THE HIGH COURT

[2016 No. 235 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

DECLAN DEREK DUFFY

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 4th day of March, 2019

Background
1. On the 22nd July, 2010, the respondent pleaded guilty to an offence of murder at Stafford Crown Court, England. He was sentenced to life imprisonment with a minimum tariff of 24 years. He was subsequently transferred to serve his sentence in HMP Maghaberry in Northern Ireland. On the 11th March, 2013, the respondent was released on licence under s. 6 of the Northern Ireland (Sentences) Act, 1998. This legislation was implemented in pursuance of the Good Friday Agreement to deal with "qualified prisoners". One of the conditions of his release was that he would not become a danger to the public.

2. On the 5th December, 2015, the respondent was arrested by An Garda Síochána on suspicion of having committed an offence of false imprisonment on the 9th June, 2015, in Dublin. He was subsequently charged with violent disorder and three counts of false imprisonment. He was remanded in custody. On the 9th February, 2016, the Under-Secretary of State for Northern Ireland suspended the respondent's licence and recalled him to prison. On the 20th September, 2016, the European Arrest Warrant ("EAW") issued.

3. The respondent was arrested on the 17th October, 2016 pursuant to the European Arrest Warrant. The application for surrender in accordance with the provisions of the European Arrest Warrant Act 2003 as amended ("the Act of 2003") was adjourned from time to time at the request of the respondent. These included time to allow him prepare his defence to these proceedings, to prepare for his trial in this jurisdiction and also for a period during which the Court of Justice of the European Union ("the CJEU") was asked to consider an issue arising out of the notice given by the United Kingdom of Great Britain and Northern Ireland ("the UK") under Article 50 of the Treaty on European Union ("TEU") of withdrawal from the European Union ("Brexit").

4. In the interim period, the respondent took part in a review of his case by the Sentence Review Commissioners ("SRC") of Northern Ireland. He appeared by way of video link from custody in this jurisdiction at the hearing before the Commissioners. His sentence was duly revoked.

5. This case raises a number of issues concerning, *inter alia*, the effect of a "suspension" of a licence, whether there is clarity as to the sentence which the respondent is serving, abuse of process, oppression and personal rights claims and the effect of Brexit on the Good Friday Agreement.

S. 16 of the European Arrest Warrant Act 2003, as amended
6. In all applications for surrender pursuant to the Act of 2003, the High Court must consider whether the requested person's surrender is prohibited by any subsection of s. 16(1) of the said Act.

Identity
7. I am satisfied on the basis of the information contained in the EAW and the affidavit of the respondent and his solicitor, that the respondent who appears before me is the person in respect of whom the EAW has issued.

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

S. 21A, 22, 23 and 24 of the Act of 2003
9. 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
10. Subject to further consideration of s. 37, s.38, s. 39 and s. 45 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
11. Under the provisions of s. 38(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 (within the meaning of Article 2, para. 2 of 2002/584/JHA Council Framework Decision on the European Arrest Warrant ("the 2002 Framework Decision") and is an offence of the required minimum gravity (three years). In the EAW, the issuing judicial authority has ticked the box of "Murder". The circumstances in which the offence was committed are set out in part E. He murdered Michael Newman, a British Army sergeant, on the 14th April, 1992, by shooting him at a car park in Derby city centre. He pleaded guilty to this offence.

12. At part C 2 of the warrant it is stated that the length of the custodial sentence or detention order imposed was "Life imprisonment with a minimum tariff of 24 years." In the circumstances, his surrender is not prohibited under the provisions of s. 38 of the Act of 2003.

Section 45
13. S. 45 prohibits surrender in circumstances where a person was not present at their trial unless certain conditions have been met. In the present case, the issuing judicial authority have indicated at part D1 that the respondent appeared in person at the trial resulting in the decision. Therefore, his surrender is not prohibited by the provisions of s. 45 of the Act of 2003.

Section 11 – Sentence Immediately Enforceable?

14. Although not contained within the subsections of s. 16, s. 11, together with s. 10, provides the legislative basis underpinning the surrender procedures in this jurisdiction. Section 10 provides that where a judicial authority in an issuing state issues a European Arrest Warrant in respect of a person *inter alia*, "against whom that state intends to bring proceedings for the offence to which the European Arrest Warrant relates" that person shall subject to and in accordance with the provisions of the Act, be arrested and surrendered to the issuing state.

15. Section 11(1) of the Act of 2003 requires that: -

> *"A European Arrest Warrant shall, in so far as is practicable, be in the form set out in the Annex to the Framework Decision as amended by Council Framework Decision 2009/299/JHA."*

Section 11(1A)(e) provides that a European Arrest Warrant shall specify: -

> *"that a conviction, sentence or detention order is immediately enforceable against the person, …"*

16. In the present case, the respondent objected to surrender on the basis of a claim that the sentence was not immediately enforceable against him at the time of the issue of the European Arrest Warrant. The respondent pointed to the statement in the warrant that the judgment of Stafford Crown Court of the 22nd July, 2010, was an enforceable judgment. The respondent submitted that the obligation on him to recommence serving his life sentence in Northern Ireland was conditional on the Sentence Review Commissioners ("SRC") revoking the respondent's licence. He submitted that such a decision had not been taken at the time of issue of the European Arrest Warrant.

17. The respondent accepted that on the date of the hearing of the s. 16 application, the sentence was immediately enforceable. This was because his licence had been revoked by the SRC by the date of the hearing. He submitted however, that the date relevant to these proceedings is the date of issue of the European Arrest Warrant. On that date he submitted, the sentence was not immediately enforceable as his licence only stood suspended at that date. The respondent's submission was that his surrender was not sought to enforce the life sentence, but instead was to enforce the obligation to surrender to custody pending the consideration of his case by the Sentence Review Commissioners. It was his submission therefore that the obligation did not arise from an "*enforceable judgment*" in the wording of the Framework Decision or "from any conviction sentence or detention order that is *immediately enforceable*" in the wording of the 2003 Act.

18. In the respondent's submission, the temporary conditional nature of the type of detention for which the respondent's surrender was sought in the EAW showed that the suspension of the licence was not a permissible basis upon which to issue the European Arrest Warrant. The respondent used the analogy that there could be no submission for investigative purposes under a European Arrest Warrant. The failure to wait rendered the EAW unenforceable.

Analysis of the Court

19. Additional information was received from the issuing state dated the 15th August, 2018. This was entitled "*Observation / comments on amended notice of objection, Declan Duffy*". The additional information gave a little bit more background to the release on licence of the respondent. The information, referring to the Northern Ireland (Sentences) Act, 1998, stated:

> *"Under s. 9 (1) of the Act of 1998, his licence was subject to the following conditions: -*
>
> > *"(i) that he does not support a specified organisation (within the meaning of section 3);*
> >
> > *(ii) that he does not become concerned in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland;*
> >
> > *and*
> >
> > *(iii) in the case of a life prisoner, that he does not become a danger to the public."*

20. The additional information then stated:

> *"On the 10th February 2016 the Secretary of State suspended Declan Duffy's licence under s. 9(2) of the Act. The reasons given by the Secretary of State were that, in suspending the licence, the Parliamentary Under-Secretary of State (on behalf of the Secretary of State) took account of the respondent's arrest in the Republic of Ireland in relation to charges of violent disorder and three counts of false imprisonment. The Secretary of State considered that these charges indicated that the respondent had breached the conditions of his licence enough to become a danger to the public."*

21. The additional information then went on to indicate that under s. 9(3) of the Act, where a persons' licence is suspended two consequences flow: -

> *"(a) he shall be detained in pursuance of his sentence and, if at large, shall be taken to be unlawfully at large,*
>
> *and*
>
> *(b) Commissioners shall consider his case."*

The additional information also recited the provisions of the s. 9(7) of the said Act of 1998 as follows: -

> *"Detention during suspension of a licence shall not be made unlawful by the subsequent confirmation of the licence."*

22. In relation to the claim that the EAW was invalid as on the date of issue no sentence of imprisonment was immediately enforceable against the respondent, the additional information stated: -

> *"By virtue of s. 9(3), it is not correct to say that when the EAW was issued no sentence of imprisonment was immediately enforceable against Mr. Duffy for the reasons set out above. He was subject to the life sentence described in para. 1 above. The reasons set out above were the references to the legal provisions set out in the foregoing passages".*

23. Despite the above statement as to the legal position in the issuing state, the respondent has never put before the Court any evidence that the sentence is not immediately enforceable in the United Kingdom. That is all the more surprising as the respondent has relied upon certain information about the laws of the UK and the procedures that occurred in the UK by virtue of an affidavit of his solicitor in the present proceedings. This was done on the basis that his present solicitor is apparently licenced to practice in Northern Ireland. Similarly, the Northern Ireland barrister who represented him in the review proceedings before the SRC also swore an affidavit. Neither of those lawyers contradict the foregoing statement as to the legal position in Northern Ireland pursuant to the provisions of the Act of 1998.

24. On the contrary, counsel for the respondent sought to construct an argument based on a difference between the word "suspend" and the word "revoke" contained in various pieces of UK legislation. For any such submission to succeed, it would necessitate this Court entering into an adjudication of the construction of foreign laws in order to ascertain whether a sentence was immediately enforceable or not at the date of issue of the European Arrest Warrant. Any such exercise could only take place when a court has before it evidence that would demonstrate that the law in the issuing state was not as it appeared in the warrant. No such evidence is before the Court here. On that basis this point is rejected.

25. It is appropriate to make further comment on the submission that this Court should embark in a consideration of whether this sentence was immediately enforceable or not. Not only is that highly undesirable in the context of the EAW mechanism, which provides for a simplified form of surrender procedures, but it is unclear if the principles of mutual trust would permit such an exercise by the High Court as an executing judicial authority. It is useful in that context to note the dicta of Murray C.J. in the *Minister for Justice and Equality v. Ó Falluin* [2011] 2 I.L.R.M. 1. In that case the Supreme Court was being asked to hold that the EAW had not been "duly issued" in the United Kingdom.

26. Murray CJ. in *Ó Falluin* stated:

> *"I do not consider that there is anything within the Framework Decision and in particular the Act of 2003 which envisages that our courts would conduct a judicial inquiry in order to determine whether as a matter of German law, French law, United Kingdom law, Latvian law, or as the case may be, a European Arrest Warrant produced and authenticated as having been issued by the relevant judicial authority is valid. Issues concerning the validity of an order of a court within the meaning of its own national law invariably fall to be tried and determined by the courts of that country. It would be invidious, to say the least, if the court of one country were to pass judgment on the validity of an order or act of a court in another country under the latter's national law and set it aside as not having the effect which it purports to have on its face. Accordingly I do not consider that the use of the word "duly" in the Act of 2003 (though now removed by an amendment in the Criminal Justice (Miscellaneous Provisions) Act 2009) was ever intended to have such a meaning or effect which would require our courts, in the field of public law to exercise an unprecedented form of jurisdiction."*

27. Murray C.J. went on to say that it was not necessary in that case to examine whether in enforcing the EAW system there might be some exception to this rule in egregious circumstances such as where there was some element of fraud involved in seeing the issuing of a warrant. But even then he suggested it would also seem to be an issue to be addressed by the court of the issuing state. In the present case there is no suggestion of fraud. The respondent has made this case based upon the Irish legal provisions or the provisions of the 2002 Framework Decision. The issue however, that he seeks to determine is whether as a matter of UK law the sentence was immediately enforceable. The dicta of Murray C.J. appears relevant to that consideration as it is only where a sentence is enforceable that an issuing state may issue a European Arrest Warrant. This is because Article 1 of the 2002 Framework Decision states that a EAW is a judicial decision issued by a member state with a view to the arrest and surrender for the purpose of executing a custodial sentence or detention order. A sentence can only be executed if it is enforceable.

28. In any event, this Court does not have to decide whether it could or should enter into a determination on whether to engage in a construction of UK law. This is for the simple reason as aforesaid, that there is no evidence before the Court to indicate that the sentence was anything other than immediately enforceable at the time the EAW issued. There is a clear statement from the issuing state that this sentence was immediately enforceable. The issuing state has gone so far as to provide an explanation together with the legal provisions as to how that conclusion was reached. In those circumstances, the Court has no grounds for even beginning to enter into a construction of whether in UK law this sentence was immediately enforceable. The Court must therefore dismiss this point of objection.

29. Finally, and for avoidance of any doubt, the Court notes that even the comparison that the respondent sought to draw with the provisions of UK law set out in the case of *Minister for Justice v Balmer* [2017] 3 I.R. 562, does not provide the respondent with any support for his argument. That case concerned the revocation of a life sentence imposed in England and Wales for breach of licence. It is not, the Court repeats, the usual function of this Court to construe foreign law, but the legal provisions set out in *Balmer* reveal that even under a revocation, there is a requirement for the proceedings to be placed before another body who will ultimately decide whether the parole or licence may be continued. Thus, in either case, the sentence is to be served, but the recall is subject to a review by another body.

Section 37 (1)

Unclear how long must be served prior to becoming eligible for release

30. The respondent claimed that surrender was prohibited by virtue of s. 37(1) of the Act of 2003, and/or by Article 47 of the Charter of Fundamental Rights of the European Union and/or because of noncompliance with s. 11(1A)(g)(iii)of the said Act of 2003. He submitted that it was unclear on the date of issue of the EAW and remains unclear what penalty the respondent was and is liable to in Northern Ireland. This was allied to a claim that the criteria to be applied by the SRC, when considering whether he should have a further application for release, were unspecified. The respondent submitted it was unclear if he would have to serve a 24 year sentence of imprisonment (the tariff period) without parole in circumstances where he had been previously judged not to pose a risk.

31. The respondent referred to s. 11(1A)(g)(iii) of the 2003 Act which provides that an EAW shall specify: -

> *"where that person has been convicted of the offence specified in the European Arrest Warrant and a sentence has been imposed in respect thereof, the penalties of which that sentence consists."*

At the outset the respondent clarified that his case was not based upon a claim that a EAW must state the date of release. It was accepted that such information was not required by either the 2002 Framework Decision or the Act of 2003. Instead the respondent focused on the indication given as to the tariff and also to issues of whether he was eligible for further release pursuant to the 1998 Northern Ireland legislation.

32. The respondent pointed to a press report about a loyalist prisoner, Michael Stone, who had been released pursuant to the 1998 provisions but had committed another offence. Mr. Stone was involved in litigation designed to identify whether time on licence counted towards the tariff period as having been served. The respondent also pointed to correspondence his Northern Ireland solicitors had with the Northern Ireland authorities in relation to his ability to appeal again to the Sentence Review Commissioners. It seems that this issue had been resolved because he had been sent an application form by the SRC to apply for release. Moreover, it must be noted that the additional information provided by the issuing state made clear that the Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998, provided for further applications to be made to the SRC for release. The issuing state provided information as to the grounds on which the Commissioners may only determine a further application.

33. The respondent sought to apply the decision of the Supreme Court in *Minister for Justice and Equality v. Connolly* [2014] 1 I.R. 720 by analogy. In that case, the Supreme Court (Hardiman J.) stated that there must be unambiguous clarity as to the number of offences and the nature of offences for which surrender is being sought. It is also the case that the Supreme Court in *Minister for Justice and Equality v. Herman* [2015] IESC 49 stated a similar principle with regard to the sentence to be served.

34. This point of objection of the respondent must also be rejected. He has been sentenced to a penalty of life imprisonment with a minimum tariff of 24 years. The sentence is one of life imprisonment. That has been made clear throughout the EAW and the additional information. There is no breach of s. 11(1A)(g)(iii), as there is a clear statement of the penalty. The manner in which release provisions operate, whether they be remission, parole, or licencing provisions, is to be determined within the issuing state. The principle of mutual trust requires this Court to accept that the UK will apply its own rules in determining release. Furthermore, any challenge to those release rules is a matter to be determined in the issuing state.

35. It would only be in circumstances where it was established there were egregious circumstances, such as a clearly established and fundamental defect in the system of justice in the issuing state, that this Court may consider that surrender is prohibited (*Minister for Justice and Equality v Brennan* [2007] 3 I.R. 732, *Minister for Justice and Equality v Balmer* [2017] 3 I.R. 562). There is no evidence of that in this case. The evidence is all to the contrary; a formal system of review of detention is available together with the possibility of judicially reviewing that decision. The evidence from the issuing state clarifies that he is entitled if certain conditions are met, to have his sentence reviewed by the Sentence Review Commissioners. There is no lack of clarity with respect to the legal position he finds himself in – he is to serve the sentence of life imprisonment and may apply for early release under the legal provisions in the issuing state. I am satisfied that there is no egregious circumstance that would require this Court to refuse to surrender him.

S. 39 of the Act of 2003

36. Section 39 (2) of the Act of 2003 provides as follows: -

> *"(2) A person shall not be surrendered under this Act where he or she has, in accordance with the law of the issuing state, become immune, by virtue of any amnesty or pardon, from prosecution or punishment in the issuing state for the offence specified in the European Arrest Warrant issued in respect of him or her."*

37. The respondent's submission was that because the 1998 Act in Northern Ireland disregarded the tariff by operation of law, an amnesty or pardon had effectively been given. The respondent sought to distinguish the dicta of this Court in *Minister for Justice and Equality v. Corry [*2016] IEHC 678, where it was rejected that the provisions of the Good Friday Agreement had led to a system of amnesty.

38. In *Minister for Justice v. Corry*, this Court stated at paras. 14, 15 and 16: -

> *"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."*

39. The respondent submitted that *Corry* could be distinguished on the basis that s. 39 of the Act of 2003 clearly did not apply to those proceedings. In *Corry* the requested person was being prosecuted in Germany rather than in the UK or Ireland and therefore the reach of the Good Friday Agreement did not apply. Counsel submitted that it is not authority for the proposition that early/ accelerated release under the 1998 Act does not constitute a pardon or amnesty. He submitted that the findings of the Supreme Court as to the nature of UK life sentences i.e. being punitive in nature, do not apply where there has been in essence a pardon or amnesty and the punitive nature of the sentence is thus over.

40. The respondent did not produce any evidence of the laws of the issuing State that would demonstrate that this was an amnesty or pardon. He did not engage with the additional information from the issuing state that rejected the contention of amnesty and pardon. The reply from the issuing state makes it clear that he remains liable to return to prison on foot of the life sentence that has been imposed.

41. Section 39 provides that there must have been an amnesty or pardon in the issuing State. There is no evidence of such. Furthermore, even if one is to engage with the argument that release under the 1998 Act changed the nature of the sentence, the information before this Court is that on its own terms, the 1998 Act provided that early release was not to be understood as a pardon or amnesty. A person released on licence was still subject to the sentence and subject to the conditions of the licence. Breach of the

licence was clearly stated in the legislation to provide for return to custody to serve the sentence. The sentence was therefore still extant. In those circumstances, there was no pardon or amnesty in any commonly understood meaning of those terms whether by reference to their ordinary meaning or to relevant legal interpretations. In that regard, it is instructive that the respondent has never pointed to any legal authority from any jurisdiction whatsoever that would construe pardon or amnesty as including a situation where a person was released on licence but the sentence remained extant. For the reasons set out, the Court rejects this point of objection.

Abuse of process/ oppressive double punishment

42. This point of objection was made on the basis of a set of individual objections, but also relied upon as cumulatively grounding a strong basis for prohibiting surrender. It is necessary to identify the overall contention being made by the respondent as well as the individual grounds for this objection.

43. Overlaying this submission was the respondent's contention that this was an entirely unusual case. The respondent submitted that the effect of the Good Friday Agreement is significant. The submission also emphasised that if he had to serve 24 years before being eligible for release, this would have the effect of having two decades to serve in circumstances where he had previously been adjudged to be entitled to release after just over two years.

44. An initial issue for this Court to resolve is his submission that it was premature for the Secretary of State to suspend his sentence. The respondent pointed to the fact he was in custody in this jurisdiction. Even if he had received bail, he would still have been bound by conditions to appear in this jurisdiction. He submitted that it was unnecessary, premature, disproportionate and oppressive to issue the EAW based only on the suspension of the licence when the Under-Secretary of State should have known, (or at least could have easily ascertained) that the SRC were willing and able to arrange a hearing by video link for the purposes of deciding on whether the licence should be revoked (as indeed ultimately they did). He thus argues that both the Under-Secretary's decision and the subsequent decision to issue the EAW were disproportionate and oppressive.

45. Article 49(3) of the Charter on Fundamental Rights was relied upon by the respondent. That provides that the severity of penalties must not be disproportionate to the criminal offence. The initial penalty was a matter for the issuing state in the penalty. The respondent submits that it is disproportionate that he is now being sought to serve at least the remaining portion of his tariff in circumstances where he has already been sentenced in this jurisdiction to a period of imprisonment, which is the basis for the recall.

46. This Court rejects the contention that it is appropriate for this Court to examine and adjudicate upon the proportionality of either the initial decision to suspend his licence or the subsequent issue of the European Arrest Warrant. The Supreme Court in *Minister for Justice and Equality v. Ostrowski* [2013] 4 I.R. 206, held that once the EWA met the minimum gravity test for an offence set out in the Framework Decision and the 2003 Act, it was not for the High Court to create and apply a proportionality test to a potential sentence. That was in the case of an offence for prosecution. A similar principle applies where there has already been a sentence imposed but the issue is one of enforcement of that sentence in the issuing state.

47. Proportionality does however have application in the consideration of personal and family rights, whether under Article 8 ECHR, or Article 40 of the Constitution. When considering proportionality in terms of whether to surrender a person, the law is equally clear. The question is: do the private and family interests of the requested person outweigh the public interest in surrender? The Court has to consider the circumstances as they apply at the date of the hearing before the High Court for surrender under s. 16 of the Act of 2003. This Court will deal with the issue of proportionality further below.

48. The respondent has also relied upon Article 50 of the Charter on Fundamental Rights, which provides as follows: -

> *"No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."*

49. The respondent accepted in his oral submissions that this situation was not in a strict legal sense a double punishment. Instead, he asked the Court to accept that he was *in effect* being punished twice because his licence was being revoked on the basis of a conviction for an offence for which he is already being punished here. This was allied to his submission that the tariff imposed upon by him by the court had been disregarded when he was released after he had served just over two years.

50. He pointed to the six year sentence that was imposed upon him in respect of the offences committed in this jurisdiction. This was, he submitted, part of the overall circumstances that this Court had to take into account in assessing whether it was oppressive to surrender him.

51. In respect of the claim that there was an abuse of process, the respondent relied on the case of *Minister for Justice, Equality and Law Reform v. Horvath* [2013] IEHC 534. He submitted that that case confirmed the jurisdiction to refuse surrender in circumstances of oppressiveness which was connected to the concept of abuse of process. In *Horvath* Edwards J. held: "This Court accepts that even if there has been no deliberate attempt to abuse the Court's process that is not automatically the end of the matter. It accepts that if the overall circumstances of a case are such as to oppress a respondent that can amount to an abuse of the process."

52. The respondent also referred to the Supreme Court decision in *MJE v. J.A.T. (No. 2)* [2016] IESC 17 where O'Donnell J. commented: -

> *"Where a true abuse of process is established, I think it would normally follow as a matter of logic that the proceedings should not be further entertained and should normally be struck out."*

The respondent also quoted from Hunt J. in *MJE v. Bailey* [2017] IEHC 482. It was accepted that *J.A.T (No. 2)* and *Bailey* indicated that the abuse of process jurisdiction would arise predominantly in the limited category of cases involving a second or subsequent request for rendition. Nonetheless the respondent submitted that an abuse of process might arise even in a first application for a warrant. Overall, it was submitted that this jurisdiction of abuse of process was a broad one, and this was such an unusual case that it should be refused.

53. The respondent also relied upon issues such as the re-imposition of a 24 – year punitive tariff on him where he had already been released. He submitted that the Good Friday Agreement and the 1998 Act that followed had rendered redundant any tariff that might have been imposed. Overall, his submission was that to require him to serve the full tariff was disproportionate. He referred also to his personal circumstances as regards his life partner and also as to his attempts to rehabilitate himself while in Portlaoise Prison.

54. Each of the respondent's arguments can be readily rejected. As stated above it is not for this Court to consider the

proportionality of issuing the European Arrest Warrant. Even when considering the proportionality of what occurred in the context of his personal rights, this is a case where the respondent pleaded guilty to an offence of murder for which a sentence of life imprisonment with a minimum tariff of 24 years was imposed. The respondent has accepted as indeed he had to, that a life sentence was not disproportionate for the offence of murder.

55. In seeking to suspend or indeed later having revoked the sentence, the Secretary of State took into account the fact that he had been charged with extremely serious offences in this jurisdiction. In terms of the oppressiveness of surrendering him at this point, it is clear that the offences for which he was convicted in this jurisdiction were serious and a substantial sentence of six years was imposed upon him. In circumstances where he had been released on licence only from the sentence of life imprisonment, with a condition not to become a danger to the public, the subsequent event was of considerable seriousness.

56. There is no issue of *ne bis in idem* or double criminality. He is not being punished again in Northern Ireland for the offence of false imprisonment, but instead is being required to serve his sentence of life imprisonment arising from the breach of the conditions of licence. As regards his efforts to rehabilitate himself, the evidence establishes that many of the certificates and letters that he relies upon were in fact placed before the SRC during his review in March 2018. In any event, there is no evidence that such rehabilitative efforts would not be considered at any hearing in the future. Furthermore, those efforts are a matter for the authorities in the issuing state.

57. In terms of an abuse of process, this Court recalls the dicta of O'Donnell J. in *J.A.T. (No. 2)* as follows:

> *"These factors – 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. Even then, and without undervaluing the offences alleged here, it is open to doubt that these matter would be sufficient to prevent surrender for very serious crimes of violence. This illustrates that the decision in this case is exceptional, and even then close to the margin."*

58. This Court has no hesitation in rejecting the respondent's submission that it would be an abuse of process to surrender him. The circumstances grounding the respondent's submission under this heading do not come remotely near the type of grounds that would require this Court to prohibit surrender. By way of analogy, it is difficult to conceive of this argument being made, let alone being successful, if a person's temporary release under similar provisions was revoked in this jurisdiction for the commission of such grave offences. The existence of the Good Friday Agreement and these provisions did not and do not provide any basis for making an argument of abuse of process. The legislation provided a process for release. That release was on licence subject to conditions. The underlying sentence remains in place. That was a sentence of life imprisonment imposed for an offence of the utmost gravity. It is a matter for the UK authorities to assess whether those conditions have been broken. It is for this Court to surrender where there is an enforceable judgment in being provided that all other conditions of the Act of 2003 have been met.

59. It is important to remember that what is at issue here is a sentence of life imprisonment imposed for the commission of the offence of murder. The respondent was released on licence to comply with certain conditions. His has now been convicted of serious offences and received a sentence of imprisonment. There was no delay in seeking his surrender. The UK authorities acted promptly on their knowledge of his arrest in respect of those offences His present circumstances in terms of his rehabilitative efforts or his family rights are not in any way unusual. It is therefore neither oppressive nor disproportionate to order his surrender. I therefore reject these points of objection whether taken individually and when taken cumulatively.

Brexit

60. The respondent's submission under this heading relied upon the fact that the early release provisions under the 1998 Act had been enacted as a direct result of the UK government's obligation under the Good Friday Agreement. It was submitted that those had been extremely controversial and might have been seen as a political necessity rather than enjoying significant popular support. While it was accepted that the UK government's policy documents and political statements expressed a desire to safeguard the Good Friday Agreement and to protect it from the effects of Brexit, it was submitted that those aspirations lost their relevance in the event of a "No – deal Brexit". It was submitted that the obvious concerns for the effect of Brexit on the integrity of the Good Friday Agreement would have a direct effect on the present case.

61. The respondent referred to the UK government's 9th January 2019 publication entitled "*UK government commitments to Northern Ireland and its integral place in the United Kingdom*". It was noted that at para. 5 it was stated that: -

> *"The Joint Report recognised that arrangements would be required to guarantee the absence of a hard border and uphold the Belfast Agreement in the event that permanent arrangements were not ready. Reflecting that, the Withdrawal Agreement provides for a Northern Ireland "backstop", which sets out a limited set of measures that would apply in the event the future relationship or alternative arrangements were not in place by the end of the Implementation Period. The Joint Report and the Withdrawal Agreement both set out unequivocally that the constitutional status of Northern Ireland and the principle of consent will be fully respected."*

62. It was submitted that the obvious implication of stating that the arrangements such as the backstop would be needed to uphold the Good Friday Agreement is that, in the event that arrangements are not in place, the integrity of the Good Friday Agreement would be at risk.

63. While the respondent accepted that the Court of Justice had ruled on the issue of Brexit in *R.O*. Case C-327/18, 19th September 2018, it was submitted that mere notification had been given in that case and that other arguments would have to be looked at differently if and when the UK leaves the EU. It must however be recalled that in R.O. the CJEU held:-

> *"In the absence of substantial grounds to believe that the person who is the subject of that European arrest warrant is at risk of being deprived of rights recognised by the Charter and the Framework Decision following the withdrawal from the European Union of the issuing Member State, the executing Member State cannot refuse to execute that European arrest warrant while the issuing Member State remains a member of the European Union."*

64. The respondent in the present case submitted that his position is different from *R.O. (or Minister for Justice v O'Connor* [2018] IESC 19). He submitted that the particular legislation that could make a difference of more than 21 years to the time which the respondent would have to serve in prison, that is, the 1998 Act, is unquestionably a creature of the Good Friday Agreement. He submitted that it seemed to be accepted by the UK government that specific Brexit agreements with the EU would be necessary in order to uphold the Good Friday Agreement. Such agreements would not be in place in the increasingly likely event of a "No – deal Brexit".

65. The respondent confirmed that in this argument he was not contending that the 1998 Act had been enacted to reflect any fundamental rights of prisoners to early release. However, he said that as it had already been applied in the respondent's case, it would be arbitrary, oppressive and unjust to now require him to serve the full 24-year tariff.

66. In the view of the Court, the respondent's argument is entirely speculative. He has not provided a shred of evidence to suggest that provisions, such as the 1998 Act, are truly at risk in the event of Brexit. Indeed, many of the reports from which he quotes and which were exhibited in the affidavit of his solicitor, confirm the importance of the Good Friday Agreement. Even if there was to be a breach of aspects of the Good Friday Agreement, concerning the nature of the border, it is not indicated in any report that other fundamental aspects of the machinery implemented following the Good Friday agreement, such as the Northern Ireland Assembly and the release of qualifying prisoners, are affected at all.

67. In the view of the Court, this point must be rejected. There are no grounds for believing that the respondent is at real risk of having any fundamental right, including a right to fair procedures, being violated in the event of his surrender. There is no ground for believing that the position as regards his entitlement to apply for release under legislation enacted to implement the Good Friday Agreement is at any risk whatsoever due to Brexit or for any other reason.

Conclusion

68. For the reasons set out above, this Court rejects each of the points of objection of the respondent. In the circumstances, the Court will order the surrender of this respondent to such a person as is duly authorised by the issuing state to receive him.