HOW TO BE A THIRD PILLAR GUARDIAN OF FUNDAMENTAL RIGHTS? THE IRISH SUPREME COURT AND THE EUROPEAN ARREST WARRANT

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Summary

The author outlines recent developments as to the operation of the European arrest warrant before the Irish Supreme Court. The European Arrest Warrant Act, 2003 includes a far-reaching obligation to refuse surrender where a breach of fundamental rights has occurred, one that has been read down dramatically by the Irish courts. While the Irish courts cannot access the Court of Justice pursuant to Article 35 EU, they have employed the Pupino *decision so as to "bridge the gap" and provide judicial protection. The effectiveness of the Supreme Court as a Third Pillar guardian of fundamental rights is thus considered.*

Introduction

In the recent decision of *Advocaten voor de Wereld*,1 the Court of Justice has upheld the validity of the European arrest warrant and has given its imprimatur to the new surrender procedures replacing traditional extradition systems and key principles of national constitutional law and extradition law, such as dual criminality. This decision comes at an important time as the use of the surrender procedure rises exponentially in the Member States, nearly three years into its operation.2 The European arrest warrant has been considered on a number of occasions by the Irish Supreme Court recently in several unsuccessful challenges on fundamental rights and procedural grounds and the number of individuals surrendered to other States by the Irish courts during this time has also increased dramatically.3 However, the Irish courts have been denied access to the Court

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1 C-303/05 *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, [2007] ECR I-3633.

2 Adopted pursuant to Title VI of the Treaty on European Union Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States OJ L 190 p. 1. See the *Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between member states* (COM)2006 8 final and Commission Staff Working Document *Annex to the Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* SEC(2007) 979.

3 The law is stated here as of 12 May, 2008. *Minister for Justice, Equality & Law Reform v. Dundon* [2005] IESC 13; [2005] 1 IR 261; *Dundon v. Governor of Clover Hill Prison* [2005] IESC 83; [2006] 1 IR 518; *Minister for Justice, Equality & Law Reform v. Altaravicius* [2006] IESC 23; [2006] 3 IR 148; *Minister for Justice, Equality & Law Reform v. Stapleton* [2007] IESC 30; [2006] 3 IR 26; *Minister for Justice, Equality & Law Reform v. Rodnov* (Supreme Court, Unreported, *ex tempore*, 1st June, 2006); *Minister for Justice, Equality and Law Reform* v. Brennan [2007] IESC 21; *Ó Fallúin v. Governor of Cloverhill* [2007] IESC 20; *Minister for Justice v. S.R.* [2007] IESC 54; *Minister for Justice, Equality & Law Reform v. Gardener* [2007] IESC 40; *Minister for Justice, Equality & Law Reform v. Tobin* [2008] IESC 3; *Butenas v. Governor of Cloverhill Prison* [2008] IESC 9; *Minister for Justice, Equality & Law Reform v. Johnston* [2008] IESC 11; *Minister for Justice, Equality & Law Reform v. Puta & Sulej* [2008] IESC 29; [2008] IESC 30. See generally www.courts.ie.

of Justice through the guise of the preliminary ruling mechanism by virtue of the decision of the Irish State not to accept the jurisdiction of the Court of Justice in respect of Third Pillar matters pursuant to Article 35 EU.4

Seeds of a major supremacy dispute relating to fundamental rights have of course famously been sown in the past in respect of Ireland and the Court of Justice as to the abortion controversy.5 It does not appear that any such saga however will result from the European arrest warrant in Irish law. In a major constitutional development, the Court of Justice in its landmark decision in *Pupino*6 has recently transferred its longstanding First pillar caselaw on the obligations of Members State courts to interpret national law in light of European Union law, to the Third Pillar, thereby extending its own jurisdiction beyond that contemplated by the Treaties.7 This decision has proven itself to be of major importance in the Irish context, it would seem, where the national courts have been content in more caselaw to use *Pupino* to "bridge the gap" in the absence of a means to refer questions to the Court of Justice.8 But the issue remains: what should a national Supreme Court do to protect fundamental rights when it is unable itself to refer questions to the Court of Justice? Does an uncritical application of *Pupino* solve this difficulty? And what measures can legitimately be inserted in domestic implementation laws to "bridge the gap" further, for example to protect fundamental rights in the realm of the Third Pillar under national constitutional law?9 The Irish jurisprudence on extradition had traditionally been particularly favourable to the accused and had an illustrious history of being acutely conscious of potential human rights violations.10 This jurisprudence, however, has been disavowed with the enactment of the arrest warrant procedure.

4 See OJ 2005 L 327 p. 19. While the level of acceptance of this jurisdiction has proven to be rather uneven across the Member States, Ireland, the United Kingdom and Denmark remain isolated in this regard, in their decision to entirely exclude access from their courts to the Luxembourg Court.

5 See Article 40.3.3 of the Irish Constitution and the decision of the Court of Justice in C-159/90 *SPUC v. Grogan* [1991] ECR I-4685, the dispute most famously captured by Phelan "The Right to life of the Unborn v. The Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union" (1992) 55 Modern Law Review 670.

6 C-105/03 *Criminal Proceedings against Maria Pupino* [2005] ECR I-5285.

7 The obligation most notably enunciated in Case 14/83 *Von Colson & Kamann v. Land Nordrhein-Westfalen* [1984] ECR I-1891 and Case C-106/89 *Marleasing* [1990] ECR I-4135. In *Pupino*, there is in fact no specific reference to these cases.

8 See above fn. 3.

9 Recital 12 of the Framework Decision provides that nothing in the Decision can "prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media", discussed here below in "The European arrest warrant and Irish law".

10 See the account in O' Higgins "Pink Underwear, the European arrest warrant and the Law of Extradition" (2007) 12(3) Bar Review 91; Hogan & Whyte eds., *Kelly: The Irish Constitution* (4th ed., Lexis-Nexis, 2003) para. 7.4.264-7.4.340. See the infamous decision of the Supreme Court in *Ellis v. O'Dea* [1989] IR 530, encapsulating decades of jurisprudence of the Supreme Court, where Walsh J. stated that:

> "… there must be not only a correspondence of offences but also a correspondence of fair procedures. No procedure to which the extradited person could be exposed may be one which, if followed in this State, would be condemned as being unconstitutional."

This article considers recent developments in the Irish Supreme Court, where the surrender procedures have been subject of much analysis recently and in particular where fundamental rights objections have been rejected despite a legal framework existing to accommodate such disputes.

1. The European arrest warrant and Irish law

It is important to note that Ireland had not been consulted initially about the content of the European arrest warrant11 and the removal of the need for "dual criminality" as contained in the European arrest warrant had at the outset presented a major challenge to key aspects of Irish caselaw on extradition existing for many decades. The Framework Decision was implemented into Irish law by the European Arrest Warrant Act, 2003 and was recently amended by Part 8 of the Criminal Justice (Terrorist Offences) Act, 2005, that sought in large measure to cure errors in implementation in the original legislation.12

Recital 12 of the preamble to the Framework Decision provides that the adoption of the arrest warrant procedure did not:

> "prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media."

This permission in Recital 12 has indeed been taken up in Ireland as it has in other jurisdictions.13 In fact, the Irish Government in drafting the European Arrest Warrant Act, 2003,14 went particularly far to ensure that the surrender procedures could satisfactorily protect fundamental rights norms pursuant to Recital 12 of the Framework Decision.15 The end result was the adoption of s. 37 of the Act of 2003, which provides that:

> "[a] person shall not be surrendered under this Act if … (*b*) his or her surrender would constitute a contravention of any provision of the Constitution..."

On either a literal or purposive construction, s. 37 does appear to exceed the text of the Framework Decision. The Commission has recently suggested that s. 37 goes further than

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11 *Irish Times*, May 21st, 2002.

12 See *Report On the Operation of the European Arrest Warrant Act 2003 (as amended) in the year 2006 made to the Houses of the Oireachtas by the Central Authority in the person of the Minister for Justice, Equality and Law Reform pursuant to s. 6(6) of the European Arrest Act 2003* (Department of Justice, Ireland, 2006).

13 Commission Staff Working Document, fn. 2 above, p. 5.

14 As amended by the (Criminal Justice Terrorist Offences) Act, 2005.

15 The then Minister for Justice, introducing the European Arrest Warrant Bill, 2003 in the Dáil (Irish Parliament), adopted s. 37 after considerable pressure being brought to bear on him so as to protect fundamental rights in the new surrender regime: see Irish Human Rights Commission *Observations on the European Arrest Warrant Bill* (IHRC, September, 2003) (see www.ihrc.ie). The Minister (577 *Dáil Debates* 10 (17 December, 2003) contended that "no state in the European Union [would] have a higher degree of real and substantial protection for those who seek the protection of its courts".

any other comparable Member State implementation measure as well as going beyond the text of the Framework Decision and gives rise to an incorrect implementation thereof.16 Whether s. 37 represents a mis-implementation of the Framework Decision remains an interesting unsolved question in so far as infringement proceedings cannot be brought against Ireland by the Commission in the realm of the Third Pillar17 and an individual the subject of surrender proceedings may not ask an Irish Court to refer such questions to the Court of Justice pursuant to Article 35 EU. Notwithstanding, ostensibly the Irish judiciary are under a far-reaching obligation to treat human rights concerns expressed in surrender applications in the most serious fashion. However, the practical operation of the Act of 2003 has not matched the ideal and the role of s. 37 has been "read down" dramatically through judicial interpretation, as will be outlined below.

2. The Third Pillar, the European Arrest Warrant and Judicial Protection: *Pupino* to the Rescue in the Irish Courts?

The Court of Justice has a particularly limited jurisprudence in Third Pillar matters to date. 18 The absence of preliminary references from Member State courts that are actually competent to refer matters to the Court in the realm of the Third Pillar is perhaps somewhat striking, given the multitude of practical problems as to the workings of surrender procedure that have arisen in the Irish courts at least. Unsurprisingly, then given this dearth of caselaw, a clarification by the Court of Justice of the role of national courts in controlling the legality of acts is particularly ripe in the realm of the Third Pillar.19 More recently, the Court of Justice itself has extended the principle of "indirect effect", usually associated with the First Pillar to the Third Pillar in the landmark decision of *Criminal Proceedings against Maria Pupino*20. This new "cross-pillarisation" of long-standing EC law doctrines, of course, raises major constitutional questions, particularly as to what protections we can offer the accused in the area of criminal justice, where traditionally national sovereignty and concern for national constitutional protections over due process have prevailed. Despite it temporally recent origins, the *Pupino* decision has been followed extensively and with much approval in the Irish Supreme Court, in recent caselaw in this area. However, the manner in which *Pupino* has been applied in Ireland, largely uncritically, merits some attention, in so far as the courts have used the decision

16 See Commission Staff Working Document (see fn. 2), pp. 5-6. Italy is also criticised for similar reasons.
17 Article 35 EU contains no provision akin to Article 226 EC, as part of the formal system of remedies contained in the Treaties.
18 Case C-105/03 *Pupino* [2005] ECR I-5285; Case C-467/05 *Dell'Orto* [2007] ECR I-5557; C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633. Contrast these cases with the successful annulment action, not a preliminary reference, recently taken by the Commission pursuant to Article 35(6) EU in Case C-440/05 *Commission v. Council*, judgment of 23 October 2007, nyr, as to the Framework Decision strengthening the enforcement of ship-source pollution law. The Framework Decision was annulled by the Court on grounds of a lack of competence.
19 See Peers "Salvation Outside the Church: Judicial Protection in the Third Pillar After *Pupino* and *Segi* Judgments" (2007) 44 Common Market Law Review 883; Walker ed., *Europe's Area of Freedom, Security and Justice* (Oxford University Press, 2004).
20 Case C-105/03 *Pupino* [2005] ECR I-5285. See Prechal "Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union" in Barnard ed., *The Fundamentals of EU law Revisited* (Oxford University Press, 2007).

to "bridge the gap", using it to construe the Framework Decision that they are unable to seek further interpretive assistance with.21 Whether in fact the Irish courts have construed the national implementation legislation as to the arrest warrant *contra legem* as a result of their uncritical adherence to *Pupino* remains a difficult question, considered below.

3. The European arrest warrant in the Irish Supreme Court: Leading Decisions

The Supreme Court has dismissed a range of recent challenges in surrender proceedings. A number of practical difficulties have emerged in this area and been resolved in the absence of a preliminary reference to the Court of Justice to resolve the questions posed. The caselaw of the Irish Supreme Court is considered here under four headings: (1) fundamental fights objections to surrender proceedings, (2) evidential aspects of the arrest warrant procedure, (3) time limits in arrest warrant proceedings and (4) access to justice in surrender proceedings

1. Fundamental rights objections in surrender proceedings

The Supreme Court has rejected all challenges on fundamental rights grounds in surrender proceedings, despite the express inclusion of s. 37 into the implementation legislation. It would appear that the relevance and utility of s. 37 is now highly questionable, it having been "read down" most significantly, despite the judicial lacuna remaining. In the first Supreme Court decision examining the operation of s. 37 in Irish law, in *Minister for Justice, Equality & Law Reform v. Brennan*,22 the appellant who had absconded from prison in the UK, sought to appeal to the Supreme Court against his surrender by order of the High Court. The appellant submitted that in light of having absconded from prison he now faced surrender for a common law offence, that of escaping from lawful custody, the maximum term being life imprisonment and resulting, he contended, in a disproportionate sentence in comparison to that applicable in Ireland23 or alternatively that the proportionate nature of a sentence was a constitutionally

21 Another recent decision of the Court of Justice in the Third Pillar, relating to the same Framework Decision considered in *Pupino* is Case C-467/05 *Dell'Orto*, [2007] ECR I-5557. The Court of Justice held, on a strictly literal parsing of the text of the Decision, that an instrument that provided for damages for *inter alia* the suffering of a natural person, entailed that legal persons could not avail of its provisions. Otherwise, the Court held, any other interpretation would contradict the very letter of the Framework Decision. The text-based analysis rings quite differently to the broad ranging or teleological approach adopted by the Court of Justice in *Pupino*, to go beyond what the literal meaning of the Treaties would generally have been understood to entail. What is interesting also is the fact that national judge sought to rely on the *Pupino* decision to construe national law in *Dell'Orto* but that such a construction was ruled by the Court of Justice to be *contra legem*.

22 *Minister for Justice, Equality and Law Reform v. Brennan* [2007] IESC 21.

23 The European arrest warrant in *Brennan*, under the heading "Nature and Legal Classification of the Offences and the Applicable Statutory Provision/ Code" stated that:

> "Escaping from lawful custody is a common law offence and triable before a Judge and jury. It is punishable by a term of imprisonment and a fine. The term is not prescribed and is at the discretion of the Judge. As it is a common law offence, the maximum term of imprisonment that a Judge can impose is life."

protected right in Irish law, relying *inter alia* on s. 37. Murray C.J. for the Court24 held that while the surrender process was subject to constitutional scrutiny, the national courts remained subject to the *Pupino* interpretive obligation. Murray C.J. held that it could not have been the intention of the Oireachtas (Irish Parliament) in enacting s. 37 that the surrender of individuals would be refused if the manner in which a trial in the requested State would be carried out did not conform to the Constitution. He remarked that he was:

> "… not aware of any authority for the principle that the extradition or surrender of a person to a foreign country would contravene the Constitution simply because their legal system and system of trial differed from ours as envisaged by the Constitution."

However, Murray CJ was prepared to admit of some "egregious circumstances such as a clearly established and fundamental defect in the system of justice" in the issuing State that would warrant a refusal of surrender pursuant to s. 37, that the Court was not prepared to speculate as to, resulting in the dismissal of the appeal. What is thus unmistakable as a result of the Supreme Court decision in *Brennan* is that the potential use to which s. 37 can be put is restricted to all but the most extreme or "egregious" of situations, ostensibly contrary to the intention of parliament. Whether such an instance may in fact ever result remains another question.

Similarly, in *Minister for Justice, Equality & Law Reform v. Stapleton*, 25 the Supreme Court there overturned a decision of the High Court that had refused the surrender of an individual to an English court on the basis of s. 37 of the Act of 2003. The arrest warrant in *Stapleton* had been issued in 2005 as to fraud offences allegedly committed between 1978 and 1982 and he alleged that his right to a fair trial had been prejudiced by way of delay, warranting the prohibition of his surrender, which the High Court readily acceded to. On appeal to the Supreme Court, the Court *per* Fennelly J. was less prepared to entertain the complaint of delay, finding instead that the applicant had contributed in fact to the delay asserted as being unlawful.26 The Court reiterated its own decision in *Brennan*, that was interpreted by the Supreme Court as having set out *per* Fennelly J., "the correct approach" to the balancing of the constitutional rights of individuals subject to surrender procedures against the obligations of the State pursuant to the Framework Decision. Rather, he held mutual recognition and mutual confidence were key elements of the new system of surrender, citing with approval the decision of the Court of Justice in *Advocaten voor de Wereld* that had upheld the validity of the arrest warrant as compatible with fundamental rights. However, nowhere in *Stapleton* is any reference made to the inability of the Irish Court of last instance to refer questions for a ruling to the Court of Justice. What is interesting about *Stapleton* is once again the overt willingness of the Court to downgrade the importance of s. 37 of the Act of 2003.27

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24 Murray C.J., Macken & Finnegan JJ. Murray C.J. held that it had not been established nor could it be that the appellant would in fact be exposed to life imprisonment and the passages impugned by the appellant had been inserted there for informational purposes only.

25 *Minister for Justice, Equality & Law Reform v. Stapleton* [2007] IESC 30; [2006] 3 IR 26.

26 Murray C.J., Denham, Geoghegan, Fennelly & Kearns JJ.

27 And to similar effect see the cases of *Minister for Justice, Equality & Law Reform v. S.R.* [2007] IESC 54; *Minister for Justice, Equality & Law Reform v. Gardener* [2007] IESC 40, where similar delay

It seems clear, however, that the Supreme Court yet again is indicating its unconditional support for the new surrender procedures, an enthusiasm that remains unabated despite the existence of s.37. Clearly s. 37 cannot now be seen as having any potential to temper surrender requests falling short of Irish constitutional requirements, despite the efforts made to include such a device on the grounds of fairness. Notably, no reference is made to Dáil Debates (Parliamentary debates) as to the intention of Oireachtas (legislature) in adopting s. 37 of the Act of 2003.28 The Irish Supreme Court jurisprudence in this area demonstrates how the Recital 12 permission remains deeply problematic as a matter of national and European law. The Supreme Court jurisprudence surely gives rise to a question as to the utility of the Oireachtas inserting s. 37 into the Act of 2003 in the first place. If a modified or watered down obligation was intended, surely s. 37 would have been drafted so as to reflect as much. Instead, *Pupino* has been excessively fastened upon by the Irish courts, unable to consult the Court of Justice for clarification of the scope of the s. 37 obligation.

2. Evidential aspects of the arrest warrant procedure

The challenges to the arrest warrant arising in the Irish Supreme Court in the area of evidential aspects of the warrant are particularly important in so far as they bear upon both fundamental rights and procedural matters equally and may affect the uniformity of the operation of the arrest warrant in Europe generally. In the first major Supreme Court decision on the evidential aspects of the European arrest warrant, delivered temporally prior to *Pupino*, *Minister for Justice, Equality & Law Reform v. Dundon*,29 the appellant was the subject of an arrest warrant issued in respect of the offence of murder. The issuing judicial authority, an English Court, had received a written undertaking from the Parliamentary Under Secretary and the Director of Public Prosecutions as to the information contained in the warrant. The issue arose thus as to whether undertakings provided by the issuing State, pursuant to s 22 of the Act of 2003, were required to be given *personally* by the judge or court concerned and whether the courts in surrender proceedings had to consider the adequacy of evidence against an individual.30 The

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challenges are rejected by the Supreme Court on appeal and where the Court invoked in the latter *inter alia* the "scheme and spirit" of the Framework Decision to dismiss the cases. See *Butenas v. Governor of Cloverhill Prison* [2008] IESC 9, where a constitutional challenge to the validity of detention powers in s. 16(4) of the Act of 2003 was rejected. In *Minister for Justice, Equality & Law Reform v. Johnston* [2008] IESC 11, an unsuccessful surrender challenge on the basis of *inter alia* delay, the plaintiff did not invoke s. 37 at all. See also *Minister for Justice, Equality & Law Reform v. Puta & Sulej* [2008] IESC 29; [2008] IESC 30, an unsuccessful challenge to the technical adequacy of the constitutional ratification of the Framework Decision, where the first appellant also alleged that his surrender to the Czech Republic, which was averred to be "more like the Wild West", would expose him to a justice system in breach of s. 37. The Supreme Court, *per* Murray C.J., held that a heavy onus had to be discharged with cogent evidence to invoke s. 37 and that the "irresponsible" allegations made could not prevail.

28 The use and legitimacy of the use of such parliamentary debates remains subject to considerable dispute in Ireland. Ireland has yet to have a "*Pepper v. Hart"* revolution ([1993] 1 All ER 42): see *Crilly v. Farrington* [2002] 1 ILRM 161.

29 *Minister for Justice, Equality & Law Reform v. Dundon* [2005] IESC 13; [2005] 1 IR 261.

30 S. 22 of the Act of 2003 provides that:

Supreme Court, *per* Denham J.,31 employing ordinary canons of statutory interpretation, held that there was no requirement that the undertaking "given" had in fact to be made by the issuing authority and thus that the undertakings given complied fully with the Act. Moreover, the Court held that the adequacy of the evidence against the person sought was not a matter for consideration in surrender proceedings under the Act, thereby overturning the Court below. That there is no necessity to establish a *prima facie* case against an individual for them to be surrendered is a striking conclusion indeed, in the absence of clarification from the Court of Justice and the Supreme Court has thus disavowed decades of its own caselaw in the realm of extradition. Whilst probably correct, this conclusion flows directly from the consequences of full mutual recognition and not due process law and practice.

To similar effect in *Minister for Justice, Equality and Law Reform v. Altaravicius*32 a net point of law arose for consideration in the Supreme Court relating to the entitlement of a person subject to surrender to request the domestic warrant on foot of which an arrest warrant is issued. Thus, there the Supreme Court allowed an appeal against a High Court decision ordering a copy of the warrant for surrender from Lithuania to be produced before the Irish High Court, on the grounds of fair procedures and Recital 12 of the Framework Decision.33 The Supreme Court thus held that the European arrest warrant was based on mutual recognition and respect between judicial authorities and could not require an underlying warrant to be produced where neither the Act nor the Framework Decision explicitly so required. There was, as Denham J. described it, a "presumption" that the underlying documents were in order, pursuant to s. 4A of the Act of 2003, 34 which an individual could seek to rebut, thereby disentitling them to go on a general "fishing expedition". If this were not the case, Denham J. held, this would defeat the development that the European arrest warrant was, that of international co-operation predicated on mutual trust and judicial co-operation.35 Once again this outcome here flows logically from mutual recognition but the conclusion is reached in the absence of a consultation of the Court of Justice. Notably, the decision is delivered after *Pupino* but no reference is made thereto. Interestingly, *Altaravicius* is analogous to the recent decision of the House of Lords in *Dabas v. High Court of Justice, Madrid*36 discussed below, where a similar evidentiary request was dismissed.

> "(1) … a person shall not be surrendered under this Act unless… (*b*) an undertaking in writing is given to the High Court by the issuing judicial authority that the person will not be proceeded against, sentenced, or detained … for an offence committed before his or her surrender other than the offence … specified in the European arrest warrant concerned."

31 Upholding the High Court: Murray CJ, Denham, McGuinness, Hardiman & Geoghegan JJ.

32 *Minister for Justice, Equality & Law Reform v. Altaravicius* [2006] IESC 23; [2006] 3 IR 148. The warrant in *Altaravicius* related to robbery offences allegedly committed in 2001 in Lithuania.

33 Pursuant to s. 4A of the Act of 2003, as amended: "It shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown."

34 Murray CJ, Denham & Hardiman JJ.

35 Denham J. further noted that a discretion was provided for in s. 20 of the Act of 2003, for a judge to seek further information from the issuing judicial authority, which had not yet been employed by the High Court in the instant case and that it had been open to the applicant here to have made such an application

36 [2007] UKHL 6; [2007] 2 AC 31; [2007] 2 CMLR 39, see below, 4.1: "Reading down s. 37 and using *Pupino* to 'bridge the gap'".

In *Minister for Justice, Equality & Law Reform v. Rodnov*37 the Supreme Court dismissed an appeal against a decision of the High Court, where the individual subject to surrender had complained that the arrest warrant was bad on its face in that it had omitted a formula of words at the commencement of the form that were contained in the annex to the Framework Decision.38 Murray C.J., for the Court, held that while there had been a want of strict formal compliance in the particular warrant at issue, the defect was not "a want of formality which affected in any way the substance or effect of the European arrest warrant".39 Murray C.J. held that it would have been wholly unsatisfactory if the Court had to look for further information40 and rather a "common sense approach" had to be adopted as to challenges to the evidentiary formalities of the warrant. There is no reference to *Pupino* here, perhaps understandably given that it is an *ex tempore* decision of the Court and thus marked by extreme brevity. Surely this question was one worthy of a definitive answer from the highest European Court but there is again no mention of the inability of the Supreme Court to consult the Court of Justice on this important point of procedure and essential procedural questions are determined in isolation despite their impact on practice and the uniformity in operation of the instrument.

Finally, in the controversial decision of the Supreme Court in *Minister for Justice, Equality & Law Reform v. Tobin,*41 the *Pupino* interpretive obligation was invoked as to the interpretation of the word "fled" in s. 10 of the Act of 2003, to decide whether an Irish businessman who was convicted and sentenced in his absence for a fatal road traffic accident in Hungary, had "fled" that jurisdiction so as to warrant his surrender there.42 The Supreme Court, per Fennelly J. in refusing his surrender, held that the term "to flee" or "fled" could not be expanded so as to include the respondent, who had paid bail and had left Hungary in the course of the prosecution with the knowledge of the authorities. The *Pupino* obligation, Fennelly J. held, would not allow for any other interpretation, in so far as "fleeing" was more usually associated with escape, haste or evasion and not an instance such as this.43 The difficultly with this much is that the respondent did not ultimately have to serve a sentence imposed by a Hungarian Court, in light of the highly

37 *Minister for Justice, Equality & Law Reform v. Rodnov* (Supreme Court, Unreported, *ex tempore*, 1st June, 2006).

38 Article 8 of the Framework Decision provides that certain essential information shall be contained in the warrant as set out in the Annex. The words omitted were that:

> "This warrant has been issued by a competent judicial authority. It requests that the person mentioned below be arrested and surrendered for the purpose of conducting a criminal prosecution or executing a custodial sentence of detention order."

39 P. 2 of the decision (Murray CJ, Hardiman & Macken JJ.).

40 Pursuant to s. 20 of the Act of 2003.

41 *Minister for Justice, Equality & Law Reform v. Tobin* [2008] IESC 3.

42 S. 10 governs the obligation to surrender and provides that:

"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."

43 Interestingly, the Tampere European Council conclusions of 1999 and the recital to the Framework Decision were dismissed by Fennelly J. as inappropriate interpretive aids.

restrictive interpretation adopted of the word "fled," and the decision of the Court provoked much public outcry in Hungary. A decision of the Court of Justice as to the term "fled" would have been fruitful in such a difficult case as to the breadth of the *Pupino* interpretive obligation, given the likelihood of this issue arising in other Member State Courts in the future.

3. Time limits in surrender proceedings

The time limits that surrender proceedings are subject to remains a key procedural and fundamental rights question in so far as surrender proceedings are designed to be efficacious and judicially policed. A range of difficulties in this regard have confronted the Irish courts. The second *Dundon* decision considered by the Supreme Court, *Dundon v. Governor of Clover Hill*,44 relating to the same applicant in the first *Dundon* decision is also of note, where the Court was asked subsequently to interpret Article 17 of the Framework Decision45. The Court was asked to decide in *habeas corpus* proceedings *before* the making of the final surrender decision46 whether the applicant had a right to immediate release upon expiry of the sixty day period specified in the Framework Decision and if not, whether such a situation was in breach of their fundamental rights. Dundon challenged the lawfulness of his detention, where the validity of his surrender had been upheld by the Supreme Court shortly before he instituted these proceedings. No penalty is provided for a breach of the time limits in Article 17. S. 16 of the Irish implementing legislation, however, provides for a curious and loose implementation of the obligations in Article 17.47 Denham J., in the Supreme Court,48 held that the

44 *Dundon v. Governor of Clover Hill Prison* [2005] IESC 83; [2006] 1 IR 518.

45 Article 17 of the Framework Decision states that:

> "1. A European arrest warrant shall be dealt with and executed as a matter of urgency.
>
> 2. In cases where the requested person consents to his surrender, the final decision on the execution of the European arrest warrant should be taken within a period of 10 days after the consent has been given.
>
> 3. In other cases, the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person.
>
> 4. Where in specific cases the European arrest warrant cannot be executed within the time limits laid down in paragraphs 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days…."

46 Article 23 of the Framework Decision provides for *inter alia* the surrender of an individual after the final decision on the execution of the warrant and mandates their release *after* particular time limits have passed. Denham J. held that the Article was inapplicable as the final decision on the applicant's appeal had not yet been made by the Supreme Court.

47 Ss. 16(10) & (11) of the Act of 2003 provide that:

> "(10) If the High Court has not, after the expiration of 60 days from the arrest of the person concerned under section 13 or 14, made an order under this section or section 15 , or has decided not to make an order under this section, it shall direct the Central Authority in the State to inform the issuing judicial authority and … and the Central Authority in the State shall comply with such direction.
>
> (11) If the High Court has not, after the expiration of 90 days from the arrest of the person concerned under section 13 or 14, made an order under this section or section 15 , or has decided not to make an order under this section, it shall direct the Central Authority in the State to inform

extendable time limits in the Framework were, in her opinion, "a strongly worded recommendation," but the processes remained subject to the fact that there was no mandatory time limit of 60 days *prior* to the final order for surrender in the same way as after the final order. While Denham J. held that it was unfortunate that it had not been possible to process the request more expeditiously, she concluded that the applicant had exercised his right of access to the courts "fully" through his extensive initiation of proceedings.

Geoghegan J. held it was quite likely that a sixty day period would be exceeded without fault in any European Member State where tiers of appellate courts were involved in the arrest warrant process. If he was wrong in this regard, Geoghegan J. held that a purposive approach applied to the Act of 2003 and that time taken up by proceedings instigated by the applicant had to be discounted from the time limits. Similarly, Fennelly J. considered the Court bound by the interpretive obligation set out in *Pupino* so as to arrive at the conclusion reached by the Supreme Court.49 Despite the extreme importance of this procedural point, the variety of ways in which the Supreme Court judges address the point raise worrisome questions once again as to uniformity of interpretation of the instrument and its implications for fundamental rights. Whether the Supreme Court is interpreting the national legislation *contra legem* remains unclear in the absence of clarification.

3. Access to the courts in surrender proceedings

Access to the courts is a fundamental right of tremendous importance in surrender proceedings given the fact that individuals are being pursued in this expeditious system between States through a judicial process. This area alone is one where the Supreme Court has reacted favorably to the subject of surrender proceedings. In the recent decision of *Ó Fallúin v. Governor of Cloverhill*,50 the Supreme Court decided an important point relating to detention powers and the right of access to justice of an individual in surrender proceedings The applicant in *Ó Fallúin* had been charged with conspiracy to defraud the UK Passport office and his surrender had been ordered by the Irish High Court, subject to a committal to prison pending the carrying out of the order for fifteen days.51 The Supreme Court there was asked to interpret in *habeas corpus* proceedings s. 16(7) of the Act of 200352 and whether it entailed that a person whose surrender had been ordered

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> the issuing judicial authority … and the Central Authority in the State shall comply with such direction."

48 Murray CJ, Denham, Fennelly, Hardiman & Geoghegan JJ.

49 See the subsequent interpretation of this decision in a later judgment of the Supreme Court in *Minister for Justice, Equality & Law Reform v. S.R.* [2007] IESC 54, that, *per* Finnegan J., held that the requirement in Article 17 is a matter related to "internal discipline within the States and is not intended to confer individual rights".

50 *Ó Fallúin v. Governor of Cloverhill* [2007] IESC 20.

51 S. 13 of the Act of 2003 provides that "An order under this section shall not take effect until the expiration of 15 days beginning on the date of the making of the order".

52 S. 16(7) of the Act of 2003 provides that:

> "… a person (to whom an order for the time being in force under this section applies) who is not surrendered to the issuing state in accordance with subsection (5), *shall be released from custody*

but who was not in fact surrendered could be detained in custody pending an appeal to the Supreme Court. While the Act thus clearly provided for the immediate release of an individual in detention in the ordinary course, the Act had failed to provide for the scenario of the surrender decision being contested in the ordinary way in the appellate process through the Irish Courts. Thus the outcome of the decision was likely to have a profound effect on the liberty of those subject to surrender proceedings. The applicant in this case notably had failed to make a *habeas corpus* application for his release within the fifteen day period from the making High Court surrender order.

The Supreme Court *per* Fennelly J. concluded that the applicant had been in unlawful detention and that there was no necessary connection between the applicant's right to pursue his appeal and his right to liberty while it was pending. Rather the appeal did not depend on his detention in custody. S. 16(7) of the Act of 2003 was silent in respect of the appellate process and thus the maxim "*expressio unius est exclusio alterius*" applied.53 Fennelly J. then turned to the Article 23 of the text of the Framework Decision to Article 23, by virtue of the fact that the Irish law had to be read in light thereof.54 Article 23 provided that:

> "upon expiry of the time limits referred to in paragraph 2 [which provides for the ten-day period] to 4, if the person is still being held in custody he shall be released".

Fennelly J. held that the true meaning and intent of Article 23 had not been properly argued in the instant proceedings and so the Court would have to await a decision of the Court of Justice. In fact, the implementation of Article 23 of the Framework Decision in Irish law has received some criticism from the Commission.55 What again is noticeable is the absence of any comment from the Supreme Court to the effect that they had no ability to access the Court of Justice as to this important practical question and its operation in the Member State courts. The outcome of the *Ó Fallúin* decision at least is favourable to the accused. However, the result was obtained through the *habeas corpus* proceedings, a constitutionally enshrined remedy, that must be dealt with expeditiously as a matter of right.56 Again, the importance of access to the courts in this area would surely entail that the Court of Justice would be in a position to decide this important procedural question.

4. Analysis

1. Reading down s. 37 and using Pupino *to "bridge the gap"*

> *immediately* upon the expiration of the 10 days referred to in subsection (5), unless, upon such expiration, proceedings referred to in subsection (6) are pending." (emphasis supplied).

53 Meaning, approximately: "To say one thing is to exclude another".

54 Pursuant to the *Pupino* decision of the Court of Justice, which is not explicitly referred to in the decision of Fennelly J. but by implication is being referred to.

55 Not strictly relating to the point raised in *Ó Fallúin*. See Commission Staff Working Document, fn.2, (p. 31), referring to the lack of clarity in Ireland as to the implementation of Article 23.

56 Irish law has now been amended to take into account the Supreme Court decision in *Ó Fallúin*: S. 16(7), as substituted by s. 76(f) of the Criminal Justice (Terrorist Offences) Act, 2005.

It is quite possible that s. 37 of the (Irish) European Warrant Act 2003, on any construction of the national legislation, does in fact constitute a mis-implementation of the Framework Decision. S. 37 permits some form of supremacy conflict to arise. A large number of applications for surrender could potentially be refused clearly on the basis thereof. However, the precise extent of the obligation intended for in Recital 12 of the Framework Decision remains unclear in the absence of clarification from the Court of Justice and Recital 12 did not form part of its substantive analysis in the recent decision of the Court of Justice in *Advocaten voor de Wereld*. However, it seems clear that s. 37 has been "read down" considerably by the Irish Supreme Court, an interpretive exercise that has rendered its utility almost meaningless. Thus the role of the Supreme Court as a guardian of fundamental rights in Third Pillar proceedings now seems redundant, compounded by its lack of access to the Court of Justice.

Equally, the *Pupino* decision appears to now form a key part of most recent decisions of the Supreme Court in surrender proceedings in order to "bridge the gap" between national implementing legislation of the arrest warrant and the absence of an ability to refer questions of law to the Court of Justice. No conflict, however, is evident in any of the Irish Supreme Court jurisprudence as to whether the use of the *Pupino* "conforming" or consistent interpretation would in fact be *contra legem*, i.e. that the asserted interpretation of the Act of 2003 in light of the Framework Decision would go beyond the actual scope or provisions of the Framework Decision wrongfully, *contra legem*. By contrast, in a recent judgment of the House of Lords as to the European arrest warrant in *Dabas v. High Court of Justice, Madrid*, a notable conflict emerged as to the proper use of the *Pupino* decision and the limits of the interpretative obligation.57 There, a split Lords divided on the application of *Pupino* "conforming" or consistent interpretation, to the (UK) Extradition Act, 2003. *Dabas* raised a net point of law, as to whether the actual arrest warrant document had to be produced in the absence of a certificate, in light of the wording of s. 64 of the Act of 2003 which reads as follows:

> The conduct constitutes an extradition offence in relation to the category 1 territory if these conditions are satisfied– ....(b) a certificate issued by an appropriate authority of the category 1 territory shows that the conduct falls within the European framework list..."

The appellant in *Dabas* had been sought by the Spanish High Court in respect of the Madrid Train bombings in 2004. The arrest warrant in that case, which otherwise complied with the form which the Framework Decision provided, was not accompanied by the certificate specified in s. 64, as above. The Framework Decision made no specific reference to such a certificate. 58 The appellant contended thus that the warrant did not comply with the Act of 2003 because of the fact that it had not been accompanied by a certificate of the kind referred to in s. 64. The Law Lords by a majority, employing the

57 *Dabas v. High Court of Justice, Madrid* [2007] UKHL 6; [2007] 2 AC 31; [2007] 2 CMLR 39. See further Mackarel "'Surrendering' the fugitive - the European arrest warrant and the United Kingdom" (2007) 71(4) European Journal of Crime, Criminal Law and Criminal Justice 362.
58 Lords Bingham, Hope, Brown and Mance; Lord Scott dissenting.

Pupino duty of construction, sought to construe the Act of 2003 in light of the Framework Decision and held that the evidential condition contended for by the appellant would if adopted have been unhelpful and inefficient and would be in breach of the spirit of co-operation that the instrument was founded on. Lord Scott, dissenting as to the application of *Pupino* only and not the result, expressed the view that it was not possible to interpret s. 64, a clear statutory provision, in light of the Framework Decision without construing the Act of 2003 *contra legem*, given the precise wording of s. 64 of the UK legislation.59 A split such as that occurring between the majority and minority in *Dabas* is a sign of the healthy operation of judicial protection in Third Pillar matters, particularly where no court in the UK (similar to Ireland) can refer such proceedings to the Court of Justice. A rigorous and critical application of the *Pupino* decision is of much importance in deciding whether a particular interpretation of implementing legislation is *contra legem* the Framework Decision. It is evident that the Irish Supreme Court has uncritically applied the *Pupino* decision. That such a divergence as to the application of *Pupino* has yet to arise in Ireland is thus most regrettable indeed.

2. Accepting the jurisdiction of the Court of Justice: The solution?

The political decision of the Irish State not to accept the jurisdiction of the Court of Justice pursuant to Article 35 EU in this area, for reasons outwardly to do with sovereignty and control over the national legal system in criminal justice, is now proving to have major legal consequences. This decision has been criticised extra-judicially by Fennelly J. of the Irish Supreme Court, who has stated that:

> "[i]t is apparent that the decision to decline jurisdiction to the Court of Justice is rooted in objection to the enlargement of the powers of the Court. It is difficult to see how the policy serves the presumed purpose…The most fundamental aspects of criminal procedure such as the burden and method of proof, the right to bail, trial by jury may be at stake…The absence of capacity to consult the Court of Justice may have the consequence that the Court of Justice is less likely to become aware of ... specific concerns".60

Ireland as a State has increasingly adopted an antagonistic stance at European level in recent times.61 How this new political relationship will impact on its domestic legal

59 He stated that [2007] 2 AC 31, 57 (para. 66):

> "In my opinion the normal construction of section 64, in the context of the Act as a whole, would require the answer that it does. The section certainly reads as though a separate and express certification signed by a judicial authority and additional to the arrest warrant itself is required. And there is good reason to suppose that the normal construction reflects Parliament's intention….Article 34(2)(b) [TEU] requires no more than that the result of the member states implementation be consistent with and give proper effect to the Framework Decision in questions…."

60 Fennelly J. of course being a former Advocate General at the Court of Justice from 1995-2000: see "Preliminary Reference Procedure: A Factual and Legal Review" (2006) 13 Irish Journal of European law 55, 80.

61 Witness for example, the furore at national level as to the decision of the Government on whether to opt out of the Charter of Fundamental Rights, ultimately not taken on account of the reaction of Trade Unions in Ireland: See *The Irish Times* 5th October, 2007. See also Ireland's latest challenge to the validity of

system in the realm of European matters remains to be seen, given the traditionally quite pro-*communautaire* stance adopted by the Irish judiciary, a stance that may be viewed through a different prism in the realm of arrest warrant law and practice.62

Conclusion

The Irish Supreme Court has arguably failed to "bridge the gap" between the domestic constitutional protection it is supposed to be affording to those subject to surrender pursuant to s. 37 and the *Pupino* interpretive obligation, shadowed by its inability to access the Court of Justice in construing an instrument that lacks direct effect. The force and utility of s. 37 appears to have been cast aside by the Irish Supreme Court in favour of full mutual recognition. Whether such a response is satisfactory in light of its inability to consult the Court of Justice as to the correct interpretation of the instrument, on so many practical points affecting liberty and fundamental rights and freedoms, appears to become more self-evidently not the case. The *Pupino* solution does not appear to be an adequate response to the Irish judicial dilemma. While the judicial protection that can be offered in the realm of the Third Pillar is questionable where the Court of Justice has such a truncated jurisdiction, the challenge remains for national courts, in Member States such as Ireland as Third Pillar guardians of fundamental rights, to truly "bridge the gap" effectively.

Directive 2006/24/EC on the retention of data on the grounds of legal base, by virtue of the fact that Ireland was outvoted at Council level: see Case C-301/06 *Ireland v. Council*, OJ 2005 C 237 p. 5. See also the outcome of the Reform Treaty, where Ireland has availed of the special arrangement available to it in the area of Justice and Home Affairs (JHA). In respect of future measures in the areas of judicial cooperation in criminal matters and police cooperation, Ireland will have the option on a case-by-case basis of participating or not doing so. The Government has made a declaration which will be attached to the Reform Treaty underlining an intention to join with other Member States wherever possible. See Declaration by Ireland on Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice. (CIG 3/1/07 REV 1) (Corrigendum 1): see http://europa.eu/reform_treaty/index_en.htm.

62 Three sitting members of the Irish Supreme Court are former members of the Court of Justice, an extraordinary statistic in comparative terms. See Fahey *Practice and Procedure in Preliminary References to Europe: 30 years of Article 234 EC caselaw from the Irish Courts* (Dublin, Firstlaw, 2007) pp. 106-108.