European Arrest Warrants – Recent Developments

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Pending Legislation

At present the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Bill 2011 is before the Oireachtas. The purpose of this bill is to implement a recent framework decision (2002/584/JHA) which itself amends the original framework decision on which the European Arrest Warrant Act, 2003 is based.

Framework Decision no longer directly effective

The new Act will make it clear that the framework decision as amended is not intended to be directly effective. The various references to the framework decision throughout the Act are amended. Most significantly the reference to the obligation that surrender be effected in accordance with the Framework Decision has been excised:

5.—Section 10 (inserted by section 71 of the Criminal Justice (Terrorist Offences) Act 2005) of the Act of 2003 is amended by substituting “subject to and in accordance with the provisions of this Act, be arrested” for “subject to and in accordance with the provisions of this Act and the Framework Decision, be arrested”.

The Act makes provision for the application of the European arrest warrant to non-Member states who have concluded extradition agreements with the EU. Quite how this manifests itself very much remains to be seen.

Trial In Absentia

One of the main purposes of the new framework decision is to seek some consistency as to the circumstances in which surrender can be refused for in absentia convictions.

The most important change is that the circumstances in which surrender can be refused are no longer to be presented as a number of options some, none or all of which may be incorporated into domestic legislation. Rather the new framework decision sets out a number of alternative conditions – when any one of these is satisfied the respondent must be surrendered. This much is made explicitly by paragraph (6) of the pre-amble:

The provisions of this Framework Decision amending other Framework Decisions set conditions under which the recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused. These are alternative conditions; when one of the conditions is satisfied, the issuing authority, by completing the corresponding section of the European arrest warrant or of the relevant
certificate under the other Framework Decisions, gives the assurance that the requirements have been or will be met, which should be sufficient for the purpose of the execution of the decision on the basis of the principle of mutual recognition.

When the conditions are not satisfied then it is still open to the issuing state to give a re-trial guarantee so as to allow surrender to take place. The new framework decision amends to original one so that the following appears at Article 4a:

1. The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:

(a) in due time:

(i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial; and

(ii) was informed that a decision may be handed down if he or she does not appear for the trial;

or

(b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial; or

(c) after being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed:

(i) expressly stated that he or she does not contest the decision; or

(ii) did not request a retrial or appeal within the applicable time frame;

or

(d) was not personally served with the decision but:

(i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which
allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed; and

(ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant.

However, the most practical change brought about by the new framework decision is its amendment of Paragraph (d) of the European arrest warrant itself. It effectively allows the issuing judicial authority to certify which one of the above conditions has been satisfied. Significantly the framework decision speaks of the issuing judicial authority certifying these matters. Assuming that the courts will approach this in a similar fashion to certification under the Article 2.2 list then it will probably be impossible to go behind the certification in the warrant.

**Surrender and extensions of time**

The other very significant innovation in the Bill relates to effecting surrender. This is an area that has been dogged by problems since the 2003 Act and has received little by way of comprehensive legislative attention. The main changes are as follows:

- In Section 16 cases there will be a period of 25 days in which surrender can be effected. This will comprise of an initial 15 day period in which the order is not executed and a 10 day period following in which it must be executed.

- In Section 15 cases the total period is 20 days made up of 10 days and 10 days.

- Most significantly the initial 10 or 15 day period cannot be waived. The explanatory memorandum rather breezily explains that the pre-existing system “... had been creating difficulties in the logistics of carrying out the order for surrender within the time limits specified in the section.”

- The Act will also contain a considerably more coherent procedure in relation to extending time in which surrender may be effected. Firstly it requires the person to be brought back before the court automatically when they have not been surrendered within the relevant period. Additionally the central authority can cause them to be brought back before the period has expired but where it is apparent that they won’t be surrendered within the period. Where the period has expired and an application is going to be made then the person shall be deemed to be in lawful custody pending same – in other words any application for Article 40 is likely to be met with an application for an extension by the Minister. Much of the change is brought about by a new Section 16(4) requiring

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1: At present the Act only seems to allow an extension application to be made after the period has expired – in other words where the person is, at that point, already in unlawful custody. This is something that has largely been ignored in the context of extension applications that have been made heretofore.
that the High Court order is considerably more elaborate and spells out what is to happen in the various eventualities.

- It would seem to be a condition precedent to any application for surrender that the failure to effect surrender within the 10 day period was due to circumstances beyond the control of the State or the issuing state.

- The extension requires the agreement of the issuing judicial authority not just the *issuing state* as is presently the case.

- It seems that only one extension application can be made is the act will now provide that where surrender isn’t effected within 10 days of the new date.

One of the problems with the new provisions as presently drafted is that they seem to take no account of the decision of the Supreme Court in Butenas and the possibility of bail being granted pending surrender. It remains to be seen whether any explicit reference to this eventuality will be included in the Act and if not whether the provisions as they stand can deal with same.

Surrender and Extensions under existing legislation

The new provisions throw into stark relief the very significant problems in current legislation in relation to both surrender itself and applications to extend time for surrender. Assuming that the Bill will result in an Act that is actually fit for purpose the question must be asked as to whether the current Act is at all workable.

There is much confusion as to the applicable caselaw concerning the time limits in which a respondent must be surrendered and the entitlement of the State to seek an extension of these time limits. Much of this confusion arises by reason of a number of conflicting and ambiguous decisions. Specifically the cases of Rimsa, Covaciui and Strazdins.

Whilst the decision in Rimsa is generally well known the very clear consequences of it are, to some extent, misunderstood. This is probably due to the fact that whilst Rimsa’s appeal was allowed on 5th February, 2008 a written judgement was not actually delivered until over 2 years later on 11th May, 2010. In the intervening period there was a succession of Article 40 applications and applications for extensions under Section 16(7) as a result of volcanic ashclouds caused by the eruption of Grimsvötn.

The decision in Rimsa is authority for a number of propositions. Firstly the Supreme Court seemed to advert, at least, to the possibility that the current system of surrender and extention of time limits is unconstitutional. This is because it would seem to allow the executive branch of government to extend the detention of a prisoner without reference to the courts. Murray CJ considered the provisions of the Framework Decision which appeared to repose this function in the relevant judicial authorities and commented:

No doubt it is for the above considerations and with a view to achieving those objectives that any decision by agreement to delay the surrender of a requested person pursuant to judicial order beyond that ten day period, must, according to
article 23, be made by the judicial authorities of the two states concerned and not by any administrative authority. By this means the Framework Decision ensures that any postponement of the date on which the surrender is due to take place on foot of a judicial order already made remains under judicial control. It also avoids any extension of a period of custody pending surrender being decided by the executive authorities as a form of administrative detention.

There had actually been parallel proceedings seeking a declaration of unconstitutionality running in tandem with the Article 40 proceedings – however these were not pursued on appeal.

Secondly, Rimsa is clear authority for the proposition that the agreement in respect of an extension must be made with the issuing judicial authority. Applying a purposive interpretation in accordance with the Framework Decision the court concluded that the reference to an agreement with the “issuing state” in Section 16 must be read as a reference to the issuing judicial authority as otherwise surrender would not be in accordance with the Framework Decision. It is still quite common for applications to be made in relation to agreements for extensions concluded with the issuing state’s central authority rather than its judicial authority.

Thirdly, and as a corollary of the above, notwithstanding the provisions of Section 16, in order to effect surrender in accordance with the Framework Decision the agreement would have to be reached with the High Court. In this regard the legislative machinery might be regarded as having broken down irretrievably as the Act mandates the central authority as the party who is entitled to make the agreement on behalf of the state whilst the Framework Decision stipulates the High Court. Whilst it is not explicit in the decision of the Supreme Court the implication would appear to be that this is a conflict in the legislation that is simply incapable of resolution.

Fourthly, it would seem to follow from the dicta that surrender must be effected in accordance with the Framework Decision that in order to obtain an extension order the state must show that it has not been possible to effect surrender due to circumstances beyond the control of the state and the issuing state.

Since the decision in Rimsa a practice has developed whereby the High Court is asked to reach agreement with the issuing state. Whilst this may accord with the Framework Decision there would not seem to be any basis under the Act for this approach – in effect it is entirely *contra legem*. In addition many of the applications are in fact based on agreements with the central authorities of the issuing states.

**Voznuka v. Governor of the Dochas Centre**

A recent decision of the High Court has also contributed significantly to the complexities of effecting surrender. In Voznuka v. Governor of the Dochas Centre (ex tempore 10/1/12 McCarthy J) the applicant had been the subject of proceedings under the 2003 Act resulting in an order being made for her surrender on 23rd April, 2009. She had appealed this order and had been granted bail pending appeal. Her appeal was listed for hearing on 18th November, 2010. On that date the applicant did not appear in the Supreme Court and her appeal was struck out. She was not arrested until January, 2012. At that point she was remanded in custody for the purpose of being surrendered on foot of the original Section 16 order. She brought
Article 40 proceedings and in essence complained that the surrender order was spent as the 10 day period in which surrender should be effected had started to run from the date that the Supreme Court struck out the appeal. Ultimately the High Court accepted this argument and ordered her release.

Leaving aside the rationale of the judgement it clearly has a number of significant practical consequences particularly in relation to respondents who are on bail pending surrender or who are the subject of Section 18 postponement orders. In essence the 10 day period in which surrender is to be effected is subject to a strict interpretation. In the absence of a court order staying or extending it there will be many circumstances in which it will simply expire. In such an event it seem that the state will have to recommence the proceedings.