Neutral Citation Number: [2013] IEHC 515

**THE HIGH COURT**

**Record No.: 2013/ 111 Ext**

**Between/**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**Applicant**

**and**

**PATRICK MALACHY GORDON**

**Respondent**

**JUDGMENT of Mr Justice Edwards delivered on the 5th day of November 2013**

**Introduction:**
The respondent is the subject of a European arrest warrant issued by the United Kingdom of Great Britain and Northern Ireland on the 23rd April, 2013, and endorsed for execution in this jurisdiction on the 14th May, 2013 pursuant to s.13. of the European Arrest Warrant Act 2003 (hereinafter "the Act of 2003").

The warrant relates to four offences which are all of the same type and which are described under the law of the issuing state as "terrorism contrary to s. 58(1)(b) of the Terrorism Act 2000". Briefly, the alleged circumstances were that, in each case, the respondent had been found in possession, without reasonable excuse, of documents containing information of a kind likely to be useful to a person committing or preparing an act of terrorism. In one instance it was a list of materials suitable for use in the manufacture of "Napalm-type" incendiaries; in another it was an electronic file containing instructions on how to make ammonium nitrate detonate; in another it was an electronic file containing a diagram of a simple pipe shotgun and in yet another instructions on how to manufacture and detonate a mixture of ammonium nitrate and fuel oils.

The warrant was duly executed on the 17th May, 2013 and the respondent was brought before the High Court in the normal way where a notional date was fixed for the purposes of s. 16 of the Act of 2003, and the respondent was remanded in custody to that date, with a view to the matter then being adjourned from time to time until pleadings were closed and the case ready to receive an actual hearing date. The respondent subsequently indicated a willingness to voluntarily surrender to the issuing state in accordance with s. 15 of the Act of 2003.

This Court conducted an s. 15 hearing on the 2nd July, 2013, in the course of which it heard oral evidence from the respondent. In the course of his evidence the respondent indicated his wish to voluntarily surrender to the issuing state, and confirmed his said wish in writing by executing a document to that effect while in the witness box. The Court, being fully satisfied as to his wish to voluntarily surrender, being satisfied that he understood the consequences of his decision, being satisfied that he had had the benefit of legal advice before making his decision, and being satisfied that all other requirements of s. 15 of the Act of 2003 were met, duly made an order pursuant to s. 15(1) 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.

Following the making of the said order pursuant to s.15(1) of the Act of 2003 the Court was immediately presented with two post surrender applications, one on behalf of the applicant seeking a postponement of the respondent's surrender pursuant to s.18(1)(c) of the Act of 2003, and the other on behalf of the respondent requesting that he be conditionally surrendered to the issuing state pursuant to s.19 of the Act of 2003. Moreover, counsel for the respondent indicated that her client was opposing the applicant's application.

As this is, to the Court's knowledge, the first occasion on which on which a respondent in this jurisdiction has sought to invoke s. 19 of the Act of 2003, and as the interplay between sections 18 and 19 respectively of the Act of 2003 has never previously received judicial consideration, the Court sought and received detailed arguments from both sides in support of their respective positions. This judgment contains the Court's determination and rulings on the issues raised.

**The legislative provisions at issue.**
Section 18 of the Act of 2013 as substituted by s.11 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012 provides for possible postponement of surrender in a variety of circumstances:

> "18.— (1) The High Court may direct that the surrender of a person to whom an order under subsection (1) or (2) of section 15 or subsection (1) or (2) of section 16 applies be postponed in accordance with this section where—
>
> (a) the High Court is satisfied that circumstances exist that would warrant that postponement, on humanitarian grounds, including that a manifest danger to the life or health of the person concerned would likely be occasioned by his or her surrender to the issuing state,
>
> (b) the person is being proceeded against for an offence in the State, or
>
> (c) the person has been sentenced to a term of imprisonment for an offence and is required to serve all or part of that term of imprisonment in the State.
>
> (2) The postponement shall continue until the High Court makes an order under subsection (4).
>
> (3) Where the High Court decides to postpone a person's surrender under this section, it shall remand the person in custody or on bail and, for that purpose, the High Court shall have the same powers in relation to remand as it would have if the person were brought before it charged with an indictable offence.

(4) The High Court shall make an order ending the postponement of surrender—

(a) where paragraph (a) of subsection (1) applies, when the High Court is satisfied that the circumstances referred to in that paragraph no longer exist,

(b) where paragraph (b) of subsection (1) applies, when the High Court is satisfied that the proceedings in respect of the offence concerned have been finally determined (where the person concerned is not required to serve a term of imprisonment), or

(c) where paragraph (c) of subsection (1) applies, when the High Court is satisfied that the person concerned is no longer required to serve any part of the term of imprisonment concerned.

(5) Section 15 or 16, as the case may be, shall apply to the person concerned as of the date of the order under subsection (4) as though that order were an order made under subsection (1) or (2) of section 15 or (1) or (2) of section 16, as the case may be."

Section 19 of the Act of 2003 as amended by s. 12 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012 provides for conditional surrender to an issuing state in certain circumstances. It provides:

"19.— (1) Where a person to whom an order under section 15 or 16 applies has been sentenced to a term of imprisonment for an offence and is, at the time of the making of the order, required to serve all or part of that term of imprisonment in the State, the High Court may, subject to such conditions as it shall specify, direct that the person be surrendered to the issuing state for the purpose of his or her being tried for the offence to which the European arrest warrant concerned relates.

(2) Where a person is surrendered to the issuing state under this section, then any term of imprisonment or part of a term of imprisonment that the person is required to serve in the State shall be reduced by an amount equal to any period of time spent by that person in custody or detention in the issuing state consequent upon his or her being so surrendered, or pending trial."

Sections 18(1)(b) & (c) and 19, respectively, of the Act of 2003, as amended, transpose for the purposes of Irish domestic law and give effect to the provisions of article 24 of Council Framework Decision 2002/584/J.H.A. 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") . Article 24 of the Framework Decision states:

"1. The executing judicial authority may, after deciding to execute the European arrest warrant, postpone the surrender of the requested person so that he or she may be prosecuted in the executing Member State or, if he or she has already been sentenced, so that he or she may serve, in its territory, a sentence passed for an act other than that referred to in the European arrest warrant.

2. Instead of postponing the surrender, the executing judicial authority may temporarily surrender the requested person to the issuing Member State under conditions to be determined by mutual agreement between the executing and the issuing judicial authorities. The agreement shall be made in writing and the conditions shall be binding on all the authorities in the issuing Member State."

**Relevant background information**
The background to the applicant's s.18(1)(c) application for postponement is that the respondent is currently serving a sentence in the State, a five year sentence having been imposed by the Special Criminal Court on 2nd December, 2011, backdated to 3rd December, 2010. The sentence shall expire on 2nd December, 2015, but the earliest likely release date, with remission, is 1st September, 2014.

The background to the respondent's s.19 application is that the European arrest warrant seeks him for prosecution. He has not yet been convicted and, of course, enjoys a presumption of innocence in respect of the four matters with which he is charged. It is urged on his behalf that he intends to defend the charges before a court of trial in the issuing state. As appears from the warrant the offences are alleged to have occurred on 17th February, 2010. The respondent was questioned in respect of the said offences on 17th and 18th February, 2010 and he was charged with three offences on 19th February, 2010. The fourth offence appears to have been added subsequently. The respondent had been remanded in custody but was admitted to bail on 10th March, 2010. He failed to answer his bail on 21st December, 2010, and domestic warrants were issued for his arrest in respect of each of the four offences on 23rd April, 2013, as well as the European arrest warrant currently before this Court.

**Evidence adduced on behalf of the respondent:**
The respondent relies upon an affidavit of Michael Finucane, solicitor, sworn in these proceedings on 1st July, 2013, the relevant paragraphs of which are paragraphs 4 to 8 inclusive. Mr. Finucane stated therein:

"4. I say and believe and am so instructed that, in or about March or April 2013, prior to becoming aware that the European Arrest Warrant herein had been issued, the Respondent herein applied to the Applicant under section 4 of the Transfer of Sentenced Persons Act 1995 for a transfer to Northern Ireland to serve the remainder of his sentence there and that this application currently appears to be with the Northern Ireland/UK Authorities for consideration.

5. I say and believe this matter has appeared and was adjourned from time to time by this Honourable Court. It was most recently listed on 2nd July 2013 with the understanding and expectation that, on that date, the Respondent would either consent to his surrender pursuant to section 15 of the European Arrest Warrant Act 2003 or would have by then filed points of objection.

6. I say and believe and am instructed by the Respondent that he wishes to be transferred to Northern Ireland as soon as possible and to that end, he consents to his surrender pursuant to s. 15 of the European Arrest Warrant Act 2003.

7. I say and believe and am instructed that the Respondent opposes any postponement under section 18 of the 2003 Act as he is most anxious to be returned to Northern Ireland as soon as possible to deal with the matters that are the subject

of the Warrant herein without further delay.

8. I say and believe that to this end my office wrote to the office of the Applicant on 11th June 2013. I say and believe that by letter dated 17th June 2013, the Chief State Solicitor responded by way of letter on behalf of the Applicant. I beg to refer to a copy of these letters, upon which marked with the letters "MF1" I have signed my name prior to swearing."

The letters exhibited "MF1" are reproduced below.

The letter of the 11th June, 2013 from Mr. Finucane to the applicant was in the following terms:

"11 June 2013

Dear Minister,

We act for Patrick Gordon in relation to the above. This matter is next listed before Mr Justice Edwards in the High Court on 18th June 2013 on foot of a European Arrest Warrant (EAW), executed on our client on 17th May 2013. His surrender is sought for the purpose of trial on a number of offences alleged to have been committed in Northern Ireland on the 17th February 2010.

Our client is currently serving a sentence in Portlaoise Prison received from the Special Criminal Court on the 2nd December 2011. We understand that his release date for that sentence is in September 2014. We understand and are instructed that our client applied to you, through the governor of Portlaoise Prison, in March 2013, for a transfer out of the state to Northern Ireland to serve the balance of his sentence. We are instructed that he wishes to be transferred as soon as is possible. In relation to this

application please confirm the following:

1. Whether a decision has yet been made in relation to our client's application?

2. If not, when it is expected that a decision will be made?

3. What it is expected the decision will be, and on what criteria it has been/is to be made?

Regarding the EAW proceedings, we are instructed by our client that he wishes to be returned to Northern Ireland as soon as is possible for the purpose of facing trial on foot of the said charges. He instructs that he wishes to consent to his surrender pursuant to section 15 of the European Arrest Warrant Act 2003, on condition that such surrender takes place forthwith (and without postponement under section 18). It would appear that a direction from the High Court for a surrender pursuant to section 19 of the Act would be the appropriate legislative provision to deal with a situation such as our clients.

We are instructed that our client would consent to a condition being imposed by the High Court, pursuant to section 19 of the Act, that our client serve the the sentence he is currently serving, but do so in Northern Ireland. Such condition could operate in tandem with a transfer pursuant to section 4 of the Transfer of Sentenced Persons Act 1995. Please confirm whether you would be agreeable to the High Court dealing with the EAW in such manner.

Please let us know what your attitude is with regard to both the EAW and the transfer of prisoners matter and their interaction. We will then be in a position to take further instructions from our client and confirm same to you.

Yours faithfully"

The replying letter of the 17th June, 2013 from the Office of the Chief State Solicitor to Mr. Finucane was then in the following terms:

"17 July 2013

Dear Sirs,

We refer to the above matter and to your letter of the 1 ltn June 2013.

We are instructed your client's Transfer of Sentenced Person application was receive by the Minister for Justice and Equality in April 2013 and is currently with the Northern Ireland/UK Authorities for consideration.

Regarding the issue of whether an Order might be made for the postponement of surrender pursuant to Section 18, or indeed an Order for temporary surrender pursuant to Section 19 might be made, this is a matter for the High Court under European Arrest Warrant Act 2003, as amended. A Section 19 transfer is only for the purposes of being tried with a transfer back to the State once the trial is finished. Both orders can only be made once a surrender order has been made.

We are instructed the Minister is not in a position to agree to an order for surrender being conditional on the Minister not applying for an order to postpone surrender or, an order for temporary surrender being made.

Yours faithfully"

**Submissions on behalf of the applicant**

Counsel for the applicant has submitted that the European Arrest Warrant Act, 2003, as amended, is silent as to the interaction between sections 18 and 19 thereof. However she submits that it is clear that either section can be invoked in the circumstances of the instant case. Both sections provide that the High Court "may" make an order thereunder if a person has been sentenced to a term of imprisonment for an offence within the State and is required to serve all or part of that term of imprisonment. Article 24 of the Framework Decision provides no guidance as to whether an order postponing surrender or an order permitting temporary surrender should be made in circumstances such as exist in the instant case. It is clear that there is no obligation either under the Act or under the Framework Decision for the executing judicial authority to make either type of order, in any circumstances. Rather it is a matter

for the discretion of the Court.

Counsel for the applicant further submitted that it is clear that s.18 applies whether or not the requested person has been convicted and or sentenced in the issuing State. Therefore, she submitted, the Oireachtas did not intend to limit the application of s.18 to cases in which the requested person had already been tried and convicted. Further there is no temporal limit placed on the length of the postponement.

It was urged upon the Court that, unlike the situation in respect of s. 18, s.19 of the Act of 2003 applies only where a person has not yet been convicted in the issuing State. Moreover, as its application is limited to the surrender of a person "*for the purpose of his being tried for the offence to which the European arrest warrant relates*", the temporary surrender of a requested person should cease once the trial has concluded. Further, it was submitted that an order should not be made under s.19 when it is not known when the trial is likely to take place. Counsel submitted that if temporary surrender was effected in the absence of a trial date, it was conceivable that the respondent would be required to remain in custody on foot of the warrant for many months prior to his trial, which would not amount to his being "*surrendered to the issuing state for the purpose of his or her being tried for the offence to which the European arrest warrant concerned relates*", but rather would entail the detention of the respondent on remand in respect of the charges to which the warrant relates. While it is clear from section 19(2) that the surrender is not limited to the period of the actual trial, it is submitted that the Oireachtas did not intend to permit the temporary surrender of a person at a time at which the date of trial is unknown and or the trial is not ready to proceed.

Counsel for the applicant further submitted that sections 18 and 19, when read together, comply with the requirements of article 6 of the European Convention on Human Rights which provides that everyone is entitled to a "*hearing within a reasonable time*". The point was further made that the respondent did not raise any issue of delay in application for surrender on foot of the European arrest warrant. It was submitted that if the order is granted under section 18, rather than section 19, the surrender and trial cannot take place earlier than 1st September, 2014, if the respondent achieves full remission, or 2nd December, 2015, if he achieves no remission (subject, of course, to any decision that the Minister might make on the application by the respondent under the Transfer of Sentenced Prisoners Act, 1995 as amended, and subject to the grant of earlier temporary release).

It was submitted that the purpose of section 19 would appear to be to enable the transfer of a person for the purpose of their being tried in a manner consistent with article 6 ECHR. Further, there may be circumstances in which the initiative might come from the issuing state, e.g., a request for temporary surrender to enable a joint trial to proceed, or where it was anticipated that witness difficulties were likely to arise if the trial were delayed.

Counsel for the applicant has submitted that the reasonableness of any prosecutorial delay will depend upon the circumstances of the particular case, and it may vary from case to case. In the most recent judgment of the European Court of Human Rights on the reasonable length criminal proceedings under article 6(1), *Sorokins v. Latvia*, (Application no. 45476/04) 28th May, 2013, it was stated:

> "The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II)."

It was further submitted that the length of time which has elapsed to date is not material to the question before the Court, particularly in circumstances where the respondent failed to answer his bail on 21st December, 2010, and he had not sought to raise delay by way of objection to, or in support of, any objection to his surrender.

Counsel for the applicant contends that there is little or no evidence before the Court concerning whether the proceedings in the issuing state are to be regarded as being complex or otherwise, and in any event there is no evidence that there has been any delay to date, or that any future delay on the part of the prosecuting authorities in the issuing state may be reasonably anticipated. Therefore, the sole basis on which the respondent can rely upon an apprehended breach of his rights under article 6(1) is that if he is not made available for trial to the issuing state until after he has finished serving his present sentence some further time will elapse. Counsel for the applicant submits that there is no basis for concluding that the respondent's ability to defend himself at trial would necessarily be adversely affected by reason of any further passage of time. Moreover, it is clear that as a matter of Irish law, in order to prohibit a prosecution from proceeding, it must be established that there is a real and substantial risk of an unfair trial due to either prosecutorial delay which could not be made fair by the appropriate rulings and directions of the trial judge and other circumstances: *Rattigan v. D.P.P.* [2008] 4 I.R. 639; *D.P.P. v. Wharrie* [2013] IECCA 4 (Unreported, Court of Criminal Appeal, 19th April, 2013). In the circumstances, counsel for the applicant urges upon this Court that the onus must be on the respondent, in opposing an application under section 18, to demonstrate likely prejudice in the event of his trial in the issuing state not proceeding until after he had served his domestic sentence, and also that he would not have an effective remedy in the issuing state should he wish to make the case there that he could not at that stage obtain a fair trial having regard to delay.

It was further submitted that any delay which would be incurred by reason of the making of an order under section 18, as opposed to section 19, of the 2003 Act, would be for reasons connected with the respondent i.e., his commission of, and punishment for, an offence within the State and not for reasons attributable to the authorities in Northern Ireland. The precise extent to which any such trial might be delayed is unknown at this point in time. The trial could potentially be delayed until after (a) the date on which the application to transfer the respondent to Northern Ireland under the Transfer of Sentenced Prisoners Act, 1995 (as amended) is determined; alternatively (b), the date on which the respondent is released with remission; or (c) the date on which his sentence expires. The latest date on which his detention within the State will cease is 2nd December 2015. In *Sorokins v. Latvia*, the case against the applicant was found not to be complex and it was found to have been referred to the trial court without excessive delay. The judgment of the lower court was handed down four and a half years later, of which a delay of over two and a half years was attributable to state authorities. It was held that there had been a breach of article 6(1). The European Court of Human Rights concluded that:

> *"Even though the delays of about eighteen months in total (see paragraphs 23-24 above) were not attributable to either of the parties, and the appellate courts adjudicated the criminal case rather speedily (see paragraphs 29-32 above), the Court considers that the delays attributable to the State authorities in the adjudication of the above criminal proceedings have rendered the length of the criminal proceedings unreasonable."* (emphasis added)

It was submitted that the provisions of article 6(1) of the EHCR do not require this Court to refuse to make an order postponing surrender of the respondent and to make an order instead under s. 19 of the Act of 2003. On the contrary, the applicant seeks an order postponing surrender to enable the respondent serve out the remainder of the sentence imposed on him by the Special Criminal

Court, following which, and within a reasonable time in all the circumstances of the case, the respondent will be available to be tried in the issuing state.

Counsel for the applicant further stated that in the event of the application under s. 18(1)(c) of the Act of 2003 being refused, and the order under s.19 of the Act of 2003 being granted, it will be necessary to transfer the respondent to Northern Ireland for the purposes of his trial, and to return him to this jurisdiction thereafter to enable him serve the remainder of the Irish sentence. The only circumstance in which this would not occur would be if the respondent's application under the Transfer of Sentenced Prisoners Act had been successful in the meantime.

Finally, it was submitted that, while the decision whether to make an order under section 18 or section 19 of the European Arrest Warrant Act, 2003 (as amended) was ultimately a matter within the discretion of the High Court, that discretion ought to be exercised in the applicant's favour where the respondent had not proffered any evidence tending to demonstrate that his right to a fair trial, as guaranteed by article 6 of the ECHR, would be infringed if surrender was postponed until the respondent was released from serving his domestic sentence (or transferred to Northern Ireland under the Transfer of Sentenced Prisoners Act). It was suggested that in those circumstances when considerations such as the desirability of continuing the detention of the respondent in the State in accordance with the sentence imposed by the Special Criminal Court until he is due to be released (or transferred to Northern Ireland under the Transfer of Sentenced Prisoners Act), and the administrative, practical and financial implications that any temporary surrender would entail, are weighed in the balance against the mere wishes or anxiety of the respondent to be returned to Northern Ireland in order to be tried for the offences which are the subject of the warrant, the former decisively outweigh the latter.

**Submissions on behalf of the respondent**
Counsel for the respondent made the following submissions to the Court. Section 18(1) of the Act of 2003 provides for the postponement of surrender in one of three circumstances:

a. On humanitarian grounds

b. Where the person is being prosecuted in the State

c. Where a person is serving a sentence in the State.

It was submitted that the basis on which the applicant herein was seeking an order for surrender is the third of these circumstances as is provided for in section 18(l)(c). Section 18(1) could of course apply to both situations (i) where surrender is sought for the purpose of serving a sentence, having already been convicted, or (ii) where surrender is sought for the purpose of putting the person on trial.

By contrast section 19 is a more specific provision which deals solely and exclusively with the type of situation that the respondent is in; that being where a person is serving a sentence in this State and the reason for the surrender is "*for the purpose of his or her being tried*".

Counsel for the applicant had submitted that section 19 cannot apply where a person may spend time on remand in the requesting state, pending trial, and that "*the Oireachtas did not intend to permit the temporary surrender of a person at a time at which the date of trial is unknown and or the trial is not ready to proceed*". It was urged that no evidence or material supporting this submission is set out. It was submitted by the counsel for the respondent that this submission is nonsensical and entirely without merit. He suggested that it is in fact clearly contradicted by a literal interpretation of section 19 and giving the words therein, as passed into law by the Oireachtas, their ordinary meaning. Section 19(2) clearly and explicitly provides for and envisages a situation where a person surrendered under section 19(1) would be on remand in the issuing state, post surrender:

> *"(2) Where a person is surrendered to the issuing state under this section, then any term of imprisonment or part of a term of imprisonment that the person is required to serve in the State shall be reduced by an amount equal to any period of time spent by that person in custody or detention in the issuing in state consequent upon his or her being so surrendered. or pending trial. "* [emphasis added]

Counsel for the respondent further submitted that the canons of statutory construction support the invocation by this Court of section 19, rather than section 18, if all other things were equal. Section 18, which provides for postponement, deals with a variety of scenarios. Section 19, by contrast, explicitly and exclusively applies and deals with the very situation this respondent finds himself in: someone serving a sentence in the State but wanted for surrender by the requesting state for the purpose of putting him on trial. All things being equal, it was submitted that section 19 should be applied as "*the legislature is deemed not to waste its words or to say anything in vain* " (per Lord Sumner in *Quebec Railway, Light, Heat and Power Co. v. Vandry* [1920] A.C. 662, cited with approval by O'Higgins C.J. in *Goulding Chemicals Ltd. v. Bolger* [1977] I.R. 211 at pp. 226-7). It was urged that not to apply section 19, in favour of section 18, would be to in effect disregard or treat as surplusage the whole of section 19. This, it was submitted, is not permissible and the respondent relied in that regard on the dicta of Griffin J. in *Shelly v. District Justice Mahon* [1990] 1 I.R. 36 at p. 48 where he said:

> "In construing a statute, it is permissible to reject words or phrases as surplusage if it is necessary to do so to give a sensible meaning to a section. That however is very far removed from treating one of three subsections as surplusage. It is not in my view a permissible approach to the construction of a statute to explain the presence of a sub-section by an argument or submission that it is surplusage. "

It was submitted that the surrender sought herein is for the purpose of trying the respondent in relation to offences alleged to have been committed on 17th February, 2010. He was arrested and questioned on that date and charged with the offences on the 19th February, 2010. He had initially been remanded in custody but was released on bail on 10th March, 2010 and the matter was remanded from time to time in the Magistrates' Court in Northern Ireland and ultimately to 21st December, 2010. The respondent did not appear on that date because he had been arrested in this State on the 30th November, 2010 for the offences for which he received the sentence of imprisonment which grounds the applicant's application for a postponement under section 18 herein.

It was submitted that in the circumstances where the respondent could not answer his bail in Northern Ireland on 21st December, 2010 having been arrested and detained in custody in this State on 30th November, 2010, it is nonsense for the applicant to submit, as he has done at paragraph 17 of his written submissions, that "*the length of time which has elapsed to date is not material to the question before the Court, particularly in circumstances where the respondent failed to answer his bail on 21st December 2010, and he has not raised any issue of delay in the course of the application by surrender by the Minister for surrender*". It was contended that the respondent does not and never has contended that the delay by the Northern Irish authorities in putting him on trial to date,

is any shape, manner or form culpable prosecutorial delay.

As to the submission of the applicant that delay has not been raised as an issue by the respondent in these proceedings, it was submitted that it is clear that it has. The very fact and entire tenor of the application for an immediate, but conditional, surrender of the respondent under section 19 is premised on being returned to face trial in Northern Ireland without further delay. As is acknowledged by the applicant in his written submissions at paragraph 9 therein, the grounding affidavit of the respondent's solicitor specifically avers that the respondent "*is most anxious to be returned to Northern Ireland as soon as possible to deal with the matters that are the subject matter of the Warrant herein without further delay*".

It was further submitted, with regard to the submission made by the applicant at paragraph 18 of his written submission regarding the appropriate test for delay and the test in Irish law being a real and substantial risk of an unfair trial, that the applicant is fundamentally misguided, as that test is applicable to applications to prohibit a trial. The standard to be reached by any applicant seeking to prohibit for ever more his trial on criminal charges is by necessity a strict and high standard. The relief or prohibition in such circumstances impacts profoundly on the right of the community and the State to see crimes prosecuted. By complete contrast in the instant matter the respondent is seeking the opposite of prohibition of his trial in Northern Ireland – he is seeking his trial without further delay. Accordingly, it was submitted that the jurisprudence of the Irish Superior Courts regarding delay in the context of prohibition as set out in cases such as *Rattigan v. D.P.P.* [2008] 4 I.R. 639, *Cormack v. D.P.P.* [2009] 2 I.R. 208, and *S.H. v. D.P.P.* [2006] 3 I.R. 575 is of no application and does not assist this Court in its task of choosing whether to exercise its discretion under section 18 or section 19.

It has been contended by counsel for the respondent that this Court must decide whether to apply the discretion given to it by the Oireachtas in one of two statutory provisions – section 18 (postponement) and section 19 (conditional surrender). If all matters were equal section 19 would appear to be more appropriate as it deals exclusively and specifically with the type of situation this respondent finds himself in, whereas section 18 is a more general provision which deals with him *inter alia*.

It has been urged that this Court must identify and weigh the relevant factors to be considered when deciding whether to exercise its discretion under section 18 or 19. It was submitted that the single and most apposite factor is the respondent's right under article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention") to a trial "*within a reasonable time*". It is a fundamentally different concept of prohibiting a trial for reason of delay. Crucially, there is no requirement to show any actual prejudice in order for a breach of article 6(1) to occur.

Rather, in guaranteeing a trial within a reasonable time, article 6(1) underlines "*the importance of rendering justice without delays which might jeopardise its effectiveness and credibility*" - *H v. France* (1990) 12 E.H.R.R. 74 (at para. 58). It furthermore serves the additional function of protecting individuals from "*remain[ing] too long in a state of uncertainty about their fate*."- *Stögmuller v. Austria* (1979-80) 1 E.H.R.R. 155 (at para. 5.) It was submitted that the applicant in his written submissions seems to miss this fundamental point as he submits at paragraph 22 that "*the respondent has not proffered any evidence which would tend to demonstrate that his right to a fair trial, as guaranteed by article 6 of the ECHR, would be infringed if the application of the Minister is granted*."

The point was also made that article 6(1) operates in conjunction with article 5(3) of the Convention requiring an arrested person to be "*brought promptly before a judge*" and also that he is entitled to "*trial within a reasonable time*".

To the extent that the applicant had added emphasis to a quotation from the judgment of the European Court of Human Rights in *Sorokins v. Latvia* at paragraph 19 of his written submissions, which refers to "*delays attributable to the State authorities*" of about two and a half years as being significant in a finding of breach of article 6(1) rights, it was submitted that the very issue is that if the applicant State authorities herein are successful in their application, and this Court postpones the surrender of the respondent for the purpose of trial to at least 1st September, 2014 and at most 2nd December, 2015, that will by necessity and as an operation of logic, lead to a further delay of at the very least in excess of one year and at most of two years and three months. That delay, again as a matter of logic, as the appellant Minister for Justice is a State authority is seeking postponement, can only be attributable to the State authorities. The respondent is seeking to avoid any further delay and wishes to be surrendered forthwith for the purpose of trial.

Issue was also taken with what counsel for the respondent characterised as the "bald assertion" made at paragraph 22 of the applicant's written submissions that seemed to rely on "*the administrative, practical and financial implications of [the respondent's temporary surrender*" as outweighing any of the respondent's article 6(1) rights. It was submitted that no evidence or detail as to these implications has been provided whatsoever. In any event, it was submitted, it must be remembered in this context that a lack of resources is unlikely to amount to a sufficient justification for delay in a trial particularly where the detention or continued detention of the defendant is at stake.

It was therefore submitted on behalf of the respondent that the only Convention compliant application of this Court's discretion under sections 18 and 19 of the Act, is to surrender the respondent with conditions under section 19 without further delay or postponement so as to vindicate his rights under articles 6(1) and 5(3) of the Convention, there being no counterbalancing factors.

**The Court's Decision**

The right to trial with reasonable expedition is widely recognised in our own jurisprudence and in the jurisprudence of many other countries, and also in various international instruments, as being an important, and some would say fundamental, procedural right. Thus, it finds expression in Ireland as an aspect of the right to trial in due course of law guaranteed by Article 38 of the Constitution. It has been acknowledged in numerous cases over the years but was first authoritatively recognised by the Supreme Court in *State (O'Connell) v. Fawsitt* [1986] I.R. 362 where that Court approved of the following remarks of Murphy J. at first instance:

> "It seems to me, therefore, that the authorities have established that the Constitution guarantees to every citizen that the trial of a person charged with a criminal offence will not be delayed excessively; or, to express the same proposition in positive terms, that the trial will be heard 'with reasonable expedition'."

In the United States the Sixth Amendment to the federal Constitution expressly guarantees the right to a speedy trial. This has been considered by the Supreme Court of the United States in the seminal case of *Barker v. Wingo* (1972) 407 U.S. 514 which has been cited with approval on many occasions by the Supreme Court in this jurisdiction. The U.S. Supreme Court considered that the right to speedy trial is a "more vague concept" than other procedural rights (at 522) and that it is impossible to determine with precision when the right has been denied. They described the right as being "slippery" and as having an "amorphous quality" (at 523). Ultimately the Court favoured an ad hoc approach to determining whether an accused has been deprived of his right to a speedy trial involving a balancing test in which the conduct of the prosecution and the defence are weighed. It identified four factors which courts should

assess in determining whether a particular defendant has been deprived of his right. These were: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

In acknowledging that possible prejudice to an accused might arise from a delayed trial the U.S. Supreme Court considered that several different interests of the accused fell for consideration, and stated (at 533-4):

> "Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record, because what has been forgotten can rarely be shown.
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> We have discussed previously the societal disadvantages of lengthy pretrial incarceration, but obviously the disadvantages for the accused who cannot obtain his release are even more serious. The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent. Finally, even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility.
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> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors, and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution."

The right to an expeditious trial also finds expression in article 6 of the European Convention on Human Rights, article 47 of the Charter of Fundamental Rights of the European Union and article 9(3) of the International Covenant on Civil and Political Rights.

The right as guaranteed under article 6 of the ECHR is framed in terms of the right to:

> *"a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

It is, of course, very far from being the case that any delay in the trial process will give rise to a breach of an accused's rights. Specific or significant general prejudice is usually required to be demonstrated. In addition, the issue as to where culpability for the delay lies is very much taken into account in the balancing exercise that a Court is required to conduct. Where an accused is himself responsible for an element of delay he cannot be heard to complain about it. However, where there has been culpable prosecutorial delay, or systemic delay for which neither of the parties is responsible, a respondent may legitimately seek to rely upon it. It is then a matter for the Court seized of the issue to determine, in the course of the required balancing exercise, whether in the light of all the circumstances of the case the accused's right to an expeditious trial has in fact been breached, and if so, what must be the consequences of that breach in terms of the trial, or pending trial, concerned.

It seems to this Court that the issue currently before it must be approached in the following way. The Court has to recognise that the respondent has a right to a trial in respect of the matters to which the European arrest warrant relates within a reasonable time. It is not necessary to delve into why the respondent wishes to be tried sooner rather than later in the particular circumstances of this case. It is his right and it ought to be accommodated if that can be reasonably achieved without displacing this State's sovereign entitlement to require him to serve in this jurisdiction (or elsewhere) the sentence imposed upon him by the Special Criminal Court. Of course, the longer the likely delay if the request is not accommodated the greater the imperative to do so. Accordingly, if a respondent has only just begun to serve a lengthy domestic sentence so that it is likely to be many years before he could tried in another jurisdiction unless he is conditionally surrendered, there will be a greater onus to accommodate a request to facilitate that if at all possible, than there would be if the same respondent was coming to the end of a domestic sentence with perhaps only months left to run until his release.

Of course, one of the consequences of being incarcerated for the purpose of serving a sentence is that many of one's personal rights are necessarily abrogated, or the enjoyment of them temporarily suspended, for the duration of one's incarceration. If there were no mechanism by means of which a respondent's request can reasonably be accommodated without truncating (as opposing to interrupting) service of a sentence for which he is presently incarcerated then in this Court's view it would be entitled to insist that he should not be surrendered until his present sentence had been served.

Moreover, even where it is technically possible to accommodate such a request a Court must, it seems to me, be entitled to consider the relative seriousness of each respective case and weigh that, together with the administrative, logistical and security issues associated with any temporary surrender, in the balance against facilitating the respondent's wish to be allowed to undergo an early trial in the other jurisdiction. For example, if a respondent was serving a lengthy sentence in this jurisdiction for a serious offence, e.g., rape and, following a surrender order to another jurisdiction on foot of a European Arrest Warrant for trial in respect of a relatively minor or petty offence (but one which nonetheless meets minimum gravity, regrettably a situation frequently encountered by this Court), the Court might reasonably refuse the request for conditional surrender. That issue does not arise in this case as the offences to which the warrant relates are at least as serious as the offence to which the domestic sentence relates.

The Court is also mindful of the jurisprudence of the European Court of Human Rights to the effect that states are obliged to organise their legal systems in such a way as to allow the courts to comply with the legal time requirement of article 6 of the European Convention on Human Rights. See in particular *McMullen v.Ireland* (Application 42297/98), [2004] E.C.H.R 404, which is admittedly a civil case. However, there are no good grounds for believing that a less rigorous approach would be applied to criminal cases. The Framework Decision in article 24 allows for states to make the necessary provision on a reciprocal basis for temporary transfers to occur so as to enable early trials to be facilitated. However, the agreement is required to be in writing, and binding on all authorities in the member state.

In the present case, the issuing judicial authority has advised the Irish Central Authority that it has a mechanism in place in terms of its domestic arrangements to facilitate such requests. It has provided information (an extract from the explanatory notes to the Policing and Crime Act 2009) that makes clear that amendments have been made to the U.K. Extradition Act 2003 by the Policing and Crime Act 2009 to that end. The information provided states:

> "Section 74 [ of the Policing and Crime Act 2009 ] repeals sections 143 and 144 of the Extradition Act 2003 and inserts new sections 153A, 153B and 153C. These provisions provide a regime within which the UK will be able to provide undertakings as to a person's treatment in the UK and eventual return to a requested territory. Unlike sections 143 and 144, the new provisions will facilitate the provisions of undertakings in relation to persons who have been extradited to the UK from any territory.
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> Section 153A(2) provides that where a person is serving a sentence of imprisonment or another form of detention in a territory, the Secretary of State may give an undertaking as to his or her treatment in the UK and his or her return to the requested territory.
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> Section 153A(3) provides that where a person is wanted in the UK for the purpose of prosecution, the Secretary of State may give an undertaking that the person will be kept in custody until the conclusion of the UK proceedings and that they will thereafter be returned to the requesting territory to serve the remainder of the foreign sentence. In contrast, where a person is wanted in the UK so that a sentence previously imposed may be enforced, section 153A(4) allows the Secretary of State to give an undertaking that the person in question will be returned to the requested territory once the person is entitled to be released from detention pursuant to the sentence imposed in the United Kingdom.
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> Where a person falls to be returned to a requested territory pursuant to an undertaking given under section 153A(2) section 153A(5) provides the authority for that person to be removed from prison and kept in custody while conveyed to the requested territory.
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> Section 153B governs the situation where a person is returned to a requested territory in compliance with an undertaking given under section 153A(2) but subsequently returns to the UK. By virtue of section 153B(2), any time spent outside the United Kingdom as a result of an undertaking given under section 153A(2) does not count as time served by the person as part of the sentence. In consequence section 153B(3) provides that where a person is not entitled to be released from detention pursuant to their sentence they may be detained and will be treated as unlawfully at large where at large. Section 153B(4)(a) provides that where someone is entitled to be released from detention on licence pursuant to their sentence any licence which was imposed prior to return to the requested territory will be suspended on their return to the requested territory, but will take effect once they come back to the UK. Section 153B(5) provides that where someone who is entitled to be released from detention on licence was not released on licence prior to their return to the requested territory, they can be detained in any place in which they could have been detained before the time of their return to the requested territory. Section 153B(6) provides that a constable or immigration officer may take the person in to custody for the purpose of conveying them to the place of detention referred to in section 153B(5). Section 153B(7) provides that the person must be released on license within a five day period, starting from when the offender was taken in to custody under this section. Section 153B(8) makes it clear that in calculating the period of five days, no account should be taken of weekends and public holidays as set out in section 59(10). Section 153B(9) makes it clear that the powers set out at section 153B(6) are exercisable in any part of the UK.
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> Section 153C allows the Secretary of State to give an undertaking that someone who has been extradited to the UK will be returned to the requested territory to serve any sentence of imprisonment imposed in the UK. Section 153C(4) establishes that where such an undertaking has been given the person must be returned to the requested territory as soon as is reasonably practicable after the sentence has been imposed and once any other proceedings in respect of the offence have been concluded. Where a person is returned to serve a UK sentence overseas, section 153C(5) provides that the sentence for the offence is to be regarded as having been served. This is to ensure that someone does not remain liable to imprisonment pursuant to their UK sentence despite having served it overseas.
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> Section 153D(1) makes it clear that nothing in section 153A or 153C require the return of a person where the Secretary of State is not satisfied that their return would be compatible with the Refugee Convention or the Human Rights Act 1998. Section 153D(2) provides that all references in sections 153A and 153C to the Secretary of State should be read as references to Scottish Ministers where a Part 3 warrant has been issued by a sheriff."

Further, the issuing judicial authority has indicated if it receives a request for the necessary undertakings from this Court to facilitate the temporary surrender of the respondent in this case it will provide those undertakings.

In the circumstances, the Court is disposed in principle to make an order for the conditional surrender of Mr. Gordon to enable him to face trial in Northern Ireland for the offences to which the European arrest warrant relates. The section 19 order will not, however, be made until the undertakings that this Court is disposed to request from the issuing state have been received in writing from the issuing state.

The Court will, at a minimum, require undertakings that the respondent will be received in custody and maintained in custody at all times until the conclusion of the proceedings in Northern Ireland and that he will thereafter be returned forthwith to this State to serve the remainder of his sentence. Further, the court requires an undertaking that at the point where the respondent falls to be returned to the territory of this State he will be conveyed in custody to this State and handed over to such person as is duly authorised by this Court to receive him. The Court will discuss with counsel the precise form of undertakings to be requested.

Finally, it is not envisaged that the temporary transfer will be effected until a date for the commencement of the respondent's trial has been set by the issuing state, or alternatively a date has been set for a pre-trial procedural hearing or the commencement of a series of pre-trial procedural hearings that is/are expected to result in the fixing of a date for his trial.