[2007–09 Gib LR 191]

FLETCHER v. GOVERNMENT OF FRANCE

SUPREME COURT (Dudley, Ag. C.J.): February 19th, 2008

Criminal Procedure—arrest—European arrest warrant—under European Arrest Warrant Act 2004, s.7(3)(b), no surrender of offender if no decision to try made by requesting State—documentation accompanying European arrest warrant may negative statement in preamble to warrant that decision to try already made—if appearance before juge d'instruction still pending, no decision to try yet made

The Government of France sought the surrender of the appellant from Gibraltar to France in respect of charges related to importation of drugs and conspiracy.

The appellant was charged with importation of cannabis, smuggling drugs and criminal conspiracy in France. A French arrest warrant was issued together with a European arrest warrant disclosing the charges. The appellant was arrested in Gibraltar and brought before the Magistrates' Court which ordered the surrender of the appellant to the French authorities in accordance with the provisions of the European Arrest Warrant Act 2004.

On appeal against the surrender order, the appellant submitted, *inter alia*, that (a) her surrender was not for her to be brought to trial but for her to be questioned, which was expressly prohibited in the terms of her warrant; (b) she had not been indicted for the offences and despite the wording of the preamble to her arrest warrant establishing a *prima facie* decision to try her, she had only been implicated on the charges which meant that "a decision to try" had not yet been made and according to s.7(3)(b) of the European Arrest Warrant Act 2004 she could not be surrendered; and (c) the material accompanying the European arrest warrant did not include "an undertaking in writing" that she would only be tried for the offence for which she was surrendered (as required by s.7(3)(a) of the Act) since the Deputy Public Prosecutor's letter accompanying the arrest warrant only contained a statement of existing fact that such an action could not take place rather than an undertaking that it would not.

In reply, the Attorney-General on behalf of the Government of France submitted that (a) the appellant's surrender was required for her to be brought to trial, first before an examining judge so that she might be indicted for the offences and her surrender was further supported by the clear wording of the preamble to the warrant which established that a

decision to try her had been made; and (b) no distinction should be drawn between the statement in the Public Prosecutor's letter that the appellant "cannot be prosecuted . . . other than for the offences listed in the text of the appended European arrest warrant" and an "undertaking" to that effect for the purposes of s.7(3)(a) of the Act, since s.8(11) provided that an "'undertaking' includes a statement under s.7(3)."

Held, allowing the appeal:

The decision of the Magistrates' Court would be quashed and appellant discharged. No decision to try the appellant had yet been made by the French authorities, the prerequisite of s.7(3)(b) of the European Arrest Warrant Act 2004 had therefore not been satisfied and the material accompanying the warrant raised sufficient doubt to overthrow the *prima facie* decision to try. If the appellant were surrendered, an examining judge would still have to examine the evidence before deciding whether she should be charged and brought to trial. It was not necessary to consider giving any technical interpretation to s.7(3)(a) since it was clear that the surrender procedure in general aimed to ensure that an offender would not be tried other than for the offence for which the surrender was being sought (para 16; paras. 22–23; para. 31; para. 36).

Cases cited:

(1) *Boudhiba* v. *Spain*, [2007] 1 W.L.R. 124; [2006] 3 All E.R. 574; [2006] Extradition L.R. 20; [2006] A.C.D. 54; [2006] EWHC 167 (Admin), *dicta* of Smith, L.J. considered.

(2) *Dabas* v. *Spain*, [2007] 1 W.L.R. 145; [2006] Extradition L.R. 123; [2006] A.C.D. 90; [2006] EWHC 971 (Admin); on appeal, [2007] 2 A.C. 31; [2007] Extradition L.R. 69; [2007] UKHL 6, *dicta* of Lord Hope considered and Latham, L.J. followed.

(3) *Dixon* v. *Prison Supt.*, 2007–09 Gib LR 12, referred to.

(4) *Ismail*, *In re*, [1999] 1 A.C. 320; [1998] 3 W.L.R. 495; [1998] 3 All E.R. 1007, *dicta* of Lord Steyn referred to.

(5) *King's Prosecutor*, *Brussels* v. *Armas*, [2006] 2 A.C. 1; [2005] 3 W.L.R. 1079; [2006] 1 All E.R. 647; [2005] Extradition L.R. 139; [2005] UKHL 67, *dicta* of Lord Scott referred to.

(6) *Pupino (Criminal Proceedings)*, [2006] Q.B. 83; [2005] 3 W.L.R. 1102; [2006] All E.R. (EC) 142; [2005] E.C.R. I-5285; [2005] 2 C.M.L.R. 63, opinion of Kokott, Adv.-Gen. referred to.

(7) *Vey* v. *Public Prosecutor of Montlucon*, [2006] Extradition L.R. 110; [2006] EWHC 760 (Admin), *dicta* of Moses, L.J. referred to.

Legislation construed:

European Arrest Warrant Act 2004, s.7(1):

"A European arrest warrant . . . shall specify—

. . .

(e) the circumstances in which the offence was committed . . . including the time and place of its commission . . . and the

> degree of involvement . . . of the person in the commission of the offence . . ."

s. 7(3): The relevant terms of this sub-section are set out at para. 6.
s.16(1)(b): The relevant terms of this paragraph are set out at para. 33.

C. Nicholls, Q.C. and *S.R. Bossino* for the claimant;
R.R. Rhoda, Q.C., Attorney General, and *J. Fernandez* for the defendant.

1 **DUDLEY, Ag. C.J.:** On February 19th, 2007 the Public Prosecutor to the Marseilles Court of First Instance sent to the Central Authority in Gibraltar a letter requesting the arrest of the appellant ("Fletcher"). The letter purported to deal with the issue of specialty, to which to which I shall have cause to turn in due course. Annexed to the letter were certified copies of a French arrest warrant dated February 9th, 2007 issued by the Vice President of the Judicial Investigation Department of the Marseilles Court of First Instance ("the French warrant") together with a certified copy of a European arrest warrant also dated February 9th, 2007 issued by the Deputy Public Prosecutor to the Marseilles Court of First Instance, requesting Fletcher's surrender. Essentially the warrants disclose three charges, namely: (i) illegal importation, possession, and/or transportation of 3461 kg. of cannabis; (ii) smuggling the cannabis as part of an organized gang; and (iii) criminal conspiracy.

2 Fletcher was arrested in Gibraltar on March 12th, 2007 and brought before the Magistrates' Court. This is an appeal from the decision of the learned Stipendiary Magistrate of July 5th, 2007 ordering the surrender of Fletcher to the French judicial authorities pursuant to the provisions of the European Arrest Warrant Act 2004 ("the Act").

3 The surrender of Fletcher to the French authorities is, on the face of Mr. Nicholls' skeleton, opposed on four distinct grounds, namely:

(i) That the Act is *ultra vires* the Gibraltar Constitution Order. Given the decision of the Court of Appeal in *Dixon* v. *Prison Supt.* (3), this is not an argument which is being pursued but given that the decision is the subject of appeal to the Judicial Committee of the Privy Council, a reservation of right is asserted;

(ii) That upon the material before the court, the respondent does not seek the surrender of Fletcher for the purposes of trying her but rather for the purpose of questioning her;

(iii) That the information relating to the circumstances of the offence provided in the European arrest warrant is lacking in conviction and fails to satisfy the requirements of s.7(1)(e) of the Act. Whilst it is not wholly apparent (given the numbering used in the skeleton argument) whether or not this is a distinct argument, as I understood Mr. Nicholls' submissions, essentially it is said that the information relating to the offence can be

relied upon and assists the court in reaching the conclusion that Fletcher's surrender is requested for the purposes of questioning her; and

(iv) That there is no "undertaking" as required by s.16(1)(b) that the surrender is sought for the purpose only of her being charged with and tried for the offences concerned. Mr. Nicholls, whilst not abandoning this ground, did not make any oral submissions and left the matter on the basis of the written submissions in his skeleton.

The law

4 The European Arrest Warrant legislation comes about consequent upon the European Council Framework Decision of June 13th, 2002 on the European Arrest Warrant and the surrender procedures between Member States ("the Framework Decision"). Framework Decisions are binding upon Member States as to the result to be achieved but leave to national authorities the choice of form and method (see art. 34(2) of the Treaty on European Union).

5 The policy underlying the Framework Decision is, I think, to be found at Recital 5 which provides:

> "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 . . . Traditional co-operation 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."

Of particular relevance for present purposes is art. 1.1, which provides:

> "The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order."

6 The arrest and surrender "for the purpose of conducting a criminal prosecution" section has been given effect in Gibraltar through s.6(a) of the Act which provides:

> "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 . . .

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

And s.7(3) which provides:

"Where a European arrest warrant is issued in the issuing state in respect of a person who has not been convicted of the offence specified therein, the European arrest warrant shall be accompanied by—

(a) an undertaking in writing of the issuing judicial authority that the surrender of that person, is sought for the purpose, only, of his being charged with, and tried for, the offence concerned; and

(b) a statement in writing of the issuing judicial authority that—

(i) proceedings against the person have commenced and a decision to try him for the offence concerned has been made; or

(ii) a decision to commence proceedings against the person and try him for the offence concerned has been made, by a person who in the issuing State, or part thereof, performs functions the same as or similar to those performed in Gibraltar by the Attorney General."

7 In the present case it is, I think, apparent from the material before me and particularly exemplified in the letter from the French prosecutor dated September 14th, 2007 (to which I shall return in due course) that proceedings against Fletcher have commenced and that therefore what falls to be determined is whether a decision to try her has been made.

8 The language by which the United Kingdom Parliament has given effect to the Framework Decision is somewhat different. The relevant parts of s.2 of the English Extradition Act 2003 provide:

"(2) A Part 1 warrant is an arrest warrant . . . which contains—

(a) the statement referred to in subsection (3) and the information referred to in subsection (4) . . .

(3) The statement is one that—

(a) the person in respect of whom the Part 1 warrant is issued is accused in the category 1 territory of the commission of an offence specified in the warrant, and

(b) the Part 1 warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being prosecuted for the offence."

9 In *Dabas* v. *Spain* (2), Lord Hope refers ([2007] 2 A.C. 31, at para. 39), I think with approval, to the opinion of Mrs. Advocate-General Kokott in *Pupino (Criminal Proceedings)* (6) who stated ([2006] Q.B. 83, at para. 36):

> "In summary, it follows from article 34(2)(b) EU and from the principle of loyalty to the Union that every framework decision obliges national courts to bring their interpretation of national laws as far as possible into conformity with the wording and purpose of the framework decision, regardless of whether those laws were adopted before or after the framework decision, so as to achieve the result envisaged by the framework decision."

Later, Lord Hope states ([2007] 2 A.C. 31, at para. 43):

> "As my noble and learned friend, Lord Bingham of Cornhill, said in *Office of the King's Prosecutor, Brussels* v. *Armas* [2006] 2 A.C. 1, at para. 8, the interpretation of Part 1 of the 2003 Act must be approached on the assumption that Parliament did not intend the provisions of Part 1 to be inconsistent with the Framework Decision or to provide for a lesser degree of co-operation by the United Kingdom than the Framework Decision requires."

10 The foregoing, in my view, supports the proposition that in determining what amounts to a decision to try, a purposive approach is required in which account must be taken of the Framework Directive. I also draw the conclusion that both the United Kingdom Parliament and the Gibraltar Parliament must have intended to make their legislation Framework Decision-compatible and that therefore there can be no qualitative difference between the criteria in the English 2003 Act and the Gibraltar Act. It follows therefore that despite the difference in language there is in my view no substantive distinction between "a decision to try" and "accused" and it therefore follows that English authorities are particularly relevant.

11 In *In re Ismail* (4), albeit in the context of the United Kingdom Extradition Act 1989, Lord Steyn dealt with the meaning of "accused" person on the following terms at ([1999] 1 A.C. at 326):

> "The starting point is that 'accused' in section 1 of the Act of 1989 is not a term of art. It is a question of fact in each case whether the person passes the threshold test of being an 'accused' person. Next there is the reality that one is concerned with the contextual meaning of 'accused' in a statute intended to serve the purpose of bringing to justice those accused of serious crimes. There is a transnational interest in the achievement of this aim. Extradition treaties, and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permits it in order to facilitate extradition . . . It follows that it would be wrong to

> approach the problem of construction solely from the perspective of English criminal procedure, and in particular from the point of view of the formal acts of the laying of an information or the preferring of an indictment.
>
> . . .
>
> It is not always easy for an English court to decide when in a civil law jurisdiction a suspect becomes an 'accused' person. All one can say with confidence is that a purposive interpretation of 'accused' ought to be adopted in order to accommodate the differences between legal systems. In other words, it is necessary for our courts to adopt a cosmopolitan approach to the question whether as a matter of substance rather than form the requirement of there being an 'accused' person is satisfied . . . [T]he Divisional Court in this case posed the right test by addressing the broad question whether the competent authorities in the foreign jurisdiction had taken a step which can fairly be described as the commencement of a prosecution."

12 In *Dabas* v. *Spain* (2) in the Divisional Court, Latham, L.J. expressed the view ([2007] 1 W.L.R. 145, at para. 45) that in considering the meaning of "accused" in the 2003 Act the approach should be that adumbrated by Lord Steyn in *In re Ismail* (4).

The material before the court

13 The official translation of the letter from the Deputy Public Prosecutor to the Marseilles Court of First Instance dated February 19th, 2007 reads:

> "I am sending you this European arrest warrant directly so that the wanted person may be apprehended and brought to France, before the examining magistrate . . . and indicted on the counts mentioned, thereby allowing her to be prosecuted."

The accompanying European arrest warrant is in its standard form. The *pro forma* wording in the preamble to the warrant provides:

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

14 The weight which is to be given to this preamble in determining the purpose for which the defendant is wanted in France requires some consideration. In *Boudhiba* v. *Spain* (1), Smith, L.J., in the Queen's Bench Divisional Court, dealing with the preamble, said ([2007] 1 W.L.R. 124, at para. 21):

> "I accept that there is some ambiguity in those words in that they do not make clear whether the person sought has yet been convicted. However, they would not be applicable if the decision to prosecute had not yet been taken. In any event, such ambiguity as there was is removed on the following page where it is made clear that the decision on which the warrant is based is the order of commitment . . . and that there is not yet an enforceable judgment in existence. On the page following, there is a statement that the maximum sentence that can be imposed for the offence is 15 years' imprisonment. I would accept Mr. Lawson's submission that that was enough in itself to make it plain that the defendant was an accused person and that proceedings had begun."

15 In *Dabas* v. *Spain* (2), Latham, L.J., in the Queen's Bench Divisional Court, dealing with the preamble stated ([2007] 1 W.L.R. 145, at para. 14):

> ". . . [W]hilst I accept that the pro forma wording in the preamble to the warrant is not necessarily determinative of the issue of whether or not the requirements of section 2(2) have been met, it seems to me that the court could only properly conclude that they did not mean what they say if the context throws clear doubt upon their prima facie meaning."

16 Albeit that the difference in approach between Smith, L.J. and Latham, L.J. may be slight, given that the liberty of the individual is at stake, I respectfully prefer the approach of Latham, L.J. and therefore adopt the view that whilst the preamble establishes *prima facie* that "a decision to try" has been taken, this conclusion is displaced where the remainder of the material before the court "throws clear doubt."

17 In determining whether, in the present case, the remainder of the material throws such clear doubt as to the purpose for which Fletcher's surrender is sought, it is necessary to examine and contrast elements in the letter from the Deputy Public Prosecutor with the domestic French warrant which underpins the European arrest warrant.

18 The passage set out above of the letter dated February 19th, 2007 from the Deputy Public Prosecutor is a translation from the French language where, as I understand it, the words "and indicted" are a translation from the French "*et qu'elle soit mise en examen*." In contrast, relevant passages of the French domestic warrant read:

> "We, the undersigned . . . pursuant to inquiry concerning Dolores Yvonne Fletcher . . . implicated in charges of:
>
> (i) illegally importing, possessing and transporting 3461 kg. and 240 g. of cannabis resin . . .;

(ii) smuggling . . .; and

(iii) criminal conspiracy.

These offences having been committed in French soil . . ."

The phrase "implicated in charges of . . ." is a translation from the French "*mise en cause de chefs de . . .*"

19 Subsequent to the lodging of this appeal, further material has been generated, namely (i) a letter dated September 14th, 2007 from the French prosecutor, Ms. Isabelle Poinso; (ii) an affidavit filed on behalf of the respondent exhibiting two legal opinions of Ms. Dreyfus-Schmidt; and (iii) two affidavits filed on behalf of the appellant sworn by Mr. Stephan Bonifassi which also deal with French law.

20 It is useful to set out in detail the translation of the relevant paragraphs of the letter of the prosecutor. For ease of reference, where appropriate, I set out in italics the words in the original letter in the French language which are of particular relevance in this case:

". . . [T]he Examining Magistrate decided to issue an arrest warrant, following the opinion of the *Procureur de la Republique* in charge of the judicial enquiry in this case, based on serious concurring evidence gathered against Mrs. Fletcher, which is stated in the body of the European arrest warrant.

Mrs. Fletcher is not only 'implicated' (*mise en cause*), she is no longer solely 'suspected' since the arrest warrant issued against her prohibits the police from placing her in custody to question her. On the other hand, a simple suspect may be placed in police custody.

She has a particular status insofar as the charges gathered against her necessitate that she be turned over to France so that she can explain herself to the Examining Magistrate.

It is only after the first-appearance interview that the Examining Magistrate can decide whether or not to indict her (*met en examen*) on the charges being claimed against her, based on her statement and the documents she may submit.

If Mrs. Fletcher is not turned over to France, the Examining Magistrate will close the file and refer Mrs. Fletcher's case directly to the Criminal Court of Marseilles; the arrest warrant issued against her by the Examining Magistrate will, in such an event, be equivalent to an official indictment (*mise en examen officielle*). Her possibilities of defending herself and presenting her arguments will therefore be less extensive if she cannot be interviewed by the Examining Magistrate who, in the course of judicial enquiry, examines the matter to either

establish the charge and to disprove the charge and may conduct the enquiries necessary to verify her statements.

The Examining Magistrate needs to see Mrs. Fletcher so as to further his enquiry into the case . . ."

21 As regards the evidence of French law, I have not had the benefit of hearing oral evidence but have been limited to assessing it on the basis of the material filed. Whilst it may be that something has been lost in translation, it is fair to say that I find the opinions of Ms. Dreyfus-Schmidt of very limited assistance. According to her, *mise en cause* status does not exist in French law. That assertion is in stark contrast to the reference to this status in the Prosecutor's letter, and also, more significantly, the reference to *mise en cause* in the domestic warrant. I struggle to accept that a judge would issue an arrest warrant making reference to a status which does not exist. I therefore find that I cannot give any weight to her evidence.

22 In some contrast, the affidavit of Mr. Stephane Bonifassi provides what I perceive to be cogent evidence of French law. Essentially Mr. Bonifassi asserts that Fletcher is *mise en cause* (this is consistent with that formulation in the domestic warrant) which, according to him, means that there is evidence "rendering it likely that she has committed an offence" but that she has not been charged (*mise en examen*). That the decision as to whether or not she is to be *mise en examen* would only be taken by the *juge d'instruction* after she appears before him and having been afforded the opportunity to give evidence. If the *juge d'instruction* upon the evidence before him determined that there was "serious or corroborative evidence that she has committed an offence" she would be declared *mise en examen.*

23 Whilst Mr. Bonifassi agrees with the prosecutor that in the event that Fletcher is not surrendered by the time that the *juge d'instruction* finishes his investigation, the French warrant will be considered a *mise en examen*, he expresses the view that this would not be an automatic outcome, but rather that the judge would have to decide whether or not, on the material before him, she is to be indicted. That irrespective of whether or not Fletcher is surrendered, that the decision as to whether or not she is to be indicted should, as Mr. Bonifassi says, require an actual decision by the *juge d'instruction* as opposed to it arising in a quasi-administrative fashion, certainly appears logical.

24 In essence, Mr. Nicholls' submissions are to the effect that Fletcher is not *mise en examen* and that taking account of the evidence of Mr. Bonifasi, it cannot be said that a decision to try her for the offences has been taken. It is argued that at this stage of the French proceedings she is required merely for the purposes of questioning, that therefore the statutory requirements have not been met and she should not be surrendered.

25 Mr. Nicholls also seeks to support his argument by submitting that the information relating to the circumstances of the offence as required by s.7(1)(e) of the Act and that set out at sub-s. (e) of the warrant is inadequate. Although in his skeleton he possibly treats this as a separate ground, in his oral submissions the argument was modulated in that he did not rely upon the particulars in terms of their sufficiency for the purposes of meeting the requirements of s.7(1)(e), but rather for the purpose of supporting his fundamental proposition that the request for Fletcher's surrender is for questioning rather than prosecution. This is a point that I can dispose of briefly.

26 In *King's Prosecutor, Brussels* v. *Armas* (5), Lord Scott, dealing with the principles underlying the Framework Decision, stated ([2006] 2 A.C. 1, at para. 52):

> "The principle underlying these changes is that each member state is expected to accord due respect and recognition to the judicial decisions of other member states. Any inquiry by a member state into the merits of a proposed prosecution in another member state . . . becomes, therefore, inappropriate and unwarranted."

27 In *Vey* v. *Public Prosecutor of Montlucon* (7), in the Queen's Bench Divisional Court, an absence of information as to the circumstances of the alleged offence led to a determination that the warrant was invalid. It is apparent from the judgments in that case that the material in that warrant was palpably lacking. In some contrast, in the present case, I find the circumstances as described in the European arrest warrant wholly adequate. Indeed, in my view, the factual matrix upon which it is asserted that there is "strong circumstantial evidence to her [Fletcher] having directly participated in this illegal importation of narcotics," is substantial.

28 Fundamentally, therefore, the issue to be determined is whether, on the evidence before me and particularly the evidence of Mr. Bonifassi, the reference to "*mise en cause*" in the domestic warrant and the letter from the Deputy Public Prosecutor dated September 14th, 2007, there is clear doubt as to whether "a decision to try" Fletcher has been taken.

29 Although *Vey* (7) was decided upon the basis of insufficiency of particulars, the appeal was primarily concerned with the issue of whether the appellant in that case was *mise en examen* and therefore whether she was required for questioning or for prosecution. In this regard Moses, L.J. expressed tentative views and undertook the intellectual exercise of highlighting arguments without reaching any conclusion. In taking account of *Vey*, I must exercise caution in that the views expressed arise from the evidence of French Law which was tendered in that case. I, of course, must decide this appeal on the evidence before me. However, with regard to inquiring into the status of the person sought, Moses, L.J. had this to say ([2006] Extradition L.R. 110, at para. 55):

> "Analysis of whether she has that status [*mise en examen*] does not seem to me to offend the principle prohibiting the courts in the UK from enquiring into the merits of a proposed prosecution in France. Rather, such analysis is necessary in order to determine whether it has been established that extradition is sought for the purpose of being prosecuted. Resolution of that issue is not easy when the process of questioning may itself be part of a judicial criminal procedure."

30 In ascertaining the status of Fletcher and consequently the purpose for which she is sought by the French authorities, I must consider the material before me in the round, avoiding undue technicalities, and reach a conclusion as to whether the presumption which arises by virtue of the preamble to the warrant is to be disturbed. Moreover, I must adopt a purposive approach in interpreting the Act but only to the extent that the text permits.

31 Mr. Nicholls' submissions are certainly logical. My concern, however, is that they are also somewhat technical and therefore essentially much turns on the prism through which the material and the Act are considered. There are also strong competing objectives, namely, the protection of the liberty of the subject as against the free movement of judicial decisions within the European Union. But, whilst the arguments are evenly balanced, ultimately there can be little doubt that Fletcher is not *mise en examen*, and it is apparent both from Mr. Bonifassi's evidence and the Deputy Prosecutor's letter that the decision whether or not to indict her has not in fact been taken. It therefore follows that in my view there must be clear doubt as to whether strictly a "decision to try" her has been taken.

32 The appeal is therefore allowed. The Stipendiary Magistrate's order is quashed and Fletcher is discharged. This may of course be something of a pyrrhic victory for Fletcher in that in all likelihood, absent her surrender, and given the apparent cogency of the evidence, she will become *mise en examen officielle*, and then there will, I think, be no issue that a decision to try her has been taken. In the circumstances, mindful that the matter may very well come before the Magistrates' Court once again right that I deal with the issue of specialty.

Specialty

33 Section 7(3)(a) of the Act requires that a warrant be accompanied by an "undertaking in writing of the issuing judicial authority" that surrender is sought only in respect of the offence concerned.

34 In the present case it is said that the warrant is not accompanied by an undertaking in writing but that rather what is proffered, by the Deputy Public Prosecutor in her letter of February 19th, 2007, is a statement of

existing fact as opposed to an undertaking in respect of future actions. The relevant passages in the translation read:

> "She cannot be prosecuted, held or sentenced other than for the offences listed in the text of the appended European arrest warrant and she cannot be sought, prosecuted, sentenced or held for any other indictable offence committed before her surrender by your authorities and other than those indicated in the said warrant.
>
> She cannot be handed over to another state which might want her within the scope of another European arrest warrant for some other indictable offence committed prior to her surrender by your authorities. Similarly, she cannot be extradited to any third state without the consent of your enforcement authorities."

35 In arguing that there is a distinction between a statement and an undertaking, reliance is had on s.8 which deals with the transmission of warrants and which at sub-s. (11) provides that "in this section 'undertaking' includes a statement under section 7(3)."

36 It strikes me that whilst it is undoubtedly an ingenious argument, it is one which is technical in the extreme and runs counter to the purposive approach which extradition legislation is to be afforded. Moreover, I accept the Attorney-General's submission to the effect that one must look at substance rather than form and that the statement/undertaking must be seen in the context of the Framework Decision which, at art. 27(2) (subject to exceptions which do not arise), provides ". . . a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered."

37 With respect, I think the matter was well put by the learned Stipendiary Magistrate when he stated:

> "The letter is clear in its terms that if surrendered, Ms. Fletcher 'cannot' be tried, sentenced or held for any other indictable offence other than those indicated in the warrant. To ask the court to read into this a duplicitous intent is to fly in the face of not just the spirit of the [Framework Decision] but also the long-established basis upon which extraditions have been carried out. It was conceded by Mr. Nicholls that were France to change her laws in such a manner that specialty arrangements would be breached, that would put France beyond the pale in these matters."

38 I shall make orders accordingly and I shall hear the parties as to costs.

Appeal allowed.