Michaelmas Term
[2022] UKPC 45
Privy Council Appeal No 0041 of 2020

JUDGMENT

Nikola Katic (Appellant) v Republic of Croatia (Respondent) (Gibraltar)

From the Supreme Court of Gibraltar

before

LORD BRIGGS
LORD HAMBLEN
LORD LEGGATT
LADY ROSE
SIR DECLAN MORGAN

JUDGMENT GIVEN ON
24 November 2022

Heard on 7 July 2022

Appellant
Keith Azopardi KC
Christopher Brunt
(Instructed by Phillips Barristers and Solicitors (Gibraltar))

Respondent
Christian Rocca KC
Graceanne Gear
(Instructed by Charles Russell Speechlys LLP (London))

SIR DECLAN MORGAN (with whom Lord Briggs, Lord Hamblen, Lord Leggatt and Lady Rose agree):

1. This is an appeal by Nikola Katic ("the appellant") from the Order of the Supreme Court of Gibraltar dismissing his appeal against the Order of the Stipendiary Magistrate ordering his surrender to Croatia as a result of his conviction in that country of conspiracy to import cocaine.

Introduction

2. On 9 December 2019 the appellant was arrested in Gibraltar pursuant to a European Arrest Warrant ("EAW") issued on 7 February 2019 by the County Court of Zagreb-9, Republic of Croatia. He was remanded in custody where he remains. The period spent in custody can count towards the period of any sentence he may be ordered to serve. Taking into account the period spent in custody in Croatia he has now been detained for approximately seven years. At the time of his arrest he was resident in Gibraltar having arrived there after the conclusion of the first instance criminal proceedings against him in June 2015.

3. The warrant stated that the appellant was born in Croatia and was a Croatian national. The last address known to the Croatian authorities was in Croatia. The warrant sought the surrender of the appellant in respect of an enforceable judgment of the Zagreb County Court made on 24 June 2015 as amended in respect of sentence by the Supreme Court of the Republic of Croatia on 20 March 2018. The sentence was for a term of ten years less a period of four years spent in pre-trial detention.

4. The warrant asserted that the appellant did not appear at the trial resulting in the decision and the respondent confirmed when submitting the warrant that on his return to Croatia he would be entitled to a retrial or appeal by way of rehearing within one year of his surrender. The warrant alleged that between January and April 2011 the appellant was part of a criminal conspiracy to import wholesale quantities of cocaine from the Caribbean to Croatia. He was arrested on 12 April 2011 in Slovenia.

5. Upon his arrest in Gibraltar the appellant declined to surrender to the EAW voluntarily. On 3 February 2020, following a hearing on 27 January 2020, the Magistrates' Court ordered the appellant's surrender to Croatia. The Magistrate found that it was not in dispute that the appellant worked and lived in Gibraltar and was a resident. The undertaking required by section 8A(3) of the European Arrest

Warrant Act 2004 ("the 2004 Act") providing that any Gibraltar resident had to be returned to Gibraltar to serve any sentence imposed only applied to those who were sought to stand trial ("a prosecution warrant"). Since he had been convicted, the Magistrate proceeded on the basis that this was not a prosecution warrant. In fairness to the Magistrate the submissions made to him indicated that this was a warrant for the execution of the sentence imposed by the Croatian court rather than a case concerning retrial.

6. On 10 February 2020 the appellant lodged a notice of appeal to the Supreme Court of Gibraltar. On 27 February 2020 he filed a single ground of appeal:

> "In the absence of any undertaking required by section 8A(3) of the European Arrest Warrant Act 2004, the learned Stipendiary Magistrate had no jurisdiction to direct the execution of the European Arrest Warrant, and erred in doing so."

7. On 18 March 2020 a letter from the Croatian Competent Authority dated 11 March 2020 was provided by the respondent's counsel to the Supreme Court of Gibraltar which set out the circumstances and history regarding the appellant's conviction in Croatia. The letter confirmed that the appellant had been formally tried in absentia and that he had the right to submit a motion to the Croatian court within one year of the date on which he became aware of the final judgment. Such a motion would result in "a renewal of the criminal offence procedure". At the hearing before the Board it was confirmed that the entitlement was in fact one year from the date of his return to Croatia as stated in the warrant.

8. On 26 March 2020 at a case management hearing counsel for the respondent informed the Chief Justice that the appeal was not opposed and that a note explaining the decision would be supplied to the court. She supplied the note on 27 March 2020 stating that the appellant was entitled to a retrial and consequently the Magistrates' Court had to be satisfied before ordering surrender that the EAW was transmitted in accordance with section 8 of the 2004 Act. That required, where appropriate, the provision of any relevant undertakings or statements which included a guarantee as required by section 8A(3) of that Act.

9. On 26 March 2020 the Croatian Competent Authority, having been informed by the Competent Authority for Gibraltar that the appellant was a resident of Gibraltar, provided Gibraltar with a guarantee in accordance with the terms of section 8A(3) of the 2004 Act stating that if the appellant were surrendered to Croatia he would, after being heard at a retrial and in the event of an unsuccessful

annulment application/appeal from any subsequent conviction and sentence, be returned to Gibraltar to serve any custodial sentence or detention order passed against him in Croatia.

10. It was the respondent's position at the appeal hearing which took place on 23 April 2020 that whilst a guarantee had now been provided it was not transmitted before the Order to surrender was made and there were no grounds to properly oppose the appeal as it was conceded that the guarantee should have been submitted before that Order was made.

11. The Supreme Court of Gibraltar, however, dismissed the appeal. Ramagge Prescott J accepted that if a guarantee was required by operation of law and was not received with the EAW then the EAW was defective and could not be cured retrospectively. She accepted that the appellant was a resident of Gibraltar. The respondent had referred her to Case C-306/09 *Proceedings concerning IB* [2011] 1 WLR 2227 which established that in cases where the person surrendered had a right to a retrial on his return the warrant was to be dealt with as a prosecution warrant rather than a warrant for the execution of a sentence only.

12. The judge considered the case of *Poland v Pawlikowska-Zawada* [2019] EWHC 985 (Admin). The appellant in that case argued that to return her to Poland was oppressive because of the passage of time. The Divisional Court in England and Wales rejected the argument finding that she had absented herself from Poland without knowing the outcome of her appeal or providing a forwarding address.

13. The judge derived the following principle from that case:

> "The general principle that can be derived from *Pawlikowska* and applied to the present case is that where an individual intentionally absents himself from a jurisdiction so that a sentence cannot be enforced against him he should not be able to use that absence to frustrate his return, nor should a person be allowed to rely on ignorance of the existence of a custodial sentence when he was aware there were proceedings against him."

Applying a purposive construction she concluded that there was an inherent injustice that a fugitive from justice should avail himself of rights afforded and formulated to benefit bona fide residents. She concluded that the guarantee was not mandatory and dismissed the appeal.

14. On 13 May 2020 the judge granted leave to appeal and certified the following question of general public importance:

> (i) Where a person has been convicted and sentenced in a requesting state and has voluntarily absented himself from part of those proceedings and has thereafter acquired residence in the executing state, is the Magistrates' Court entitled to order that a European Arrest Warrant be executed in the absence of an undertaking in accordance with sections 8(2) and 8A(3) of the European Arrest Warrant Act 2004,
>
> (ii) If the answer to question (i) is no, was the learned judge obliged to allow the appeal.

15. By an Order made on 30 September 2021 the issues in the appeal were identified as follows:

> a. Whether and in what circumstances the return condition as defined in section 8A of the 2004 Act is to be made in the case of a resident of Gibraltar facing the execution of an EAW;
>
> b. Whether the return condition had to be provided in this case before the Order of surrender was made by the Magistrates' Court;
>
> c. Whether a return condition should be made in the case of a person acquiring residence after voluntarily absenting himself from proceedings in the issuing state;
>
> d. Whether the surrender order made against the appellant should be quashed and the appellant released from custody.

Council Framework Decision 2002/584/JHA

16. The legal status of Council Framework Decision 2002/584/JHA on the European arrest warrant and surrender procedures between member states of the European Union ("the FD") in United Kingdom law was considered by the United Kingdom Supreme Court in *Assange v Swedish Prosecution Authority (Nos 1 and 2)* [2012] UKSC 22; [2012] 2 AC 471. The position has changed since then as the United Kingdom opted into the FD on 1 December 2014. In this case the arrest was made

before 31 December 2020 so that the changes made to the regime as from that date as a result of the exit of the United Kingdom and Gibraltar from the EU do not apply as explained at para 3 of *Zabolotnyi v Mateszalka District Court, Hungary* [2021] UKSC 14; [2021] 1 WLR 2569. It was not suggested to the Board during the hearing that the position as regards Gibraltar was any different from the position of the UK. It follows that the Framework Decision continues to apply in relation to Mr Katic's arrest.

17. After the withdrawal of the United Kingdom and Gibraltar from the EU the 2004 Act has been amended by the European Arrest Warrant (EU Exit) Regulations 2020 but in substance its provisions remain in place. From 1 January 2021 it applies only to any state designated by Order for the purposes of the Act by the Government of Gibraltar or to the United Kingdom. No state has been so designated so the Act at present applies only to extraditions involving the UK.

18. Recitals 1, 5 and 6 identify the general purpose and effect of the Framework Decision.

> "(1) According to the Conclusions of the Tampere European Council of 15 and 16 October 1999, and in particular point 35 thereof, the formal extradition procedure should be abolished among the Member States in respect of persons who are fleeing from justice after having been finally sentenced and extradition procedures should be speeded up in respect of persons suspected of having committed an offence….
>
> (5) The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.

> (6) The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the 'cornerstone' of judicial cooperation."

That is reflected in article 1(2) of the FD which states that "Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of the Framework Decision".

19. Article 3 of the FD provides that the judicial authority of the requested state shall refuse to execute the warrant in cases where the offence is protected by an amnesty in the requested state, the person has been prosecuted on the same facts in another Member State or the person is not, owing to age, criminally responsible for the acts on which the arrest warrant is based.

20. Article 4 by contrast sets out a number of grounds on which the executing judicial authority may refuse to execute the warrant. In particular paragraph 4(6) provides that the executing judicial authority may refuse to order surrender:

> "if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law;"

21. In 2014 the FD was amended to include article 4a which deals in particular with persons who have been prosecuted in their absence, limiting the circumstances in which Member States can confer a discretion the executing court to refuse to execute the warrant on that basis:

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

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

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

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

The EAW in this case indicated that the conditions at article 4a(1)(d) were satisfied and it is common ground that the FD did not permit Member States to confer a discretion on their courts to refuse to order the surrender of someone in Mr Katic's position on that basis.

22. Article 5 differs from Articles 3 and 4 in that it deals with guarantees to be given by the issuing Member State in particular cases. It provides:

"The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

2. if the offence on the basis of which the European arrest warrant has been issued is punishable by a life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure;

3. where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or

> resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State."

23. Article 15 deals with the exchange of information between executing judicial authorities and Member States:

> "1. The executing judicial authority shall decide, within the time-limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.
>
> 2. If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in Article 17.
>
> 3. The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority."

It is unnecessary to set out the relevant provisions on time limits but it is clear that applications for surrender on foot of an EAW should be dealt with urgently.

The 2004 Act

24. The 2004 Act was passed by the Gibraltar Parliament to give effect to the FD. It was amended by the European Arrest Warrant Act 2004 (Amendment No 2) Regulations 2014 which introduced section 8A dealing with the matters contained in Article 5 of the FD and section 33A which addressed the optional ground in Article 4(6).

25. Section 8 deals with transmission of the warrant:

> "8.(1) A European arrest warrant shall be transmitted by, or on behalf of, the issuing judicial authority to the Central Authority in Gibraltar and, where the European arrest warrant is in a language other than the English language, a translation of the European arrest warrant into English shall be so transmitted with the European arrest warrant.
>
> (2) Such undertakings as are required to be given under this Act shall be transmitted by, or on behalf of, the issuing judicial authority to the Central Authority in Gibraltar, and where any such undertaking is in a language other than the English language, a translation of that undertaking into English shall be so transmitted with the undertaking."

26. Section 8A deals with the article 5 arrangements introduced in 2014 and is headed "Guarantees from the issuing State prior to Execution":

> "8A.(1) The execution of a European arrest warrant transmitted in accordance with section 8 is subject to the conditions in subsections (2) and (3).
>
> (2) Where the offence in the European arrest warrant is punishable by a custodial life sentence or life-time detention order, the issuing State must have provisions in its legal system for-
>
> > (a) a review of the penalty or measure imposed, either on request or within 20 years of the imposition of the penalty or measure; or (b) an application of measures of clemency which the person is entitled to apply for under the law or practice of the issuing State, aiming at non-execution of the penalty or measure.
>
> (3) Where the person named in the European arrest warrant is a Gibraltarian (as defined in section 4 of the Gibraltarian Status Act) or resident and he is to be surrendered to the issuing State, he must, after being heard, be returned to Gibraltar in order to serve a custodial

sentence or detention order passed against him in the issuing State."

27. Section 12 deals with the surrender procedure before the Magistrate:

> "12.(1) Where a person does not consent to his surrender to the issuing State the magistrates' court may, after hearing that person, make an order directing that the person be surrendered to such other person as is duly authorised by the issuing State to receive him.
>
> (2) Subsection (1) shall apply subject to the following provisions, that is to say that–
>
> (a) the European arrest warrant, transmitted in accordance with section 8 and, where appropriate, such undertakings or statements as are required under this Act are provided to the court…"

28. Sections 13 and 13A implement article 15 (2) and (3) of the FD dealing with requests for information from the issuing judicial authority. The powers of the appeal court are set out in sections 38 and 39:

> "38.(1) If the magistrates' court orders a person's surrender under this Act, the person may appeal to the Supreme Court against the order…
>
> (3) An appeal under this section may be brought on a question of law or fact...
>
> 39.(1) On an appeal under section 38 the Supreme Court may–
>
> (a) allow the appeal; or
>
> (b) dismiss the appeal.

(2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.

(3) The conditions are that–

(a) the magistrates' court ought to have decided a question before it at the surrender hearing differently; or

(b) if the court had decided the question in the way it ought to have done, the court would have been required to order the person's discharge…

(5) If the Supreme Court allows the appeal it must–

(a) order the person's discharge; and

(b) quash the order for his surrender."

Whether the return condition as defined in section 8A(3) had to be provided before the Order for surrender was made by the Magistrates' Court.

29. This essentially covers the first two of the four issues identified in the amended Notice of Appeal. The appellant submitted that the assurance, if required, had to be submitted to the Magistrates' Court before the Surrender Order was made. The respondent agreed with that position.

30. In the United Kingdom the Extradition Act 2003 says nothing about assurances or undertakings between Member States other than in circumstances where the person to be surrendered is already serving a sentence in the United Kingdom and arrangements need to be made to secure the offender's return to complete the sentence.

31. It is common ground that the FD is not directly effective but article 34 requires Member States to transpose into domestic law the obligations imposed by it. Although the manner in which the transposition occurs is a matter for the individual state the Court of Justice of the European Union ("CJEU") in *Criminal Proceedings*

against Pupino (Case C-105/03) [2006] QB 83 held that the domestic provisions must be interpreted in conformity with Community law.

32. The law on assurances in the United Kingdom has developed largely as a result of concern over prison conditions in some Member States. The issue was addressed in the conjoined cases *Criminal proceeding against Aranyosi and Criminal proceedings against Caldararu (*Joined cases C-404/15 and C-659/15PPU) [2016] QB 921. The cases were concerned with prison conditions in Hungary and Romania. The CJEU emphasised that the principles of mutual trust and mutual recognition were of fundamental importance. Where there was objective, reliable, specific and properly updated evidence giving rise to a concern about inhuman or degrading prison conditions the executing authority should seek information from the issuing authority to establish how the individual the subject of the application would be affected. Systemic deficiencies did not mean that individual prisoners would be exposed to inhuman or degrading treatment. (paras 89 to 95).

33. The approach of the United Kingdom courts in such cases is demonstrated by the background to the recent United Kingdom Supreme Court decision in *Zabolotnyi*. The issue before the Supreme Court was the test for the introduction of fresh evidence on appeal. The history of the case was that the Magistrate concluded that the evidence on prison conditions in Hungary did not raise any concern about the fundamental rights of prisoners in light of improvements made by the Hungarian authorities and no assurance was necessary.

34. The appellant appealed. Before the appeal was heard a subsequent case in the High Court established that assurances were required in that case and consequently were required in *Zabolotnyi*. Shortly before the hearing of the Divisional Court appeal the Hungarian government provided assurances in respect of prisoners surrendered from the UK.

35. The legal test on appeal in section 27(3) of the Extradition Act 2003 is whether the appropriate judge ought to have decided a question before him at the extradition hearing differently and if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge. In deciding the outcome of that test the UK courts, applying the principle of mutual trust, take into account any assurance received by the Divisional Court on appeal as if it had been before the Magistrates' Court. None of this is criticised in this appeal.

36. The position in Gibraltar is different. Unlike the UK, Gibraltar has implemented article 5(3) of the FD in section 8A(3) of the 2004 Act. It has imposed a specific condition precedent in section 12(2) that the power to make a surrender order is

dependent on the undertaking being provided to the Magistrates' Court. The words "where appropriate" do not confer a discretion but indicate that the condition is not required in all circumstances. In this case the undertaking was not provided to the Magistrates' Court and that cannot be cured on appeal.

37. It is clear that the position taken by the respondent when the case was appealed to the Supreme Court of Gibraltar was to concede the appeal in which case the Croatian court could issue a new EAW in the same terms with the undertaking required by article 5(3) provided. The Board considers that that concession was rightly made. In that way the principle of mutual trust would be implemented. Article 34 of the FD is not prescriptive of the methods to be used by Member States to achieve its objectives. The approach taken by Gibraltar is one of those methods.

38. Accordingly the undertaking, if required, had to be provided before the court could order the surrender of the appellant. In most cases the undertaking should be provided before the hearing. It is conceivable that a conditional Order could be made by the court where the undertaking had not been received but was expected. The difficulty with that course is that there may be some dispute about the terms of the undertaking if it did not correspond precisely with the court Order.

Does article 5(3) of the FD enable the executing Member State to impose a mandatory condition precedent to surrender requiring the return of the person charged to serve any sentence imposed in the executing state and if so did Gibraltar impose such a condition in this case?

39. The answers to these questions address issue 3 in the revised Notice of Appeal. Article 5 of the FD is clearly distinguishable from articles 3, 4 and 4a. Whereas those articles impose mandatory and discretionary reasons for refusing to surrender to be exercised by the executing judicial authorities, article 5 is concerned with the exercise of legislative power by the individual Member States.

40. The first part of the question is whether article 5(3) enables a Member State to impose a return condition for service of any sentence in respect of citizens and residents facing prosecution in other Member States rather than enabling a Member State only to go so far as to confer a discretion on the executing court whether to require a return condition. Clearly if there is a power for the Member State to make a return condition mandatory, it must also include the power to legislate to impose such a condition on a discretionary basis with the discretion to be exercised by the executing court.

41. The language of article 5(3) supports the view that there is such a power. The opening sentence of article 5 states that the execution of a warrant "may, by the law of the executing Member State, be subject to the following conditions". Article 5(3) states that surrender "may be subject to the condition" that is there set out:

> "the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State."

Whether each Member State chooses to do so is, of course, a matter entirely within the discretion of each state.

42. Secondly, the CJEU addressed article 5(3) in *IB*. The principal issue in that case was whether article 5(1) of the FD could apply to a warrant requesting the surrender of a person who had been convicted in absentia but who had a right to a retrial in the issuing state. In its conclusion, however, the Court said:

> "where the executing member state has implemented article 5(1) and article 5(3) of that Framework Decision in its domestic legal system, the execution of a European arrest warrant issued for the purposes of execution of a sentence imposed in absentia within the meaning of article 5(1) of the Framework Decision, may be subject to the condition that the person concerned, who is a national or resident of the executing member state, should be returned to the executing state in order, as the case may be, to serve there the sentence passed against him, following a new trial organised in his presence in the issuing member state."

The imposition of the condition is optional for each Member State but there is no suggestion that it must involve a discretionary judgment by the executing judicial authority. The terms of the condition are unqualified. It was accepted at the hearing by the respondent arguing for the existence of such a discretion that there was no decision of the European court supporting that view.

43. Thirdly, at least six Member States, (Austria, Bulgaria, Czech Republic, Estonia, Italy and Finland) have imposed a mandatory condition pursuant to article 5(3) in some cases limited to citizens and in others dependent upon the request of the

person surrendered. A number of others have introduced some element of judicial discretion but that does not undermine the principle that the Member State is entitled under article 5 to make the condition mandatory if it chooses to do so.

44. Fourthly, where it was intended in the FD to require Member States to provide for an element of judicial discretion on where a sentence should be served that was made clear. Under article 4(6) where the surrender was on foot of a conviction warrant the executing judicial authority had a discretion as to whether the sentence should be served by citizens, residents or those staying in the executing state.

45. There is some tension between the proposition that the executing court has a discretion in respect of a person subject to a conviction warrant but no discretion in the case of a prosecution warrant. It is important, however, to bear in mind that in the case of a conviction warrant the person sought has completed the criminal process and information about the circumstances of the crime and the background of the offender are available to inform the decision on discretion.

46. In the case of a prosecution warrant there is usually no conviction to be taken into account and the nature and length of any sentence are unknown. The material that might inform a discretion is therefore limited and incomplete. Once the suspect is surrendered the executing state has no control over where the sentence is to be served unless the surrender is made conditional. Article 5(3) enables those states that wish to do so to retain control over where their citizens and residents will serve any sentence that may be imposed if the person is convicted.

47. As a result of the decision in *IB* this case is treated as a prosecution warrant. No special adjustment has been made to article 5(3) consequent upon that decision. The presumption of guilt will be set aside in such cases if the person sought seeks a retrial. It follows that article 5(3) of the FD enables the executing Member State to impose a mandatory condition precedent to surrender requiring the return of the person charged to serve any sentence imposed after the retrial in the executing state. The fact that the person sought is a fugitive from justice does not undermine that conclusion. Recital 1 of the FD makes clear that the FD applies directly to such persons.

48. The second part of the question depends upon the construction of the 2004 Act. Guidance as to the approach to the determination of the meaning of words used in a statute is to be found in the speech of Lord Nicholls of Birkenhead in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 397:

> "In identifying the meaning of the words used, the courts employ accepted principles of interpretation as useful guides. For instance, an appropriate starting point is that language is to be taken to bear its ordinary meaning in the general context of the statute….
>
> Additionally, the courts employ other recognised aids. They may be internal aids. Other provisions in the same statute may shed light on the meaning of the words under consideration. Or the aids may be external to the statute, such as its background setting and its legislative history…"

49. The opening words of section 8A mirror those of article 5 of the FD: "The execution of a European arrest warrant transmitted in accordance with section 8 is subject to the conditions in subsections (2) and (3)". The use of the term "subject to the conditions" demonstrates the mandatory nature of the requirement to be fulfilled before execution by way of surrender can occur.

50. This obligation also applies in section 8A(2) dealing with the requirement for a review of a life sentence passed in the issuing jurisdiction before surrender by Gibraltar. If it were concluded that section 8A(3) was to be interpreted to include some element of discretion for the executing judicial authority that would also apply in that subsection. The provision in section 8A(2) is designed to provide a minimum standard of procedural right for those detained under life sentences. That minimum standard is not the subject of discretion.

51. Where it was intended to provide a discretion in respect of return to serve a sentence that was provided in section 33A which implemented article 4(6):

> "33A. A person shall not be surrendered under this Act if the European arrest warrant has been issued for the purposes of the execution of a custodial sentence or detention order and–
>
> (a) the person named in the European arrest warrant is either–
>
> (i) a Gibraltarian;

(ii) a resident of Gibraltar; or

(iii) staying in Gibraltar; and

(b) the court makes an order requiring the person to serve the period of the sentence in accordance with the law of Gibraltar."

The purpose of the provision in section 8A(3) was to implement the condition in article 5(3) of the FD. The distinction between section 8A and section 33A was clearly deliberate.

52. The court below relied on the case of *Poland v Pawlikowska-Zawada* in which the appellant argued that she should not be returned because of the passage of time. The judge was correct to recognise that it was not strictly on point. The judge concluded that the statute had to be purposively interpreted to avoid the frustration of the surrender process by the appellant. In fact the frustration in this case arose from the misunderstanding in the Magistrates' Court about the nature of the warrant. If the Magistrate had been advised that the warrant should be treated as a prosecution warrant and not only as an execution warrant so that a return undertaking was required under the 2004 Act, a request to Croatia for the relevant undertaking could have been made. There was in any event a relatively straightforward remedy by way of a fresh warrant supported by the appropriate undertaking.

53. The proposed purposive construction was directly contrary to the statutory language. The provisions at issue were intended to deal with persons fleeing from justice as is apparent from Recital 1 of the FD. The statutory arrangements were perfectly capable of dealing with the issue which arose. There was no basis for construing the statute in opposition to its statutory express terms.

Conclusion

54. The answer to both parts of the question set out above is in the affirmative. The Board humbly advises His Majesty (i) that the appeal be allowed (ii) that an order be made pursuant to section 45(3) of the 2004 Act for the appellant's discharge and (iii) that the Order for surrender be quashed.