEU interpreting the provisions of the Framework Decision was not of relevance to the decision this Court had to make. That contention was urged upon the Court on the following three grounds:

- (i) The conforming interpretation obligation (assuming it otherwise applies here) does not permit Framework Decisions to impose obligations or detriments on individuals who are not in some manner instrumentalities of the State.
- (ii) These answers have no application to circumstances in existence prior to the 1st November 2019, such as here, when the EU-Norway and Iceland Treaty went into force, nor can they operate retrospectively.
- (iii) Regardless of the foregoing, the answers given are so incompatible with the relevant provisions of the Act of 2003, that it cannot be “conformingly” interpreted in the same way, *i.e.* such interpretation would be *contra legem*;

**Ground i: The Framework Decision and Conforming Interpretation**

10. This ground was not argued before me prior to the referral and was apparently not made before the Court of Justice of the European Union. The respondent now makes the argument to say that this Court is not entitled to use the conforming interpretation principles to impose detriments on him and consequently s. 10(d) and s. 44 must be interpreted no differently from other legislation. Counsel submits that the argument only came to mind late in the day (even after his initial written submissions to this Court filed in the aftermath of the CJEU decision).
11. This submission hinges on the argument that because the Third Pillar of the pre-Lisbon Treaty on the European Union (TEU), under which the Framework Decision on an EAW was adopted, stipulated that such instruments did not have “direct effect”. The present TEU did not change that rule. The respondent accepts that as interpreted in *Pupino* (Case C-105/03), where possible, national law must be interpreted to conform with a relevant Framework Decision. The legal basis for this conforming interpretation requirement is that Member States may not rely on their failure to apply or properly apply EU law to escape their obligations under that law, relying on the principle of sincere cooperation in Article 4(3) TEU.
12. The respondent submits that Article 4(3) does not place legal obligations on private individuals and bodies. Accordingly, the respondent submits that, like Directives, Framework Decisions do not place obligations/impose detriments on private individuals and bodies. He relies upon *Smith v. Meade* (Case C-122/17) concerning Directive (now) 2009/13 on motor vehicle insurance in which the CJEU stated at para 42:

*"The fact remains that the Court has also consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as*

*such against an individual (see, inter alia, judgments of 26 February 1986, Marshall, 152/84, EU:C:1986:84, paragraph 48; of 14 July 1994, Faccini Dori, C 91/92, EU:C:1994:292, paragraph 20; and of 5 October 2004, Pfeiffer and Others, C 397/01 to C 403/01, EU:C:2004:584, paragraph 108). If the possibility of relying on a provision of a directive that has not been transposed, or has been incorrectly transposed, were to be extended to the sphere of relations between individuals, that would amount to recognising a power in the European Union to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations (see, to that effect, judgment of 14 July 1994, Faccini Dori, C 91/92, EU:C:1994:292, paragraph 24)."*

13. In the respondent's submission, the conforming obligation cannot be deployed by the State to impose obligations/detriments on private individuals and bodies but can be involved against instrumentalities of the State. The respondent relies upon the case of *Farrell v. Whitty* (Case C-413/15) to that effect.
14. In my view, the cases relied upon by the respondent do not support the contention that the principle of conforming interpretation cannot be relied upon by a Court interpreting the Framework Decision in circumstances where to do so would create an obligation on an individual; in this case, to be surrendered against his will. The *Smith v. Meade* judgment was given in the context of a dispute that was wholly between private individuals. It concerned a situation where the private individual was seeking to rely upon the particular directive.
15. A close examination of that judgment reveals that the CJEU repeated that the Member States' obligation arising from a directive to achieve the result envisaged by the directive, and their duty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is "*binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts.*" (Emphasis added) at para. 38 of *Smith v. Meade*.
16. The CJEU stated, that in applying national law, national courts called upon to interpret that law are required to consider the whole body of rules of law and to apply methods of interpretation that are recognised by those rules in order to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently to comply with the third paragraph of Article 288 TFEU. The CJEU went on to repeat that the principle of interpreting national law in conformity with EU law has certain limits. Thus, the obligation on a national court to refer to EU law when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law that is *contra legem*. The CJEU said at para. 41 of *Smith v. Meade*, "[i]n that regard, it is true that the question whether a national provision must be disapplied in so far as it conflicts with EU law arises only if no interpretation of that provision in conformity with EU law proves possible."

17. Paragraph 42 of the judgment, relied upon by the respondent, is set out at para. 13 above. Immediately thereafter the CJEU stated :
- "43. Accordingly, even a clear, precise and unconditional provision of a directive seeking to confer rights on or impose obligations on individuals cannot of itself apply in a dispute exclusively between private persons (judgments of 5 October 2004, *Pfeiffer and Others*, C 397/01 to C 403/01, EU:C:2004:584, paragraph 109; of 24 January 2012, *Dominguez*, C 282/10, EU:C:2012:33, paragraph 42; and of 15 January 2014, *Association de médiation sociale*, C 176/12, EU:C:2014:2, paragraph 36).
44. The Court has expressly held that a directive cannot be relied on in a dispute between individuals for the purpose of setting aside legislation of a Member State that is contrary to that directive (see, to that effect, judgment of 27 February 2014, *OSA*, C 351/12, EU:C:2014:110, paragraph 48).
45. A national court is obliged to set aside a provision of national law that is contrary to a directive only where that directive is relied on against a Member State, the organs of its administration, such as decentralised authorities, or organisations or bodies which are subject to the authority or control of the State or which have been required by a Member State to perform a task in the public interest and, for that purpose, possess special powers beyond those which result from the normal rules applicable to relations between individuals (see, to that effect, judgments of 24 January 2012, *Dominguez*, C 282/10, EU:C:2012:33, paragraphs 40 and 41; of 25 June 2015, *Indėlių ir investicijų draudimas and Nemaniūnas*, C 671/13, EU:C:2015:418, paragraphs 59 and 60; and of 10 October 2017, *Farrell*, C 413/15, EU:C:2017:745, paragraphs 32 to 42)." (Emphasis added).
18. As can be seen from the foregoing, the case law relied upon by the respondent, addresses an entirely different matter; the reliance by an individual in a dispute against another individual on the direct effect of a Directive.
19. The application of the principle of conforming legislation has been applied to the Framework Decision on a number of occasions by the Court of Justice of the European Union. On engaging with counsel for the respondent about case-law of the CJEU which applied the principle in the case of the Framework Decision on EAWs, counsel contended that it only applied in the context of a right provided to an individual and not an obligation imposed on an individual. In my view that interpretation is not correct. In the case of *Poplawski* (Case C-579/15), a situation arose where the Dutch Court was concerned that to apply national law on an optional ground for surrender might have the consequence of making the requested person immune from serving the sentence as there was, apparently, no basis in Dutch law for requiring the requested person to serve the sentence in the Netherlands. The Dutch Court asked if the Framework Decision had direct effect and, if not, whether national law may be interpreted in a manner consistent with EU law. The Dutch court sought to have Article 4(6) provide the formal basis required under domestic law as an international convention to permit the taking over of execution of the custodial sentence at issue.

20. In *Poplawski*, the Court of Justice ruled as follows:

- " 26. *In that regard, it must be pointed out that Framework Decision 2002/584 does not have direct effect. That is because that framework decision was adopted on the basis of the former third pillar of the European Union, in particular, under Article 34(2)(b) EU (in the version prior to the Lisbon Treaty). That provision stated that framework decisions are not to entail direct effect (see, by analogy, judgment of 8 November 2016, Ognyanov, C 554/14, EU:C:2016:835, paragraph 56).*
27. *It must be added that, under Article 9 of the Protocol (No 36) on transitional provisions, the legal effects of the acts of the institutions, bodies, offices and agencies of the European Union adopted on the basis of the EU Treaty before the entry into force of the Treaty of Lisbon are to be preserved only until those acts are repealed, annulled or amended in implementation of the Treaties. As the Advocate General stated in point 67 of his Opinion, Framework Decision 2002/584 was not repealed, annulled or amended after the Treaty of Lisbon entered into force.*
28. *Although the provisions of Framework Decision 2002/584 may not, therefore, entail direct effect, in accordance with Article 34(2)(b) EU, that framework decision is still binding on the Member States as to the result to be achieved, but leaves to the national authorities the choice of form and methods (see, by analogy, judgment of 8 November 2016, Ognyanov, C 554/14, EU:C:2016:835, paragraph 56).*
29. *In the present case, as is apparent from paragraphs 19 to 24 above, where the conditions laid down in Article 4(6) of Framework Decision 2002/584 have not been satisfied, Article 1(2) of that framework decision requires Member States to execute any EAW on the basis of the principle of mutual recognition.*
30. *In that context, it must be recalled that, in accordance with the Court's settled case-law, Member States must take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under a framework decision (see, to that effect, by analogy, judgment of 16 June 2005, Pupino, C 105/03, EU:C:2005:386, paragraph 42).*
31. *In particular, it is clear from the Court's settled case-law, that the binding character of a framework decision places on national authorities, including national courts, an obligation to interpret national law in conformity with EU law. When those courts apply domestic law, they are therefore bound to interpret it, so far as possible, in the light of the wording and the purpose of the framework decision concerned in order to achieve the result sought by it. This obligation to interpret national law in conformity with EU law is inherent in the system of the FEU Treaty, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of EU law when they rule on the disputes before them (judgment of 8 November 2016, Ognyanov, C 554/14, EU:C:2016:835, paragraphs 58 and 59 and the case-law cited).*

32. *It is true that the principle of interpreting national law in conformity with EU law has certain limitations. Thus, the obligation on the national court to refer to the content of a framework decision when interpreting and applying the relevant rules of its national law is limited by general principles of law, particularly those of legal certainty and non-retroactivity. In particular, those principles preclude that obligation from leading to the criminal liability of individuals being determined or aggravated, on the basis of a framework decision alone, absent any legislation implementing its provisions, where they are in breach of those provisions (judgment of 8 November 2016, Ognyanov, C 554/14, EU:C:2016:835, paragraphs 62 to 64 and the case-law cited).*
33. *Moreover, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law contra legem (judgment of 28 July 2016, JZ, C 294/16 PPU, EU:C:2016:610, paragraph 33 and the case-law cited).*
34. *However, the fact remains that the principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that the framework decision in question is fully effective and to achieving an outcome consistent with the objective pursued by it (judgment of 5 September 2012, Lopes Da Silva Jorge, C 42/11, EU:C:2012:517, paragraph 56 and the case-law cited)."*
21. In light of the above, I therefore reject the submission that the principle of conforming interpretation does not apply to the Framework Decision in so far as it creates a liability to surrender on the part of an individual.

**Ground ii: The relevance of the 2019 EU-Norway/Iceland Agreement**

22. On the 1st November, 2019 the EU entered into an agreement with Norway and Iceland in respect of the surrender procedure between Members State of the EU and Norway and Iceland. In that agreement, the parties expressed their mutual confidence in the structure and functions of their legal systems and their ability to guarantee a fair trial. The respondent submits that as this agreement was entered into after the EAW was issued and/or was endorsed for execution in this State, the agreement has no application to these proceedings. The Minister does not contend that the 2019 Agreement is directly relevant to these proceedings. The respondent goes further however and submits that as the 2019 Agreement was used by the CJEU in their interpretation of the Framework Decision, the principle of conforming interpretation cannot apply in the present circumstances.
23. It is important to analyse the reasoning of the Court of Justice of the European Union. In its decision the CJEU repeated that an EAW must contain evidence of an enforceable judgment, an arrest warrant or any other enforceable decision having the same effect, coming within the scope of Articles 1 and 2 of the Framework Decision. The Framework Decision applies only to Member States and not to third States. An act of a court of the issuing state recognising such a judgment and rendering it enforceable is capable of



satisfying the requirements of Article 1(1), Article 2(1) and Article 8(1)(c) of the Framework Decision.

24. The conditions may only be satisfied provided that the sentence in question is a custodial sentence of at least four months (as that is a requirement of Article 2(1)). The Court went on to say that the rules of secondary EU law must be interpreted and applied in compliance with fundamental rights, an integral part of which is respect for the rights of the defence, flowing from the right to a fair trial, enshrined in Article 47 and 48 of the Charter of Fundamental Rights of the European Union. The judicial authorities of the issuing Member State must ensure that the execution in their State of a custodial sentence imposed by a court of a third State whose decision has been recognised in that Member State, they are required to ensure compliance with the requirements inherent in the EAW system in relation to procedure and fundamental rights. The CJEU repeated that there must exist a dual level of protection at national level, the first is in the issue of the national decision and the second level is the issue of the European arrest warrant.
25. At one of those levels of protection there must be provision in the issuing member state for judicial review to verify that, in the procedure leading to the adoption in the third State of the judgment (subsequently recognised by the issuing state), the fundamental rights of the sentenced person, Article 47 and 48 in particular, have been complied with. Where there is doubt as to compliance, it is for the executing judicial authority to request necessary information under the provision of Article 15(2) of the Framework Decision.
26. It was this point that the CJEU stated as follows at para. 60:

*"Furthermore, it must be observed that the dispute in the main proceedings concerns a European arrest warrant issued on the basis of acts of recognition and enforcement of a judgment delivered by a court of the Kingdom of Norway, a third State which has a special relationship with the European Union, going beyond economic and commercial cooperation, since it is a party to the Agreement on the European Economic Area, participates in the Common European Asylum System, implements and applies the Schengen acquis, and has concluded with the European Union the Agreement on the surrender procedure between the Member States of the European Union and Iceland and Norway, which entered into force on 1 November 2019. In that last agreement, the parties expressed their mutual confidence in the structure and functioning of their legal systems and their ability to guarantee a fair trial."*

27. Thereafter the CJEU gave the answer set out above at para. 8 of this judgment.
28. I do not consider that the statement of the CJEU at para. 60 supports the view that the decision is based upon the entry into the 2019 agreement by Norway. I agree with counsel for the Minister when he submitted that the use of the word *observation* is of significance as this was an observation and not a dependent finding. Moreover, I consider the observation as being one which was made after the CJEU dealt with the important issue of fundamental rights and the requirement of the courts of the issuing State to

ensure compliance with the requirements inherent in the EAW system in relation to procedure and fundamental rights. It was in that context that the reference to Norway was made. The CJEU recognised that Norway had a special relationship based upon a number of members the first three of which were a) it is a party to the Agreement on the European Economic Area, b) participated in the Common European Asylum System and c) applies the Schengen *acquis*. The fourth matter set out was the 2019 Agreement. These were indications of the relationship that the EU has with Norway upon which the question of the protection of fundamental rights can be viewed. There is nothing in the judgment which would preclude the application of the reasoning set out therein to recognition of the judgments of third countries with whom the EU did not have such a special relationship. Such an issue may become relevant as to how much scrutiny an issuing judicial authority in the first place and an executing judicial authority in the second place would have to apply to such a decision prior to a decision on enforcement.

29. I am therefore satisfied that the interpretation of the Framework Decision as given by the CJEU in this case applies to the situation, as here, where the EAW was issued, was endorsed for execution and the hearing commenced prior to the entry into force of the EU Agreement with Norway and Iceland on surrender proceedings between Member States and Norway and Iceland.
30. In the present case the respondent has not raised any reason for this Court to doubt that the Lithuanian judicial authorities did not comply with their obligation to ensure that in the procedure leading to the adoption in Norway of the sentence, the fundamental rights of the respondent and in particular, the obligations arising from Article 47 and 48 of the Charter have been complied with. I have no reason to doubt that there has not been compliance and there is therefore no reason for me to seek any necessary information in that regard. I am satisfied therefore that there is no ground to refuse (or delay) his surrender because of a failure to ensure that his fundamental rights have been protected in the process in Norway or in Lithuania.

**Ground iii: The interpretation of s. 10(d) and/or s. 44 of the Act of 2003 requires surrender to be refused**

31. The respondent submits that even if the principle of conforming legislation is applicable, the relevant sections of the Irish legislation are clear in prohibiting surrender and cannot be interpreted *contra legem* or contrary to law. The provisions of the Act of 2003 upon which he relies upon are s. 10(d) regarding the duty to surrender and s. 44 regarding extraterritorial offences:
32. Section 10 of the Act of 2003 provides as follows:

“Where a judicial authority in an issuing state issues a European arrest warrant in respect of a person—

- (a) against whom that state intends to bring proceedings for an offence to which the European arrest warrant relates,
- (b) who is the subject of proceedings in that state for an offence to which the European arrest warrant relates,

- (c) who has been convicted of, but not yet sentenced in respect of, an offence in that state to which the European arrest warrant relates, or
  - (d) on whom a sentence of imprisonment or detention has been imposed in that state in respect of an offence to which the European arrest warrant relates,
- that person shall, subject to and in accordance with the provisions of this Act, be arrested and surrendered to the issuing state.”

Section 44 of the Act of 2003 provides as follows:

“A person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State.”

33. The respondent submits that there are a number of methods through which courts can implement the principle of conforming legislation. The parties are in agreement that the relevant decision in this jurisdiction as to how the Court should address the principle of conforming legislation is that of *Minister for Justice and Equality v. Vilkas* [2018] IESC 69. In that case McKechnie J. stated:

*"79. It is clear from the above that the principle of conforming interpretation cannot be used to lead to an interpretation of national law contra legem. This concept of 'contra legem' is frequently used in EU law. The Latin phrase means 'against the law'. Often the case law of the CJEU will simply refer to the prohibition on a contra legem interpretation without elaborating on what precisely this means. However, the meaning of the concept is somewhat intuitive although generally well understood at a surface level: it is that a court cannot adopt an interpretation which goes against the express wording of a provision. Put differently where it is not reasonably possible to construe a national measure in conformity with its EU counterpart, to do so would be against the law. If a conflict of that scale exists, a court must give preference to its domestic provisions.*

80. A good description of the rule was that as stated by AG Bobek in his Opinion in Case C 220/15 *European Commission v. Federal Republic of Germany*, where he said that 'the clear wording of a provision is the outer limit of any interpretative endeavour'. The same Advocate General also defined the principles thus in his Opinion in Case C 441/14 *Dansk Industri, acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen*:

*'A contra legem interpretation must, to my mind, be understood as being an interpretation that contradicts the very wording of the national provision at issue. In other words, a national court is confronted by the obstacle of contra legem interpretation when the clear, unequivocal wording of a*

*provision of national law appears to be irreconcilable with the wording of a directive. The Court has acknowledged that contra legem interpretation represents a limit on the obligation of consistent interpretation, since it cannot require national courts to exercise their interpretative competence to such a point that they substitute for the legislative authority.’ (para. 68)*

81. *As alluded to in this passage, the interpretive limit provided by the contra legem principle is tied to the separation of powers, insofar as it ensures that a court will not assume the mantle of a legislature and interpret a provision contrary to the clear meaning of its express terms. To interpret contra legem is to surpass the limits of the judicial function, for the judge must be bound by statute. The concept is also connected to the principles of legality and legal certainty, in that it is important that the law should be certain and its application foreseeable, which understandably would not be the case if judges could freely adopt interpretations contra legem, as just defined.”*

34. McKechnie J. proceeded to address how the relevant national provisions must be construed. He stated:

"82. *Notwithstanding the sequence in which I have structured this judgment, it is important to understand that the front line approach to interpreting a domestic provision, even one derived from an EU measure, is to apply national rules in the first instance: in a great number of situations such approach would establish the compatibility of the provision with the measure. It is only when concern arises in this regard that resort to a Pupino like approach becomes necessary. Accordingly, one should see whether, without more, the view of the Court of Appeal in this case can be sustained on the first mentioned basis.*

83. *The general principles of statutory interpretation have been well rehearsed on many other occasions, and thus do not require any meaningful restatement here. It is well known that the objective of the task is to ascertain the will or intention of the legislature (see, for example, Kelly v. Minister for the Environment [2002] IESC 73 at p. 214 and Macks Bakeries Ltd v. O’Connor [2003] 2 I.R. 396 at p. 400). The exercise is a purely objective one: what matters is not what was subjectively in the minds of those who passed the legislation, but rather what intention can be gathered from the words used in the Act (People (Attorney General) v. Dwyer [1972] I.R. 416). It follows that the express terms of the statute itself are the best indicator of this objective intention: thus the primary route by which such can be ascertained is by construing the words used in their ordinary and natural meaning. This is the “literal approach”. If such words used are clear and unambiguous, they should be given their plain meaning: then the task is at its end.*

84. *That is not to say, however, that the words of the section in question can be read divorced from the context in which they appear: this context may include, inter alia, the rest of the sentence or sentences joined therewith, the other sub-sections of the provision, other sections within the relevant Part of the Act, the Act as a*

*whole, and even, on occasion, the legislative history of the Act. Consideration of the context forms a part of the literal approach. In an overall sense the task for the judge is to construe the words used by reference to the entirety of the Act, rather than in isolation (see C.K. v. Northern Area Health Authority [2003] 2 I.R. 544 at p. 559 and Crilly v. T. & J. Farrington Ltd. [2001] 3 I.R. 251 at p. 295). The question therefore is what is the ordinary and natural meaning of the words used, in the context in which they appear.*

85. *If this first approach should result in ambiguity, it will be necessary to have regard to other interpretive tools, including but by no means limited to what has been described as the purposive approach. In such instances the Court will go beyond the pure text of the statute and consider any relevant and permitted circumstance including the intended objective of the Oireachtas and the reason for the statute's enactment. Occasionally it may be necessary to depart from the literal approach where to apply it would defeat the clear object and purpose of the legislation: see section 5 of the Interpretation Act 2005. In the present case, where it is accepted by all that the Oireachtas, in enacting the relevant sections of the 2003 Act, intended to transpose Article 23 F.D., any purposive interpretation of section 16 would have to have regard to the CJEU's interpretation of that Article as outlined in Vilkas."*

35. McKechnie J. discussed the fact that two contrasting constructions had been placed upon the domestic legislation by the parties. He held that the mere fact that the other interpretation was stateable was not of itself sufficient to found an ambiguity as to the true meaning of the section. There had to be some higher threshold before it can cast doubt on the face of the statute. McKechnie J. held:

*"there must be a level of credibility and reality to the contrary construction, beyond the bare fact of its stateability, in order to produce such uncertainty. Though I would be reluctant to define a threshold, such must at least plausibly be the correct one.*

*While accepting that the respondent's construction is not wholly untenable, insofar as it is not plainly nonsensical or manifestly incoherent, nonetheless in my view, the section, in accordance with the ordinary principles of statutory construction, has but one proper meaning."*

36. In *The Minister for Justice and Equality v. Vilkas*, the CJEU had interpreted the Framework Decision as not limiting the number of new surrender dates that may be agreed on by the relevant authorities where the surrenders have been prevented by *force majeure*. The Supreme Court, in overturning the Court of Appeal, held that the relevant provisions of the Act of 2003 only permitted one new surrender date to be agreed. For the sake of completeness, I should mention that McKechnie J. stated that, having found there was no ambiguity in the section, it was not necessary for him to address the issue of whether the doubtful penalisation principle of legislative interpretation should apply when a court is required to interpret an Act in accordance with the conforming interpretation principle, or

indeed whether the relevant provisions of the Act of 2003 created penal or other sanctions within the meaning of that phrase as it is used in s. 5 of the Interpretation Act, 2005.

37. I consider therefore that this Court must first seek to interpret the relevant sections of the Act of 2003 in accordance with the ordinary principles of statutory construction. If those principles lead to the conclusion that the Act of 2003 applies to a situation where the EAW is seeking to enforce a sentence which was originally imposed in a third country but recognised in the issuing state then that is the end of the matter so far as s. 10(d) is concerned. It is only where there is an ambiguity or where the literal meaning would lead to an absurdity that the Court must then address whether the principle of conforming legislation can apply in these circumstances. A similar process will then be applied to s. 44 should it become necessary to do so.

**The meaning of section 10 (d)**

38. Section 10(d) refers to the *sentence imposed* in that (i.e. the issuing) state. The CJEU in its judgment on the preliminary reference, pointed to Article 1(1) of the Framework Decision which refers to an EAW as a judicial decision issued with a view to the surrender of a requested person for the purposes of conducting a criminal prosecution or *executing a custodial sentence or detention order*. According to the CJEU, then, subject to a further check that fundamental rights have been complied with, where the EAW is issued by a member state's judicial authority for a sentence that is for a period of imprisonment of 4 months or more, then the conditions are met regardless of whether the original sentence was imposed in a third country.
39. The respondent accepts that if the relevant provisions of the Act of 2003 had incorporated the Framework Decision or had transposed the Framework Decision in such a way as to mirror the wording of the Framework Decision, then this Court would be bound to surrender him. It is the absence of such a transposition that requires the Court to refuse to surrender him because of the ordinary, natural, plain and unambiguous meaning of the wording of the above provisions.
40. I will pause here to note that the original wording of the concluding part of s. 10 of the Act of 2003 read as follows: "that person shall, subject to and in accordance with the provisions of this Act *and the Framework Decision*, be arrested and surrendered to the issuing state." (*Emphasis added*). The phrase "*and the Framework Decision*" was deleted pursuant to the provisions of s. 5 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act, 2012. The inclusion in that section of "*and the Framework Decision*" had been criticised by the then Chief Justice in the decision of *Minister for Justice, Equality and Law Reform v. Altaravicius* [2006] 3 I.R. 148. Murray C.J. said that s. 10 as then constituted meant that in deciding on an application for a surrender pursuant to the terms of the Act of 2003, the Court must apply both the provisions of the Act and the Framework Decision. He said that was "*an idiosyncratic method of legislation and likely to create ambiguity.*"

41. It is worth pointing out that the phrase “*and the Framework Decision*” appears to continue to create problems for lawyers, law reformers and legislators. At the resumed hearing of this action I was handed the Law Reform Commission’s Revised Version of the Act of 2003 updated to include all relevant Acts and Statutory Instruments including the European Arrest Warrant (Application to Third Countries (Iceland and Norway) Order 2020 (S.I. No. 346 of 2020). This version included the phrase “and the framework decision” in s. 10 of the Act. I was assured by Counsel for the Minister however that no such amendment had then, in 2020, been made by statute or by statutory amendment. The 2020 instrument was a short instrument applying the Act of 2003 to Iceland and Norway, but, as stated above, this is not relevant to the present proceedings.
42. Pursuant to the provisions of European Union (European Arrest Warrant Act 2003) (Amendment) Regulations 2021, (S.I. 150 of 2021), the Minister made a number of amendments to the Act of 2003 in exercise of powers conferred by s. 3 of the European Communities Act, 1972. A curious feature is that pursuant to regulation 8, the S.I. purports to amend s. 10 of the Act of 2003, *inter alia*, “by the substitution of “the relevant agreement” for the “the Framework Decision.” The Minister is therefore proposing to substitute a phrase which is not present in the legislation by reason of the amendment made by legislation in 2012, highlighted in para. 40 above. This is not vital to the determination of the present proceedings. I must deal with this EAW on the basis of the legislation as existed at the time it was presented to the High Court for execution. It is for another case to decide the relevance, if any, of this “substitution” provision.
43. I must apply the Act to this application for surrender having interpreted it in the manner set out by McKechnie J. in *Minister for Justice and Equality v. Vilkas* above. The Minister submits that it is appropriate to look at the ordinary and natural meaning within the context of the Act as a whole. The purpose of the Act is to give effect to the Framework Decision. Counsel for the Minister submits that this is an important factor in the construction of the section. It is an important factor and one to which I have regard. I consider however, as the *Minister for Justice and Equality v. Vilkas* decision demonstrates, that this is not a factor which *of itself*, overrides the plain, ordinary and natural meaning of a particular section.
44. The respondent’s contention is a simple one that the sentence itself has to be “imposed” “in that state” meaning the issuing state. In the respondent’s submission, a sentence is imposed when a court passes sentence. The Lithuanian court, the respondent submits, did not impose the sentence, it merely recognised it. In that regard, I note that similar language is used by the CJEU at various points in its judgment when it refers to an issuing state recognising a judgment in a third country and rendering it enforceable. Perhaps the clearest example of that use of language is at para. 55 where the CJEU stated:

*“Consequently, where the judicial authorities of a Member State issue a European arrest warrant in order to ensure in that member State the execution of a custodial sentence imposed by a court of a third State whose decision has been recognised in*

*that Member State, they are required to ensure compliance with the requirements inherent in the European arrest warrant system in relation to procedure and fundamental rights.” (Emphasis added)*

Of course, this Court is concerned with the meaning of the relevant phrase as used by the legislature in this State. The foregoing is mentioned however as an example of how the phrase “sentence imposed” was used by the CJEU in what appears to be an ordinary and natural meaning: that a court has given a decision as to what sentence a person should serve. That is distinct from the subsequent recognition (or giving effect to) that sentence by a judicial decision in another state.

45. In my view the usage of the phrase “sentence imposed” by the CJEU is a common usage. Such a usage is an entirely natural one. When identifying the source of a sentence in everyday, non-legal language, it is common to see or hear references in media reports of a sentenced imposed in the District Court or in the Circuit Court as the case may be. That conveys that the sentence was handed down by the particular Court. We regularly refer to a sentence being *imposed* by a particular court. The phrase “sentence imposed” in its ordinary and natural meaning means a sentence that a court/judge has delivered in respect of an offence. It is not surprising that this common understanding is also given to the context of sentence imposed in the Transfer of Sentenced Persons Act, 1995, as amended. That Act as amended refers to the sentenced imposed by the sentencing state. The High Court warrant issued for the purpose of authorising the bringing of a person sentenced in a sentencing state is said under the Act to have the *effect of authorising the continued enforcement of the sentence concerned imposed by the sentencing state*. Although that is a legislative provision it is using the concept of sentence imposed in its ordinary meaning to identify a decision in which a particular sentence has been handed down. The reference to the effect of that sentence being to authorise continued enforcement reflects, in my view, the ordinary meaning of what has happened. The High Court is giving effect to a sentence imposed in another State. The sentence that a transferred person is serving is not considered a sentence imposed by the High Court, it is a sentence imposed in the sentencing State but given effect to here.
46. In the present case, there is an added clarity to the phrase “sentence imposed”. That is because of the phrase “in that state” which qualifies, if qualification, was needed, the place in which the sentence must have been delivered *i.e.* in the issuing state. There is therefore no ambiguity left in the phrase.
47. McKechnie J. in *Vilkas* also referred to the legislative history being, on occasion, relevant to considering the context of the Act as well as to the context of other sections or sub-sections of the Act. The context and purpose of a provision may be highlighted by tracking the legislative provisions. Of course, a literal meaning must be given a *prima facie* interpretation but nonetheless the context may assist with ascertaining such a meaning. It is worthwhile to look at the legislative history of s. 10 of the Act of 2003, while at the same time tracing the use of the phrase “in that state” in other sub-sections of s. 10 of the Act of 2003. I have already held that the ordinary and natural meaning of



the phrases "sentencing imposed" "in that state" demonstrates that the literal meaning of the words must be understood as requiring that the sentence for which surrender is sought must have originally been imposed in the issuing state. As will be demonstrated that interpretation finds strong support from considering the context of the Act by reference to the other sub-sections of s. 10 and the legislative history of that section of the Act.

48. I have already outlined how the use of the phrase "and the Framework Decision" was deleted from the Act. The phrase "in that state" in s. 10(d) was added by a later amending statute.

49. Section 10 as originally enacted read:-

"Where a judicial authority in an issuing state duly issues a European arrest warrant in respect of a person –

- (a) against whom that state intends to bring proceedings for the offence to which the European arrest warrant relates, or
- (b) on whom a sentence of imprisonment or detention has been imposed and who fled from the issuing state before he or she –
  - (i) commenced serving that sentence, or
  - (ii) completed serving that sentence,

that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision be arrested and surrendered to the issuing state."

In its original form the phrase "in that State" did not appear but where the EAW sought the surrender for the purpose of prosecution subsection (a) required that the proceedings had to be brought by the issuing State. It was silent as to the place in which the sentence of imprisonment or detention had to have been imposed.

50. Section 71 of the Criminal Justice (Terrorist Offences) Act, 2005 amended s. 10 by substituting the following section for the original:-

"10. –Where a judicial authority in an issuing state duly issues a European arrest in respect of a person –

- (a) against whom that state intends to bring proceedings for an offence to which the European arrest warrant relates,
- (b) who is the subject of proceedings in that state for an offence to which the European arrest warrant relates,
- (c) who has been convicted of, but not yet sentenced in respect of, an offence to which the European arrest warrant relates, or
- (d) on whom sentence of imprisonment or detention has been imposed in respect of an offence to which the European arrest warrant relates, and who fled from the issuing state before he or she –

- (i) commenced serving that sentence, or
- (ii) completed serving that sentence,

that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision, be arrested and surrendered to the issuing state.”

51. The additional subsections add two extra situations where a person may be surrendered. The original Act did not apply a) to a situation where the person requested in the EAW was already the subject of proceedings in *the issuing state* and b) to a situation where the person had been convicted but not yet sentenced in respect of the offence to which the EAW relates. It can be seen that the first of these additions (ss. (b) where the person is already the subject of proceedings) included a requirement that it was the issuing state that was bringing the proceedings. In the second addition (ss. (c) where the person was convicted but not yet sentenced), the new subsection did not have a requirement that the conviction be recorded in the issuing state. Of course, the sub-section at issue here, ss. (d), did not contain a reference to “in that state” either.
52. The phrase “in that state” was inserted into s. 10(c) and (d) by s. 6 of the Criminal Justice (Miscellaneous Provisions) Act, 2009 (hereinafter, “the Act of 2009”). That section is perhaps better known for deleting the requirement that the requested person had to have “fled from the issuing state before her or she” commenced or completed serving the sentence. The difficulties with the use of the word “fled” were made apparent in the decision of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Tobin*. The word had been added by the Oireachtas but had not been required by the Framework Decision. It is helpful to note the reasoning of the Supreme Court in *Tobin*. The Supreme Court (Fennelly J.) accepted that the Framework Decision did not require that a person who was sought to serve a sentence had to have “fled” from the issuing state but held that:-
- “this Court must be satisfied that he falls within one of the headings of s. 10 of the Act of 2003, as amended. Only paragraph (d) is capable of applying. It is a condition of the application of that provision that the respondent have “fled”. For reasons already given, I am satisfied that he did not “flee”. If the court were to hold otherwise, it would be acting contrary to the clear meaning of the Act of 2003, i.e. contra legem.*
- It follows that his surrender cannot be ordered.”*
53. For the purposes of the present case, s. 6 therefore completed the requirement that the EAW relate to either a conviction in the issuing state or a sentence imposed in the issuing state by the inclusion of the phrase “in that state”. Its inclusion into s. 10(d) is relevant to the interpretation of the subsection.
54. I have no doubt that if the phrase “in that state” had not been inserted into the relevant provision of s. 10 by the Act of 2009 the plain, ordinary and natural meaning would clearly require the surrender of the respondent to the issuing state to serve the sentence

which had been imposed upon him in respect of the offence to which the EAW relates. That would be because there was no geographic or territorial limitation on the phrase "sentence imposed". The Court would then be able to consider this as a situation where the issuing state was seeking his surrender for a sentence that had been imposed on him and s. 10(d) did not place a limitation on where such sentence had been imposed. By contrast, the plain, ordinary and natural meaning of the subsection with the addition of the phrase "in that state" is to the effect that the sentence referred to in the subsection must have been *imposed in the issuing state*.

55. If ss. (d) as now amended means that the sentence could have been imposed in any state rather than just the issuing state, what would be the justification for the addition of the words "in that state"? I cannot conceive of such a justification and I cannot conceive of a meaning to the newly amended subsection that would permit surrender to take place in circumstances regardless of the place of imposition of the sentence. It must be recalled that the legislature cannot be said to have legislated in vain by the addition of those words. They must carry some meaning and the only one I can see, is that they clarify beyond any doubt that the sentence had to be imposed in the issuing state.
56. Indeed, even when one considers that the mechanism of the EAW is, as set out in recital 10 of the Framework Decision, based on a high level of confidence between Member States, it is easy to understand why the original section as enacted may not have required the sentence to have been imposed in the issuing State. Ireland could have confidence that an issuing state would not seek the surrender of a person to serve a sentence unless that person was required to serve such a sentence according to the law of the issuing state. That a member state would abide by such a basic rule of law concept should be axiomatic. Therefore, in its original format, s. 10(d) could have been read that an issuing state, such as Lithuania in the present case, would only request surrender of a person where the person was wanted to serve a sentence which had either been imposed by a Lithuanian court *or* recognised and given effect to by a Lithuanian court. Instead by this amending provision, the legislature has restricted the ambit of the provision and ensured that the *imposition* of the sentence had to be in the issuing state. The only interpretation that I see available to the present subsection is one which gives effect to the limitation of the section by the requirement that the sentence be *imposed* in the issuing state.
57. For the sake of completeness, I should repeat that if the *current* emanation of s. 10(d) was the one which had originally been enacted, I would also reach the conclusion that the plain, ordinary and natural meaning of the subsection was that it referred to sentences imposed by the courts of the issuing state. In other words, the literal interpretation of the words supports the view that the sentence must have been delivered in the issuing state. That of course is also the interpretation having regard to the legislative history.
58. By way of contrast, the original formulation, up to and including the amendments made under the 2005 Act, which did not require the imposition of sentence to have taken place in the issuing state, would have been sufficient to incorporate a meaning that so long as a

sentence had been imposed on a requested person elsewhere but had been given effect to in the issuing state, then that was sufficient. The order of the court of the issuing state, giving effect to the sentence already imposed in a third country, would have been the judicial decision or enforcement decision on which the EAW was based.

59. It can also be observed that if the original and/or 2005 formulation of s. 10 had continued, then s. 11(1A)(e) of the Act of 2003 would have been complied with. That subsection requires the EAW to specify “that a conviction, sentence or detention order is immediately enforceable against the person, or that a warrant for his or her arrest, or other order of a judicial authority in the issuing state having the same effect has been issued in respect of one of the offences to which the European arrest warrant relates”. Furthermore, if s. 10 was worded in a similar fashion, there would have been no bar to surrender. I am satisfied however that the clear, plain, ordinary and natural meaning of s. 10(d) requires that the sentence had to have been imposed in Lithuania as the issuing state.
60. I therefore must refuse to surrender the respondent.

#### **Section 44**

61. In light of my findings in respect of s. 10(d) of the Act of 2003, I do not have to proceed to examine whether the provisions of s. 44 clearly prohibited his surrender despite the interpretation of the CJEU that the rules on extraterritoriality did not apply if the offence had been committed in the territory of the third country.

#### **Conclusion**

62. For the reasons set out above, s.10(d) of the Act of 2003 requires this Court to refuse to surrender the respondent to Lithuania.
63. In the course of this judgment I have referred to a number of occasions where the provisions of the Act of 2003 have either been criticised by the courts in this jurisdiction or have required interpretation in a manner which does not conform to the provisions of the Framework Decision because to so interpret them would be contrary to law (“*contra legem*”). I have also pointed out a very puzzling amendment purporting to be made in the 2021 Regulations by a substitution of a provision that has already been deleted by an earlier amending Statute. The inclusion of that provision in the Act had been criticised by the Supreme Court as “idiosyncratic” but curiously if it did still apply, this requested person accepts that he would have no answer to this application for his surrender. This is another case where the plain, ordinary and natural meaning of a provision in the Act means that this requested person cannot be surrendered as the Act cannot be interpreted contrary to such meaning despite the Framework Decision placing an obligation on Member States to transpose into national law the requirement to surrender a person in the same circumstances as this requested person. It is a matter for the Oireachtas to decide if it wishes to amend the legislation to comply with the obligations so that other similarly situated persons may still be held liable to surrender.