



THE COURT OF APPEAL

**The President
McCarthy J.
Donnelly J.**

[Record No. 2021/37]

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent/Applicant

AND

ANDRIUS SCIUKA

Appellant/Respondent

**JUDGMENT of the Court delivered by Ms. Justice Aileen Donnelly on the 22nd
day of March 2021**

A. Introduction

1. This is an appeal against the Order of Burns (P) J. made on the 10th of February 2021 pursuant to section 18 (1) (a) of The European Arrest Warrant Act 2003 as amended (“The Act of 2003”), in which he postponed the surrender of Mr. Sciuka (“the appellant”) to Lithuania. Burns J. ordered the postponement for humanitarian reasons pursuant to the said section. On behalf of the appellant, it is contended that this was an incorrect use of the “humanitarian reasons” provisions and that there was no evidential basis for the making of said order.

B. Background

2. On the 18th January 2021, Burns (P) J. made an order pursuant to s.16(1) of the Act of 2003, directing that the appellant be surrendered to Lithuania to serve the

remainder of a sentence of imprisonment, on foot of a European Arrest Warrant “EAW”) which had been issued on the 14th February 2017 by an issuing judicial authority. On the 26th January 2021, Burns J. refused the Appellant's application for a certificate granting leave to appeal under s.16(11) of the 2003 Act.

3. On the 10th February 2021, the Minister (respondent to this appeal) applied to Burns (P.) J. for an Order pursuant to s.18(1)(a) of the 2003 Act, directing that the surrender of the appellant be postponed. The basis for this application was a letter dated the 5th February 2021 which had been received from the issuing judicial authority. In this letter, the issuing judicial authority referred to a letter dated the 2nd February 2021 which the Klaipeda Regional Court had received from the International Liaison Office of Lithuanian Criminal Police Bureau, in which it was indicated that surrender had been scheduled for the 5th February 2021. In reference to the said letter from the Police Bureau, the issuing judicial authority stated as follows:-

“The Letter states that, due to the situation caused by the spread of virus COVID-19, Germany has cancelled all flights from Ireland and the United Kingdom; therefore, there is no possibility to arrange the takeover of Mr. Andrius Sciuka. According to the information provided by travel agency, there is no possibility to take over Mr. Andrius Sciuka until 19.02.2021. For these reasons, the International Liaison Office of Lithuanian Criminal Police Bureau requests to apply to Your Institution for the extension of the takeover deadline. In the light of the foregoing, we kindly ask You to extend the deadline for taking over Mr. Andrius Sciuka under the European Arrest Warrant until 01.04.2021.”

4. At the hearing of the appeal, the Court was informed that the appellant did not take issue with the admissibility of the information contained in the letter. Indeed, the appellant relied upon the contents of the letter in support of his argument whereas the respondent also relied on the contents in support of her argument.

C. The High Court Hearing

5. The hearing before Burns J. was brief but focused. Based upon the above letter, counsel for the Minister sought a postponement pursuant to s.18 of the Act of 2003. Counsel for the appellant objected on the basis that the application did not come within s.18 as the application was made due to the unavailability of flights i.e. and not the pandemic. Counsel for the appellant submitted that it was more properly a type of application brought under s.16(5) which required proof by the issuing state to show that the circumstances for the delayed surrender were beyond its control. Counsel for the appellant objected however to any such application of s.16(5) on the basis of lack of evidence.
6. Counsel for the Minister submitted that the letter was not sufficient to allow the State rely upon s.16 to seek to delay surrender. Counsel submitted that there was precedent for the use of s.18 in Covid-19 related circumstances and also that s.18 was quite broadly worded. Counsel submitted that the reference to humanitarian considerations was broader than the reference to the requested person. It would also cover other people travelling as well.
7. In a brief ruling Burns J. stated:-

“I am satisfied that the circumstances have arisen as a result of the COVID-19 pandemic do represent sufficient humanitarian grounds that I would allow the court to postpone the surrender in this particular case. I note that there is quite

a lot of precedent for taking that approach over the last year in respect of European Arrest Warrants. [...] I will list the matter for the 26th of March. I will give liberty to both sides to apply should it look like it is possible or that it is likely that surrender can be affected within that period or prior to that period and I will remand in custody then until 26th March [...].”

D. The Appeal

8. The Notice of Appeal contained three grounds as follows:-
 - (a) There was no evidence before the High Court that any humanitarian grounds existed so as to warrant the postponement of the surrender;
 - (b) That s18 required that it be read in accordance with Article 23(4) of the Framework Decision. That required serious humanitarian grounds to exist before surrender could be postponed and no such grounds existed; and
 - (c) A postponement on humanitarian grounds demands that evidence establish that surrender be too harsh, unjust or oppressive for the subject of the EAW to be surrendered. There was no such evidence before the High Court.
9. The Minister opposed the appeal on all grounds.

E. Submissions

10. The Court received very helpful written and oral submissions from counsel on both sides. The appellant referred to the provisions of s.16 of the Act of 2003 in submitting that these provisions provided a mechanism whereby those time limits can be extended if the High Court is satisfied that “because of circumstances beyond the control of the state or the issuing state” the person has not been surrendered or will not be surrendered within those these limits.
11. The appellant relied upon the Supreme Court decision in *Minister for Justice and Equality v. Skiba* [2018] IESC 68 and submitted that the phrase

“circumstances beyond the control of the State” as it appears in section 16(5) had to be given an interpretation consistent with the concept of *force majeure* as it appears in community law. The concept of *force majeure* had to be understood as:-

“[...] referring to abnormal and unforeseeable circumstances which were outside the control of the party by whom it is pleaded and the consequences of which could not have been avoided in spite of the exercise of all due care.”

Relying on *Skiba*, the appellant submitted that s.16(5) provides a statutory mechanism to extend time when the State for some unforeseen reason cannot meet the deadline for surrender.

12. The appellant submitted that s.18 was intended to implement Article 23(4) of the Framework Decision; that concerned humanitarian situations. The appellant submitted that what the Minister was actually endeavouring to do in this case was to extend time for surrender because circumstances had arisen beyond the control of the issuing state which meant that the appellant would not be surrendered within the time allowed for surrender. Instead of making the application pursuant to s.16, the Minister presented it as an application pursuant to s.18 of the Act of 2003. No “humanitarian situation” had arisen; rather what had happened was that a third country had cancelled flights to and from Ireland.
13. The appellant relied upon the decision of Edwards J. in *MJE v. DL* [2011] IEHC 248 in submitting that evidence of humanitarian grounds must be shown. The appellant submitted that *DL* required that the evidence has to be establish all of the following:-

- (i) The existence of humanitarian grounds or in other words something which impinges directly on some aspect of an individual's human condition or identity; and
- (ii) That those grounds warrant postponement of surrender i.e. that grounds relied upon are so grave and of such a serious nature, and that the desirability of avoiding the apprehended prejudice was so compelling, as to render postponement the only effective option.

14. There was no evidence in even a general way of the health risks associated with travel and the specific risks to the individual. While Covid-19 had the potential to impact directly on a person's health, no evidence was placed before the High Court to the effect that postponing surrender was the only effective option so as to avoid the appellant or others contracting Covid-19. There was no evidence of prevalence rates comparing Ireland to Lithuania or to any other form of testing or contact of this appellant with others who had Covid-19.

15. The appellant submitted that no consideration was given by the High Court as to whether the global pandemic was such a compelling reason so as to warrant postponement of surrender so that postponement was the only effective option. Rather what motivated the postponement was the unscheduled cancellation of flights to Germany. Current domestic travel restrictions allow for necessary travel including attendance at court. Only non-essential international travel is not allowed.

16. The Minister submits that s.18 gives effect to Article 23(4) of the Framework Decision and there is no tension between the two. The Minister rejected the submission that circumstances had to be "extreme" but accepted that they had to be serious; serious did not mean life threatening. Danger to health suffices.

- 17.** The Minister distinguished the present circumstances from those in *DL* but submitted that the travel restrictions related to the Covid-19 pandemic (including the cancellation of flights) undoubtedly pertain to “the saving of human lives or to the alleviation of human suffering.”
- 18.** Counsel submitted that Burns J. was entitled to take judicial notice of the general international situation relating to the Covid-19 pandemic, and to the fact that travel restrictions relating to same have the aim of saving lives and preserving health. Burns J. also had before him evidence in the form of the letter from the issuing judicial authority of the 5th February 2021 which stated in clear terms that the flight cancellations which caused the necessity for postponement of surrender had occurred as a result of “the situation caused by the spread of virus COVID-19”. The Minister also relied upon two decision of the Court of Appeal regarding the taking of judicial notice concerning the global pandemic.
- 19.** The aim of the flight cancellations was to preserve human life and human health. A consequence of the actions taken in pursuance of that aim was that a postponement of the appellant's surrender became necessary. It is submitted that this constituted a serious humanitarian ground for the postponement.
- 20.** The Minister rejected the requirement that there be a direct link to the requested person as the appellant submitted. The Minister also rejected that there was a requirement that postponement be the “only effective option”. The Minister agreed that proportionality was required in assessing whether to postpone but submitted the High Court had done so by granting the postponement for a shorter period than the maximum required.

G. Section 18 and Article 23(4)

21. Section 18 of the Act of 2003 deals with postponement of surrender and provides as follows:-

“(1) The High Court may direct that the surrender of a person to whom an order under subsection (1) or (2) [...] of section 16 applies be postponed in accordance with his section where-

(a) the High Court is satisfied that circumstances exist that would warrant the postponement, on humanitarian grounds, including that a manifest danger to the life or health of the person concerned would likely be occasioned by his or her surrender to the issuing state.

(b) the person is being proceeded against for an offence in the state, or

(c) the person has been sentenced to a term of imprisonment for an offence and is required to serve all or part of that term of imprisonment in the State.

(2) The postponement shall continue until the High Court makes an order under subsection (4).

(3) [...]

(4) [...]”

22. These provisions were intended to implement Article 23(4) of the Council Framework Decision of 13th June 2002 which provides as follows:-

“The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person’s life or health. The execution of the European arrest warrant shall take place as soon as these grounds have ceased to exist. The executing judicial authority shall

immediately inform the issuing judicial authority and agree on a new surrender date. In that event the surrender shall take place within 10 days of the new date thus agreed.”

H. The decision in MJE v. DL

23. In *Minister for Justice and Equality v. D.L. Edwards* J. considered the provisions of s.18 of the Act of 2003. His views on the interpretation of humanitarian grounds were in general accepted by both sides. There was one particular aspect of how a court may approach a request that the Minister contended had to be adjusted somewhat when the humanitarian grounds were being relied upon by the State to postpone surrender rather than by a requested person and we will refer to that further below. In *D.L.* the requested person sought a postponement because of anticipated prejudice to the emotional health of his daughter. Edwards J. stated in the section headed “The Court’s Decision” at page twelve:-

“In that regard, the first requirement is that the **evidence must establish the existence of humanitarian grounds** [emphasis added]. Two issues arise with respect to this aspect of the matter: (a) what is meant by “humanitarian” grounds, and (b) whether they must relate to the proposed extraditee personally, or can they also relate to a third party such as, in this case, the respondent’s daughter?

The word “humanitarian” appears in both the Act of 2003 and in the underlying Framework Decision. Neither of these documents attaches any special meaning to it, and so the word should be accorded its ordinary meaning. It is used as an adjective and it is used in conjunction with the word

“grounds” in the Act of 2003, and “reasons” in the Framework Decision. Accordingly, it imports something about those grounds or reasons that is to do with, or is a feature of, the humanity or human nature of the subject person, whether that be the proposed extraditee or another person. When used as an adjective, the word “humanitarian” most commonly connotes having concern for or helping to improve the welfare and happiness of people; alternatively it pertains to the saving of human lives or to the alleviation of human suffering.

The common example given both in s.18 (2) of the Act of 2003, and in Article 23(4) of the Framework Decision is danger to the person’s life or health. The Court takes the point that this is an indicative example only and is not intended to be definitive. However, it makes it clear that what is contemplated is a prejudice that impinges upon some fundamental personal right of the subject individual to the extent of threatening his or her core well being, or perhaps very existence as a human being, such as a threat to life, or a threat to physical or mental health, or to bodily integrity, or a threat to that individual’s dignity as a human person. These are again examples and do not constitute an exhaustive list. The important feature is that the prejudice, whatever it is, must impinge directly on some aspect of the individual’s human condition or identity. The Court can see no reason in principle, particularly having regard to Article 8 of the Convention, why the prejudice in question must be personal to the proposed extraditee. [...]

Where humanitarian grounds are shown to exist, there is then a second requirement that must also be satisfied. It must be demonstrated that a postponement “is warranted” in all the circumstances on the humanitarian

grounds identified. This brings in the question of proportionality. While the Act of 2003 does not establish a gravity threshold in terms of the humanitarian grounds identified, the Framework Decision speaks of “serious humanitarian reasons”. In the Court’s view, in a postponement application, just as in surrender applications, regard must be had to the public interest in extradition as well as to the predicament of the individual (or persons) who is (are) at risk of prejudice. The Court agrees with the approach advocated in *Norris*, and in *HH* and *B*, respectively, and in particular, endorses the views of Laws L.J. in *HH* that the public interest in extradition is systematically served by the extradition being carried into effect, subject to the proper procedures. Of course, it is not all about the public interest but the Court is satisfied that before postponement of an extradition would be “warranted”, it would have to be demonstrated that the humanitarian grounds relied upon were so grave and of such a serious nature, and that the desirability of avoiding the apprehended prejudice was so compelling, as to render postponement the only effective option.”

I. Discussion and Analysis

24. Having considered the written and oral submissions of the parties, we consider that the following two issues arise:-

- (i) The extent of the reach of “humanitarian grounds” in s.18; and
- (ii) Whether the evidence before the High Court was sufficient to establish humanitarian grounds for the postponement of surrender.

J. Issue (i): The Extent of the Reach of “Humanitarian Grounds”.

25. As part of the consideration of this first issue it is useful to discuss the provisions of s. 16(5) of the Act of 2003. The parties are agreed that, s.16 gives effect to

Article 23(3) while s.18 gives effect to Article 23(4) of the Framework Decision. Article 23(3) provides:-

“If the surrender of the requested person within the period laid down in paragraph 2 is prevented by circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.”

26. In both s. 16(5) and Article 23(3) there is a requirement that the issuing judicial authority and the executing judicial authority must agree a definitive date. The Supreme Court in *Minister for Justice and Equality v. Vilkas* [2018] IESC 69, the Supreme Court held that the s.16(5) only permitted one request for an extension of time. That case had returned to the Irish courts from the Court of Justice of the European Union who had held, *inter alia*, that Article 23(3) permitted, if circumstances of *force majeure* again prevailed, to delay the surrender again. The Act of 2003 was not amended subsequent to the Supreme Court decision in *Vilkas* so only a single application can be made under the provision of s.16(5) of the Act to delay surrender on the grounds of force majeure.

27. The Minister submits that although this was not referred to by the High Court judge, it may have been an aspect in the thinking regarding the use of the s.18 provisions i.e. if the conditions prevailed beyond the agreed new date for surrender, release would have to be made. In our view such a consideration cannot turn a non-humanitarian situation into a humanitarian situation. If s.18 does not apply to the situation, it must not be stretched beyond its breaking

point. Therefore, regardless of consequences for the actual physical surrender, if s.18 does not apply, it cannot be utilised as insurance against unfavourable conditions in the future. It should of course not require to be stated but for the avoidance of doubt we confirm that there is no suggestion that the High Court judge was deliberately engaging in such a policy. The sole question for this Court is whether his genuine view, based upon his interpretation of the law and evidence, that s.18 was appropriate to utilise in the circumstances was a correct one. Of course, it may be that if s.18 can be utilised, it represents a more attractive option because it gives a higher likelihood that the High Court and the State generally can ensure that Ireland's obligation to surrender under the Framework Decision will be met even if the pandemic continues to cause problems for particular surrenders.

- 28.** The Supreme Court in *Skiba* outlined the restrictive nature of s.16(4) (and Article 23(3)) as applying to a situation where a *force majeure* has intervened. Under both Article 23(3) and s.16(4) it is clear that a new surrender date has to be agreed. In the present case both the appellant and Minister submitted to the High Court judge that the proofs in s.16(4) were not sufficient albeit for different reasons. The appellant relied upon an argument that the newly fixed date had to be within ten days of the time permitted for surrender together with a more general submission that the onus lay on the State to prove the matter was out of control. Counsel for the Minister submitted that the letter was not clear enough to apply for the 19th to be fixed as a date for surrender.
- 29.** As stated above, the Act of 2003 and the Framework Decision require that a new date for surrender be fixed for surrender by agreement between the issuing judicial authority and the executing judicial authority and that here is then a ten

day period subsequent to that date in which to surrender the person. It appears therefore that there was no definitive date for surrender given. In those circumstances, we are of the view that in the absence of the letter fixing a definitive date for agreed surrender, the Minister was correct in not seeking to have the High Court fix a new date under s.16(5). There simply was no *agreed* date for the surrender between the relevant judicial authorities. That does not dispose of the issue of whether s.18 was correctly used in these circumstances. That requires a closer look at the provisions.

30. At the hearing of the appeal, counsel for the appellant agreed, as she had to agree, that the Covid-19 pandemic may in certain circumstances form an appropriate evidential basis for postponement of surrender pursuant to s.18 of the Act of 2003. Counsel submitted however, that such humanitarian reasons were limited to situations where a person actively had Covid-19 or, if Lithuania had such a high incidence of Covid-19 that it was unsafe to transfer him to prison there or, indeed if there was a ban on all travel to and from Lithuania based upon the spread of Covid-19.

31. Counsel for the appellant also clarified that she was not arguing that humanitarian grounds had to relate to the requested person. Again, this appears to be a wise and sensible concession. Indeed, in the *D.L.* case above, relied upon so heavily by the appellant, Edwards J. accepted that the grounds could relate to other persons. We have no hesitation in holding that s.18 applies to humanitarian considerations that extend beyond an immediate danger to the *requested person's* life or health. Apart from the situation referred to by Edwards J. (i.e. humanitarian circumstances related to a family member of the requested person), another example might be where the person has an infectious

and quite serious disease, but travel is not a danger to that person. If the nature of disease meant that close proximity to the requested person would be a danger to those accompanying them or in an aircraft with them, there would be manifest danger to the life and health of those other persons coming within the provision of s.18. Even if s.16(5) or Article 23(3) were applicable (as this is a circumstance outside the control of either member state), s.18 would be available and may even be more appropriate to use as no definitive date of the end of the infectious period may be known.

32. We consider therefore that in general terms this answers the first issue I have identified above. The reach of the humanitarian grounds covers the Covid-19 global pandemic in a general sense and it is not restricted to the risk of disease i.e. the risk to life or health, to the requested individual. Indeed, given the extraordinary change to daily life in Ireland and across the world (we will refer later to the taking of judicial notice of the pandemic), for the purpose of safeguarding public health, it would be an extraordinary situation if the pandemic was to be held not to amount to be *capable* of being considered a humanitarian ground for postponement of surrender.

33. It is worth pointing out that according to a document prepared by the General Secretariat of the Council of the EU (Brussels, 18 September 2020 (OR.en) 7693/4/20 REV 4), some other Member States have also taken the approach that the humanitarian provisions of Article 23(4) covers the difficulties with surrender created by the global pandemic. It is noteworthy that the document was compiled using information from Eurojust (the European Union Agency for Criminal Justice Cooperation) and the European Judicial Network (a

network of national contact points for the facilitation of judicial cooperation in criminal matters in the European Union).

34. The Council document notes that there is no single common approach. Many member states invoked the *force majeure* under Article 23(3) of the FD, “a few others, bearing in mind that the duration of this pandemic is unpredictable, preferred to rely on the serious humanitarian reasons set forth by Article 23(4) EAW FD”. The document goes on to record that “there are several States that applied **either Article 23(3) or Article 23(4) EAW FD depending on the specific circumstances of the individual case.**” [original **emphasis**]
35. The Council document also notes that actual surrenders had been most easily been carried out where countries had land borders. Although by then (September) the situation with air travel had improved it noted that there was “**some remaining/reoccurring issues in relation to the functioning of commercial flights.**” [original **emphasis**] We are satisfied that this Court can use the information in that document to take judicial notice that there is a mixed picture of how the impact of the global pandemic on surrenders under EAWs has been dealt with by the courts of member states. The document has limited relevance however as we have not been pointed to any specific legal judgments from the member states. It is interesting to note that the very issue that was identified in this case as a deficiency in proof under our implementing provision of Article 23(3), namely the lack of a definite date for surrender, is a reason that a few member states have relied upon for using the national provisions implementing Article 23(4).
36. The High Court is therefore entitled to consider that the Covid-19 pandemic may give rise to humanitarian reasons requiring a surrender to be postponed and

that these facts may go beyond a specific risk to the requested person by virtue of travel. Whether the evidence satisfies the requirements under s.18 is something which must be assessed in each individual case.

K. Issue (ii) Was there Evidence to Satisfy the Conditions of s.18?

37. In essence, the appellant submits that the reason for the postponement was not the global pandemic but the cancellation of the flights to Germany. This was not the extreme circumstances required by Article 23(3) and it was not “the only option available”.

38. The appellant refers to the word “exceptional” in Article 23(4) as connoting something more than the “norm”. The “norm” counsel submits is that we are now living with Covid-19 and that things have to adjust to take this into account. She submits that the Government guidelines available do not indicate that all international travel is to be stopped but only non-essential travel. There may be quarantine required but for Gardaí, Defence Forces etc. on duty even the mandatory fourteen days quarantine does not have to be fulfilled. She submits that Lithuania has not cancelled all entries from Ireland, that this only relates to Germany. There were other options available such as military flights or private flights and she references a newspaper article where in the same week as this took place, four Lithuanians convicted of serious crime were deported by military plane and the same plane was used to bring to Ireland a person wanted on a European Arrest Warrant.

39. The Minister does not agree that there is any tension between s.18 and Article 23(4) and accepts that s.18 applies to serious situations. The Minister submits that the situation here is serious and comes within the provisions of both statute and Framework Decision.

40. We too do not see a tension between the statutory provisions and those of the Framework Decision. Moreover, we consider that the word “exceptional” has to be viewed as something outside the “norm” of surrender within the time frame permitted under the Framework Decision. The time frame laid out in the Framework Decision must be followed by the member states (including the judicial authorities) and it is only exceptionally that such time frames will be extended because of postponement on humanitarian grounds. The issue of whether something is exceptional can only be decided on the facts.

41. On one level there can be no gainsaying that the global pandemic is exceptional; being a once in a more than 100 year event. The Court of Appeal in the cases of *C v. G* [2020] IECA 233 and *JV v. QI*. [2020] IECA 302, both Hague Convention cases, have recognised that the Courts can take judicial notice of the global pandemic. In the latter case, Whelan J. said at para 77.:-

“The court is entitled to take judicial notice of the pandemic which is worldwide in its extent and it is not confined to Belgium. Belgium is a contracting party to the Revised Brussels II Regulations. In evaluating risks contended to constitute grave risks of serious harm within the meaning of Art. 13(b) of the Hague Convention the court is entitled to have regard to the international nature of the pandemic, the uncertainty regarding its duration, whether measures are being taken within the jurisdiction of the requested State to protect the health of the citizenry including children and to evaluate whether a sensible and pragmatic solution may be achieved to address any concerns through the imposition of undertakings on the applicant directed towards the protection of the welfare, health and safety of the children in the context of

ascertained risks of the pandemic attendant on their summary return to the jurisdiction of the requesting State being the Kingdom of Belgium.”

42. The global nature of the pandemic and the uncertainty as to its duration are therefore matters to which the Court may have regard; both relevant to the current situation. We would also add that the Court may also take judicial notice of “surge” nature of the pandemic. It is not a static event, rates of disease can decrease and rates can also increase. Variants of the virus impact on those rates. Therefore, what is exceptional today may not have been exceptional at the height of last summer when rates of disease in Ireland (and much of Europe) were very low.

43. In the present case, the Court has to have regard to the evidence before the High Court in the form of the request to extend the deadline for the surrender from the issuing judicial authority. That request referred to a letter from the International Liaison Office of the Lithuanian Criminal Police Bureau stating:-

“The Letter states that, due to the situation caused by the spread of virus COVID-19, Germany has cancelled all flights from Ireland and the United Kingdom; therefore, there is no possibility to arrange the takeover of Mr. Andrius Sciuka. According to the information provided by travel agency, there is *no* possibility to take over Mr. Andrius Sciuka until 19.02.2021.”

[Original *Emphasis*]

44. Therefore, within the period in which surrender was to be carried out, Germany had cancelled all flights from Ireland because of Covid 19. We do not understand that there is any dispute that in the period of time prior to the cancellation by Germany, surrenders to Lithuania had been resumed and were carried out as normal. The letter is evidence that due to a new situation arising

from the global pandemic Germany had cancelled flights from Ireland (and the UK). The Court was informed that the route through Germany is a common one for extraditions to Lithuania but that the State was not in a position to say that it was the only route. We view it as important not to lose sight of the fact that it is an exceptional situation to have all commercial flights cancelled between European nations and in particular between member states. Even though there was such a situation with respect to the “ash cloud” arising from an active Icelandic volcano, this is the exception rather than the “norm”. Moreover, even our “new normal” was, up to the events of the early part of this year, permissive of commercial flights. The spread of the virus in Ireland and the UK caused the Germany to shut down its flights. That was exceptional and was without doubt taken in the interest of public health i.e. because of the risk to life and health.

45. The appellant’s submission is that such an indirect link is not sufficient to come within s.18 and also that the Minister has not demonstrated in the words of Edwards J. in *D.L.* that this route was the “only effective option”. It is important to consider the decision in *D.L.*. The case concerned an application by a requested person to postpone his surrender on the basis that it would have a severe effect on his daughter’s health. One remarkable aspect of this case was how much Article 8 family and personal rights featured in the judgment and how the Court had made reference to case law from the UK which dealt with how arguments concerning fundamental rights had to be treated in the hearing of an application for *extradition* i.e. not postponement. In many ways, the decision in *D.L.* was a forerunner to the judgments of the Supreme Court (McKechnie J.) in *Ostrowski* [2013] IESC 24 and of the High Court (Edwards

J.) in *MJE v. T.E.* [2013] IEHC 323 and *MJE v. RPG* (Unreported, High Court, Edwards J., 18th July, 2013) in which reference was made to the balancing between the public interest in extradition and the private rights of the individual. All of those decisions must now be read in the light of the Supreme Court decisions in *MJE v. JAT (No 2)* [2016] IESC 17 and *MJE v. Vestartas* [2020] IESC 12 which emphasise the weight to be attached to the public interest in extradition.

46. It is against that backdrop that the reference to “only effective option” must be understood. At that point in the judgment, Edwards J. was pointing out that the public interest in extradition was systematically served by the extradition being carried into effect and that postponement would only be warranted where the humanitarian grounds were so grave and serious a nature that the desirability of avoiding the apprehended prejudice was so compelling as to render postponement the only effective option. The Supreme Court have referred to the importance of the public interest in ensuring that extraditions are carried out. O’Donnell J. in *MJE v. JAT (No 2)* stated at paragraph four:-

“An important starting point, in my view, is that considerable weight is to be given to the public interest in ensuring that persons charged with offences face trial. There is a constant and weighty interest in surrender under an EAW and extradition under a bilateral or multilateral treaty. People accused of crimes should be brought to trial. That is a fundamental component of the administration of justice in a domestic setting, and the conclusion of an extradition agreement or the binding provisions of the law of the European Union means that there is a corresponding public interest in ensuring that persons accused of crimes, in other member states or in states with whom

Ireland has entered into an extradition agreement, are brought to trial also. There is an important and weighty interest in ensuring that Ireland honours its treaty obligations, and if anything, a greater interest and value in ensuring performance of those obligations entailed by membership of the European Union. All agreements are based on broad reciprocity and there is, therefore, a further interest and benefit in securing the return to Ireland for trial of persons accused of crimes, or the return of sentenced offenders. There is also a corresponding public interest in avoiding one country becoming, even involuntarily, a haven for persons seeking to evade trial in other countries. There is no option in this jurisdiction for a court, in most cases, to direct a trial of the offence here (whatever the practical difficulties involved). This means that the decision to refuse to surrender in individual cases will provide a form of limited immunity to a person so long as they remain in this jurisdiction. [...]"

47. The *JAT (No 2)* case involved a request for surrender for the purpose of trial, we consider that the above *dicta* applies with even greater force to a situation where a person has already been convicted and sentenced. In the instant case it is Lithuania who have requested the postponement. There is no balancing of public versus private interests in *precisely* the same way as that in *D.L.* The public interest here is in giving effect to the order for surrender. That will not happen if a postponement is refused as the appellant must be released. We do not for a moment wish to give the impression that the appellant's right to liberty is not to be considered of paramount importance. He has a right, as counsel on his behalf urged, to have his legal rights respected. This means that if the law does not permit a postponement for the reasons proffered he must be released.

On the contrary, the point we are making here is that Edwards J. in *D.L.* was referring to a different situation where the public interest in carrying out extradition was to be weighted against the personal and family rights of the requested person who sought a postponement on humanitarian grounds. The weighing of those considerations demanded that there be no other effective option other than the postponement.

48. In the instant case, even accepted the test as set out by Edwards J., it could be seen that the public interest in Ireland fulfilling its obligations to surrender means that the public interest weighs heavily in postponement whereas apart from relying on a principle of legality (i.e. that the law demanded his release as the provisions did not apply to the situation) there is no personal interest at stake from the appellant's point of view. He is not claiming a violation of his personal or family rights pursuant to Article 8. He is not claiming that his right to liberty is at issue under than in the sense that the principle of legality must apply. He is not in any way prejudiced as time spent in custody here is time taken off his sentence in Lithuania. Indeed, the Minister places much emphasis on the fact that he is not prepared to waive the fifteen day period to permit surrender to take place on the 19th March 2021 (subject to the outcome of this appeal).

49. We consider that Edwards J. correctly identified that the Court, in a s.18 application, is obliged to assess whether the grounds proffered amount to serious humanitarian reasons for a postponement and to consider whether the postponement is warranted. Edwards J. stated that consideration of whether it was warranted brought in the question of proportionality and the Minister accepts that proportionality is correctly a consideration. The Minister submits that proportionality was complied with by the High Court judge who only

postponed the matter until the 26th March (instead of the 1st April) and permitted the parties to come before him if an earlier date could be agreed. Where serious humanitarian grounds have been established on the evidence to exist in the particular individual case, great weight must then be given to the public interest in ensuring that surrender takes place i.e. to the public interest in granting the requested postponement. There are many ways that issues of proportionality can be addressed where required other than by refusing the postponement; example may be an early date or permitting a new bail application to be made having particular regard to the matters like the remaining time left to be served or the seriousness of the alleged offence.

50. It is important in the instant case however not to lose sight of the evidence provided by Lithuania. The issuing judicial authority said that there was *no* possibility of extraditing him before the 19th March 2021. This is evidence that the High Court based upon the principle of mutual trust and confidence must accept save for some exceptionally weighty reason for rejecting it. The appellant submits that there were other possible options such as military and private flights. The CJEU in the *Vilkas* decision did not raise any objection to the fact that commercial flights are used to surrender people. We can see no obligation in the Framework Decision that would require a system of private or military flights to be used to ensure that surrenders can take place within a more definitive time limit. Given that the member states bear these costs, this would be disproportionate to smaller states who would have to hire private plans or use stretched and expensive military options for each, generally uncontested and safe, surrender via commercial airplane.

51. The appellant referred to a newspaper report concerning a situation where deportations (not surrenders) from Ireland and a return to Ireland for an EAW was permitted. The flight appears to have taken place on Monday 1st February and thus before this appellant could lawfully have been surrendered as the letter requesting surrender arrangements was only sent on the 2nd February. It is entirely unclear how many could be transferred on these flights and what if any planning had been required to do so. In any event, it appears that it was the Irish authorities who were using their capabilities to ensure the surrender to Ireland pursuant to a European arrest warrant. There is no evidence that Lithuania were able to organise such an event by virtue of their military capabilities and indeed the evidence is to the contrary. There was *no* possibility of surrender within the required time-frame. We must reject the submission based upon other alternatives.

52. At heart the appellant's objection boil down to a submission that the evidence is too indirect to be capable of satisfying the s.18 humanitarian conditions, as in truth the reason was the cancellation of flights and not humanitarian considerations. This point was extremely well articulated by counsel for the appellant and it is in some ways an attractive argument. We consider it however to be a superficially attractive argument. When considered fully it must be rejected for the following reasons:-

- (a) The public health requirements arising from the Covid-19 pandemic apply to the *public* and not simply to specifically identified individual;
- (b) The Covid-19 pandemic has created a significant risk to life and health and has required limitations on "normal" life;

- (c) The Covid-19 pandemic has not created a single “new normal”. What has emerged is a series of “surges” requiring different responses by public health/governmental authorities;
- (d) The Covid-19 pandemic itself is exceptional;
- (e) The decision to shut down all flights from one member state to another based upon public health conditions is exceptional;
- (f) The stopping of flights from Ireland (and the UK) to Germany was based upon public health considerations arising from the Covid-19 pandemic;
- (g) The evidence from the issuing judicial authority establishes that because of the German authorities’ decision which itself was based upon the Covid-19 pandemic that there was *no* possibility of extradition; and
- (h) The evidence therefore establishes that the serious risk to life and health arising out of the Covid-19 pandemic has led to a situation where exceptionally the postponement of surrender of the appellant is required by the issuing judicial authority of Lithuania as there is no possibility of arranging his surrender within the statutory time-frame.

53. From all of the foregoing, we conclude that the humanitarian provisions of s.18 apply to the situation where Lithuania could not carry out the surrender because the German authorities had stopped all flights from Ireland to Germany. The High Court judge correctly applied the law to the evidence before him and also applied the proportionality principle to assessing the period of the postponement.

54. We therefore dismiss the appeal.

55. The Court will confirm the recommendation that the appellant be granted the benefit of the Legal Aid (Custody Issues Scheme) for solicitor and two counsel.