Neutral Citation [2016] IEHC 678

THE HIGH COURT

Record No. 2015/217 EXT

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

JAMES CORRY

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered the 14th day of November, 2016.

1. On 28th June, 1996, members of an Active Service Unit ("ASU") of the Provisional IRA used a battery launcher mounted on an open bed of a small Ford Transit truck to launch three mortar shells, each with 70kg of explosives, into the British Army barracks in Osnabruck, Germany. Later that same year, this respondent was arrested in Dublin on foot of an extradition request made by Germany in which he was sought for criminal prosecution as one of the alleged perpetrators of the attack. In or about February 1997, having spent four months in custody in Ireland, the respondent was released on the direction of the then Minister for Justice. It is common case that, having made a declaration of Irish citizenship on 14th January, 1997, his extradition to Germany was thereby prohibited under the provisions of s. 14 of the Extradition Act, 1965, as amended.

2. In the year 2000, the respondent was arrested in this jurisdiction, under the provisions of the Offences Against the State Act, 1939-1998 and detained for a period of 36 hours on suspicion of having committed an explosives offence relating to the attack at Osnabruck. He was released without charge and was never prosecuted in relation to the allegations of his involvement in the attack on the barracks in Osnabruck.

3. A European Arrest Warrant ("EAW") issued for the arrest of this respondent on 13th October, 2004. The evidence establishes that this EAW was only transmitted to this jurisdiction in or about August, 2015. Subsequent to endorsement of this EAW by the High Court, the respondent was arrested on 9th October, 2015.

4. The main point of objection of the respondent is that his surrender would amount to a breach of his constitutional rights and his rights under the European Convention on Human Rights ("ECHR"), in particular Article 8 thereof. The respondent stressed the delay of the German authorities in forwarding this EAW to this jurisdiction and their failure to explain this delay. In light of his established family and personal ties over a long period in the jurisdiction and the history of the case, the respondent submitted that there would be a disproportionate interference with his right to respect for his personal and family rights to surrender him now.

Section 16 of the European Arrest Warrant Act, 2003, as amended
5. The court is obliged to consider whether the respondent's surrender is prohibited by any subsection of s. 16 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003").

Identity
6. I am satisfied on the basis of the affidavit of Sergeant Seán Fallon, member of An Garda Síochána, the affidavit of the respondent and the details set out in the EAW, that the respondent, James Anthony Oliver Albert Corry, who appears before me is the person in respect of whom the EAW has issued.

Endorsement
7. I am satisfied that the EAW has been endorsed in accordance with s. 13 of the Act of 2003 for execution in this jurisdiction.

Section 21A, 22, 23 and 24 of the Act of 2003
8. Having scrutinised the documentation before me, I am satisfied that I am not required to refuse the respondent's surrender under any of the above provisions of the Act of 2003.

Part 3 of the Act of 2003
9. Subject to further consideration of s. 37, s. 38 and s. 39 of the Act of 2003, having scrutinised the documentation before me, I am satisfied that I am not required to refuse the surrender of the respondent under any other section contained in Part 3 of the said Act.

Section 38 of the Act of 2003
10. Under the provisions of s. 38 ss. 1(b) of the Act of 2003, surrender is not prohibited if the offence for which surrender is sought has been designated as a list offence and is an offence of the required minimum gravity. For the reasons set out hereunder, the Court is satisfied that these conditions have been met. In those circumstances, the respondent's surrender is not prohibited under s. 38 of the Act of 2003.

11. The EAW recites that the respondent is sought for prosecution in respect of a single offence. Details of the activity of the Provisional IRA in Osnabruck on 28th June, 1996 are set out in the EAW. The respondent is stated to be a suspect in the actions of the ASU of the Provisional IRA on that date. The EAW alleges that he jointly took the decision to commit the criminal offence and that the ASU acted with a division of responsibilities in committing the offence.

12. Under the heading "nature and legal classification of the offence", the EAW states that this is an offence of attempted murder under the German Penal Code. The issuing judicial authority, the Federal Prosecutor General at the Federal Court of Justice of Germany, has indicated that this is an offence to which Article 2, para. 2 of the Council (EC) Framework Decision of 13th June, 2002 on the European Arrest Warrant and surrender procedures between Member States ("the 2002 Framework Decision") applies. The offence of "murder, grievous bodily injury" has been ticked. It is a matter for the issuing judicial authority to indicate whether the offence amounts to murder or grievous bodily injury in the issuing state. An attempt to commit an offence set out in the list may properly be included in the list. Furthermore, this is an offence which carries a maximum length of sentence of imprisonment for life, which is clearly in excess of the three years minimum gravity required for an offence to be properly designated as an offence coming within the said list set out in the 2002 Framework Decision.

13. Finally, even if this were not a list offence under Article 2, para. 2 of the 2002 Framework Decision, the Court is quite satisfied

that correspondence with an offence in this jurisdiction has been made out, *e.g.* conspiracy to cause an explosion. The minimum gravity requirement has also been met as required by the provisions of s. 38 ss. 1(a) of the Act of 2003.

Section 39 of the Act of 2003
14. In his points of objection, the respondent asserted that the provisions of the 1998 Good Friday Agreement (also known as the Belfast Agreement), meant that the State operated an amnesty on punishment in respect of offences of this sort and therefore his surrender was prohibited by means of s. 39 of the Act of 2003. In the course of the hearing, counsel for the respondent expressly conceded that he was not arguing that s. 39 of the Act of 2003 amounted to an amnesty.

15. For the avoidance of doubt, the court is quite satisfied that s. 39 of the Act of 2003 which refers to "*immunity from prosecution or punishment for an offence*" does not apply to a situation where a person remains liable in law to be tried for, and/or if convicted, sentenced in respect of the offence set out in the European arrest warrant. The prospect of future early release from any possible sentence that may be imposed does not come within any of the subsections of s. 39 of the Act of 2003 which prohibit surrender. I am quite satisfied, therefore, that his surrender is not prohibited under s. 39 of the said Act.

16. In relation to the claim concerning discriminatory or arbitrary treatment, it was clarified at the hearing of the action that this was not being advanced as a stand-alone ground, rather it was the respondent's inability to benefit from the Good Friday/Belfast Agreement that formed part of the consideration of the right to respect for his family and personal rights. Counsel for the respondent also submitted that the fact that the Good Friday/Belfast Agreement provisions would not apply to him if surrendered to Germany, but would apply if he were to be prosecuted in this jurisdiction in relation to the same offences, meant that his surrender would be oppressive. This submission will be addressed later in this judgment.

Section 37 of the Act of 2003
17. Section 37 of the Act of 2003 prohibits the surrender of a person where, *inter alia*, the surrender would be incompatible with obligations under the ECHR or the surrender would constitute a contravention of any provision of the Constitution. In this case, the respondent's objection to surrender is that the delay in seeking his surrender gives rise to a breach of respect for his personal and family rights under the Constitution and under Article 8 of the European Convention on Human Rights. There is no claim that, by virtue of the delay, his right to a fair trial has been violated.

18. The respondent swore an affidavit in which he stated that he had been arrested in 2004 in relation to these offences. It was subsequently clarified by the Chief State Solicitor's Office, and not disputed by the respondent, that this arrest in fact took place in July, 2000. The respondent blames the delay for his inability to remember the year.

Communications regarding the delay in transmitting the EAW to Ireland
19. From the outset of these EAW proceedings the respondent, through his solicitors, sought information about the time taken between issue of this EAW and its endorsement in this jurisdiction. The first query related to when the EAW was sent to the central authority by the German authorities. It was confirmed that it was received by the central authority in September, 2015.

20. The solicitors for the respondent also sought information regarding correspondence with the German authorities since the determination of the extradition proceedings in 1997 and the introduction of the Act of 2003. In the course of the proceedings, the central authority sought information regarding the lapse of time in transmitting the EAW to this jurisdiction. The detail of that communication provides information regarding the earlier communications between the authorities in this State and the German authorities and is set out in the paragraphs below.

21. The central authority wrote to the issuing judicial authority on 18th March, 2016, requesting the following:

> *"Please provide an explanation for the delay between issuing the European arrest warrant on 13/10/2004 and seeking the respondent's arrest on foot of same."*

The reply of the issuing judicial authority of 22nd March, 2016, was as follows:

> *"The European Arrest Warrant dated 13 October 2004 was sent to the Central Authority for the European Arrest Warrant after it had been informed by the German Federal Bureau of Investigation in an email dated 15 July 2015 that Interpol Dublin had informed it in an email from 11 July 2015 that the suspect Corry might possibly stay in County Kerry, Republic of Ireland. In the email, Interpol Dublin asked for confirmation that investigations were to be conducted there in order to determine the whereabouts of the suspect Corry so that he could be extradited. This resulted in Interpol Dublin being requested to conduct investigations for the purpose of apprehending and extraditing the suspect Corry. On 4 August 2015, Interpol Dublin requested us to send them the European Arrest Warrant through official channels. We acted accordingly, attaching it to our letter of 27 August 2015."*

22. The e-mail from Interpol Dublin dated 11th July, 2015, stated as follows:

> *"Dear colleagues, we have information to suggest that the above subject may be residing in the Clare / Kerry area of Ireland. We understand that he may be wanted by your authorities, we therefore request that you confirm if you wish for us to carry out discreet enquiries aimed at positively locating him for the purpose of extradition."*

The e-mail of 4th August, 2015, from Interpol Dublin had requested that the EAW be forwarded via the German authorities in order that it may be endorsed by the Irish courts for execution.

23. The central authority wrote again to the issuing judicial authority on 19th May, 2016, seeking the following information:

> *"The European arrest warrant does not appear to have been sent to Ireland prior to the Garda authorities notifying the German Federal Bureau of Investigation that the respondent was living in Co. Kerry, Ireland by email dated 11th July 2015. Please provide an explanation why the European arrest warrant issued on 13th October 2004 was not sent to Ireland until the German authorities were notified that the respondent was living in Ireland in July 2015.*
>
> *Please confirm whether or not the respondent has been sought by the German authorities throughout the relevant period and please state what efforts have been made to locate the respondent for the purposes of surrender to the Federal Republic of Germany between 2004 and 2015."*

24. The issuing judicial authority replied on 20th May, 2016, as follows:

"An international search of the suspect James Anthony Oliver Albert Corry has been carried out on the basis of the Arrest Warrant issued by the Investigative Judge at the Federal Court of Justice on 11 July 1996 since that date. When the law about European Arrest Warrants came into force on 13 October 2004, such a EAW was issued on 13 October 2004, and the suspect was again searched for arrest – including in Ireland. The relevant search measures were regularly prolonged since that date.

In July 2015, the Federal Prosecutor General at the Federal Court of Justice was informed that the suspect Corry may be staying in the county of Kerry in Ireland. When sending an inquiry to Interpol Dublin, they confirmed that the search was still active; our Bundeskriminalamt requested them to investigate into the precise place of abode further so that he could be arrested and extradited to Germany.

When Interpol Dublin requested the transmission of the European Arrest Warrant by official channels on 4th August, 2015 we did so, including an English translation with our letter dated 27th August 2015. It was not justified to send the European Arrest Warrant any earlier.

All this means that there is still an international search for the suspect Corry going on, and he is being searched – including in Ireland – for arrest purposes on the basis of the European Arrest Warrant."

25. This case was part heard on 25th May, 2016. On 23rd May, 2016, the central authority had sent a further request to the issuing judicial authority as follows:

"(i) Please elaborate on the search measures that are said to have occurred in Ireland after the European arrest warrant was issued on 13 October 2004. Did the German authorities approach or contact An Garda Síochána (Irish police) in relation to this matter in 2004.

(ii). The response states that 'search measures were regularly prolonged since that date'. Please explain what this means?

(iii) Perhaps you could provide clarification in relation to who informed the Federal Prosecutor's Office at the Federal Court of Justice in July 2015 that the requested individual was believed to be living in Ireland."

26. A reply dated 24th May, but translated on 25th May, 2016 was received by the central authority. The issuing judicial authority stated as follows:

"*1. As we have already told you, the suspect was also searched for arrest in Ireland after the European Arrest Warrant had been issued in November, 2014.* [This was subsequently confirmed to be a typographical error and should read October, 2004]. *All further measures to be carried out would therefore be generally in the range of responsibility of the countries which have been addressed with the request to search the suspect on the basis of the European Arrest Warrant when the search was opened.*

We have looked for more information here, and we have found that Interpol London had informed us in April 2005 that the suspect might be staying in Ireland. This was when Interpol Dublin was requested by the German Bundeskriminalamt *to do further research and send corresponding confirmation. On 13 May 2005, Interpol Dublin sent a possible residential address of the suspect, informing us that a person identified as the suspect had already been arrested on the basis of a request for extradition in 1996. Then, for reasons we do not know, there were no further activities in Ireland in order to find the suspect and implement the Letter of Request for his arrest by the Irish authorities on the basis of the European Arrest Warrant we sent them. Until 2015, there was no further contact between the German offices and the Irish police authorities.*

2. All search activities were regularly prolonged and extended in time and validity by the German authorities. This means that German police officers continued to ensure that the request for the search for the suspect and ultimate arrest was validly registered in the police information systems – such as the databases of Interpol or the Schengen Information System (SIS). This resulted in the participating States seeing that it was still thought necessary to arrest the suspect on the basis of the European Arrest Warrant. This Wanted Notice is still valid today.

3. The information from Interpol Dublin with the message that the suspect might be staying in Ireland was received on 11 July 2015. Please find a photocopy of the message attached for your information."

27. A further request was sent to the issuing judicial authority on 17th June, 2016, which, having recited the paragraph beginning "On 13th May 2005, Interpol Dublin sent…" above, stated as follows:

"Having reviewed their files, Interpol Dublin has confirmed that an email was received from Interpol Wiesbaden on the 27th April 2005 seeking information as to the current whereabouts of the suspect, James Corry. On the 13th May 2005, Interpol Dublin notified Interpol Wiesbaden of the suspect's current address in Kerry and also advised that he had been previously arrested in 1996 on foot of an Extradition request from Germany. Having notified Interpol Wiesbaden of the suspect's address, Interpol Dublin did ***not*** *receive any further communication in 2005.*

Interpol Dublin has ***no record*** *of having received any request for surrender or arrest of the suspect on foot of a European arrest warrant prior to 4th August, 2015. Furthermore, the Irish Central Authority has no record of receiving a European arrest warrant seeking the surrender of the suspect, or of receiving a request for his arrest, prior to 2015.*

Accordingly, we would be obliged if you could clarify the date on which the European arrest warrant was first sent to the Irish authorities and provide any further information that might assist us in clarifying the position. If the German authorities have record of further communications with Interpol Dublin in 2005, we would be obliged if you would furnish a copy of same." (emphasis in the original).

28. A reply to that request was received from the issuing judicial authority on 30th June, 2016, as follows:

"For clarification, please note that – as already notified to you in former letters – the European Arrest Warrant was issued in the name of the suspect on 13 October 2004. On the basis of that warrant, the international search was then also initiated in the Republic of Ireland in the month of November 2004 on the basis of the European Arrest Warrant.

After knowledge was gained of a possible place of abode of the suspect, the European Arrest Warrant from 13 October 2004 was the first time sent as a document through legal channels in response to the request made by Interpol Dublin dated 4th August 2015. The letter dated 27 August 2015 has the European Arrest Warrant both in the German and the English languages enclosed with it.

As we have already informed you in our letter dated 20 May 2016, an international search was also being conducted of the suspect James Anthony Oliver Albert Corry on the basis of the Arrest Warrant issued by the Investigating Judge of the Federal Court of Justice on 11 July 1996. Once the law concerning European Arrest Warrants came into force, such a European Arrest Warrant was issued on 13 October 2004, and the suspect again placed on the international wanted list on its basis. The search for the person and for arrest in inpol [sic] *and in the Contracting States of the Schengen Implementation agreement and in Switzerland as well as in the European neighbouring states, including the Republic of Ireland, was regularly prolonged by the German police authorities. The countries connected to the databases of Interpol and the Schengen Information System were therefore able to determine that an arresting of the suspect was considered to be necessary. This search continues to be valid today."*

Submissions on the law

29. The submissions of both parties with regard to the assessment of claims of interference with respect for personal and family rights under Article 8 of the ECHR, drew heavily upon the tests so carefully set out by Edwards J. in the cases of *Minister for Justice and Equality v. T.E.* [2013] IEHC 323 and *Minister for Justice and Equality v. P.G.* [2013] IEHC 54. Counsel for the respondent, however, also placed significant reliance upon the case of the *Minister for Justice, Equality and Law Reform v. Gorman* [2010] 3 I.R. 583. Counsel submitted that the facts of this case are on all fours with, or stronger than, the circumstances in the case of *Gorman* where surrender was refused. Indeed, the respondent went so far as to proffer written submissions that the principle of *stare decisis* meant that this Court was obliged to follow *Gorman*.

30. It will be recalled that the case of *Gorman* was one of the earliest cases in which the surrender of a respondent was refused on the basis that there would be an interference with his Article 8 right to respect for his family and personal life. The case concerned an allegation of murder against that respondent, in circumstances where it was claimed, amongst other matters, that the early release scheme under the Good Friday/Belfast Agreement would cover the alleged offence, and the respondent, in the event of a conviction. The respondent in *Gorman* had also been arrested previously in relation to an extradition request from the United Kingdom pursuant to the Extradition Act, 1965; those extradition proceedings were not ultimately pursued. After the EAW system came into being, the United Kingdom authorities issued a European arrest warrant. About two years later, the EAW was endorsed by the High Court. The two year period, unlike the period in the present case, could be explained by communications between the authorities as to the implications of the new provisions for the extradition of that particular person. In the meantime, that respondent had established himself in the jurisdiction and raised his family in the belief that he would not be subject to any further proceedings in relation to the alleged offence.

31. In his oral submissions, counsel's argument on the doctrine of legal precedent was somewhat more nuanced. There was an emphasis on the factual similarities between the cases, in circumstances where, it was submitted, the differences could only enure to the benefit of this respondent. In respect of the overall submissions, there was a recognition that the law as regards Article 8 had developed over time, with specific reference to the decision of McKechnie J. in the Supreme Court case of *Minister for Justice and Equality v. Ostrowski* [2013] 4 I.R. 206 and the subsequent decisions of Edwards J. in the High Court in *T.E.* and *P.G.*. Counsel urged on the court to consider that the law at the time of the *Gorman* decision was more limited in terms of Article 8 ECHR considerations (see *Minister for Justice, Equality and Law Reform v. Gheorghe* [2009] IESC 76) and that the balance had been struck in favour of that respondent over the requesting state. It was also submitted that it would give rise to a legitimate sense of grievance if a person whose situation was more egregious than in *Gorman's* case, was surrendered. In those circumstances, it was submitted that *Gorman's* case, and perhaps more particularly the result in that case, was binding on the court.

The Court's analysis and determination

The applicable law

32. For some considerable time now, there has been an acceptance by the courts in this jurisdiction that surrender ought to be prohibited where surrender would amount to an unjustified or disproportionate interference with respect for the personal and family rights of a requested person. The basis of the approach to be taken by the courts has been carefully analysed by the High Court in the cases of *T.E.* and *P.G.* in which Edwards J. outlined twenty-two principles on which the court should operate. Since then, the High Court has applied those principles in cases where Article 8 issues have arisen. The full list of twenty-two principles as set out in *P.G.,* has been recited in the respondent's written submissions as the basis for the applicable law in the determination of Article 8 rights. To that extent, there is little, if any, disagreement between the parties. The Court will not recite those principles but will refer to them by the number of each principle as set out in *P.G.*

33. The real disagreement between the minister and the respondent lies in the application of those principles to the present case. In particular, the respondent submitted that the facts of *Gorman*, being so similar to those of the present case, requires the court to refuse the surrender of this respondent. In the view of the Court, simply to compare the facts of this case with the facts of another, would be a failure to engage with the tests set out in P.G. – those tests require an individual assessment of the public interest features in the case as well as of the family and personal circumstances (see points 6 and 9 in particular).

34. As this Court has said in the case of *Minister for Justice and Equality v. E.P.* [2015] IEHC 662 at para. 100: *"[…][t]he consideration of an Article 8 point is fact specific to each case."* The approach that the court must take is to apply those criteria in a structured and systematic manner in each case. The issue for this Court is whether this respondent's surrender would amount to an unjustified interference with his right to respect for his family and personal life. There can be no legitimate sense of grievance, if the Court acts in accordance with law. This is because no objective observer would find it objectionable that a Court, applying the law correctly in the individual case before it, reached a conclusion that may appear different from the conclusion reached in an entirely unrelated case heard and determined a number of years before.

Responsibility for the delay

35. The respondent submitted that the responsibility for the delay clearly lay with the German authorities. It was submitted that such delay, being culpable, was indicative of the lack of public interest in the surrender of the respondent in this particular case. The Court has considered carefully the correspondence between the central authority and the issuing judicial authority in respect of the matter. It reveals that after the issue of the EAW in 2004, Interpol London sent notification to Interpol Wiesbaden in April 2005 that Mr. Corry may be resident in Ireland. It has to be observed that there was at the very least a possibility that he was in Ireland, given that he

had been arrested here in 1997 on foot of the extradition request.

36. Interpol Dublin replied promptly in May, 2005 notifying Interpol Wiesbaden of the respondent's current address. I am satisfied to accept the information that has been placed before me by the central authority, to the effect that it was the respondent's current address that was forwarded to the German authorities and not "*a possible residential address*" as has been indicated by the issuing judicial authority. Furthermore, it is clear that Interpol Dublin also advised that the respondent had been previously arrested in 1996 on foot of the extradition request from Germany. The Court accepts that, despite being in possession of information as to the respondent's whereabouts in this jurisdiction since May 2005, the German authorities did not send the EAW to the Irish authorities until prompted to do so again by the communication from Interpol Dublin in 2015.

37. A notification on Interpol does not give jurisdiction to a member of An Garda Síochána to arrest an individual. Counsel for the respondent submitted, and it was accepted by counsel for the minister, that there was no legal or practical mechanism available to a Garda to arrest this particular respondent for the purpose of surrender without the EAW being endorsed by the High Court. In those circumstances, the Court will operate on the basis that the only ground for arrest for extradition/surrender of this respondent, subsequent to the coming into force of the Act of 2003, was if and only if, an EAW was endorsed for execution by the High Court.

38. Having regard to the history of the previous attempt at extradition and the communications between this State and Germany subsequent to the issue of this EAW in Germany in 2004, the Court has no hesitation in finding that the German authorities, through their failure to respond to the notification by Interpol Dublin in May 2005 of the whereabouts of this respondent, were responsible for the delay of ten years in seeking the arrest of this respondent. That delay was highly surprising, given that the respondent was sought for a serious offence and had been the subject matter of a previous request for extradition which had to be denied because of his nationality.

39. The Court has also considered the lack of clarity of the Federal Prosecutor as to why the information of May 2005 was not acted upon. In various replies, he appeared to rely upon the search and request for the arrest and surrender being on the database of Interpol or in the Schengen Information System as sufficient. The German authorities should have been fully aware of the need for the particular EAW to be sent to Ireland before an arrest could have been made thereon. The Court is forced to conclude from the Federal Prosecutor's responses that there is a failure to accept responsibility by the German authorities for the lengthy delay.

40. On the other hand, the Court observes that, however culpable the German authorities may have been in failing to respond to the information they received about the respondent's whereabouts in 2005, the additional information before the Court establishes that the German authorities were still seeking him through the use of various national and international databases. The Court is satisfied from the information that it has received, that this respondent remained wanted in Germany and beyond ("all search activities were regularly prolonged and extended in time and validity by the German authorities."). This is supported by the evidence before the Court that the e-mail from Interpol Dublin, dated 11th July, 2015 was sent on the understanding of Interpol Dublin that he was wanted in Germany.

41. In particular, this Court, having regard to the principles of mutual trust and mutual confidence underpinning the 2002 Framework Decision, accepts that, while there may have been error or negligence in attending promptly, or indeed at all, to the 2005 communications, there is no reason to reject the *bona fides* of the Federal Prosecutor when he informs the High Court that this respondent has always been sought by Germany. Therefore, the Court is quite satisfied that the delay was caused by the German authorities' negligence or omission and not because of any deliberate decision not to seek this respondent's surrender.

The effect of culpable delay on the public interest

42. What then is the effect of that culpable delay on this application for surrender? Counsel for the respondent submitted that this delay nullifies the public interest in his surrender. Counsel submitted that in nullifying the public interest in the surrender, there is no pressing social need for the surrender and in light of the respondent's particular circumstances (which are detailed below), it would be, after all this time and with the combination of events, disproportionate or unjust to surrender him.

43. The Court accepts the submission of counsel for the minister, that there is no legal basis for the approach to the calculation of public interest as put forward by counsel for the respondent. As Edwards J. stated at point 8 of his twenty-two principles in *P.G.: "[t]he 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."* He went on to say at point 9 *"[h]owever, 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."* (emphasis added). At point 10, having stated that there is no fixed or specific attribution to be assigned to the importance of the public interest in extradition, Edwards J. stated *"[t]he 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."* With regard to delay and the assessment of the public interest, Edwards J. stated at point 13 that *"[d]elay may be taken into account in assessing the weight to be attached to the public interest in extradition."*

44. I am quite satisfied that a finding of significant or culpable delay does not mean the court must regard the public interest as having been nullified. Significant or culpable delay is a factor that is to be taken into account in assessing the weight to be attached to the public interest. This is another way of saying that delay, even significant and culpable delay, is one factor in the calculation of the pressing social need. The court is obliged to have regard to other factors, not least that there is a constant public interest in the surrender of individuals to face criminal prosecution or to serve sentences already imposed.

45. The issue for the court is the calculation of, or weight of, the public interest in the light of the significant and culpable delay. It must be borne in mind that the consideration of delay in the calculation of the public interest is not designed to act as a punishment for a state's culpable delay. Even where culpable delay exists, there is still a public interest in bringing individuals to trial or to face punishment already imposed. The fact of the culpable delay may, however, demonstrate the lack of importance attached to the particular offending or the particular offender by the issuing state.

46. Point 11 of the tests set out in *P.G.* and *T.E.,* specifically states that "*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.*" The alleged offence for which the surrender of the respondent is sought is an offence amounting to a serious crime of violence; moreover the use of explosives brings an even greater seriousness to the already serious offence of attempted murder. Undoubtedly, this request for surrender concerns an allegation of a crime of a high order of gravity.

47. The significant culpable delay does indicate a surprising lack of urgency on the part of the German authorities to follow up all pathways open to them to seek the earliest possible surrender of this respondent. Nonetheless, the error and omission to follow up the information available to them, does not establish that there is a low public interest in his surrender. The German authorities

continually sought him through national and international databases. When the e-mail of 15th July, 2015 from Interpol Dublin was sent to Germany, there was an immediate response and by September 2015, the EAW was received in this jurisdiction. The Court is satisfied that the German authorities, despite their culpable delay, have demonstrated the importance to them of prosecution of this respondent for this alleged serious crime of violence.

48. Although the Court has regard to the significant culpable delay in seeking the surrender of the respondent, the public interest in his prosecution for this alleged organised offence of attempted murder through the use of explosives is not thereby diminished. He continued to be sought in respect of the alleged serious crime of violence. In light of the foregoing, the Court concludes that the public interest in his surrender is high.

The family and personal circumstances of the respondent

49. The respondent relied on the facts set out in his own affidavit concerning his personal and family circumstances. According to the respondent, he was born in Belfast on 21st December, 1968, and resided there until approximately 1989 with his parents and siblings. On 21st July, 1988, his then partner, now (estranged) wife, gave birth to their first child. They had a second child in 1994 and married later that year. In 1996, the respondent was arrested in Ireland on foot of the extradition request from Germany. He says that in or around February 1997, he was released from custody and his extradition refused. He said that:

> *"[…] from my release in 1997 I understood that the issue of my extradition to Germany had been finally determined and that I proceeded to live my life on the basis that there was no prospect of my extradition to Germany. I am advised that the determination of those extradition proceedings may have related to the fact that Germany did not permit extradition of her own nationals and, as such, there was no reciprocal arrangement in place for extradition. I understand this to be so on the basis of consideration of such contemporaneous news reports as are still available."*

50. Counsel for the respondent submitted that there has been no cross-examination of the respondent on his averments and no averment made on behalf of the minister to the contrary. It was submitted that these averments must be accepted. In an extradition/surrender case, the court does not have to accept every averment made by a respondent. The court is entitled to weigh the evidence it receives. In weighing the evidence, the court is entitled to consider whether an assessment amounts to a mere assertion. The lack of basis for any belief is a matter to which the court is entitled to have regard to when weighing that evidence. The lack of corroboration, such as an averment from a wife or partner, is also something the court is entitled to take into account. These are but some of the factors that the court may assess when weighing evidence.

51. As stated above, the refusal of the respondent's extradition in 1997 came about in circumstances where he had filed a declaration of Irish citizenship. Apparently, the original extradition papers identified Mr. Corry as a British citizen, as indeed does the present European Arrest Warrant. The Court has been informed, without demur from the respondent, that the respondent had filed a declaration of Irish citizenship whilst in custody pending his proposed extradition. In those circumstances, it is just not credible that this respondent could have been in any doubt as to the basis for the refusal of his extradition to Germany. The only proper inference is that it was on the advice of his lawyers, that he made and served this declaration of citizenship. The Court finds that he must have known that his release at an early stage without recourse to the courts was due to the filing of that declaration.

52. It is also striking that the respondent never says that he was advised that the matter of extradition had finally been determined against him. On the contrary, he simply says that he understood that it had been finally determined, while never giving any basis for that understanding. The respondent makes no reference to his knowledge of the Act of 2003 or indeed any change that may have brought about. It must be noted, however, that under the provisions of the Act of 2003 as originally enacted, s. 42 would have prohibited his surrender in any event. This is because his case had been considered by the Director of Public Prosecutions ("DPP") and a decision was made not to prosecute him in relation to the offences for which he was sought on the European Arrest Warrant. Counsel for the respondent does not make the case that his client knew that he could not be so surrendered pursuant to the then s. 42 of the Act, as it appears the respondent did not know about any decision being made by the DPP not to prosecute him. Counsel for the respondent submitted it was simply artificial to suggest that the Act of 2003 would have been at the forefront of the respondent's mind.

53. In his original affidavit, the respondent stated that the next he heard in relation to the alleged offences was when he was contacted by the Gardaí in 2004 when they attended at his family home. He said that he subsequently attended Killarney Garda Station by arrangement and was thereafter brought to Togher Garda Station where he was questioned for approximately two days. In his later affidavit, the respondent accepted what was said in a letter from the Chief State Solicitor that it was in the year 2000 that this arrest took place. The respondent responded to this by stating that this demonstrates how the lapse of time has created difficulty. Despite the lapse of time and difficulty of memory, the respondent was able to state that the arrest came as a complete surprise to him in circumstances where he had understood that he was no longer the subject of interest in respect of these alleged offences. He said that, in any event, he understood the Garda intervention was related to matters arising under the Offences Against the State Act, 1939, and was an issue of domestic concern. He said that thereafter, he received no further communication from any state body in relation to these alleged offences.

54. The respondent averred that in 1997, due to the family home being burgled, he and his family moved to Kerry from Dundalk, where he had resided after his release. It was the intention of the respondent and his wife, to raise their family in a rural environment where he could also engage in playing traditional music in which he has a strong interest. He said that the move was intended to be a permanent move in circumstances where he was certain that he was no longer sought, nor would be sought, for the purpose of extradition to Germany. Again, the Court notes that the basis for this certainty has never been made clear.

55. In May, 1999, the respondent's third child was born. His fourth child was born in 2002, his fifth child in 2005 and his sixth child in 2006. His seventh and final child was born in March 2009. It is of some note that the respondent could not date his arrest by relating it to the date of his children's birth.

56. The respondent states that:

> *"these proceedings are deeply oppressive in circumstances where I felt that I was entitled to get on with my life subsequent to the disposal of the original extradition proceedings in 1997. I say that, as will be apparent from the foregoing, myself and my wife took many significant life changing decisions in relation to our family on foot of the assumption that these matters were behind us."*

57. At para. 12 of his affidavit, the respondent averred that five of his seven children have been born since the Irish courts refused his extradition to Germany and were born in circumstances where he had no reason to apprehend that the matter could be resurrected. He says that his parental responsibility for his children had been undertaken in those circumstances.

58. The Court accepts that the Act of 2003 and any amendments thereto, may not have been at the forefront of the respondent's mind. On the other hand, this is a man who must have understood there was some risk of being prosecuted in this jurisdiction when he decided to have another child who was born in 2002, in circumstances where he had been questioned about these matters in 2000, but did not receive any information about the DPP's decision to prosecute or not to prosecute. The Court draws the inference from the evidence that the respondent did not seek this information either. Having considered what is said by the respondent and what is unsaid, the Court concludes that the risk of prosecution must have been contemplated by the respondent in at least the early years after his arrest.

59. While the respondent may not have remembered the date of his arrest correctly, in light of the time frame in which he had children after that arrest, the decision to have at least one of his children was made during the period in which the Court has concluded he must have contemplated that he might have been prosecuted for these offences. The Court concludes that there is no reality to his averment that the respondent and his wife took significant life changing decisions in relation to their family "on foot of the assumption that these matters were behind [them]."

50. In all the circumstances, the respondent's averment that he had no reason to apprehend that this matter could be resurrected is not something to which the Court gives any great weight. This was a man who was not bothered to make any enquiries of the DPP as to whether he would in fact be prosecuted. Furthermore, he has given no basis for his belief that he understood that the extradition matter had been finally determined – in the sense that he would never be liable to extradition or prosecution in the future. On the contrary, from all of the evidence before it, the Court finds it reasonable to infer that this is a man who simply continued to live his life without regard one way or the other to the risk of prosecution or of extradition.

61. Nonetheless, the Court is entitled to, and does, take into account that there has been a significant delay in seeking his surrender. The Court also takes into account that in the intervening time, the respondent has lived his life and had children. The Court also accepts that as the years passed, the respondent undoubtedly did feel more secure in his situation simply because of the efflux of time.

62. The particular circumstances for the respondent that exist at present are that his eldest child is married with a family of her own, while the remaining six children are said to all live at home. It appears that since 2010, the respondent has not been living in that family home, but has continued to play a role in his children's lives. He states, and there is no reason to doubt, that he has remained deeply involved with his family and continues to care for his children. He states that when he was arrested in October 2015, he was dropping his children to school.

63. Overall, the particular personal and family circumstances of this man are not remarkable. He has seven children, six of whom are living at home. Only four of his children are still at school. He is separated from his wife and living away from the family home but has an ongoing relationship with the family. He drops his children to school. He has had a work history in this jurisdiction and he is involved in traditional music.

64. The Court does accept, in light of the previous attempt at extradition, his arrest in this jurisdiction which did not result in a prosecution, together with the passing years, that the respondent was entitled to believe, and probably did believe, that he would no long be subject to extradition or prosecution in this jurisdiction. That is a factual circumstance that the Court will take into account in balancing the public interest in his surrender as against his personal and family rights.

The balancing exercise between public interest and personal interests

65. O'Donnell J. in his concurring judgment in *Minister for Justice and Equality v. J.A.T. (No. 2)* [2016] IESC 17, stated at para. 10 that the factors in that case – "*repeat application, lapse of time, delay, impact on the appellant's son, and knowledge on the part of the requesting and executing authorities of those factors - when weighed cumulatively, are powerful."* Yet even considering those factors, the learned Supreme Court judge opined at para. 12 that it was "*open to doubt that these matters would be sufficient to prevent surrender for serious crimes of violence.".* The dicta of O'Donnell J. in *J.A.T. (No. 2)* is an observation on the relative weight to be given to each side of the balance. When analysed, the *dicta* demonstrates the undoubtedly high public interest in surrendering people accused (or convicted) of serious crimes of violence, despite culpable delay or lapse of time due to the activity or inactivity of the relevant authorities in the requesting state or in this State.

66. In this case, the balancing test is between a high public interest on the one side, and what are quite unremarkable personal and family circumstances occurring against the backdrop of repeat application, previous arrest without prosecution and considerable delay on the other. Although he brings his children to school, there is no suggestion that his children cannot be brought to school without his presence in the jurisdiction. There are no "particularly injurious, prejudicial or harmful consequences" for this respondent should he be surrendered. Indeed, even if the Court had found that the respondent and his wife decided to have their younger children in the belief that he could neither be prosecuted here or extradited to Germany, the impact of that bare fact would not weigh to any greater extent against the pressing social need for his surrender in light of the high public interest in his surrender.

67. The Court has also considered the issue of the Good Friday/Belfast Agreement "amnesty" and whether the apparent availability of that amnesty were he to be prosecuted in Ireland compared to its unavailability in Germany, amounts to oppressive or discriminatory circumstances for this respondent. At the outset, the Court observes that in his original affidavit, the respondent asserted that the Court should take into account in considering proportionality that the offence was in principle covered by the Good Friday/Belfast Agreement and any period of incarceration was unlikely to be substantially in excess of two years. That plea was abandoned and the point of objection referred to above was added by way of amendment. It may be of note to observe that in *Gorman's* case, the potential for a two year period of incarceration was a potent issue. Indeed, while not necessarily specifically identified by Peart J. in his decision in *Gorman* on the Article 8 issue, it is a factor which distinguishes the two cases.

68. The Good Friday/Belfast Agreement does not apply to people convicted and sentenced in Germany *per se* (but it may be relevant if there is a conviction and the sentenced respondent is transferred to this jurisdiction). The German authorities have sought the respondent's surrender in order to put him on trial in relation to offences allegedly committed by him on their territory. The German offence carries a maximum sentence of life imprisonment. The DPP's decision not to prosecute in this jurisdiction is a decision which the law empowers the DPP to make. It does not affect the right of the German authorities to prosecute the respondent in Germany.

69. There is nothing oppressive or discriminatory about this respondent being sought to face trial and punishment in the same manner as any other person who is alleged to have committed an offence of attempted murder in Germany. Furthermore, the Court observes that the availability of early release under the Good Friday/Belfast Agreement is a matter that can only be assessed by the Minister for Justice and Equality after a conviction (or if convicted in Germany, after transfer to this jurisdiction). Even in this jurisdiction, any trial and sentence he would face would be that of a maximum of life imprisonment. The Court must, and does, proceed on the basis that this is a sentence of life imprisonment that the respondent is facing if convicted of the offence alleged against him.

70. The Court takes into account that he spent four months in custody in this jurisdiction on the first extradition request. The Court takes into account that this is a second request made after some considerable period of culpable delay. The fact that this is a second request and that there has been a period in custody are not in themselves matters that prevent surrender. They are factors, amongst the other factors, that must be weighed in the balance when calculating if the pressing social need for the surrender of this respondent outweighs his private interests. The Court also takes into account that this particular respondent, as time went by, was no doubt of the belief that he would not be sought for surrender or prosecution for this alleged offence.

71. In balancing the public interest in his surrender with his own personal interests, it is clear that there can only be one outcome; the public interest in his surrender outweighs any interference with his private and family life. This is the inevitable outcome of the balancing test which has been proffered to the Court as being the correct approach in accordance with the principles set out in *P.G.*. His personal circumstances are unremarkable and no particular injurious, harmful or prejudicial consequences are evident. His time in custody previously, the significant delay and the fact that a second attempt has been made, even accepting that through the passing of the years he legitimately came to the view that he would no longer be liable to extradition or prosecution in this jurisdiction, are not of such import that would make it disproportionate to surrender him to face trial for this serious crime of violence alleged against him.

72. Although the Court, in applying the appropriate balancing exercise in considering the issue of interference with his personal and family rights, has not required this respondent to rely upon exceptional facts, it can be observed that the factual circumstances, taken as a whole, do not amount to the type of exceptional case where surrender must be prohibited. Finally, the Court repeats that in carrying out the test mandated by law, there can be no objective legitimate sense of grievance arising from an attempt to compare this case with another case in which surrender was refused.

73. The Court is satisfied, therefore, that the surrender of this respondent would not amount to a disproportionate interference with his right to respect for his family and personal rights under the Constitution or under Article 8 of the European Convention on Human Rights.

Conclusion
74. For the reasons set out above, the Court concludes that the surrender of the respondent is not prohibited. The Court may therefore make an Order under s. 16 of the Act of 2003 for his surrender to such person as is duly authorised by the issuing state to receive him.