Neutral Citation Number: [2014] IEHC 320

THE HIGH COURT

Record No: 2011 No. 319 EXT

IN THE MATTER OF THE EUROPEAN ARREST

WARRANT ACT 2003, AS AMENDED

BETWEEN:

MINISTER FOR JUSTICE AND EQUALITY

Applicant

-and-

J. A. T.

Respondent

Judgment of Mr Justice Edwards delivered on the 9th day of May 2014

Introduction:
For future citation purposes this case may be referred to as "*T. (No 2.)*" to differentiate it from the earlier case of the same name (described later in this judgment) which may be referred to as "*T. (No 1.)*".

The respondent is the subject of a European arrest warrant dated the 13th June, 2011, on foot of which the United Kingdom of Great Britain and Northern Ireland (hereinafter "the United Kingdom") seeks his surrender for the purpose of prosecuting him in respect of four offences particularised in Part (e) of the warrant. The warrant was endorsed for execution in this jurisdiction on the 16th September, 2011, and it was duly executed on the 24th July, 2012. The respondent was arrested by Sergeant J. K. on that date, and he was brought before the High Court on the same day pursuant to s.13 of the European Arrest Warrant Act 2003 (hereinafter "the Act of 2003"). In the course of the s.13 hearing a notional date was fixed for the purposes of s.16 of the Act of 2003 and the respondent was remanded on bail to the date fixed. Thereafter the matter was adjourned from time to time in connection with preparation of the case on both sides, ultimately coming before the Court for the purposes of a surrender hearing.

The respondent does not consent to his surrender to the United Kingdom. Accordingly, this Court is now being asked by the applicant to make an order pursuant to s.16 of the Act of 2003 directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him.

Uncontroversial issues
The Court has received an affidavit of Sergeant K. sworn on the 13th November, 2012 testifying as to his arrest of the respondent and as to the questions he asked of the respondent to establish the respondent's identity. When these are compared with the information in Part A of the warrant they can be seen to correspond. In addition, counsel for the respondent has confirmed that no issue arises either as to the arrest or as to identity.

The Court has also received and has scrutinised a true copy of the European arrest warrant in this case. Further, the Court has taken the opportunity to inspect the original European arrest warrant which is on the Court's file and which bears this Court's endorsement.

I am satisfied following my consideration of these matters that:

(a) The European arrest warrant (hereinafter "the EAW") was endorsed for execution in this State in accordance with s. 13 of the 2003 Act;

(b) The warrant was duly executed;

(c) The person who has been brought before the Court is the person in respect of whom the European arrest warrant was issued;

(d) The warrant is in the correct form;

(e) The warrant is a prosecution type warrant and the respondent is wanted in the United Kingdom for the purposes of prosecuting him for the four offences particularised in Part E of the warrant.

(f) The underlying domestic decision on which the warrant is based is a warrant of arrest issued in respect of the respondent on the 7th of March, 2008 by a Welsh Magistrates' Court.

(g) The nature and classification of the offences alleged under the law of the issuing state are: two instances of "conspiracy to cheat the public revenue, contrary to s. 1(1) of the Criminal Law Act 1977 (offences 1 & 2 in Part (e)), one instance of "cheating the public revenue, contrary to common law" (offence 3 in Part (e)) and one instance of "conspiracy to commit money laundering, contrary to s. 1(1) of the Criminal Law Act 1997 (offence 4 in Part (e)).

(h) The issuing judicial authority has invoked para. 2 of article 2 of Council Framework Decision 2002/584/JHA of the 13th June 2002 on the European arrest warrant and the surrender procedures between Member States, O.J. L190/1 18.7.2002 (hereinafter referred to as "the Framework Decision") in respect of all four of the offences listed in Part (e) by the ticking of the boxes in Part (e) I of the warrant, relating to "fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of European Communities financial interests" and "laundering of the proceeds of crime", respectively. Accordingly, subject to the Court being satisfied that the invocation of paragraph 2 of article 2 is valid (*i.e.* that the

minimum gravity threshold is met, and that there is no basis for believing that there has been some gross or manifest error), it need not concern itself with correspondence in respect of those offences;

(i) The minimum gravity threshold in a case in which para. 2 of article 2 of the Framework Decision is relied upon is that which now finds transposition into Irish domestic law within s. 38(1)(b) of the Act of 2003, as amended, namely that under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than three years. It appears from Part (c) of the warrant that the maximum potential sentence for the offence of conspiracy to cheat the public revenue contrary to section 1(1) of the Criminal Law Act 1977, is life imprisonment; that for the offence of cheating the public revenue contrary to common law, it is life imprisonment; and that for the offence of conspiracy to commit money laundering contrary to section 1(1) of the Criminal Law Act 1977, it is 14 years imprisonment. Accordingly, the minimum gravity threshold is comfortably met in respect of all offences;

(j) The Court has considered the description of the circumstances in which the offences are said to have been committed as set out in Part (e) of the warrant. Having done so it has no reason to believe that the ticking of the boxes relating to "fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of European Communities financial interests" and "laundering of the proceeds of crime", was in error. It is clear that the ticking of the box in respect of the "fraud *etc*" offence is intended to apply to offences, 1, 2, and 3 in Part (e) and the ticking of the box in relation to the offence of "laundering of the proceeds of crime" is intended to apply to offence 4 in Part (e);

(k) As the respondent is wanted for prosecution no issue as to trial in absentia arises in the circumstances of this case.

(l) There are no circumstances that would cause the Court to refuse to surrender the respondent under s. 21A, s.22, s.23 or s.24 of the Act of 2003, as amended.

In addition, the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) Order 2004 (S.I. No. 4 of 2004) (hereinafter "the 2004 Designation Order"), and duly notes that by a combination of s. 3(1) of the Act of 2003, and article 2 and the Schedule to the 2004 Designation order, the United Kingdom of Great Britain and Northern Ireland is designated for the purposes of the Act of 2003 as being a state that has under its national law given effect to the Framework Decision.

Background to the Proceedings
Certain important background information is expressly alluded to within the present warrant. It states in that regard:

> "An earlier Part 3 warrant had been issued for [T.]'s surrender to the United Kingdom in respect of the same offences. The Part 3 warrant had been issued on 7 March 2008 by District Judge W. at [a] Magistrates' Court, [in] London. Mr. [T.] was subsequently arrested in Ireland pursuant to the Part 3 warrant and contested extradition proceedings ensued. On 21 December 2010 the Supreme Court of Ireland discharged Mr. [T.] from the Part 3 warrant.
>
> The UK authorities maintain their request for [T.]'s surrender. This reissued Part 3 warrant takes into account the observations of the Supreme Court of Ireland and addresses the observations made by that Court."

The Supreme Court case alluded to is *Minister for Justice, Equality and Law Reform v. J.A.T* [2010] IESC 61 (Unreported, Supreme Court, Hardiman J., *nem diss*, 21st December, 2010) (hereinafter "*T. (No. 1)"*). The case was before the Supreme Court by way of an appeal against the earlier decision of the High Court to surrender the respondent in respect of all offences.

The High Court had found that, due to inconsistencies in the warrant on foot of which the respondent's surrender was then being sought, dual criminality was required to be established in respect of the three offences allegedly involving a conspiracy. The Court had held that in respect of those three offences correspondence could be demonstrated with "conspiracy at common law". The High Court had further held that with respect to the fourth offence, the substantive offence of cheating the public revenue, it was covered by the ticking of the box relating to fraud in the article 2.2 list in Part (e)(I) of the warrant and that in the circumstances dual criminality was not required to be established for that offence.

The respondent, having, at the relevant time, an unrestricted and automatic right of appeal, successfully appealed to the Supreme Court. The Supreme Court held that it was uniquely for the issuing state to say whether and, if so, where in the article 2.2 list of actions in the Framework Decision a particular offence is to be found. In the case before the Court, it was certified in the warrant that three of the four offences charged (*i.e* the offences involving conspiracy) *were* within that list, and later in the warrant that they *were not* within that list. In the Supreme Court's view this represented a serious internal conflict in the warrant. In those circumstances correspondence would need to be established for the conspiracy charges. The Supreme Court further held, however, that there was no general offence of "conspiracy at common law" and that the High Court had been wrong in believing that to be the case. As regards the substantive charge, the warrant failed to specify the circumstances in which the offence was alleged to have been committed and it was impossible in the circumstances to determine whether the conduct comprising it was conduct described in the article 2.2 list. In those circumstances correspondence needed to be demonstrated in respect of that offence, but that was not possible having regard to the earlier decision of the Supreme Court in *Attorney General v. Hilton* [2005] 2 I.R. 374 which had held that there is no common law offence in Ireland of cheating the public revenue.

The Points of Objection
The respondent has pleaded detailed points of objection running to six closely typed A4 pages. Not all points were ultimately proceeded with, and those that were may be summarised as comprising:

> • an objection based upon an alleged abuse of this Court's process by the domestic prosecuting authority of the issuing state and/or the applicant in seeking to "come again" in circumstances where they failed or neglected or misused the ticked box procedure available to them pursuant to article 2.2 of the Framework Decision in T*. (No. 1);*
>
> • an objection alleging insufficient particularisation of the alleged offences contrary to s. 11(1A)(f) of the Act of 2003, and in particular failure to adequately specify the place in which the offences are said to have been committed, which it is contended renders it impossible for the respondent to know whether or not he can rely upon extraterritoriality grounds to resist his surrender;
>
> • multiple objections pursuant to s. 37 of the Act of 2003 based upon alleged breaches/apprehended breaches of various rights guaranteed to the respondent and members of his immediate family either under the European Convention on Human Rights or the Constitution of Ireland, or both, including:

o the right to fair procedures (article 6 European Convention on Human rights (hereinafter "the ECHR") and/or Articles 38 and Article 40 of the Constitution);

o the rights to life; liberty, bodily integrity and human dignity; Articles 2, 3 & 5 of the ECHR and/or Articles 40.3 & 40.4 of the Constitution)

o the right to respect for, and enjoyment of, family life (article 8 of the ECHR and/or Article 41 of the Constitution)

Moreover, delay has been specifically pleaded and is relied upon as an aspect of the case based upon abuse of process; as an aspect of the case based upon prejudice to the health and wellbeing of the respondent and his family; and as an aspect of the case based upon the right to respect for family life guaranteed by article 8 ECHR and the contention that it would be a disproportionate measure to surrender the respondent in the circumstances of this case.

The Evidence relied upon by the Respondent.
The respondent has sought to put two affidavits before the Court, together with a considerable number of documentary exhibits to those affidavits (consisting mainly of medical reports).

The respondent's principle affidavit, which was sworn on the 11th January, 2013, is lengthy, running to 71 paragraphs. The Court has considered its contents in detail and has taken them fully into account. In brief summary, the respondent deposed to the following:

The affidavit commences with a detailed description of the respondent's personal circumstances including the fact that he is in his mid sixties, his family background, his modest educational attainments, his emigration to England in the 1960's where he worked in construction, his mother's mental health issues, his marriage in 1970 to his wife L., the birth of his two children, O. and D., the family's return to Ireland in 1982, the construction of a family home in the Midlands, and subsidence problems with that property subsequently experienced. The affidavit also describes him continuing to work in construction up, either in this jurisdiction or in the United Kingdom, depending on where work was available, up until 2000.

The respondent claims to have become a self employed builder in 2000 and to have worked at that until 2005, journeying frequently as required between Ireland and the United Kingdom. He claims to have had three men employed in this jurisdiction up until the recent economic downturn when he had to lay them off, and to have been registered for tax purposes here. He claims he now has little or no work, is in financial difficulty (including being in mortgage arrears) and that his financial difficulties have been exacerbated by freezing orders obtained in respect of his bank accounts under the anti-money laundering provisions of the Criminal Justice Act 1994.

The affidavit then goes on to describe his family life in great detail. He refers in particular to the fact that his son D, now in his early forties, suffers from schizophrenia. He describes the history of D's illness and his treatment and exhibits a medical report of the then treating psychiatrist, Dr W. F., dated the 10th November, 2008.

The respondent emphasises that D. needs full time attention and care from both his father and mother and he goes on to describe the care and assistance that he routinely provides for his son. The point is made that neither D., nor his mother, drive, and both are reliant on the respondent for transport purposes. A further medical report is also exhibited from the family's General Practitioner, a Dr. D. B., dated the 30th November, 2012, which confirms that D. suffers from chronic schizophrenia and alcohol addiction, and which again stresses the extent to which D. is dependent upon family support and the major role played by his father in contributing to that.

In the next section of the said affidavit the respondent sets out the chronological history of the first set of proceedings. This is common case and may be summarised as follows:

01/01/97 Earliest date on indictment - offences cover a span between 1/1/1997- 31/12/2005

2005 Respondent interviewed by police on two occasions

26/01/06 Alleged failure by respondent to attend police station.

07/03/08 Both a domestic arrest warrant and EAW 1 issued by a Welsh Magistrates' Court.

12/03/08 Endorsement of EAW 1 by the High Court

03/04/08 Arrest of respondent on EAW 1

Nov 2008 S. 16 hearing in the High Court in respect of EAW 1.

28/01/09 Order of the High Court surrendering respondent on EAW 1.

Oct 2010 Hearing of the appeal by the Supreme Court.

21/12/10 Delivery of judgment by the Supreme Court.

The respondent then describes how he was affected by the first set of proceedings. He refers to having coping difficulties in general with stressful events, and to the fact that he has a long standing drink and alcohol addiction problem, for which he has been hospitalised from time to time. Moreover, he claims that his mental health difficulties were exacerbated by stress and anxiety associated with the first proceedings. He also states that he has a long standing depressive illness, for which he has been on medication and under medical care for some time. In addition, he had a cancer scare in 2008 when he developed a sebaceous gland carcinoma which, fortunately, was successfully excised surgically. Medical reports to support all of this are exhibited from Dr. T. M., General Practitioner (report dated the 2nd July, 2008), Dr.R. M., Consultant Surgeon (report dated the 12th September 2008), and Dr. F., Consultant Psychiatrist (reports dated the 26th September 2008 and the 10th November, 2008).

At para. 32 of his said affidavit the respondent asserts that he found himself feeling under unbearable strain in relation to the previous proceedings. He says he was in severe anguish about the proceedings and what would happen to him during them. He felt under continual pressure thinking and worrying about his family's future and his own future in the event of him being surrendered to the United Kingdom. He states that he was unable to sleep properly and his mental health suffered in a substantial way. He goes on to describe attempting to commit suicide by overdosing in May 2008, and being hospitalised as a consequence. He claims to have

subsequently suffered a number of relapses of depression necessitating yet further hospitalisations. This continued until December 2010. He says that he was devastated when the High Court ordered his surrender in January 2009 and that the subsequent appeal proceedings increased the pressure on him which pressure was only alleviated when the Supreme Court issued judgment in his favour on the 21st December, 2010. At para. 45 of his affidavit he states that when he learned of the Supreme Court's decision he considered that a huge weight had been lifted off his shoulders and that he could try to get on with his life. He thought that the matter was at an end.

In the next section of his affidavit the respondent sets out the chronological history of the present proceedings. Again this is common case and may be summarised as follows:

> 13/06/11 EAW 2 issued by a London Magistrate's Court
>
> 16/9/11 Endorsement of EAW 2 by the High Court
>
> 24/07/12 Respondent arrested on EAW 2
>
> 05/06/13 S. 16 surrender hearing commences in the High Court
>
> 06/06/13 S. 16 hearing continuing
>
> 07/06/13 S. 16 hearing continuing and adjourned part heard at end of day
>
> 14/06/13 S.20(1) request for additional information.
>
> 17/06/13 S. 16 hearing resumed and concluded subject to response awaited to s.20(1) request and any issues arising therefrom
>
> 09/07/13 S.20(1) response presented
>
> 30/07/13 Final brief oral submissions and judgment reserved.

The respondent says at para. 50 of his said affidavit that it was a huge shock to him that he was being pursued again by the United Kingdom authorities on this matter. He states that he also knew that his family would be distressed at this news, and he withheld the existence of the present EAW proceedings from his wife for some time after his arrest as he did not want her to be burdened with worry about what would happen to him. He says that he only told her when he realised that he could not seek to hide the matter any longer.

In the next part of his affidavit the respondent sets out his present personal circumstances. He expresses concern that these proceedings and his possible surrender to the United Kingdom pursuant to the EAW will affect his son, D., in an adverse way and leave his wife with nobody to protect her and their son at a very vulnerable time. Further, he evinces the belief that if he is surrendered in relation to these proceedings it will have a damaging effect on his life and that relating to his family.

The respondent characterises his present financial situation as being "very difficult" and says that he is in mortgage arrears (and exhibits documents to support that). He says that he is the sole financial provider within the family as neither his wife, nor his son D., are working. While D. has a medical card the respondent says that there are additional costs associated with his care that the respondent and his wife have to pay on an on-going basis. The respondent expresses worry that if he is surrendered the family home will be repossessed and that his wife and son will be left with nowhere to live. He says that he cannot foresee his wife being able to deal with the financial pressure, on top of caring for their son, if he is surrendered to the United Kingdom.

The respondent deposed to feeling very stressed at that time (January, 2013), to experiencing anxiety and having sleeping difficulty. He exhibits further reports from Dr. B. and Dr. L. in support of this.

He states that his son's health has not improved in any significant manner since the previous set of proceedings. His medical care still encompasses medication and he also obtains therapeutic care in a local out-patients clinic. The respondent stated that he brings him to that out-patients clinic in the car. Even so, he is still prone to occasional outbursts at home and both the respondent and his wife have to be there to placate him when that happens. The respondent contends that in other day to day aspects of D..'s care his presence and assistance is also required, such as helping D. to take a bath, as he is too strong and heavy for his mother to lift him for that purpose, and also so as to ensure that he does not do any harm to himself in the process.

At para. 65 of his said affidavit, the respondent states that the present proceedings have re-ignited the stress and strain in his life which existed during the previous proceedings. He acknowledges that court proceedings can induce stress in any person who is subject to them and that this is not a good reason in itself why criminal or, indeed, EAW proceedings should not proceed. However, he goes on to state that "these proceedings have been a disaster for me and my family where, for a second time, I am being sought in respect of the same said offences as in the first set of proceedings. My wife has found it difficult to cope with the stress of the proceedings for a second time. I am very worried about the proceedings and feel that my life is falling apart once again where I have already been put through a court process about these matters previously."

Finally, at paras. 65 and 66, he adds:

> "65. In all of the circumstances I believe that the effect of this second set of proceedings, after the ordeal of the first application, is affecting me and my family to such an extent that my health and well-being are damaged to it and I cannot cope with the pressure of same. My family is also being put under severe strain for the second time in relation to the same matter where our ability to deal with those matters is poor in light of all other difficulties in our lives at present.
>
> 66. I am informed and so understand that the arguments being made by the UK authorities about the legal requirements for my proposed surrender could have been made in the first set of proceedings. Thus, I am now being made to ensure two sets of proceedings for the same matter where the first set of proceedings took 20 months to finalise in the courts and had a terrible effect on me and my family. The second set of proceedings only came to my attention some 20 months later through no fault of my own and I must now deal with this process again where the pressures on me and my family are to be repeated.

67. I also am informed that if an order for surrender is made in the High Court I do not have a full right of appeal to the Supreme Court. Instead, the right of appeal is restricted. This change occurred after the first proceedings had already been appealed to the Supreme Court. Thus, I am now deprived of the full appeal on all matters that was available to me up until August 2009 where it is the actions of the UK authorities that have resulted in that delay rather than anything done by me. I am advised and so believe that this is invidious and unfair to my rights."

The Court has considered carefully the contents of all of the exhibits to the respondent's said affidavit. It is unnecessary to refer with particularity to their contents, save in the case of the very detailed fourteen page report of Dr. F. dated the 10th November, 2008. I consider it appropriate to specifically quote Dr. F.'s opinions and conclusions relating to the respondent personally, and relating to the respondent's son D., set forth at paras. 70 to 84 inclusive of the said report:

"Opinion on Mr J.T.
70. Mr J.[T.]. is fit to attend and appear before Court.

71. The International Classification of Diseases, tenth edition (ICD-10) states that Alcohol Dependence Syndrome is present if repeated use of alcohol leads to a strong desire to use alcohol, difficulties controlling the [sic] its use, persistence despite evidence of harm, higher priority given to it alcohol than other activities, increased tolerance and a withdrawal state.

72. In my opinion Mr J.[T.] suffers from Alcohol Dependence Syndrome. He describes craving, a "longing for alcohol". He felt that he had a destructive pattern of use, but persisted in its use. He said that he had to change jobs more frequently than usual due to its use. Tolerance is evident in the transition over the years from social drinking, to daily and finally drinking increasingly early in the day. Withdrawal symptoms prevented him working in the morning. In the last ten years he has found it increasingly difficult to stop of his own accord. Six years ago he required inpatient detoxification to stop and this led to his last extended period of abstinence, one year. Mr [T.] says that he has also used alcohol to relax. Given his tax difficulties over the past ten years and the illness of his son, it is likely that this further prompted him to use alcohol and accelerated the onset of Alcohol Dependence Syndrome.

73. The ICD-10 describes the features of a depressive episode as a lowering of mood, reduced energy and a decrease in activity. There can be also reduced concentration, tiredness, reduced self esteem and confidence, sleep, appetite and weight disturbance and suicidal thoughts and acts. The episode can be classified as mild, moderate or severe depending on the degree of functional impairment, which is some to complete impairment.

74. From my assessment of Mr J.[T.]I believe that he is suffering from a depressive episode mild in intensity. He describes a low mood with irritability, "short-fused". He felt overwhelmed with his difficulties and unable to cope. In May 2008 he has suicidal ideas and acted on them. He was seen at this time after his overdose by the psychiatric services, noted to be depressed, but found to have an adjustment disorder. An adjustment disorder is a reaction to stress and the symptoms are not as severe as a depressive episode. Later, in late June 2008 he was seen by Dr O'C, Consultant Psychiatrist, who assessed Mr [T.]and referred him to my service. He noted that he was depressed. I am of the opinion that Mr [T.] was starting to become depressed in May 2008 and so in hindsight it was not an adjustment disorder, but the onset of the depressive episode. When I saw Mr [T.] his depressive episode was causing him a mild degree of impairment.

75.1 have seen Mr J.[T.]on three occasions. As did Dr O'C, I have advised Mr [T.] first to tackle his alcohol use and next address his mood. I did not commence an antidepressant as its effectiveness with alcohol is likely to be diminished. My first meeting was to assess Mr [T.] and in the subsequent visits I went through techniques with him on how to stop his alcohol. He has managed to reduce his use of alcohol and has entered into abstinence. This has led to an improvement in his mood symptoms, but as he has been only attending since late September 2008 (report 10.11.2008) it is to [sic] early yet to state that he is in remission. As his mood is improving I have not started an antidepressant.

76.1 have advised Mr J.[T.] to continue to attend my service firstly for treatment of alcohol dependence syndrome and secondly for monitoring of his mood state. I have withheld pharmacologically treatment of depression, as his depressive symptoms are reducing off alcohol. In the past Mr J.[T.] has used alcohol to reduce stress. It is likely that he will experience further stress due [sic] his legal difficulties. He may relapse and resume excessive alcohol use. This could worsen his mood and even precipitate thoughts and acts of self harm as happened in May 2008. In view of this I have advised Mr J.[T.] of the necessity to continue to attend me to prevent this occurring and to learn better methods of coping with adversity.

Opinion on Mr D. [T.]
77. Schizoaffective disorder in ICD-10 is described as exhibiting both schizophrenic and affective symptoms. Schizophrenic symptoms are delusions that ones thoughts are being interfered with, delusions that ones actions or emotions are under outside control, other delusions such as of persecution or reference, hallucinations and catatonic behaviour. Affective symptoms are mood symptoms of either depression or mania. Affective symptoms classify Schizoaffective disorder into types, depressive type or manic type.

78. Schizoaffective disorder is characterised by acute episodes and a chronic course with the emergence of negative symptoms. Acute episodes are where the symptoms are very prominent and are accompanied by marked impairment of functioning. Negative symptoms are psychomotor underactivity, emotional flattening, lack of drive, poverty of speech and poor social performance. Negative symptoms are more likely to emerge in Schizoaffective disorder, depressive type.

79. In my opinion Mr D.[T.], Mr J.[T.]'s son suffers from Schizoaffective disorder, depressive type. When Mr D. [T.] first presented to services in 1993 he presented with delusions concerning his family, a delusions that other people were talking about him and a delusion that his mind was being interfered with it [*sic*[. At the same time his mood was low. He recovered, but has had further episodes over the rest of the 1990s. At the beginning of this decade he showed similar episode with delusions that people on TV were observing him, thought reading and depression. By 2005 the pattern had changed where he developed phobic anxiety about eating in that he or others might choke. During the time that I have treated Mr D.[T.]he has had delusions that people are going to harm him or his family, phobic anxiety about swallowing and subjective low mood.

80. By the late 1990s Mr D.[T.] was noted to have negative symptoms. The records from the UK in early 1997 refer to symptoms of lack of motivation, social withdrawal and lack of spontaneity. In 2002 Mr D.[T.] was referred to the Stonham project for rehabilitation, which is specific treatment for this. During the time he has been attending my service, he has

shown lack of drive, flatten [sic] emotional expression, reduced speech and reduced interest.

81. Mr D. [T.]'s illness has been difficult to treat. He has been tried on a variety of medication and often at higher than standard doses. In 1999 he was seen at the Institute of Psychiatry at the Maudsley for a second opinion. This Institute has a well-established reputation in the treatment and research of psychiatric disease. The second opinion was that he has a psychotic illness with both schizophrenic symptoms and depression. The Institute suggested the use of Clozapine, which is only licensed for use in more difficult cases. This was not used as a subsequent admission of itself led to an improvement.

82. In my opinion Mr D. [T.] has a markedly impaired level of occupational and social functioning. This is due to his illness. In his early adulthood he did work for short periods mainly with his father and had a few brief relationships, the last being in 1996. Since the late 1990s this has not been the case. He is dependent on his parents for support and receives disability benefit from the state. The last time that he lived separately from his parents was before 2004 and then in supported accommodation.

83. The records from the UK refer to Mr D. [T.] becoming psychotic in 1996 following the death of his cousin. In 2004 he was present when his father nearly choked while eating. After this he developed a phobic anxiety concerning his own eating and that of his family. When I saw Mr D.[T.] he expressed worry and concern over his father's possible extradition to the UK. He said that he noted reoccurrence of some of the symptoms of depression. In view of this change I suggested to Mr [T.] that he be admitted for hospital for assessment. Mr D.[T.] said that he was fearful of coming into hospital and preferred to continue as an outpatient.

84. In my opinion a change to Mr D.[T.]'s home circumstances, such as the extradition of his father, would be a challenge for him given the present deterioration and the relapses that have occurred in the past to family events. If his father is extradited it is possible that this could led to a relapse of his illness. He is dependent on his family for support, again if this should change he would find it difficult to adapt and may require much more support from the psychiatric and social services. This is due to the difficulties there have been in treating his illness and the presence of negative symptoms."

The second affidavit sworn by the respondent in these proceedings was sworn by him on the 15th March, 2013. This was for the purpose of updating the medical picture with respect to himself for the benefit of the Court. It exhibits a more up to date report from Dr. F., this one dated the 7th October, 2010, which details, inter alia, the respondent's hospital attendances in 2009 and 2010 and refers to his on-going treatment under Dr. F.'s care during that time. This report was in fact initially obtained for the benefit of the Supreme Court in the first set of proceedings, and had been placed before that Court during the appeal hearing. On this occasion Dr. F. had opined:

"34. This report follows on from my previous report of 10.10.2008. In that report my opinion was that Mr J.[T.] was suffering from a Depressive episode and Alcohol Dependence Syndrome. The Depressive episode in 2008 was Mr J. [T.]'s first. Since then he has had two further episodes. On that basis I have modified my opinion in that the diagnosis of a single Depressive episode has evolved into Recurrent Depressive Disorder. I believe the diagnosis of Alcohol Dependence Syndrome holds.

35. I believe that Mr J. [T.]'s presentation since my report of 2008 has deteriorated. When I saw him first, it was his first depressive episode. Since then he has had two depressive episodes, both of which required hospital admission. I note that on both episodes he was on treatment already and required higher dose as well combination of two antidepressants. This suggests that his illness is more resistant to treatment and progressive in nature.

36. I am of the opinion that there is an association between Mr J. [T.]'s illness, its progressive nature and the pressure put on Mr J.[T.] by his lengthy legal difficulties. I note that the approach of this coming Court date has caused some of Mr J.[T.]'s depressive symptoms to return and it is possible that it could provoke a full relapse.

37. Other stresses may precipitate a relapse of Mr J. [T.]'s illness. He is the main support for his family. In particularly [sic] his son also attends the service with a severe mental illness, Schizoaffective disorder. He is dependent on his father for practical and emotional support. Separation for Mr J.[T]. from his family and the awareness of the consequences to them could possibly lead to a relapse in his illness.

38. Mr J.[T.] suffers from Alcohol Dependence Syndrome. This is much less problematic then it was when he first presented in 2008. He has reported to me that he has gone from daily drinking in 2008, to weekly drinking in 2009 and most recently drinking once a month at a minimum. During his last two admissions he was detoxified from alcohol, but the detoxification process was also used to help him relax. The medication used both replaces alcohol and has a relaxant effect.

39. In 2008 I believed that Alcohol Dependence Syndrome was the primary disorder with Depression being secondary. Since then I have changed my opinion, as Mr J.[T.] reports that he has greatly reduced his alcohol use and the depressive episodes have had a proportionally greater impact on Mr J.[T.]'s functioning. I am now of the opinion that Mr J. [T.]'s primary disorder is Recurrent Depressive Disorder.

40. Mr J.[T.] has complained to me about memory impairment, particularly around short-term memory. This symptom first presented in the second half of 2009. I believe that this symptom is part of his depressive illness and shows its progressive nature. Memory difficulties may interfere with a person's capacity.

41. I would ask that if this report is added to the deliberations of the Court that the Court take into account Mr J.[T.]'s primary disorder, Recurrent Depressive Disorder, the progressive nature of it and how further stress such as being separated form [sic] his family may lead to a further relapse."

Other Medical Information

At the s. 16 hearing in this matter the Court was asked by counsel for the respondent to receive another medical report on D.T., from a Dr. E. H., Consultant Psychiatrist dated the 25th May, 2013. It was acknowledged by counsel for the respondent that this was neither verified by, nor exhibited with, any affidavit. However, the Court was urged to receive it in circumstances where it had only just been received, the parties on both sides were anxious to avoid an adjournment, and the applicant was not objecting. In fact, it

transpired that the applicant's side had themselves only just received a report on the respondent from a Dr. S. M., Consultant Psychiatrist, that they were anxious should also be put before the Court on a similar basis. In circumstances where there were reciprocal indications of consent, the Court agreed, in the interests of justice, and to avoid further delay, to receive both of these reports and treat them as evidence notwithstanding that they were neither verified by, nor exhibited with, any affidavit.

In his report dated the 25th May, 2013, Dr. H. has opined:

> "OPINION
>
> 1. DIAGNOSIS
>
> [D. T]. suffers from paranoid schizophrenia and has done so for approximately twenty years. His illness is characterised by the following: worsening apathy - frequently spending fifteen hours per day in bed; paucity of speech; blunting of emotional responses; social withdrawal; markedly diminished social and occupational performance; distressing persecutory delusions that he is being watched by the television; delusions that he is being stared at on the few occasions he walks in town; screaming and shouting when he believes people are staring at him. As a consequence of the preceding persecutory experiences, [D. T.] experiences considerable anxiety, tearfulness and mental distress for which, at times, he appears to self-medicate with excessive quantities of alcohol, in addition to occasional suicidal ideation.
>
> 2. RESPONSE TO TREATMENT
>
> To date, [D. T.] has not adequately responded to treatments with various medications. He has no meaningful occupational functioning and no social independence of note. [D. T.] appears to understate the symptoms of his mental illness and this, over the years, combined with the apparent remarkable patience and tolerance of his parents, may have resulted in less assertive treatment than otherwise might have been the case. Indeed, when I assessed him very briefly on 19th March, 2013, I did not appreciate the severity of his symptoms. It was only following a lengthy interview on 17th May, 2013 that the nature and extent of his symptoms and consequences of his mental illness were apparent to me. In otherwords, [D. T.] and his parents stoically endure and do not exaggerate the impact of his mental illness on his own functioning and that of his family.
>
> 3. FUTURE TREATMENT
>
> (a) In view of failure to adequately respond to pharmacological treatment to date [D. T.] requires treatment with Clozapine. He is agreeable to this treatment. I have arranged for [D. T.] to see me as an outpatient in July, 2013 with a view to commencing Clozapine.
>
> (b) Clozapine is licensed for treatment of schizophrenia in patients unresponsive to treatment with two or more antipsychotic drugs. There is potential for dramatic improvement in schizophrenia following treatment with Clozapine. Clozapine carries the risk of potentially fatal agranulocytosis, a disorder of production of blood cells. In order to manage and minimise this risk regular blood tests and vigilance for signs of infection are necessary.
>
> (c) Treatment with Clozapine will involve considerable inconvenience to [D. T.] as it will necessitate the following:
>
> (i) daily attendance as an outpatient for the first two weeks of treatment in order to have temperature, pulse and blood pressure monitored, followed by
>
> (ii) once weekly attendance as an outpatient for eighteen weeks in order to have a blood test, followed by
>
> (iii) once fortnightly attendance as an outpatient to have a blood test for a further period of thirty four weeks, followed by
>
> (iv) once four weekly attendance for blood tests as an outpatient for as long as the patient remains on Clozapine, and after discontinuation.
>
> (v) If treatment with Clozapine is successful, and there is no guarantee that it will be, and if the drug is tolerated, [D. T]. will, if willing, take this medication indefinitely. He will need to arrange attendance as an outpatient in order to have the necessary blood tests. I have consulted regarding public transport links from his home address to the community mental health centre where monitoring and blood tests are envisaged to take place, and understand that no direct transport links exist. Even if such transport links did exist, in part or in full, his disturbed mental state, at this point in time, would militate against benefiting from such an arrangement.
>
> (vi) Having consulted with consultant psychiatrist and management colleagues, I can confirm that it is not currently realistic for the local mental health service to provide the necessary logistical support for initiation and treatment with Clozapine should [D. T.] not be in a position to arrange his own transport. I further understand, based on discussion with [D.] and [J.. T.], that [D. T]. is dependent on his father for transport to all medical appointments as his mother does not drive, (vii) In other words, as matters stand, [D. T.] is dependent on the presence of his father if treatment with Clozapine is to commence. It may be the case, following improvement in mental state after taking Clozapine for several months, that [D. T]. could attend as an outpatient by a combination of walking and using public transport.
>
> RELATIONSHIP BETWEEN D. T. AND HIS FATHER
>
> [D. T.] spoke affectionately of his father. His account revealed that he is dependent on his father for attendance at medical appointments, social outings and emotional support. He appears to have a similar level of dependence on his mother albeit limited insofar as she does not drive a car.[D. T.] informed me that he does not think life would be worth living if he didn't have his mother and father.
>
> 5. IMPACT OF EXTRADITION OF [J.T.] ON [D. T.]
>
> On the basis of the aforementioned, there is little doubt, in the event of extradition of his father to the United Kingdom, that [D. T.] would experience considerable emotional distress and probable exacerbation of his mental illness. He would not be able to avail of the proposed and necessary treatment with Clozapine. Consequently there would be little prospect

of improvement in his mental illness."

For his part Dr. S. M., Consultant Psychiatrist, has prepared a report for the Court at the request of the applicant, based upon an assessment of the respondent conducted on the 27th May, 2013, and having received certain of his medical records including the reports of Dr. F.. Dr M.'s report states, inter alia:

"**OPINION**

Mr [T.] is a 64 old man who is subject of European Arrest Warrant in relation to criminal proceeding [*sic*] in the UK. He is currently unemployed and in receipt of state benefits. He previously worked in the construction industry in both the UK and Ireland. He lives with his wife and son in [the Midlands]. His son suffers from schizophrenia. Mr [T.] has a history of alcohol dependence syndrome of many years and depressive disorder since 2008.

He currently faces a number of psychosocial stressors. He is the subject of a criminal investigation in the UK and European Arrest Warrant proceedings. According to Mr [T.], legal proceedings were instigated over a decade ago and the protracted nature of these proceeding [*sic*] has caused him great stress. He reported financial difficulties and that he fears that his family home will be repossessed. He reported that he is main carer for his son whose mental illness renders him highly dependent on family support.

Mr [T.] has a long history of alcohol dependence syndrome. The course of his alcohol problems has been documented in detail in the psychiatric reports by Dr [W. F.].

Mr [T.] has a recurrent depressive disorder. He currently presents as mildly to moderately depressed. He reported anhedonia, a lack of energy, suicidal thoughts, negative cognitions about the world and his circumstances and hopelessness for the future. Continued drinking will exacerbate and perpetuate his symptoms of depression. As has been documented in Dr Flannery's psychiatric reports abstinence from alcohol during hospital admission has lead [*sic*] to improvement in Mr [T.]'s depressive symptoms.

Mr [T.] has reported problems with his memory in recent years. Chronic alcohol use is well known to have adverse effects on memory function. Mr [T.] has had an MRI brain scan in 2011 which showed no abnormality. However, he would benefit from further assessment of his reported memory difficulties. I attempted to screen Mr [T.]'s cognitive function using the Mini Mental State Examination. My impression was that the score achieved in this instance was invalid due to poor effort during testing. The very low score achieved was not consistent with Mr [T.]'s performance later in interview. His performance during the course of the interview was much higher than his initial presentation. He was able to discuss the nature of the legal proceeding and their course over the past few years fluently and in considerable detail.

Mr [T.] presents with many risk factors for future suicidal behaviour which are summarised below:

Historical risk factors which predispose Mr [T.] to self harm and suicidal behaviour:

- History of deliberate self harm with suicidal intent in 2008
- Previous hospitalisation - 3 psychiatric admissions in total.
- Mental disorder - he has a recurrent depressive disorder
- Substance use disorder - chronic alcohol dependence syndrome
- Older and male.

Dynamic risk factors for self harm and suicide:

- Ongoing suicidal ideation - expresses ongoing thoughts of suicide
- Hopelessness - expresses lack of hope for the future.
- Current symptoms of depression - as documented above
- Current substance use - continued use of alcohol
- Psychosocial stress - financial, legal and familial.
- Possible issues with problem solving - may relate to long term effects of alcohol
- Response to treatment - depression poorly responsive to treatment with medication
- Future stress — if surrendered to UK authorities Mr [T.] is likely to experience an increased level of stress.

Fluctuations in the dynamic risk factors for suicidal behaviour can increase or decrease the overall risk. In the context of the legal proceedings which Mr [T.] faces, stress and hopelessness are significant risk factors in this regard.

It is likely that the stress of being surrendered to the UK authorities would have a negative impact on Mr [T.'s] mental health and by proxy the mental health of his son. The possible effects of this eventuality have been outlined in the psychiatric reports by Dr [W.F.]."

Additional Information relied upon by the Applicant
The applicant relies upon two documents containing additional information provided by the issuing state.

The first is a letter from the Crown Prosecution Service addressed to the Irish Central Authority at the behest of the United Kingdom

Central Authority (SOCA), and dated the 3rd June, 2013. It is in the following terms:

"In reply to your request to be provided with further detail of Mr [T.]'s involvement in each of the offences mentioned in the warrant I confirm the following:

1. Conspiracy to Cheat The Revenue/Money Laundering

Between 1997 and 2005, it is alleged that [J.A.T.] was at the centre of a large scale fraud on the UK Public Revenue. He managed and controlled a large number of Companies and individuals in the UK associated with the Construction Industry, which were used to systematically defraud the Revenue by dishonestly pretending that payment had been properly made to third parties which held tax exemption certificates under the Inland Revenue Construction Industry Scheme ("CIS Scheme"), thereby resulting in the dishonest submission of corresponding vouchers (715, CIS 24 & CIS 25) to the Revenue. Such pretence allowed payments to be made by a contractor gross of tax and VAT to a sub-contractor further down the chain, thereby causing liability to account for tax and VAT to be passed down the chain accordingly. False invoices were raised to justify such payments. Tax and VAT was not accounted for to the Revenue. Instead, the funds passed down the chain were ultimately withdrawn to cash, to pay an off record workforce cash in hand without deduction of tax, and also to benefit Mr [T.] and others involved in the fraud. The loss to the Revenue is in excess of £10 million.

The evidence does indeed establish a very clear fraud, and associated money laundering operation.

Invoices purportedly from subcontractors were forged, and as a result payments Gross of Tax and VAT were made down the chain to those subcontractors. Monies were laundered and withdrawn to cash ona huge scale, either directly by those subcontractors, or others deliberately layered below them as part of the dishonest laundering structure - and no account was made by the subcontractors for payment of tax or VAT. No workforce was ever declared to the Revenue. The fraud and money laundering also extended to companies which operated outside the CIS system, whereby false invoices were produced and cash extracted - again reducing tax liability accordingly.

The fraud operated upon a timeline basis, with new companies replacing existing companies as and when required. It is alleged that Mr [T.]'s involvement was central to the fraud throughout the relevant period, and that he was directly involved with companies at each level of the dishonest chain, from the top of the chain to the bottom - in all material respects - and assumed control of companies and their Revenue documentation accordingly. He assisted in setting up bank accounts to further the fraud, and used the services of an associate to operate a large number of such accounts. To that end, he formed a network of facilities in order to launder the proceeds of the fraud through to cash, including use of bank accounts opened specifically for that purpose, participation of a series of companies and individuals in London, the South East and the Midlands, and the use of cheque cashing/cash converting entities. It is alleged that witness evidence, documentary material, and also forensic evidence connects Mr [T.] to the fraud and associated money laundering arrangements, including (but not limited to) the following:

- Mr [T.] used false names during the course of the fraud, including [J.S., P.C. and J.S.].

- His handwriting was found on documents associated with the lead CIS 6 Sub-contracting companies, on cheques written by those companies (including to cash), and on CIS 24 vouchers.

- His handwriting was also found on large numbers of the CIS 24 vouchers of sham sub-contractor companies lower down the chain, representing falsely that payments had been properly made to those sub-contracting companies, when in fact the companies were no more than vehicles used to extract cash without payment of tax.

- His handwriting was found on telegraphic transfer forms, and on cheques and cheque stubs of those sham companies lower down the chain - and of significance on cheques cashed through cash converting companies.

- His handwriting was found on draft handwritten bogus invoices relating to sham companies lower down the chain.

- The companies lower down the chain with which Mr [T.] is provably associated, and from which cash was extracted accordingly, made no returns to the Revenue, nor accounted for a workforce - and hence failed to account properly or at all for tax and VAT.

- His handwriting was also found on business documents seized during the course of the Revenue investigation, and which showed computations of payments made, or intended to be made, to other companies/individuals participating in the fraud.

- Computers were seized from Mr [T.]'s business premises during the course of the Revenue search operation. Templates for false invoices relating to sham companies involved in the fraud and money laundering were found on those computers. False invoices relating to sham companies involved in the fraud and money laundering were also found on a computer from his daughter's address.

2. Cheating The Revenue - Personal Tax
Between 1997 and 2005, in excess of £2 million was received into personal bank accounts held by [J. T.] in the UK. Mr [T.] concealed such income and benefit, and failed to make any or any proper return to the Revenue to account for the receipt of such sums, or make any payment of income tax. He did not declare any employment during this period. In particular:

- Between 23/4/1998 and 3/2/2004, approximately £2.1 million was credited to his personal bank account held with the Allied Irish Bank.

- Between 13/1/1999 and 16/12/1999, approximately £260,000 was credited to his personal bank account held with the Halifax.

- Between 14/11/2000 and 4/9/2002 approximately £300,000 was credited to his personal account held with the Nat West.

3. Arrest and Interview
On 14th July 2005, Mr [T.] was arrested. His premises were searched, and £23,000 in cash was seized. He was subsequently interviewed under caution, and asked questions about his alleged involvement in tax fraud and money laundering. He made no comment to any of the matters put to him."

The second document containing additional information upon which the applicant relies is a letter, again from the Crown Prosecution Service, dated the 21st of June, 2013, written in response to a request made by this Court pursuant to s. 20(1) of the Act of 2003, and communicated by the Irish Central Authority to his United Kingdom counterpart on the 14th June, 2013, requesting additional information concerning where the acts the subject matter of the offences were alleged to have occurred. The Crown Prosecution Services's letter dated the 21st June, 2013, is in the following terms:

> "In reply to the request made by the presiding Judge, Edwards J seeking information in respect of where the acts the subject matter of the offences are alleged to have occurred I confirm the following:
>
> • the Crown's case is not concerned with extra-territorial crime;
>
> • [J.A.T.] was largely domiciled in the United Kingdom during the period covered by the charges;
>
> • the overt acts (hi-jacking of UK Revenue contractor documents, forgery of the same, forgery of invoices for UK based companies, use of UK companies through which to launder the funds diverted from the Revenue, and the extraction of cash from bank accounts held in the UK in the names of UK companies/UK based cash converting companies) which evidence the conspiracy were carried out in the UK;
>
> • there is no reliance upon extension of jurisdiction principles.
>
> I hope this is of assistance."

The Alleged Abuse of the Process

The Case made by the Respondent

The principal ground of objection which the respondent raises is that of abuse of process. His case is essentially that the first set of proceedings failed as a result of want of care by the issuing judicial authority. Counsel for the respondent maintains that this view is fortified by a comparison between the original European arrest warrant and the one grounding the present application. It is suggested that the differences between the two are very minor and that the additional material that is now put before the Court was at all times available to the applicant. Counsel for the respondent maintains that it is "patent" in the circumstances that the first application failed because insufficient care was taken in preparing and presenting the application. Counsel for the respondent has not sought to put a tooth in it. He squarely contends that the issues that caused the first proceedings to fail were capable of being addressed during the currency of the first proceedings but that that did not happen due to ineptitude by those responsible for the drafting and presentation of the first European arrest warrant, and by those responsible for the presentation of the application for the respondent's surrender based upon it. He further points to the fact that, albeit that the first proceedings had been particularly stressful for the respondent, in circumstances where he was already vulnerable to oppression by virtue of his personal make up and medical conditions, he had been ultimately successful and, understandably, then felt that a great weight had been lifted from his shoulders. The respondent, it is said, was entitled at that point to regard matters as being at an end and to consider that he could get on with his life. The case is made that in the absence of an explanation as to the extraordinary course of the earlier proceedings the court ought to regard the present proceedings, in which the applicant attempts to come again, *as prima facie* abusive.

Counsel for the respondent has referred the Court to a number of judgments which, it is claimed, provide support for the abuse of process aspect of his client's case. These include the judgments in *Minister for Justice, Equality and Law Reform v. Tobin (No. 2)* [2012] IESC 37 (Unreported, Supreme Court, 19th June, 2012), as well as those in *Henderson v. Henderson* (1843) 3 Hare 100; *AA v. the Medical Council* [2003] 4 I.R. 302; *Bolger v O'Toole* (Unreported, *ex-tempore*, Supreme Court, 2nd December, 2002) and *In re Vantive Holdings Ltd* [2009] 2 I.R. 118. The four latter mentioned cases are all reviewed extensively in *Tobin (No 2)*:- vide, in particular, the judgments of Hardiman J and Denham C.J.

In *Tobin (No. 2)* the principle dissenting judgment as to the result was that of Denham C.J., with whom Murray J. agreed. Denham C.J. acknowledged that, where surrender was being sought on foot of a second or subsequent warrant, abuse of process could in principle be advanced as a ground for resisting surrender, albeit that it would require the establishment of some additional factor. She stated:

> "45. Thus, on the claim that this subsequent warrant is an abuse of process, I am satisfied that a second or subsequent warrant seeking the surrender of a person is not of itself an abuse of process. To establish abuse of process there would have to be additional factors.
>
> 46. As pointed out in *Bolger v. O'Toole & Ors* (Ex tempore, Unreported, Supreme Court, 2nd December, 2002), if there was an abuse of process, a subsequent application may fail. Thus, even though there has been no *mala fides* by any person or institution, and the fact that a subsequent warrant is not per se invalid, it is necessary to consider whether there are factors, or whether the cumulative effect of all the circumstances are such that the appellant has suffered an abuse of process."

In the present case counsel for the respondent has submitted that there are very significant additional factors apart from the repetitious and unnecessary nature of the present litigation that would justify a finding of abuse of process.

First, counsel has submitted that there exists an obligation on any party who seeks to invoke the jurisdiction of the courts on successive occasions to explain the necessity for so doing. It is said that no such explanation has been provided in the present case and that in the absence of such an explanation the current proceedings must, *prima facie*, be regarded as abusive.

In seeking to develop his argument under this heading counsel for the respondent referred to the largely inquisitorial nature of proceedings under the Act of 2003 and the obligation on respondents to clearly notify their grounds of objection in advance of a s.16 hearing. He makes the point that, whatever about the conclusions of the Supreme Court to the effect that it was surprising that the

fatal omissions had not been noticed prior to the application to endorse the first warrant, the fact that no steps were taken to remedy the defects subsequent to the respondent having effectively identified the deficiencies by way of Points of Objection demands explanation. It was submitted that to allow a second application to succeed in the absence of such explanation would be to reduce the role of the respondent to that of advising the applicant's proofs, not for the application in hand, but rather for a subsequent application assuming the application in hand were to fail.

Moreover, the failure to provide any explanation means that the inherent conflict which rendered the surrender of the respondent unlawful remains. It was urged that whilst the conflict in respect of the certification/non-certification of the conspiracy offences is no longer internal to the EAW itself the fact remains that in relation to the first EAW it was certified that the conspiracy offences were not subject to certification pursuant to article 2.2. of the Framework Decision.

Secondly, it has been urged upon the Court that the manner in which the United Kingdom authorities have proceeded has, *de facto*, deprived the respondent of his automatic right of appeal in the event of an order under s.16 being made.

Thirdly, it has been submitted that the respondent in the instant proceedings is in a markedly different situation to the respondent in *Tobin (No. 2)* having regard to his own medical condition and the medical conditions of certain of his immediate family members.

Fourthly, unlike the respondent in *Tobin (No. 2)* who could never have been surrendered on foot of the first warrant that was issued regardless of its terms, the respondent in the present case could indeed have been surrendered if due care had been taken to address, in a timely manner, defects that were capable of being addressed.

Counsel for the respondent submits that an abundance of evidence exists to establish that, cumulatively, both these proceedings and the previous proceedings have had, and continue to have, an oppressive effect on the respondent, and on the members of his family. In that regard great reliance is placed on the respondent's affidavits and the psychiatric and other medical reports exhibited therewith. The point is strongly made that much of the medical evidence presently before this Court already existed, and had been placed before both the High Court and Supreme Court in the first proceedings. While the medical evidence has been updated in the meantime, and the updates indicate a worsening of both the respondent's own situation, and that of his son D., counsel for the respondent emphasises that, from 2008, the applicant has been explicitly on notice that the respondent has serious psychiatric difficulties and is more vulnerable, and would be less resilient, to circumstances of oppression than many other respondents. It is suggested that it is unconscionable for the applicant to seek to come again in circumstances where, despite having this knowledge, he failed to exercise due care at the material time, and offers no explanation for that failure. Moreover, it is also contended that the specifically oppressive circumstances of the present case have been greatly aggravated by significant unexplained delay both in commencing and in prosecuting the present proceedings.

The Applicant's Response

The applicant contends that nothing in the evidence adduced in this case goes anywhere close to demonstrating a basis for contending that there has been an abuse of process by the United Kingdom authorities or the applicant.

In the applicant's written submissions the Court was referred in great detail to Denham C.J.'s judgment in *Tobin (No. 2),* and particular emphasis was placed on paras. 34 to 45 inclusive. Within this extract, (*vide* para. 41), Denham C.J. cites with approval a passage from the ex- tempore judgment of the Supreme Court in Attorney General v. Gibson (Unreported, *ex tempore*, , Supreme Court, 10th June, 2004) wherein Keane C.J. stated that:

> " ….it is clear beyond argument that in extradition cases, the mere fact that a warrant has been issued and an application made arising out of the warrant to the court for an order or extradition, that a warrant has been issued on an earlier occasion arising out of precisely the same alleged offence, and has been adjudicated upon by the District Court or any court of competent jurisdiction, that fact does not, of itself and by itself, preclude a subsequent application to a court of competent jurisdiction. If there were any doubts that that is the state of law, they were, in my view, laid to rest by the decision of this Court in Bolger v. O'Toole …"

Counsel for the applicant relies heavily on this statement, and in oral argument before this Court also opened the following additional passage from the *Gibson* judgment:

> "I am satisfied that that statement of the law [that of Denham J. in *Bolger v. O'Toole*], which is not disputed in any way, and were [*sic*] not invited in this court to depart from that decision in any way, makes it clear that in extradition proceedings, unlike many other forms of civil or criminal proceedings, it is perfectly open to the applicant for extradition the Attorney General, as it is under our system, if an application for extradition arising on particular facts has been dismissed by a court of competent jurisdiction but fresh warrants were issued, it is perfectly open to the Attorney General to invite the court to adjudicate upon an application for extradition on the basis of the new warrants. Of course, there may be cases in which, if he seeks to rely on the existing warrants, he would certainly be met by a defence of *res judicata* or abuse of process. But where they are different warrants, the law is as stated in the *Bolger* case that it is then a matter for the court which is asked to extradite the person concerned to consider whether the statutory requirements have been met."

Counsel for the applicant relies on these authorities in support of his contention that for the applicant to "come again" is not *per se* to be regarded as an abuse of the process. As conceded by counsel for the respondent, the establishment of abuse of process requires the demonstration of additional factors. As Denham C.J. indicated at para. 46 of her judgment in *Tobin (No. 2),* quoted earlier in this judgment, "it is necessary to consider whether there are factors, or whether the cumulative effect of all the circumstances are such that the appellant has suffered an abuse of process". Counsel for the applicant contends amongst the alleged additional factors relied upon by the respondent there is no sufficiently egregious individual factor capable of establishing an abuse of process in this case. Equally, submits counsel for the applicant, even when such additional factors as are relied upon by the respondent are considered cumulatively, they are incapable of establishing an abuse of the process.

Addressing the argument advanced by counsel for the respondent that there exists an obligation on the party who seeks to invoke the jurisdiction of the courts on successive occasions to explain the necessity for so doing, counsel for the applicant contends that no explanation is necessary in the circumstances of this case because it is, to quote him in oral argument, "blindingly obvious" why it has been necessary to come again. The difficulty only arose after the decision in the Supreme Court. The applicant had won in the High Court. *Ergo* the position adopted by the applicant must have been at least stateable for that to have occurred. The Supreme Court ultimately allowed an appeal against the learned High Court judge's decision. The mere fact that both the issuing state in

issuing its warrant, and the applicant as the party with carriage of the subsequent proceedings before the Courts here, had proceeded on a basis that was ultimately found to be erroneous, and having had the error pointed out by the Supreme Court now seek to come again in circumstances where the error has in their belief been addressed, is not indicative of an intention on anybody's part to abuse any process, nor is it in fact abusive of this Court's process. On the contrary, counsel for the applicant contends, the application is both proper and appropriate.

Counsel for the applicant contends that as there has been no deliberate misuse by the applicant or the United Kingdom authorities of the process of this Court in order to secure an unfair advantage or an unlawful result, the Court need only be concerned with whether the overall circumstances of the case, viewed cumulatively, are so oppressive of the respondent as to render the proceedings an abuse of process. It was submitted that a critical analysis of the circumstances of the case does not justify that conclusion.

While it is accepted on the applicant's side that the respondent has medical difficulties that may render extradition proceedings more burdensome and difficult to cope with in his particular circumstances, and it is further accepted that his son also has medical difficulties; it is contended that the overall circumstances of the case are not so oppressive of the respondent as to render the present application an abuse of the process. It is urged that this is so notwithstanding the procedural history of the case and the passage of the time that has elapsed since the respondent's first engagement with the police in 2005.

It has been urged that, whatever about the respondent's vulnerability to oppression by virtue of his particular make up and medical difficulties, the evidence does not bear out that he has in fact been unduly oppressed by the present second set of proceedings. He undoubtedly had medical difficulties involving recurrent depressive disorder, alcohol dependence syndrome, and skin cancer (from the latter of which he appears to have recovered), during the first proceedings and ever before these second proceedings were commenced. While his mental and addiction problems certainly continue, and it is not gainsaid that the continuing proceedings are burdensome for him, it is argued that the evidence does not establish that his pre-existing conditions have significantly worsened or altered adversely since the second proceedings were commenced. Indeed, the evidence discloses no recurrence of suicide attempts since 2008, or required psychiatric hospital admissions since 2009. While the report of Dr. B. dated the 30th November, 2012, indicates that he remains anxious and stressed, and the even more recent report of Dr. M. indicates that he has ongoing suicidal ideation and is exposed to a number of historical risk factors and dynamic risk factors that continue to predispose him to self harm and suicidal behaviour, that is the extent of it. There has been no marked worsening of his underlying medical conditions. Indeed they appear to be under somewhat better control, as evidenced by the absence of any suicide attempts or need for further psychiatric hospitalisation since these (second) proceedings commenced.

In so far as alleged delay is concerned, counsel for the applicant does not accept that the overall proceedings have been unduly protracted, and contends that there has not been any, or certainly no significant, culpable delay on the part of the authorities here or in the United Kingdom. He suggests that the evidence discloses that the United Kingdom authorities have acted with reasonable expedition at all stages. He submits that it is clear, even from the limited information contained in the warrant and the additional information provided subsequently, that the case is complex and would have taken a considerable time to properly investigate. Moreover, no reasonable complaint could be made with respect to how quickly matters were progressed following the commencement of proceedings against the respondent in March, 2008 when both a domestic arrest warrant and the first European arrest warrant were issued at a Welsh Magistrate's Court. He submits that the first proceedings were not unduly protracted. He says that following the Supreme Court's judgment in December 2010 the relevant authorities were entitled to a reasonable time to consider that judgment and to see if they could address the issues raised by it. They took no more than six months to do so, which, says counsel, was entirely reasonable. The second European arrest warrant, once issued on the 13th June, 2011, was transmitted to this jurisdiction within a reasonable time. It was subsequently presented to the High Court for endorsement on the 16th September, 2011, which was during the long vacation. Counsel for the applicant concedes that he has no explanation for why the second warrant was not then executed by gardaí for a further ten months. However, he contends that even if that period is to be regarded as culpable delay, it is not culpable delay to a gross and egregious extent. In counsel for the applicant's submission the total time that has elapsed during both sets of proceedings, when considered cumulatively, has not been unreasonable having regard to the complexity of the overall case and its particular procedural history.

The Court's Analysis and Decision on the Abuse of Process Issue

The Court agrees with counsel for the applicant that there is simply no evidence of any deliberate misuse by the applicant or the United Kingdom authorities of the process of this Court in order to secure an unfair advantage or an unlawful result.

In fairness to counsel for the respondent, he has never sought to make that case. His client's case, in so far as abuse of process is concerned, is really based upon the existence of an accumulation of circumstances which, coupled with the attempt by the applicant to come again, is said to have created a situation that is so oppressive of his client, and potentially harmful to him given his history of attempts at self harm, as to render these second proceedings abusive of the process.

In the Court's view it has to be accepted, as the applicant evidently does, that the respondent is a vulnerable person due to his medical adversities, who is likely to find the proceedings against him more burdensome than a person in the whole of their physical and mental health. That said, to seek the extradition of such a person is not *per se* abusive of the process. It would only be abusive of the process where to do so is unconscionable in all the circumstances.

The question for the Court is therefore whether it is unconscionable for the applicant to seek this particular respondent's rendition for a second time in all the circumstances of the present case. Those circumstances include the fact that there were previous proceedings which failed; the reasons why the first proceedings failed; the justification, if any, for the applicant seeking to come again; the procedural history of the case including the total time involved to date; the alleged delay and if delay is indeed a factor, the degree to which such delay has been culpable; the public interest in the respondent's extradition; and finally the respondent's personal circumstances including his particular vulnerabilities previously alluded to.

It is a fact beyond dispute that the first set of proceedings failed for reasons that could have been addressed within the scope of those proceedings if the defects, or problems, had been identified and/or correctly engaged with, in time. It is also correct to say that no specific explanation is proffered as to why appropriate steps were not taken. In the Court's view it is regrettable that the applicant has not risen to the challenge of engaging with this issue in the course of the present proceedings. With due respect to counsel for the applicant the reason is not "blindingly obvious" as he suggests. Yes, it was necessary to seek to come again because the first proceedings failed, and it is indeed obvious why those proceedings failed. What is not at all obvious, however, is why they were allowed to fail in circumstances where the defects were capable of being addressed at a relatively early stage.

Counsel for the respondent has strongly urged that the problems that bedeviled the first proceedings could have been addressed at

an early stage if the Central Authority had properly scrutinized the warrant and applied its mind to how the manifest problems therewith could be addressed, and had advised the issuing judicial authority appropriately. He characterises the refusal of surrender on foot of the first proceedings as being "patently" due to want of care by the applicant. Although there may be a degree of overstatement in that, there are certainly some grounds for believing that at least part of the explanation may have been want of care by the applicant.

As regards steps not taken in the pre-hearing phase, although it is to engage to some extent in speculation, the possibility cannot be foreclosed upon that there may have been a degree of uncertainty on the part of the Central Authority as to how far it could legitimately go in "advising proofs" for the issuing state, and that it may have felt obliged to put the manifestly defective first warrant before the Court "warts and all" and endeavour to deal with it as best it might. However, even if it legitimately had had reservations about advising the issuing judicial authority in respect of matters of substantive law, the Central Authority could have been in no doubt concerning its duty to bring defects with respect to the form of the warrant, and specifically the internal contradictions, and inadequacy of particulars, subsequently criticised by Hardiman J., to the attention of the issuing judicial authority before presenting it to the High Court for endorsement. The Central Authority was clearly aware of its duty in that regard in circumstances where, two years previously, express assurances had been given to the Supreme Court in a case of *Minister for Justice, Equality and Law Reform v. Rodnov* (Unreported, ex- tempore, Supreme Court, Murray C.J., 1st June, 2006), to which I will be referring in more detail presently, that in future cases the State would "*take serious steps to ensure that all documentation is complete and clear before it is relied upon for the purpose of seeking to endorse a European Arrest Warrant.*"

As regards the hearing itself, and whether there was a want of care at that stage, regrettably the judgment of the Court sheds little light on the role played by the applicant. Although the learned High Court judge alludes extensively to submissions made to him by counsel for the respondent, he does not refer at all to any submissions that may have been made to him on behalf of the applicant. It was undoubtedly the duty of counsel on both sides not to mislead the Court, or to knowingly permit the Court to mislead itself, in relation to the applicable law. Although it cannot be gainsaid that the Supreme Court subsequently disagreed with the judgment of the learned High Court judge and found that he had misdirected himself as to the applicable law, and in a number of respects, this Court would not, in the absence of clear evidence of what submissions were made to the judge concerned on behalf of the applicant at the hearing, be justified in concluding that the inevitable, and only possible, inference to be drawn is that there was a want of care on the part of the applicant at that stage in the proceedings.

Be all of that as it may, the bottom line is that this Court has no explanation as to why it has been necessary, in the circumstances of this case, for the applicant to have to come again. That being the case, must the Court regard the present proceeding as being prima facie abusive of its process, as counsel for the respondent, relying principally upon *A.A. v. the Medical Council* [2003] 4 I.R. 302, urges it should?

The case of *A.A. v. the Medical Council* concerned a medical doctor who had been acquitted on charges of sexual assault and who was seeking further temporary registration from the Medical Council. The Medical Council had decided there was a *prima facie* case for holding an inquiry pursuant to Part V of the Medical Practitioners Act 1978. The doctor brought judicial review proceedings in which he was unsuccessful in prohibiting that inquiry from proceeding on the grounds of double jeopardy. Subsequently a new date was fixed for the holding of the inquiry. In a second set of judicial review proceedings, the doctor, as applicant, again sought to restrain the holding of the inquiry on the grounds of the respondent's alleged failure to provide him with legal aid. The High Court refused the relief sought. The applicant appealed to the Supreme Court. The respondent argued, *inter alia*, that the applicant should be refused relief in the discretion of the court on the basis that he could have raised the issue of legal aid in the first judicial review proceedings. The applicant objected to the respondent relying on grounds of opposition that had not been the subject of any adjudication in the High Court.

The principal judgment of the Supreme Court addressing this issue was that of Hardiman J., (with whom Keane C.J., Denham J., Murray J. and McGuinness J. agreed). The learned Supreme Court judge held in favour of the respondent, stating (at pp. 318 -319):

> "It is also relevant to note that all times since first notification to him of the respondent's consideration of allegations of professional misconduct in 1999, the applicant has had legal advice and representation of high quality. Thus assisted, he instituted and was partially successful in the first judicial review proceedings. It is in my view a very material fact that no tenable explanation whatever has been advanced, in pleadings, affidavit or oral argument, for the failure to raise the points now taken in relation to legal aid or funded legal representation when those proceedings were instituted and when the first order restraining the holding of an inquiry was obtained. Counsel for the applicant pointed out that the primary relief claimed in the first proceedings would, if granted, have had the affect of stopping the inquiry into allegations of professional misconduct in limine. In that event, he said, no other relief would have been necessary. But the proceedings also sought, in the alternative, to attack only the allegations of sexual assault/indecent assault. This, substantially, was the relief actually granted in the first proceedings and it left eight allegations in respect of which there must be a hearing. This result, specifically contemplated in the first proceedings, clearly left open the need, as the applicant sees it, for legal aid or representation. But the applicant chose not to raise this topic in a legal forum for another two years, until the eve of the re-fixed inquiry. This is unexplained.
>
> I consider this to be the determining feature of the present proceedings. The applicant obtained on the 13th March, 2000, an order restraining the conduct of an inquiry fixed for the next day on the ground that the inquiry as proposed to be conducted was a denial of his legal and constitutional rights. That issue having been decided and the inquiry re-fixed for the 20th February, 2000, he again sought to restrain its conduct or continuance on the basis that this would again constitute an invasion of his legal or constitutional rights, but on different grounds, those relating to legal aid or funded representation. No reason has been advanced, and none appears on the evidence as to why these points could not have been raised two years previously. The applicant's financial position had not worsened in the interval: he was impecunious at all material times. He had first raised the question of legal aid less than a month before the institution of the present proceedings, and no reason has been advanced for not raising it earlier. The information he received in reply to his solicitor's letter of the 24th February, 2002, cannot have come as a surprise to any lawyer or doctor and no case has been made to the contrary. The issues in relation to legal aid are, therefore, to adapt the language of *Henderson v. Henderson* [1843] 3 Hare 100 at p. 115, issues "which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time" of the first proceedings. In the language of *Johnson v. Gore Wood & Co.* [2002] 2 A.C. 1, there are issues which might 'sensibly' have been brought forward in the previous litigation. The present litigation in my view runs foul of the rule of public policy 'based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits where one would do', in the words of Brooke L.J. in the passage cited above in *Woodhouse v. Consignia p.l.c*. [2002] 1 W.L.R. 2558 at p. 2575."

While it is clear from *A.A. v. the Medical Council* that an explanation for the need for second proceedings is highly desirable, and that a failure to provide such an explanation may ultimately be the determining feature depending on the circumstances of the particular case, as indeed it was for Hardiman J. in the circumstances of the case before him, I am not sure that I can agree with counsel for the respondent in the present case that that decision requires the Court to adopt the view that in every case in which there is an absence of explanation the proceedings are to be regarded as "prima facie abusive of the court's process". I significantly doubt that it was the intention of the Supreme Court to take such an absolutist position, particularly when the judgment of Hardiman J. does not say so in terms, and also having regard to the statement of Lord Bingham in *Johnson v. Gore Wood & Co*, [2002] 2 A.C. 1, quoted with apparent approval by Hardiman J., in which the learned law lord, speaking of *Henderson v Henderson* (1843) 3 Hare 100, said:

> " … Henderson v. Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in the earlier proceedings it should have been, so as to render the raising of it in a later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

Moreover, Hardiman J. referring (at p.317) to Lord Bingham's characterisation, in *Gairy v. Attorney General of Grenada* [2002] 1 A.C. 167, of the rule in *Henderson v Henderson*, and its offshoots, as "rules of justice, intended to protect a party (… not necessarily, a defendant) against oppressive and vexatious litigation" has himself remarked:

> "Rules or principles so described cannot, in their nature, be applied in an automatic or unconsidered fashion."

Hardiman J. reiterated that remark in *Minister for Justice, Equality and Law Reform v. Tobin (No. 2)* [2012] IESC 37 (Unreported, Supreme Court, 19th June, 2012) adding that in that particular case "it cuts both ways, so to speak".

An important function, though by no means the only function, of the abuse of process jurisdiction is deterrence, both specific and general. Where appropriate, the court acting in protection of its own process, seeks to send forth the message that a party interested in litigation will not be allowed to benefit from engaging in an abuse of the court's process. The necessary deterrence is readily achieved, with no collateral injustice, where the party in default is personally and directly interested. However, where the party primarily in default is a mere facilitator who is not personally and directly interested in the outcome of the proceedings, there is a risk of the desired deterrence being achieved at the price of injustice being done to the third party whose interests were to be facilitated, particularly where that third party has, due to structural barriers, been unable to bring proceedings directly and in his or her own name. It seems to this Court that given the unique role of the Central Authority in proceedings such as the present, it should be slow to conclude, notwithstanding the absence of an adequate explanation for why the first proceedings were allowed to fail, that the present proceedings are to be presumptively regarded as abusive of the process and that there should automatically be non-surrender on account of it. Were it to do so, it would be applying the rules that have developed in an automatic or unconsidered fashion. Yes, the absence of an explanation must be taken into account, but it is but one of a number of relevant factors that require to be considered and it would be wrong, in this Court's view, to attribute to it a presumptive or fixed weight or significance. It would, in this Court's view, be an entirely different situation if there was prima facie evidence of deliberate misuse by the applicant, or the United Kingdom authorities, of the process of this Court in order to secure an unfair advantage or an unlawful result. However, as stated earlier, there is no such suggestion in this case.

The unique role of the Central Authority

Before moving to consider the competing considerations at issue in the present case, it is desirable that the Court should further elaborate on what it is referring to when it speaks of "the unique role of the Central authority in proceedings such as the present".

One of the radical features of the European arrest warrant system is that it eschews pre-existing extradition procedures in favor of a system of rendition. The significance of this was considered by McKechnie J. in *O'Sullivan v. Chief Executive of the Irish Prison Service & Ors* [2010] 4 I.R. 562. Moreover, the process was to be de-politicised by taking it out of the hands of member states' executives and entrusting it to judicial authorities who were expected to co-operate and mutually recognise each others' decisions and actions. Indeed, the principle of mutual recognition has been characterised as "the cornerstone of judicial co-operation" and this is expressly referred to in recital 6 to the Framework Decision.

Somebody engaging with European arrest warrant law for the first time might be forgiven for wondering, how then does "the Minister" come into it, and why are surrender proceedings taken in his name? In its judgment in *Minister for Justice and Equality v. Haniszewski* [2014] IEHC 50 (Unreported, High Court, Edwards J., 24th January, 2014) this Court stated:

> "Under the European arrest warrant system decisions on rendition are a matter for the relevant judicial authorities, both issuing and executing. The executive has no role in that regard, unlike in traditional extradition. There is a judicial authority that issues the warrant, and a judicial authority that executes the warrant. Participating member states have an optional entitlement under the Framework Decision to establish a Central Authority to facilitate that process. Not all countries have availed of this option and accordingly not all countries have a Central Authority. However, Ireland has opted to establish a Central Authority and in this country the designated Central Authority is the applicant Minister."

The Court knows from its experience of dealing with European arrest warrant cases over several years that the facilitative role and function of the Central Authority is poorly defined, and that from time to time issues arise, not infrequently raised by the Central Authority itself, as to the extent and limits of its role. Little or no guidance is provided by the Framework Decision as to the extent of a Central Authority's overall remit, and apart from the assignment of specific statutory tasks to our Central Authority there is nothing

in the way of broader guidance to be found in the Act of 2003. The extent of the guidance to be found in the Framework Decision is that contained in recital 9, and article 7.

> Recital 9 merely states:
>
> "The role of central authorities in the execution of a European arrest warrant must be limited to practical and administrative assistance."
>
> Article 7 then states:
>
> "Recourse to the central authority
>
> 1. Each Member State may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent judicial authorities.
>
> 2. A Member State may, if it is necessary as a result of the organisation of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and reception of European arrest warrants as well as for all other official correspondence relating thereto.
>
> Member State wishing to make use of the possibilities referred to in this Article shall communicate to the General Secretariat of the Council information relating to the designated central authority or central authorities. These indications shall be binding upon all the authorities of the issuing Member State."

Unquestionably, decision making in the new system is intended to be primarily judicial. As Farrell and O'Hanrahan (Remy Farrell S.C. and Anthony Hanrahan B.L.) *The European Arrest Warrant in Ireland* (Clarus Press, 2011) have stated:

> "In effect what the Framework Decision seeks to do is to cut out the middle man in the form of the executive and remove decisions in relation to extradition (or more properly 'surrender') from a political and diplomatic context into a purely judicial context"

All of that having been said, however, the Central Authority, who is in this state (somewhat paradoxically) a member of the executive, has a difficult tightrope to walk, between acting as an disinterested and impartial, but nonetheless, effective, facilitator of the European arrest warrant process on the one hand; and being concerned not to exceed his remit and encroach upon functions reserved to and intended to be fulfilled by a judicial authority (whether that be an issuing or executing judicial authority either in this state, or in another state) on the other hand.

Some examples will serve to illustrate the tension that exists.

In the recent case of *Minister for Justice and Equality v. Haniszewski* [2014] IEHC 50 (Unreported, High Court, Edwards J., 24th January, 2014), a respondent had submitted that the Central Authority had exceeded its remit and acted *ultra vires* in delaying presenting a manifestly defective warrant for endorsement, opting instead to point out the defects to the issuing judicial authority and to advise it to issue a corrected warrant. The Court rejected the objection and upheld the actions of the Central Authority.

The Court held:

> "The Minister's role is entirely facilitative, but that does not mean that he is merely a post box. In terms of incoming warrants, his function is to receive such a warrant, place it before the High Court for endorsement, and if it is endorsed maintain carriage of any subsequent court proceedings before the High Court acting as the executing judicial authority. Moreover, in his facilitative role the Minister will act as the conduit for communications between the issuing and the executing judicial authority, liaising where necessary with his counterpart in the other state if that state also has a Central Authority. In addition, as s. 20(2) makes clear, where the applicant is of the opinion that the documentation or information provided to him under the Act is not sufficient to enable him or the High Court to perform its functions under the Act, he may require the issuing judicial authority, or the issuing state, as may be appropriate, to provide such additional documentation or information as he may specify, within such period as he may specify.
>
> The Court does not agree that the s. 20(2) power only extends to a situation where proceedings have actually commenced, *i.e.*, where a warrant has actually been endorsed. Both the Central Authority and the High Court have functions to perform before a decision to endorse is taken. The decision whether to endorse a warrant or not is of course entirely a matter for the Court, but it is both appropriate and to be expected that the High Court would be facilitated in its consideration of that issue by receiving advice or submissions from the Central Authority. Moreover, it is entirely reasonable that the Central Authority, being mindful, as it must be, that court time is a precious resource, should scrutinise incoming warrants to ensure that they are fit, in terms of fulfilling formal requirements, to be placed before the Court for endorsement. If there is something about an incoming warrant that leads the Central Authority to believe that the Court may not be prepared to endorse it in the form in which it has been presented, and it is a matter that is perhaps capable of being remedied, it is entirely appropriate and proper in this Court's view that the Central Authority should draw the problem to the attention of the issuing judicial authority, and forbear in presenting the warrant for endorsement until a response has been received from the issuing judicial authority. The Central Authority's function, in this Court's view, is to facilitate "the process", and that may involve offering appropriate advice to either the issuing or the executing judicial authority; not with the intention of "advising proofs" in order to secure a particular result, as counsel for the respondent sought to pejoratively characterise it, but for the purpose of ensuring that this Court's valuable time is not wasted considering applications that are doomed to failure unless a particular defect is addressed. Moreover, to offer advice is not in any sense to seek to usurp the function of either the issuing judicial authority or the executing judicial authority. It is entirely appropriate that a facilitator should do so in this Court's judgment, if it may smooth the process. At the end of the day, of course, it is a matter for the relevant judicial authority as to whether or not it wishes to act on advice proffered in good faith by the Central Authority."

Even more recently, in an ongoing case, the Central Authority expressed reservations as to whether it was under any duty to seek an explanation, in advance of the surrender hearing, from an issuing judicial authority for ostensible delay evident on the face of the warrant, notwithstanding a strong likelihood that the respondent would seek to rely on delay in support of a possible point of objection. It was argued before the Court at a directions hearing that the Central Authority considered that that obligation rested solely upon the Court at the surrender hearing, and that it was concerned that if it were to request such information, on a contingent

basis, it might be exceeding its remit and usurping the Court's function. The Court indicated its view that advance intervention by the Central Authority seeking additional information that the Court was likely to need at the hearing was within the Central Authority's facilitative remit, and that seeking such information in advance was not merely appropriate but desirable in the interests of the efficient disposal of cases, both from the point of view of the efficient use of this Court's time, and also, more importantly, from the point of view that efficient disposition of cases was an important objective of the European arrest warrant system.

These recent cases have obviously provided some additional guidance for the Central Authority with regard to the specific issues raised therein. Further, some guidance on other aspects of that party's role and function has been provided in cases such as *Rimsa v. Governor of Cloverhill Prison* [2010] IESC 47 (Unreported, Supreme Court, Murray C.J., nem diss., 28th July, 2010) and *Minister for Justice, Equality and Law Reform v. Rodnov* (Unreported, *ex- tempore*, Supreme Court, Murray C.J., 1st June, 2006).

In *Rimsa*, which was an inquiry under Article 40.4 of the Constitution, the Central Authority had purported to agree to the extension of time within which a person could be surrendered even though this was a function reserved to the judicial authority under article 23.3 of the Framework Decision. The Supreme Court considered that the Central Authority was not entitled to do so, given its limited role. Murray C.J. stated:

> "It may be seen therefore that the Framework Decision intends that the role of any central authority, which, in contrast to a judicial authority referred to in the Framework Decision, belongs to the executive arm of a state, is confined to assisting the competent judicial authority and may also, if necessary, have responsibility for the administrative transmission and reception of European arrest warrants and related official correspondence.
>
> This limitation placed on the role of the central authorities of the member states, in contrast to that of a judicial authority, is of importance when one considers an objective of the Framework Decision, as set out at Recital (5) of the Preamble, is the establishment of an area, within the Union, of freedom, security and justice which would lead to the abolition of extradition between member states and replace it '*by a system of surrender between judicial authorities*'." [original emphasis]

In *Rodnov* the Supreme Court upheld a decision to surrender, notwithstanding the existence of substantial defects in the warrant, noting that its purpose and meaning was still clear and that the defects did not create "a want of formality which affected in any way the substance or effect of the European Arrest Warrant". (It should be noted that this case was decided before the amendment to the Act of 2003 effected by s.20(b) of the Criminal Justice (Miscellaneous Provisions) Act 2009 which inserted a new provision, *i.e.*, s.45C, expressly enabling a Court to surrender in certain circumstances notwithstanding the existence of errors or technical details in the warrant. It should also be noted that subsequent to that again a newer form of s.45C was substituted by s.24 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012).)

An important feature of the *Rodnov* case was that the Central Authority had not pointed out the defects to the issuing judicial authority, seemingly being of the belief that it was not its function to do so. In the course of giving judgment Murray C.J. said:

> "I would add that there is … a duty on the applicant in these proceedings to examine requests for surrender and all documents which may be associated with a request in order to ensure that they are complete and correct. It would be wholly unsatisfactory if such an obligation on an applicant was disregarded on the basis that the Court could be asked to look for further information pursuant to s. 20 of the Act. That is not the purpose of s. 20 outlined in the judgment which I gave in the *Altaravicius* case (Supreme Court, unreported. 5th April. 2006). The duty of the applicant includes an examination of documents relied upon so as to ascertain that they are written in terms which are clear and understandable. Some or all of the documents in question may be translations of originals from other languages and may have been prepared by a person for whom English is not a first language. Consequently they may contain phraseology or expressions which are ungrammatical or idiosyncratic. Adopting a common sense of (*sic*) approach a Court may be in a position to determine the true or essential meaning of the text concerned. However where language is used which, even when reading the document as a whole, is not at all meaningful or clear there is a risk that the application may fail especially if the deficiency concerns an essential matter. Also it is the duty of the applicant to examine the requests in the manner which I have indicated so as to avoid unnecessary and time-consuming litigation arising from ambiguous or unclear language. I am reassured to note the counsel for the State has stated that the State will in future take serious steps to ensure that all documentation is complete and clear before it is relied upon for the purpose of seeking to endorse a European Arrest Warrant."

As previously noted, the assurance given to the Supreme Court in *Rodnov* was given in mid 2006, nearly two years before the warrant in *T. (No. 1)* was endorsed.

Be that as it may, the cases of *Rodnov, Rimsa, Haniszewski* etc are all illustrative of the fact that, although there is no evidence that it was a specific factor in the present case, there has sometimes been an understandable lack of sure footedness by the Central Authority, and want of confidence as to when and to what extent it is appropriate for it to intervene, directly attributable to a lack of precise definition of, and clear guidance concerning, the extent of its role. The Central Authority's role is slowly becoming more clearly defined as, over the last ten years, a body of jurisprudence has developed with respect to the European arrest warrant but that definition is only being achieved incrementally.

A further aspect of the unique role of the Central Authority to be taken account of is that the Minister, although merely a facilitator of the process, is, in the case of an incoming warrant, required by the Act of 2003 to take carriage of proceedings before the executing judicial authority, which in this jurisdiction is the High Court. In that regard, s. 13 of the Act of 2003 expressly provides that:

> "The Central Authority in the State shall, as soon as may be after it receives a European arrest warrant transmitted to it in accordance with section 12, apply, or cause an application to be made, to the High Court for the endorsement by it of the European arrest warrant, or a true copy thereof, for execution of the European arrest warrant concerned."

As pointed out by this Court in Minister for Justice and Equality v. Surma [2013] IEHC 618 (Unreported, High Court, Edwards J., 3rd December, 2013) the application for endorsement is made ex parte and in the matter of intended proceedings, and surrender proceedings do not actually commence until the point at which the Court endorses the warrant for execution. It is following endorsement that the case is assigned a record number. As to the form of the proceedings, the Rules of the Superior Courts are silent as to how proceedings in European arrest warrant cases are to be specifically entitled. There are no special rules. In accordance with the practice that has developed, the proceedings are now always entitled "*The Minister [for Justice and Equality, as presently described]*" v. *[A named requested person],* although it seems to the Court they might equally be entitled "*The Central Authority for*

the European Arrest Warrant v. *[A named requested person],* a practice which, if adopted, might serve to make it more apparent that the applicant does not bring the proceedings in his capacity as a member of the executive of this State, or on behalf of, or as a representative of, the specific interests of this State. Moreover, the manner in which proceedings are currently entitled also suggests that the Central Authority and the respondent, respectively, are engaged in an adversarial contest, which is not the case. Although the procedure has some adversarial features, it is more in the nature of an inquiry than an adversarial contest. The proceedings are, in truth, and as has been stated in numerous judgments both of this Court, and of the Supreme Court, *sui generis* in nature.

Although the Central Authority maintains carriage of the proceedings as "applicant" in its role as facilitator, in reality the true applicant is the issuing judicial authority. That having been said, Hardiman J., in an *obiter dictum* in his judgment in *Minister for Justice, Equality and Law Reform v. Tobin (No. 2)* [2012] IESC 37 (Unreported, Supreme Court, 19th June, 2012) has stated:

> "In my opinion …no distinction can be made between the actions or omissions of the Central Authority and those of the requesting State. The Central Authority acts on foot of a warrant issued by the requesting State or some organ thereof, but the Central Authority itself is the moving party in the proceedings in this country. Accordingly, it appears to me that the Central Authority is fixed with knowledge both of the contents of the warrant issued in the requesting State and, of course, with the provisions of Irish law."

Is the present request *de facto* abusive of the Court's process?

Proceeding, as the Court believes it must, on the basis that the proceedings are not, in the circumstances of this case, to be regarded as *prima facie* abusive of the process merely on account of the absence of an adequate explanation for the need to come again, it must now proceed to consider whether or not it is in fact unconscionable for the applicant to seek this particular respondent's rendition for a second time. This is a crucial inquiry because, as the earlier jurisprudence makes clear, there is an underlying public interest in finality in litigation and in ensuring that parties are protected against oppressive and vexatious litigation. To quote Lord Bingham in *Johnson v Gore Wood & Co*, [2002] 2 A.C. 1, what I am really concerned with is whether the present proceedings involve "*what the court regards as unjust harassment of a party*", in this instance the respondent.

Public Interest Considerations
A number of public interest considerations immediately occur. Some relate to the case in general while others, some of which have already been mentioned, arise specifically in circumstances where the court is being asked to consider a second request based upon a form of warrant and information that manifestly could have been presented and relied upon in earlier proceedings.

The first consideration relates to the case in general, and it concerns the public interest in this respondent's rendition. The warrant seeks the rendition of the respondent so that he might be prosecuted for what are undoubtedly serious offences. The alleged circumstances are serious. The case concerns conspiracy to defraud the revenue, and to commit money laundering, and actual fraud on the revenue, in the issuing state. The sums allegedly at issue are very large indeed. Moreover, the potential penalties that might be imposed in the event of the respondent's conviction are up to 14 years imprisonment in one instance and up to life imprisonment in all other instances. By any yardstick there is a substantial public interest in the respondent's rendition, particularly viewed from the perspective of the issuing state, which is pursuing the entirely legitimate aim of ensuring that a person suspected of committing serious criminal offences in that state is returned to face trial before a court of competent jurisdiction in respect of those matters.

Another public interest consideration is the importance of Ireland honouring its international obligations where it is legally possible for it to do so. In this instance both Ireland and the United Kingdom have entered into binding legal commitments under the Framework Decision. They are parties to a judicial rendition arrangement known as the European arrest warrant system which is built upon the principle that member states can have mutual trust and confidence in each other, and in which there is real judicial cooperation *inter se* by application of and adherence to the principle of mutual recognition of judicial actions and decisions. In this case, there have been ostensible failings both on the part of the issuing judicial authority, and on the part of the applicant, the Irish Central Authority. The issuing judicial authority may be legitimately criticized for issuing a first warrant that contained manifest defects in terms of internal contradictions and inadequate particularisation, (as well as other defects arising from Irish constitutional law that in fairness would have been less obvious to that party); and the applicant may be legitimately criticised for failing in turn to properly scrutinize that warrant and apply its mind to how the manifest problems therewith could be addressed, and in failing to advise the issuing judicial authority appropriately. Notwithstanding these failings, it seems to this Court that in any consideration of whether it would exercise its inherent jurisdiction to refuse relief on abuse of process grounds it must also have regard, and weigh in the balance, the statutory imperative created by s.10 of the Act of 2003, enacted with a view to giving effect to international commitments entered into by this State, that the Court should surrender the respondent on foot of the present warrant unless some legitimate ground for non-surrender has been established.

Yet another relevant public interest consideration is that already alluded to, namely that that there should be finality in litigation and that a party should not be twice vexed in the same matter. Moreover, as has been stated elsewhere, it is desirable that there be efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. While that is true in general, it is an particularly apposite consideration in applications for surrender based upon a European arrest warrant in circumstances where that system is intended to be faster and more efficient that traditional extradition (*vide* the Conclusions of the Tampere European Council of 15 and 16 October 1999, and recital No 1 to the Framework Decision).

Another public interest consideration of which account must be taken is the need for public confidence in the law and in the courts system to be maintained. In that regard the courts themselves must assume a duty to secure fair treatment for those who come or are brought before them. They have a responsibility to protect their process, and the process of the law, and ensure that it is not abused. That having been said the question of how abusive or potentially abusive conduct should be addressed will obviously depend on the circumstances of the case, and how egregious the abusive conduct is. A gross abuse may require staying the proceedings or otherwise preventing them from proceeding, or a refusal of relief, both for its future deterrent effect and also in vindication of the rights of the party prejudiced, particularly if the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the proceedings, or by their outcome. Depending on the circumstances of the case, an abuse to a lesser degree might be dealt with differently, *e.g.*, by means of an award of costs, or by admonishment, or in some other appropriate fashion that sufficiently marks the Court's concern and displeasure, while at the same time allowing the case to proceed and/or substantive relief to be granted.

This Court has derived much assistance on this subject from the majority judgment of the Supreme Court of Canada in *R v. Regan* [2002] 1 S.C.R. 297, which sets out the principles applicable in that jurisdiction concerning when a stay of criminal proceedings may be appropriate on the grounds of abuse of process. The majority judgment of the nine judge Supreme Court was delivered by LeBel J. who stated:

"53. A stay of proceedings is only one remedy to an abuse of process, but the most drastic one: 'that ultimate remedy', as this Court in *Canada (Minister of Citizenship and Immigration) v. Tobiass* [1997] 3 S.C.R. 391, at para. 86, called it. It is ultimate in the sense that it is final. Charges that are stayed may never be prosecuted; an alleged victim will never get his or her day in court; society will never have the matter resolved by a trier of fact. For these reasons, a stay is reserved for only those cases of abuse where a very high threshold is met: 'the threshold for obtaining a stay of proceedings remains … under the common law doctrine of abuse of process, the "clearest of cases"' (*R. v. O'Connor* [1995] 4 S.C.R. 411. at para. 68).

54. Regardless of whether the abuse causes prejudice to the accused, because of an unfair trial, or to the integrity of the justice system, a stay of proceedings will only be appropriate when two criteria are met:

(1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and

(2) no other remedy is reasonably capable of removing that prejudice. (*O'Connor.* at para. 75)

The Court's judgment in *Tobiass*, at para. 91, emphasized that the first criterion is critically important. It reflects the fact that a stay of proceedings is a prospective rather than a retroactive remedy. A stay of proceedings does not merely redress a past wrong. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole, in the future.

55. As discussed above, most cases of abuse of process will cause prejudice by rendering the trial unfair. Under s. 7 of the *Canadian Charter of Rights and Freedoms*, however, a small residual category of abusive action exists which does not affect trial fairness, but still undermines the fundamental justice of the system (*O' Connor*, at para. 73). Yet even in these cases, the important prospective nature of the stay as a remedy must still be satisfied: '|t]he mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings' (*Tobiass.* at para. 91). When dealing with an abuse which falls into the residual category, generally speaking, a stay of proceedings is only appropriate when the abuse is likely to continue or be carried forward. Only in 'exceptional', 'relatively very rare' cases will the past misconduct be 'so egregious that the mere fact of going forward in the light of it will be offensive' (*Tobiass*. at para. 91).

56. Any likelihood of abuse which will continue to manifest itself if the proceedings continue then must be considered in relation to possible remedies less drastic than a stay. Once it is determined that the abuse will continue to plague the judicial process, and that no remedy other than a stay can rectify the problem, a judge may exercise her or his discretion to grant a stay.

57. Finally, however, this Court in *Tobiass* instructed that there may still be cases where uncertainty persists about whether the abuse is sufficient to warrant the drastic remedy of a stay. In such cases, a third criterion is considered. This is the stage where a traditional balancing of interests is done: 'it will be appropriate to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits'. In these cases, 'an egregious act of misconduct could [never] he overtaken by some passing public concern [although] ... a compelling societal interest in having a full hearing could tip the scales in favour of proceeding' (*Tobiass*, at para. 92)."

While the *Regan* case was concerned with criminal proceedings, and the present proceedings are technically civil proceedings, this Court is satisfied that because of the quasi-criminal nature of extradition and rendition proceedings, and the fact that a person may be deprived of their liberty, or have their liberty constrained, during such proceedings; and may ultimately have to face trial or incarceration, or both, in a foreign jurisdiction, if they are unsuccessful in resisting such proceedings; it is appropriate to have regard to, and apply (with necessary modifications) the (stricter) approach to abuse of process applicable to criminal proceedings. Therefore this Court is prepared to adopt the approach described in *Regan* and apply it in this case.

Private Interest Considerations

In *Minister for Justice Equality and Law Reform v Tobin (No. 2)* [2012] IESC 37 (Unreported, Supreme Court, 19th June, 2012), Hardiman J., has spoken of the need for a Court to have weapons in its armoury to protect a litigant from oppression or harassment because "the right to be free of harassment and vexatious litigation, and to fair procedures and equality of arms in litigation, are rights of a Constitutional nature and arise fundamentally from respect for the dignity of the human person."

The learned Supreme Court Judge has also commended that amongst the topics and values to be considered in assessing whether a particular proceeding is an abuse of process are the following: "the massive disparity of resources and power between the State and an individual and the vulnerability of the individual and his family to embarrassment and expense; their vulnerability to 'ordeal'; and the need to avoid 'compelling him [and them] to live in a state of continuing anxiety and insecurity', and instead to provide 'closure' in the phrase of Denham J." (in *In Re Vantive Holdings* [2009] 2 I.R. 118 at para. 89).

As has already been acknowledged, the respondent is a vulnerable person who suffers from significant medical adversities. The position in regard to that is well documented in the reports referred to and described earlier in this judgment. Moreover, the effect of the proceedings, both on himself and the members of his family, have been described in his affidavits which the Court has also summarized earlier in this judgment.

It is undoubtedly the case that the respondent has found the entire proceedings stressful, and although the Court agrees with counsel for the applicant that there has not been gross and egregious culpable delay, the proceedings have nonetheless gone on very much longer than they should have if they had been prosecuted with reasonable care and diligence.

Although the medical evidence does not indicate that either the respondent's depressive illness, or his alcohol dependence syndrome, were specifically precipitated by the stress of the proceedings, it cannot be gainsaid that continuing stress was noted, particularly around the time of the Supreme Court appeal, to be somewhat inhibiting his recovery and that it had precipitated some return of depressive symptoms, and rendered him at risk of a full relapse. Happily that has not occurred to date in the present proceedings. Nevertheless, the most up to date report, that of Dr. M., cautions that he continues to have many risk factors for self harm and suicide and that the stress of being surrendered to the United Kingdom authorities would have a negative impact on both the respondent's mental health and that of his son. It also has to be accepted that the entire litigation to date, and in particular its

avoidable prolongation, cannot have represented anything other than an ordeal for the wider T. family.

Moreover, the Court accepts that, having been successful in the first proceedings, the respondent formed the belief that matters were at an end, and that the issuance of the second warrant upon which the present proceedings are based came as a shock to him. Although one might question whether objectively speaking he was justified in coming to the belief that the United Kingdom authorities would not seek to pursue matters further, given the seriousness of the allegations against him, the sums of money allegedly involved, and the existence of jurisprudence in this jurisdiction suggesting that in certain circumstances it is possible for an issuing state to come again, the Court accepts that he was subjectively of that belief.

It must also be accepted that in proceedings such as the present there is an imbalance of powers and resources as between the requesting and the requested party. While it only addresses one aspect of this concern, and even then perhaps only addresses it in part, the Court notes that the respondent's legal representation in the first proceedings was paid for under the Attorney General's scheme, and that in the present proceedings he has flagged an intention to seek a recommendation under the Legal Aid (Custody Issues) scheme, which he will be entitled to unless there has been some material positive change in his financial circumstances.

The respondent has been on bail throughout both these and the earlier proceedings, which he has honoured. It is accepted, however, that even though he has not been remanded in custody, a regime of bail is still restrictive of a person's liberty. The Court therefore also takes into account that the unnecessary prolongation of the proceedings has caused a consequential prolongation of that restriction of liberty.

The Court also takes account of the unnecessary prolongation of the period during which the respondent and his family have had to endure uncertainty as to his fate, and the inevitable additional worry and anxiety that they have been caused on account of it.

The Court's Conclusions:
The Court is satisfied, on balance, that the respondent has suffered unjust harassment on account of the manner in which his rendition has been pursued to date, and that cumulatively the proceedings in *T. (No. 1),* and the present proceedings, have subjected the respondent in particular, but also his family, to oppression. In those circumstances the present proceedings must be regarded as being *de facto* abusive of the Court's process and I so find.

However, having carefully weighed the various considerations that I identified as relevant, I do not consider that this is a case in which I would be justified in denying the applicant relief by refusing surrender, notwithstanding that the manner in which the respondent's rendition has been pursued has been abusive of the process.

It is a matter of significance that nobody has set out to deliberately abuse the Court's process or by underhand and despicable means to secure an unfair advantage. That said, a duty of care was owed both to the court and to the respondent, which has ostensibly been breached. This is not a case, however, where irremediable ongoing prejudice has been caused to the respondent by the unjustifiable prolongation of the rendition efforts. The respondent's medical conditions were pre-existing and were not caused by the additional oppressive stress to which he has been subjected. Moreover, his medical conditions, though they remain ongoing, have fortunately not significantly worsened with the effluxion of time. Indeed, there has been some improvement. The many risk factors for self harm and suicide identified by Dr. M. in his report existed at the time of the first proceedings. Though Dr. M. has stated that the stress of being surrendered to the United Kingdom authorities may potentially have a negative impact on both the respondent's mental health and that of his son, I am satisfied on the evidence that that was always going to be the case given the vulnerabilities of those parties. Accordingly, while oppression has occurred, and it is very regrettable, it may be regarded as an historical prejudice at this time in the sense that the case is now at the point that it ought to have been at in January 2009, when the High Court gave judgment in *T. (No 1),* had the initial rendition request been addressed with due diligence. However, any surrender that may happen hereafter, with all its direct and indirect consequences, is something that the respondent and his family would have to have faced in any event even if the first case had been properly conducted. Moreover, the court is entitled to take account of the fact that the respondent, and others affected, may possibly have legal remedies open to them to pursue in respect of any suffering which they have been caused to experience unnecessarily.

In this Court's view the abuse of process that has occurred in this case can be appropriately addressed by admonishment of the parties responsible for it, and particularly of the applicant who had carriage of the proceedings in this jurisdiction at all stages. The Court wishes to deprecate in strong terms the fact that the respondent has been unjustly harassed and oppressed and unnecessarily twice vexed with litigation. That having been recorded, I consider that the abuse that has occurred has not been so egregious that the mere fact of going forward in the light of it would be offensive. On balance, taking into account all of the circumstances of the case, I believe that it should still be allowed to proceed in the overall interests of justice.

The Alleged Insufficiency of Particularisation

The Case made by the Respondent

Counsel for the respondent complains that the particulars of the offences alleged in the warrant studiously eschew any detail of precisely where the offences are alleged to have occurred. Counsel for the respondent submits that his client is entitled to have the place where the alleged offences are said to have been committed specified with precision so that he may consider whether or not a defence to surrender based upon extraterritoriality is open to him. Further, the point is made that in circumstances where it is clear from the warrant and other evidence in the case that the respondent spent much of the period covered by the charges in Ireland, the rather obvious possibility arises that some of the conduct alleged against him may have taken place in this jurisdiction. According to counsel, the extent of what we are told is that the respondent was "based in London, in the UK, throughout the period of the offending", and that the issuing judicial authority certifies that the offences are not extraterritorial offences. Counsel for the respondent submits that in those circumstances the failure of the issuing state to provide the particulars required by s.11(1A)(f) of the European Arrest Warrant Act, 2003 renders the task of the Court impossible and, as such, surrender ought to be refused.

The Applicant's Response

In summary the applicant's response has been to submit that the offences have been sufficiently particularised with respect to place. There has been extensive information provided, sufficient for that purpose, within the warrant itself and in the additional information dated the 14th May, 2013.

The Court's Decision

S.11(1A)(f) of the Act of 2003 mirrors and gives effect to article 8(e) of the Framework Decision. It requires that the warrant should set out "*the circumstances in which the offence was committed or is alleged to have been committed, including the time and place of its commission or alleged commission, and the degree of involvement or alleged degree of involvement of the person in the commission of the offence*" While article 8(e) is worded slightly differently to the section in the transposing statute the difference is of no materiality (as has been held by the Supreme Court in *Minister for Justice Equality and Law Reform v. Desjatnikovs* [2009] 1 I.R. 618). Just for completeness, it can be noted that the article 8(e) wording requires that the warrant should contain a description of "*the circumstances in which the offence was committed, including the time, place, and degree of participation in the offence by the requested person".*

In my judgment in *Minister for Justice and Equality v. Cahill* [2012] IEHC (Unreported, High Court, Edwards J., 19th July, 2012) I stated:

> "The rationale for the requirements set out in Article 8(e) of the Framework Decision, as substantially reproduced in s.11(1A)(f) of the Act of 2003, has been discussed in a number of judgments, both of this Court and of the Supreme Court, including *Minister for Justice, Equality and Law Reform v. Hamilton* [2008] 1 IR 60; *Minister for Justice, Equality and Law Reform v. Stafford* [2009] IESC 83 (Unreported, Supreme Court, Denham J., 17th December, 2009); *Minister for Justice Equality and Law Reform v Desjatnikovs* [2009] 1 I.R. 618*; Minister for Justice and Equality v. Shannon* [2012] IEHC 91 (Unreported, High Court, Edwards J., 15th February, 2012); and *Minister for Justice and Equality v. Baron* [2012] IEHC 180 (Unreported, High Court, Edwards J., 4th May, 2012).
>
> Briefly, it may be summarized as having three broad objectives, certainly in so far as the Irish courts are concerned.
>
> The first is to enable the High Court, in its capacity as executing judicial authority, to be satisfied that it is appropriate to endorse the warrant for execution in this jurisdiction."
>
> ….
>
> "The second objective is to enable the executing judicial authority to be satisfied as to correspondence in cases in which double criminality is required to be demonstrated. In such cases, the Court must, per *Attorney General v. Dyer* [2004] 1 IR 40 (as approved in the European arrest warrant context in *Minister for Justice, Equality and Law Reform v. Fil* [2009] IEHC 120 (unreported, High Court, Peart J., 13th March, 2009), and applied in many subsequent cases) have regard to the underlying facts as disclosed in the warrant itself, and any additional information furnished, to see if the factual components of the offence specified in the warrant, in their entirety or in their near-entirety, would constitute an offence which, if committed in this State, could be said to be a corresponding offence….
>
> The third objective, and the critical one in the circumstances of the present case, is to enable the respondent to know precisely for what it is that his surrender is sought. A respondent is entitled to challenge his proposed surrender and in order to do so needs to have basic information about the offences to which the warrant relates. Among the issues that might be raised by a respondent are objections based upon the rule of specialty, the ne bis in idem principle and extra-territoriality to name but some. In order to evaluate his position, and determine whether or not he is in a position to put forward an objection that might legitimately be open to him to raise, he (and also his legal advisor in the event he is represented) needs to know, in respect of each offence to which the warrant relates, in what circumstances it is said the offence was committed, including the time, place, and degree of participation in the offence by the requested person.
>
> This point was emphasised by the current Chief Justice in her judgment in *Desjatnikovs*. Giving judgment for the Supreme Court in that case, Denham J. (as she then was) stated:
>
> > 'The Framework Decision addressed the scope of the European arrest warrant in Article 2. The list system is a new approach of enhanced cooperation between Member States enabling a speedier process of extradition. This is made possible by the mutual confidence which exists between Member States.
> >
> > In contrast to the requirement of correspondence, this new list system does not require double criminality. The executing state is not required to verify double criminality in respect of offences identified on the list of thirty two categories of offences, but the offence should be punishable by a penalty as set out in law. The matter of penalty is not in issue in this case.
> >
> > The fact that there is a precise description of the facts of the case is important, even though the issue of double criminality is not required to be considered. It is important that there be a good description of the facts. An arrested person is entitled to be informed of the reasons for his arrest and of any charge against him in plain language which he can understand. Also, in view of the specialty rule, the facts upon which a warrant is based should be clearly stated.' "

There is no dispute on either side that the law is as I have stated it to be in passage just quoted. It is ultimately a matter of judgment as to whether such particulars as have been furnished are sufficient to enable the respondent to consider if a possible defence to surrender based upon extra – territoriality is open to him. In this Court's view the particulars given as to where the offending conduct occurred are sufficient for that purpose. First there is the express statement within the warrant that "Mr T. was based **in London, in the UK**, throughout the period of the offending" (the Court's emphasis). Secondly, the additional information dated the 14th May, 2013 specifically states that "Between 1997 and 2005 … [J.A.T.] was at the centre of a large scale fraud on the UK Public Revenue. He managed and controlled a large number of Companies and individuals **in the UK**"…(the Court's emphasis) … "associated with the Construction Industry, which were used to systematically defraud the Revenue by dishonestly pretending that payment had been properly made to third parties which held tax exemption certificates under the Inland Revenue Construction Industry Scheme ("CIS Scheme"), thereby resulting in the dishonest submission of corresponding vouchers (715, CIS 24 & CIS 25) to the Revenue." Thirdly, elsewhere within the additional information it is stated that

> "Mr [T.]'s involvement was central to the fraud throughout the relevant period, and … he was directly involved with companies at each level of the dishonest chain, from the top of the chain to the bottom - in all material respects - and assumed control of companies and their Revenue documentation accordingly. He assisted in setting up bank accounts to

> further the fraud, and used the services of an associate to operate a large number of such accounts. To that end, he formed a network of facilities in order to launder the proceeds of the fraud through to cash, including use of bank accounts opened specifically for that purpose, participation of a series of companies and individuals **in London, the South East and the Midlands** (the Court's emphasis) the use of cheque cashing/cash converting entities."

Moreover the context makes clear that the references to the "South East and Midlands" are to those regions of Britain, and not Ireland or elsewhere. Fourthly, the additional information also makes clear that extensive physical and documentary evidence was found in searches of the respondent's business premises, which the warrant makes clear are located in London. It is also expressly stated in the additional information that "Between 1997 and 2005, in excess of £2 million was received into personal bank accounts held by [J.T.] **in the UK**" … (the Court's emphasis) … . "Mr [T.] concealed such income and benefit, and failed to make any or any proper return to the Revenue to account for the receipt of such sums, or make any payment of income tax."

In all the circumstances the Court is not disposed to uphold the objection based on insufficient particularisation.

The Objections based on Unfairness of Procedures

The Case made by the Respondent

The basic case made under this heading is that the offences for which the respondent is wanted would be *prima facie* unconstitutional in this jurisdiction. Counsel for the respondent has argued that to surrender the respondent for an offence or offences that would be *prima facie* unconstitutional in this jurisdiction would be fundamentally unfair and in breach of fair procedures, and as such this Court ought not to countenance such surrender and instead should regard it as being prohibited by s. 37 of the Act of 2003.

In so far as the conspiracy offences are concerned, the respondent relies heavily upon the following passage from the judgment of Walsh J. in the Supreme Court in *Ellis v. O'Dea* [1989] I.R. 530 in which the learned judge not only deprecated the inclusion of a charge of conspiracy where there was also a charge relating to the substantive offence as being procedurally unfair, but also suggested that the special rules that apply in conspiracy trials may, of themselves, be unconstitutional:

> "Apart from some very obvious considerations which could arise, the present case provides a possible illustration of what could arise. One of the charges laid in the present case is that of conspiracy. It is accompanied by a charge relating to the substantive offence. For many years judicial authorities have condemned the joinder of a conspiracy charge when there is a charge for the substantive offence. Whatever justification may exist in certain cases for preferring a charge of an inchoate crime, such as that it may prevent a substantive crime from being committed, it is difficult to see what, if any, justification can exist in justice for adding as a count where the substantive offence is charged. To adopt it as a policy is, to say the least, very dubious. Because of the wide ambit and the elasticity of the offence it can operate most oppressively. Naturally the advantage to the prosecutor of such a charge is that it widens the evidence which may be introduced and permits the introduction of evidence which would be totally inadmissible against the accused person tried on the substantive charge, whether he was tried with another person or alone. The special rules of evidence which apply to conspiracy have in the light of experience demonstrated that it is not always desirable in the interest of justice to have such a charge. It can, for example, result in wholly innocent persons being convicted on the untrue "admissions" of a co-accused. Thus if the courts of this country should at some future time decide that these special rules of evidence were such as to fall foul of the constitutional guarantees of fair procedures it is obvious that no court here could extradite a person from the protection of this jurisdiction to another where such protection would not be enjoyed."

Counsel for the respondent contends that the conspiracy charges preferred in this case would be *prima facie* unconstitutional in this jurisdiction having regard to their vague and imprecise definition, and the possibility that special rules of evidence falling foul of the constitutional guarantees of fair procedures might be availed of in connection with their prosecution.

In relation to the offence of cheating the public revenue, as known to the law in the United Kingdom, counsel for the respondent contends that it is so vague and imprecisely defined as to give rise to a real apprehension that the prosecution of the respondent for such an offence would contravene his convention and constitutional rights pursuant to s. 37 of the Act of 2003.

It was argued that while it is beyond doubt that the offence of cheating does not exist within this jurisdiction, *vide: Attorney General v. Hilton* [2005] 2 I.R. 374, it is of particular significance that the judgment in that case discloses a view on the part of the Supreme Court to the effect that it could not exist due to the inherently vague and uncertain nature of the parameters and definition of the offence. Reliance was placed on the comments of Denham C.J. in that case suggesting that the vagueness attaching to the parameters of the offence would not have passed muster with the test prescribed in *King v. The Attorney General* [1981] I.R. 233. The learned Chief Justice stated:

> "Considering the factors set out above, the situation in Ireland as to an offence of cheating the public revenue is vague and unclear. It appears to have fallen into obsolescence. The reference to the effect of cheating the Public Revenue in the Act of 2001 is not so precise as to create an offence, an offence which may have ceased to exist prior to the statute. The offence was not utilised in prosecutions over the last 100 years. Nor has it been the subject of academic analysis. Consequently, its constituent parts are not clear. This is a critical factor.
>
> In criminal law the constituent parts of an offence should be clear. The law must be certain. If there is ambiguity, it is rendered to the advantage of an accused. It is a fundamental principle that the criminal law must be clear and certain. The constituents of an offence must be clear and certain. The possibility that such an offence exists in our common law is insufficient clarity of the situation. The ambiguity as to its constituent parts is relevant. These are most relevant factors…
>
> It has been the practice that offences of this type have been prosecuted by way of statutory offences. This is the modern practice. This is a relevant factor."

It was submitted that the practical consequence of this is not just that the offence of cheating contrary to common law does not correspond with an offence in this jurisdiction, but also that, the essence of the offence as disclosed by the common law is contrary to basic constitutional concepts of legal certainty.

Counsel for the respondent suggests that it is of particular note that, having adopted the above passage, Hardiman J., in *T. (No. 1)* made the following observations in relation to the offence of cheating the public revenue:

> "Moreover, the parameters of the offence of cheating the Public Revenue in the United Kingdom itself are notably vague and obscure. In this country, of course, it is a constitutional imperative that the definitions of a crime be sufficiently precise and certain: see *DPP v. Cagney and McGrath* [2008] 2 I.R. 111, which referred to a very broadly drafted statutory offence, Reckless Endangerment.
>
> In that case, the Court said, at p.34:
>
> > 'From a legal and constitutional point of view, it is of fundamental value that a citizen should know, or at least be able to find out, with some considerable measure of certainty, what precisely is prohibited and what is lawful. Thus *in Attorney General v. Cunningham* [1932] IR 28 O'Byrne J. said at p.32 in the Court of Criminal Appeal: 'The offence as charged in the indictment is one of maliciously firing into the dwelling house of one William O'Donoghue and it seems to us that the proper question for our determination is whether that is, at Common Law, an indictable offence. In considering that question the Court must have regard to the fundamental doctrine recognised in these courts that the criminal law must be certain and specific, and that no person is to be punished unless he has been convicted of an offence recognised by law as a crime and punishable as such'. [35]'
>
> Equally in *King v. The Attorney General* [1981] IR 233 Kenny J. said, at p.263:
>
> > 'It is a fundamental feature of our system of government by law (not by decree or diktat) that citizens may be convicted only of offences which have been specified with precision by the judges who made the common law, or of offences which, created by statute, are expressed without ambiguity… in my opinion both governing phrases, "a suspected person" and "reputed thief" are so uncertain that they cannot form the foundation for a criminal offence'.
>
> It may indeed be relevant to quote a passage appearing later in the Cagney judgment, at p.37. There it is said that considerations relating to the need for certainty and clarity in criminal statutes or law:
>
> > '… make it undesirable that so vague and open ended a section should be used in circumstances such as those of the present case where the actions of applicants as alleged by the prosecution would clearly constitute and established and recognised criminal offence viz assault in one or other of its variance. In those circumstances, in my view, it is desirable that the obvious offence should be charged.'
>
> There are, of course, both in Ireland and in the United Kingdom specific statutory offences relating to the Income Tax code, including an offence of not making a return of income if one is obliged to do so. It may be that the extremely severe penalty said to be available at Common Law is a great attraction to prosecutors."

Hardiman J .then went on to consider other commentary suggesting that reform of the offence was long overdue before concluding that much of this was merely of academic interest in Ireland.

Counsel for the respondent in the present case argues that, taking the jurisprudence just rehearsed into account, it is clear that the explicit purpose of the surrender of the respondent is in order that he might be proceeded against for an offence which the Irish Constitution would regard as patently unconstitutional. It is suggested that, as such, there exists an immediate and proximate nexus between his surrender and the anticipated violation of his constitutional right and this Court's own judgment in *Minister for Justice, Equality and Law Reform v. Gavin Nolan* [2012] IEHC 249 (Unreported, High Court, Edwards J., 24th May, 2012) is referenced in that regard.

Counsel for the respondent makes the further point that the principle of legal certainty has also been emphasised by the European Court of Human Rights (hereinafter "the E.Ct. H.R.") in cases such as Steele & Ors. v. United Kingdom (1999) 28 E.H.R.R. 603 and in *Hashman and Harrup v. United Kingdom* (2000) 30 E.H.R.R. 241. In Steele the E.Ct. H.R. stated at para.54 that:

> "…it is essential that the applicable national law meets the standard of "lawfulness" set by the Convention, which requires that all law, whether written or unwritten, be sufficiently precise to allow the citizen—if need be, with appropriate advice —to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

The Applicant's Response

Counsel for the applicant has argued that nothing in the judgments of the Supreme Court in *T. (No. 1)* operates, expressly or impliedly, as a bar to this Court considering whether the respondent can be surrendered to the United Kingdom on this second European arrest warrant. The issuing judicial authority has now amended its hand in the light of the Supreme Court's decision in *T. (No. 1)* and on this occasion has made a clear and valid invocation of para.2 of article 2 of the Framework Decision such that this Court is not required to be concerned with double criminality.

In so far as constitutional issues are concerned, the fact that one or more of the offences for which the respondent may be tried if surrendered might be regarded as constitutionally infirm in this jurisdiction is irrelevant. It is not proposed to try the respondent in this jurisdiction.

It was submitted that it is not a legitimate exercise for the Courts of this jurisdiction to seek to examine the laws of another state to determine if they are legitimate in terms of our constitutional values save in very limited circumstances. (*vide: Minister for Justice and Equality v. Nolan* [2012] IEHC 249 (Unreported, High Court, Edwards J., 24th May, 2012). It was further submitted that there is nothing in this case to justify such an examination.

Moreover, notwithstanding the *obiter dictum* of Walsh J. in *Ellis v. O'Dea* [1989] I.R. 530 relied upon by the respondent, it has not in fact been established that the inchoate offence at common law of conspiring to commit some substantive offence, whether under statute or common law, is unconstitutional. In addition,, even if Walsh J.'s remarks were to treated as having weighty persuasive force, the learned Supreme Court judge was not speaking of the statutory conspiracy offences with which it is proposed to try the respondent in the issuing state.

The Court's Decision

It requires to be observed that the passage from the judgment of Walsh J.in *Ellis v. O'Dea* [1989] I.R. 530 upon which the respondent places great reliance was very much obiter dictum in the following circumstances. This was an appeal against a refusal of the High Court to prohibit the District Court from proceeding with a Part III rendition hearing until such time as the applicant was furnished with true copies of sworn informations apparently grounding two warrants issued by an English magistrate. The High Court had ruled that unless there was good reason to the contrary, and there was none in that case, it was to be assumed by a court that any statement of fact appearing on the face of a warrant sent for execution in the State was a true statement. The appeal was determined by the Supreme Court sitting as a bench of three. It was unanimous in its view that the appeal should be dismissed. The principal judgment was that of Walsh J. who noted that extradition (rendition, strictly speaking, in the case in question), being a matter of reciprocity, required good faith from each side. The court considered that in the absence of anything suggesting that the warrants were not backed up by the recited informations there was no basis for prohibiting the proceedings in the District Court, noting that the District Court had jurisdiction to decline to order the extradition of a person to a jurisdiction where he would be exposed to practices or procedures amounting to an infringement of his right to just and fair procedures. However, two members of that court, Finlay C.J. and McCarthy J., although concurring with Walsh J. that the appeal should be dismissed for the reasons just indicated, expressly disassociated themselves from the further views expressed by Walsh J. in the controversial passage upon which the respondent in the present case relies. Indeed, both Finlay C.J. and McCarthy J., each stated that they would prefer to express no view on the consequences of including a charge of conspiracy in the warrants in that case, in circumstances where the topic had neither been included in the grounds seeking prohibition nor been argued before the court.

In these circumstances the point made by the applicant with regard to *Ellis v. O'Dea* has validity in this Court's view. Moreover, there is absolutely no evidence before this Court that the type of evidential rules that render prosecutions in this jurisdiction for the inchoate offence at common law of conspiring to commit some substantive offence, whether under statute or under common law, constitutionally suspect per Walsh J., would apply in the case of prosecutions in the issuing state in respect of the statutory conspiracy offences which are the subject of the European arrest warrant, and with which it is proposed to charge and try the respondent if he is surrendered. Moreover, even if it was possible for the prosecution to avail of such rules there might be other counter-balancing safeguards available under the law of the issuing state. The evidence is silent as to that. This Court is, however, bound to proceed upon the presumption that the issuing state will respect the fundamental rights of the respondent in the event that he is surrendered, in the absence of cogent evidence suggesting the contrary. The mere fact that they do things differently in the issuing state does imply that the respondent's rights will not be respected.

In *Minister for Justice, Equality and Law Reform v. Brennan* [2007] 3 I.R. 732 Murray C.J. (*nem diss*) stated at pp. 743 and 744:

> "35. There is no doubt that the operation of the process for surrender as envisaged by the Act of 2003, as amended, is subject to scrutiny as to whether in any particular case it conforms with constitutional norms and in particular due process so that, for example, the respondent in such an application has an opportunity to be duly heard in the proceedings.
>
> 36. However the argument of the respondent goes much further. He has contended that the sentencing provisions of the issuing state, in this case the United Kingdom, did not conform to the principles of Irish law, as constitutionally guaranteed, governing the sentencing of persons to imprisonment on conviction before our courts for a criminal offence.
>
> 37. The effect of such an argument is that an order for surrender under the Act of 2003, and indeed any order for extradition, ought to be refused if the manner in which a trial in the requesting state including the manner in which a penal sanction is imposed, does not conform to the exigencies of our Constitution as if such a trial or sentence were to take place in this country. That can hardly have been the intention of the Oireachtas when it adopted s. 37(1) of the Act of 2003 since it would inevitably have the effect of ensuring that most requests for surrender or extradition would have to be refused. And in deed if that were the intent of the Framework Decision, which the Act of 2003 implements, and other countries applied such a test from their own perspective, few, if any, would extradite to this country.
>
> 38. Indeed it may be said that generally extradition has always been subject to a *proviso* that an order for extradition, as with any order, should not be made if it would constitute a contravention of a provision of the Constitution. I am not aware of any authority for the principle that the extradition or surrender of a person to a foreign country would contravene the Constitution simply because their legal system and system of trial differed from ours as envisaged by the Constitution.
>
> 39. The manner, procedure and mechanisms according to which fundamental rights are protected in different countries will vary according to national laws and constitutional traditions. The checks and balances in national systems may vary even though they may have the same objective, such as ensuring a fair trial. There may be few, if any, legal systems which wholly comply with the precise exigencies of our Constitution with regard to these matters. Not all for example will provide a right to trial by jury in exactly the same circumstances as our Constitution does in respect of a trial for a non-minor offence. Rules of evidence may differ. The fact that a person would be tried before a judge and jury in this country for a particular offence could not in my view, be a basis for refusing to make an order for surrender solely on the grounds that in the requesting state he or she would not be tried before a jury. The exceptions which we have to the jury requirement, as in trials before the Special Criminal Court, acknowledges that a fair trial can take place without a jury even though it is constitutionally guaranteed for most trials in this country.
>
> 40. That is not by any means to say that a court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may well be egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting state, where a refusal of an application for surrender may be necessary to protect such rights. It would not be appropriate in this case to examine further possible or hypothetical situations where this might arise. The sole matter which I wish to make clear here is that the mere fact that a trial or sentence may take place in a requesting state according to procedures or principles which differ from those which apply, even if constitutionally guaranteed, in relation to a criminal trial in this country does not of itself mean that an application for surrender should be refused pursuant to s. 37(2) of the Act."

This passage has been cited and applied by this Court in *Minister for Justice and Equality v. Shannon* [2012] IEHC 91 (Unreported, High Court, Edwards J., 15th February, 2012) and many other cases. The Shannon case concerned*, inter alia*, an objection to surrender on the grounds that the respondent would not get a fair trial in the United Kingdom because its rules of evidence allow for

the admission of evidence of propensity in certain circumstances. This Court rejected the objection citing the passage from Brennan quoted above, and also the judgment of the Supreme Court in *Nottinghamshire County Council v. B* [2011] IESC 48 (Unreported, Supreme Court, 15th December, 2011). I said in the *Shannon* case:

> "The Court agrees with counsel for the applicant that the respondent's case under this heading is misconceived. It is fundamentally misconceived because it asks the Court to engage in a completely artificial, and indeed inappropriate, exercise and that is to exercise a supposed jurisdiction that is premised on the application of the Constitution to the laws of England and Wales and to pore over the issuing state's criminal justice process to determine, as the court is invited to do, that it differs in different respects from what is constitutionally mandated in this jurisdiction. In this Court's view it is clear from the Supreme Court's judgments both in *Minister for Justice, Equality and Law Reform v. Brennan* and in *Minister for Justice, Equality and Law Reform v. Stapleton* that to do so would be entirely inappropriate."

This Court rejects the objections under this heading in the present case for similar reasons. In addition, I do not regard the presumption that the issuing state will afford the respondent a fair trial as having been rebutted on the evidence adduced. Nor do I consider that the present proceedings are unfair, or that the respondent is in any respect being denied fair procedures, merely on account of the fact that he faces surrender to be charged with, and tried in respect of, *inter alia*, an offence for which he could not be tried in this jurisdiction (*i.e.*, cheating the public revenue) due to the constitutional rules that apply in this jurisdiction.

The Objections based on Prejudice to Family and other Personal Rights
The respondent has further made a case under s. 37(1) of the Act of 2003 that to surrender him would breach his right to respect for family life, and the cognate rights of his wife and son D., as guaranteed under article 8 of the European Convention on Human Rights. In essence, the respondent's case is that his proposed surrender would have profound consequences for him and his family and that it therefore would represent a disproportionate measure in all the circumstances of the case, notwithstanding that it would be in pursuit of a legitimate aim. He asks the Court not to surrender him in the circumstances.

In this Court's judgments in *Minister for Justice and Equality v. T.E.* [2013] IEHC. 323 (Unreported, High Court, Edwards J., 19th June, 2013) *and Minister for Justice and Equality v. R.P.G.* [2013] IEHC 54 (Unreported, High Court, Edwards J., 18th July, 2013) it conducted an extensive review of relevant Irish, English, and E.Ct.H.R case law and sought to distill from that jurisprudence a series of principles for application both in those and in future cases.

Among the cases reviewed were *Minister for Justice, Equality and Law Reform v. Gorman* [2010] 3 I.R. 583; *Minister for Justice, Equality and Law Reform v. Gheorgie* [2009] IESC 76 (Unreported, Supreme Court, Fennelly J, 18th November, 2009); *Minister for Justice, Equality and Law Reform v. Bednarczyk* [2011] IEHC 136 (Unreported, High Court, Edwards J., 5th April 2011) ; *Launder v. United Kingdom* (1997) 25 E.H.R.R. CD67; *King v. United Kingdom* [2010] E.C.H.R. 164; *Babar Ahmad and Others v United Kingdom* [2013] 56 E.H.R.R. 1; *Huang v. Secretary of State for the Home Department* [2007] 2 A.C. 167; *Zigor Ruiz Jaso v. Central Criminal Court (No 2) Madrid* [2008] 1 W.L.R. 2798; *Norris v. Government of United States of America (No 2)* [2010] 2 A.C. 487; *ZH (Tanzania) v. Secretary of State for the Home Department* [2011] 2 A.C. 166 ; *R.(H.H.) & (P.H.) v. the Deputy Prosecutor of the Italian Republic, Genoa*, also *R.(F-K) v. Polish Judicial Authority*, [2012] 1 A.C. 338 and *Minister for Justice and Equality v. Ostrowski* [2013] IESC 24 (Unreported, Supreme Court, 15th May, 2013 – in particular the judgment of McKechnie J.) This represents an indicative, but by no means exhaustive, list of the cases and judgments reviewed.

As a result of its review the Court was satisfied to set forth and adopt the following principles of law for application in the European Arrest Warrant context in cases where article 8 is engaged:

> 1. the test imposed by article 8(2) is not whether extradition is on balance desirable but whether it is necessary in a democratic society;
>
> 2. there is no presumption against the application of article 8 in extradition cases and no requirement that exceptional circumstances must be demonstrated before article 8 grounds can succeed;
>
> 3. the test is one of proportionality, not exceptionality;
>
> 4. where the family rights that are in issue are rights enjoyed in this country, the issue of proportionality involves weighing the proposed interference with those rights against the relevant public interest;
>
> 5 in conducting the required proportionality test, it is incorrect to seek to balance the general desirability of international cooperation in enforcing the criminal law and in bringing fugitives to justice, against the level of respect to be afforded generally to the private and family life of persons;
>
> 6 rather, the assessment must be individual and particular to the requested person and family concerned. The correct approach is to balance the public interest in the extradition of the particular requested person against the damage which would be done to the private life of that person and his or her family in the event of the requested person being surrendered;
>
> 7. in the required balancing exercise the public interest must be properly recognized and duly rated;
>
> 8. the public interest is a constant factor in the horizontal sense, i.e., it is a factor of which due account must be taken in every case;
>
> 9. however, the public interest is a variable factor in the vertical sense, *i.e.*, the weight to be attached to it, though never insignificant, may vary depending on the circumstances of the case;
>
> 10. no fixed or specific attribution should be assigned to the importance of the public interest in extradition and it is unwise to approach any evaluation of the degree of weight to be attached to it on the basis of assumptions. The precise degree of weight to be attached to the public interest in extradition in any particular case requires a careful and case specific assessment. That said, the public interest in extradition will in most cases be afforded significant weight.
>
> 11. the gravity of the crime is relevant to the assessment of the weight to be attached to the public interest. The graver the crime, the greater the public interest. However, the opposite effect, namely 'the lesser the crime the lesser the interest' may not follow in corresponding proportion. Where on the spectrum the subject offence may sit, is an aspect of each case which must also be explored as part of the process.

12. the public interest in extraditing a person to be tried for an alleged crime is of a different order from the public interest in deporting or removing an alien who has been convicted of a crime and who has served his sentence for it, or whose presence in the country is for some other reason not acceptable. This does not mean, however, that the Court is required to adopt a different approach to article 8 rights depending on whether a case is an extradition case or an expulsion case. The approach should be the same, but the weight to be afforded to the public interest will not necessarily be the same in each case.

13. delay may be taken into account in assessing the weight to be attached to the public interest in extradition;

14. in so far as it is necessary to weigh the balance of the rights of potentially affected individuals on the one hand, with the public interest in the extradition of the requested person, on the other hand, the question for consideration is whether, to the extent that the proposed extradition may interfere with the family life of the requested person and other members of his family, such interference would constitute a proportionate measure both in terms of the legitimate aim or objective being pursued and the pressing social need which it is suggested renders such interference necessary.

15. it is self evident that a proposed surrender on foot of an extradition request will, if carried into effect, result in the requested person being arrested, being possibly detained in custody in this State for a period pending transfer to the requesting state, and being forcibly expelled from the State. In addition, he/she may have to face a trial (and may possibly be further detained pending such trial) and/or may have to serve a sentence in the requesting State. Such factors, in and of themselves, will rarely be regarded as sufficient to outweigh the public interest in extradition. Accordingly, reliance on matters which could be said to typically flow from arrest, detention or surrender, without more, will little avail the affected person.

16. article 8 does not guarantee the right to a private or family life. Rather it guarantees the right to respect for one's private or family life. That right can only be breached if a proposed measure would operate so as to disrespect an individual's private or family life. A proposed measure giving rise to exceptionally injurious and harmful consequences for an affected individual, disproportionate to both the legitimate aim or objective being pursued and the stated pressing social need proffered in justification of the measure, would operate in that way and breach the affected individual's rights under article 8.

17. it will be necessary for any Court concerned with the proportionality of a proposed extradition measure to examine with great care in a fact specific enquiry how the requested person, and relevant members of that person's family, would be affected by it, and in particular to assess the extent to which such person or persons might be subjected to particularly injurious, prejudicial or harmful consequences, and then weigh those considerations in the balance against the public interest in the extradition of the requested person.

18. such an exercise ought not to be governed by any predetermined approach or by pre-set formula: it is for the Court seized of the issue to decide how to proceed. Once all of the circumstances are properly considered, the end result should accurately reflect the exercise.

19. the demonstration of exceptional circumstances is not required to sustain an article 8 type objection because in some cases the existence of commonplace or unexceptional circumstances might, in the event of the proposed measure being implemented, still result in potentially affected persons suffering injury, prejudice or harm. The focus of the court's enquiry should therefore be on assessing the severity of the consequences of the proposed extradition measure for the potentially affected person or persons, rather than on the circumstances giving rise to those consequences.

20. where the article 8 rights of a child or children are engaged by a proposed extradition measure the best interests of the child or children concerned must be a primary consideration. They may be outweighed by countervailing factors, but they are of primary importance.

21. if children's interests are to be properly taken into account by an extradition court, it will require to have detailed information about them, and about the family as a whole, covering all considerations material to or bearing upon their welfare, both present and future. Primary responsibility for the adduction of the necessary evidence rests upon the party raising article 8 rights in support of an objection to his or her surrender.

22. in an appropriate case, where it is satisfied that there are special features requiring further investigation to establish how the welfare of a child or children might be affected by a proposed extradition measure, and/or as to what the best interests of the child or children in question might require, an extradition court can, of its own motion, seek further evidence.

The Court has carefully considered all of the evidence before it in the present case, and has endeavoured to engage in the rigorous case specific analysis that is called for. There is clearly a strong public interest in the respondent's rendition for the reasons that I have already referred to in considering the abuse of process aspect of the case. It then requires to be considered whether there is a continuing pressing social need for the respondent's rendition in circumstances where there has been some delay. The Court has considered the overall period with which we are concerned, without any regard to the reasons for it, and then the specific periods of delay that are relied upon in this jurisdiction and in the issuing state, both culpable and non culpable, and both explained and unexplained. In the Court's view, although specific delay, and/or the overall passage of time, can sometimes operate to affect the weight to be afforded to the public interest side of the equation, these factors would not, in the circumstances of the present case, justify this Court in considering that there is other than a continuing pressing social need for the respondent's rendition or that the public interest in his rendition is diluted.

The Court has considered in great detail the personal circumstances of the respondent and his family, including the very specific vulnerabilities of the respondent, and his son D., on account of their medical and mental health difficulties. In doing so, I have sought to apply the principles that I have outlined above and to be rigorous in considering every relevant aspect. However, having done so, I have concluded that although it will be distressing and difficult for the whole family, and particularly for the respondent and D., if the respondent is surrendered, the consequences for them of the proposed surrender would not be so profound or extraordinary as to outweigh the substantial public interest that exists in the respondent's rendition.

The Court is not therefore disposed to uphold the s. 37 objection based upon article 8 of the ECHR.

Conclusion

It is appropriate in all the circumstances of this case to make an order for the respondent's surrender to the issuing state.