THE HIGH COURT

[2018 No. 33 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ROY NORMAN KENYON

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 03rd day of May, 2019

1. Pursuant to a European Arrest Warrant ("EAW") dated 29th November, 2017, a judicial authority in the United Kingdom of Great Britain and Northern Ireland ("the UK") seeks the surrender of the respondent to serve a sentence of life imprisonment imposed upon him on the 21st March, 1972 in respect of an offence of murder. The respondent was a juvenile at the time of his conviction for the murder of a 74 year old woman in her own home.

2. The respondent absconded on the 28th March, 2003 while on temporary release licence. A parole board in the UK had been considering his release at that time but had not made a decision to release him. It appears that he fled to this jurisdiction where he lived under an assumed name. In March, 2017, he contacted An Garda Síochána with a complaint about an unrelated matter to do with a neighbour. He gave the Gardaí his correct name. Having been invited to surrender himself to the UK authorities, he moved away from where he had been living in Tullamore, Co. Offaly.

3. The EAW was then issued in the UK and was endorsed by the High Court for execution in this jurisdiction. On the 2nd May, 2018, the respondent was arrested on the EAW when he was located in West Cork.

4. The respondent filed a notice of points of objection. Those points of objection contained wide ranging objections to surrender, primarily claiming that to surrender him would amount to a violation of his rights under the Constitution and under the European Convention on Human Rights ("ECHR"). By the time of his written submissions, the respondent's case focused upon two interlinked aspects. The respondent claimed that there was a violation of his rights because there was no longer any causal link between his detention on this sentence and his original detention for the offence of murder. Thus, he claimed it would be egregious to surrender him in light of the lack of evidence that he was a real risk to the public. He claimed his lengthy residence in this jurisdiction demonstrated that he was capable of living within the community and furthermore that he had served such a lengthy time of imprisonment in the UK without any indication that he would commit an offence of violence in the future.

5. Prior to dealing with the specific issues that arise in this case, this Court must deal with the uncontested matters in order to establish whether the conditions under the European Arrest Warrant Act, 2003 as amended ("the Act of 2003") have been met.

A Member State that has given effect to the Framework Decision
6. The surrender provisions of the Act of 2003 apply to the member states of the European Union ("EU") that the Minister for Foreign Affairs have designated as member states having, under their national law, given effect to the Council Framework Decision (2002/584/JHA) of the 13th June, 2002 on the European Arrest Warrant and the surrender procedures between Member States ("the Framework Decision"). I am satisfied that the Minister for Foreign Affairs has designated the UK as a member state for the purpose of the Act of 2003.

Identity
7. I am satisfied on the basis of the affidavit of Mark O'Donovan, member of An Garda Síochána, the affidavit of the respondent and the details set out in the EAW, that the respondent, Roy Norman Kenyon 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.

Sections 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 the above provisions of the Act of 2003. I have addressed a particular aspect of s.22 in the judgment below.

Part 3 of the Act of 2003
10. Subject to further considerations of ss. 37, 38 and 45 of the Act of 2003, and having scrutinised the documentation before me, I am satisfied that I am not required to refuse the surrender of the respondent under any other section contained in Part 3 of the said Act.

Section 38 of the Act of 2003
11. Section 38 of the Act of 2003 provides for two situations in which surrender may be permitted for specific offences. If the offence in the EAW is an offence referred to in Article 2 para. 2 of the Framework Decision, then, provided the requirements of minimum gravity in terms of available sentencing powers have been met, there is no requirement to find correspondence/double criminality of the offence with an offence in this jurisdiction.

12. In the present case, the issuing judicial authority has ticked the box of murder under point (e) of the European Arrest Warrant. In doing so, the issuing judicial authority relies on Article 2, para. 2 of the Framework Decision. A life sentence has been imposed. The facts set out in the EAW outline an offence of murder. In those circumstances, there is no manifestly incorrect designation of the box in point (e). His surrender is therefore not prohibited under the provisions of s. 38 of the Act of 2003.

Section 45 of the Act of 2003
13. This section concerns the issue of trial *in absentia*. In the present case the issuing judicial authority has indicated that the respondent appeared in person at the trial resulting in the decision. In those circumstances, where it is clear that no trial *in absentia* has taken place, I am satisfied that his surrender is not prohibited by s. 45 of the Act of 2003.

Points of Objection
14. In his written submissions, the respondent helpfully reduced his points of objection into a more manageable form. His main points of objection were collected under the heading "Surrender to indeterminate preventative detention". This general objection was stated as follows: -

> *"If the respondent is surrendered, he will resume serving an indeterminate period of preventative detention on the basis that he poses a risk to the public. This is in circumstances where the respondent has already served 31 years in custody, seventeen of which were in preventative detention; the offence which led to the sentence was committed when the respondent was a juvenile; and the respondent has demonstrated, during the fifteen years he was at large in this jurisdiction, that he does not pose a continuous public risk. In those circumstances, the imposition of further preventative detention would contravene the respondent's rights under Articles 3 and 5, para. 1 of the Convention. Further or in the alternative, it would be an egregious breach of the respondents' constitutional rights to freedom from inhuman or degrading treatment, liberty and the presumption of innocence. For the same reasons, surrender would violate Articles 4, 6 and 49 of the Charter. Accordingly, surrender is prohibited by s. 37 of the European Arrest Warrant Act 2003".*

15. A second general point of objection related to the absence of safeguards pertaining to the respondent's release from custody. Under this objection, the respondent claimed that he would not be provided with access to the necessary rehabilitative services to satisfy the parole board and as a result this would constitute a violation of his rights under Articles 3 and 5(1) of the European Convention on Human Rights. It was also said that the evidence suggested that there was a the risk that the parole board will not conduct sufficient regular reviews of the respondent's case so as to ascertain when release would be appropriate and consequently his rights under Article 5(4) of the ECHR would be violated.

16. This claim appeared to be based upon the affidavit of the respondent. The respondent claimed a lack of rehabilitative services and also that he had not been subject to regular reviews and would not be subject to regular reviews if he were to be surrendered. The information obtained from the respondent's legal expert from the UK (which is set out in detail below) and the information provided by the issuing state meant that the respondent did not persist in this claim in oral argument. The evidence demonstrated that contrary to the respondent's assertions, he had been granted regular reviews on a more frequent basis than he recollected. Furthermore, as a matter of UK law he was entitled to a review at least every two years. Not only that but the evidence also demonstrated that reviews at a greater frequently may be required in specific cases. The lack of a timely review within the two year period is judicially reviewable in the UK courts. No authority was placed before the Court to suggest that the legal and factual position in the UK was incompatible with ECHR requirements for review. This aspect of his claim must be rejected.

17. The respondent maintained that because he had absconded it would mean that he had to start at the very beginning in order to demonstrate that he was no longer posing a risk to the public. The respondent claimed that this violated his rights. In the view of the Court, it is appropriate to deal with that under the main ground of objection. The issue with being provided with the necessary rehabilitative programmes was also not pursued as it was clear that specific programmes were provided to this respondent and indeed on occasion he did not avail of them himself, while on other occasions he did so avail.

18. His final general point of objection was a lack of clarity in the European Arrest Warrant. He pointed to a lack of detail concerning the licence conditions upon which he was released, of any breach of those conditions or of any parole board's involvement. It was also claimed that the EAW used different terms to describe the sentence imposed and it was not clear in the nature of same. This point of objection was not vigorously pursued, correctly in my view, in light of the evidence that came from the issuing state (and to a certain extent supported by the legal opinion of the respondent's legal expert) as to the nature of the sentence and also as to the conditions on his temporary release licence. This point of objection can be rejected.

Section 37 of the Act of 2003
19. Section 37(1)(a) of the Act of 2003 provides that a person shall not be surrendered on foot of an EAW if his surrender would be incompatible with the state's obligations under the European Convention on Human Rights. Section 37(1)(b) prohibits surrender where it would constitute a contravention of any provision of the Constitution. The respondent filed his own affidavit and that of a legal expert in support of his contention that surrender would be in breach of the above section.

The respondent's affidavit
20. In his original affidavit, the respondent stated that he was detained on foot of his sentence at Her Majesty's pleasure since he was sentenced in 1972 when he was seventeen years of age. He said that he had been remanded in custody from the 15th December, 1971 when he was sixteen years old. He set out a number of institutions in which he said he was held for certain stated periods. The respondent admitted that on two prior occasions he had absconded from an open prison but was only absent for a couple of days each time.

21. The respondent said that while he was in Her Majesty's Prison ("HMP") Leyhill, from 2000 up to when he absconded in 2003, he undertook unpaid work in the community, in a charity shop, and as a gardener at a school or at a waste disposal recycling centre. He queried the date in the warrant as to when he had absconded.

22. He said that he had come to Ireland on the 24th April, 2003 to live in this state and he had lived under a particular alias during his time here. He said he left Tullamore, Co. Offaly, where he had lived from 2005 to 2017, due to issues with the accommodation that he was renting. An individual, who was living next door to the respondent at the time, had been carrying out certain intimidatory actions and his landlord did nothing to prevent it. He made a complaint to the Gardaí in Tullamore about that situation in or about March, 2017 and used his real name rather than his alias when doing so. He said he was told the Gardaí would keep an eye on the situation, but they did nothing further and the intimidation continued. He said in those circumstances he decided that he would leave Tullamore. This contradicted what is said in the EAW, which was that he was advised to surrender to the UK border but that he declined to so surrender. He said he then stayed in Galway, Kerry and Clare for brief periods, and in September, 2017 spent his time mostly living in a rented caravan at Eyeries Castletownbere until he was arrested on the EAW in May 2018.

23. The respondent said that during the fifteen years he spent in this state, he had not come to any adverse Garda attention nor had he been in any trouble whatsoever. He said he had not engaged in any behaviour that might be construed as posing a threat to any member of the public. Instead, he said he lived a quiet peaceful life and kept to himself.

24. He said that the EAW made clear that the UK seeks his surrender for the purposes of detaining him on a preventative basis for an indeterminate duration, solely on the grounds that he poses a risk to the public. He said that to surrender him in those circumstances would be arbitrary and unjust especially where he has not demonstrated any such risk for the period of fifteen years for which he has been at large. He said that over the last fifteen years he has formed a life for himself in this state and that surrender would be a

disproportionate interference with his right to respect for his private life.

25. The respondent maintained that the parole board only reviewed his sentence on six occasions during the 31 years he spent in custody. He said they refused to direct his release on any of these occasions. He gave information about specific reviews including where it said he had been directed to complete certain courses. He maintained that he had difficulty in completing some of the courses because they were discontinued by the prison while he was in the process of completing them. He said that on one review the parole board indicated that they would not set a date for his release as they wanted him to complete the courses that he had partially finished.

26. In relation to his sixth parole board review, the respondent said the parole board refused to release him again on the basis that he had taken a drink while at home, that he was institutionalised and that he would not be able to survive in an unsupervised setting. He was not given any indication of when it might be appropriate to release him, but the parole board stated that he should be given home leave again. He said that this failure to set a release date left him feeling completely hopeless that he would never regain his liberty and that led him to abscond when he was given home leave in April, 2003.

27. The respondent accepted that when he was first incarcerated he did not participate in courses in prison. He said however as time went on, and for the bulk of his 31 years in custody, he engaged with all necessary services and undertook all courses that the parole board requested. He said that despite this activity, the parole board was never satisfied that he had rehabilitated himself to the extent that he no longer posed a risk to the public and could be released from imprisonment and it never seemed to him that release was in reach.

28. The respondent stated that in those circumstances, he faced a sentence which was irreducible in *de facto* terms, i.e. nothing he could do was enough to secure his release. He also said that alternatively if release could potentially be obtained, it was clear that he was not provided with the necessary rehabilitative services or facilities to make his release a realistic possibility or to satisfy the parole board's particular concerns.

29. The respondent again said that he had only had four parole board reviews in seventeen years that had elapsed between the expiration of the stated minimum tariff for his sentence on the 1st December, 1985 and when he left the UK in April, 2003. He also complained that the parole board will take the fact that he absconded into account as a factor in deciding that it is not appropriate to direct his release. The respondent contended that this factor would be an improper and unfair consideration to take into account and it would mean that the parole board was acting contrary to his right to liberty.

30. The respondent also complained that he would be segregated and given additional punishment if he was returned. This point of objection was not pursued by him. A claim that surrender would be a breach of his Article 8 rights to respect for his private life was also not pursued.

The respondent's affidavit of laws

31. The respondent obtained an affidavit of laws from a barrister at the Bar of England and Wales; Christopher Sykes. Mr. Sykes gave his opinion having reviewed the extradition request for the respondent and the request for further information. He appears to have relied upon the information provided by the respondent as to the parole board reviews. In terms of his views on life sentences, the issuing state did not contest any of the statements as to law contained in this opinion.

32. Mr. Sykes said that following a conviction for murder, it is a statutory requirement for one of three life sentences to be passed. The sentence imposed in this case was a sentence of detention at Her Majesty's pleasure. This is a sentence imposed on offenders under the age of eighteen when they commit the offence of murder. Although he referred to legal provisions which post-dated the imposition of the sentence on the respondent, it appears from his opinion that the respondent is serving, and has always been serving, a life sentence. This sentence is and has been one known as a sentence of detention at Her Majesty's pleasure. Mr. Sykes referred to the case of *V. v. UK* [1999] 30 EHRR 121 in which this type of sentence was challenged as being incompatible with Articles 3 and 5 of the European Convention on Human Rights. That claim was rejected by the European Court of Human Rights ("ECtHR").

33. Mr. Sykes explained the concept of "tariffs". There is a minimum term, or more colloquially, a tariff, before the parole board considers a life prisoner's suitability for release. Under the relevant legislation dating to 1967, the tariff for prisoners serving at Her Majesty's pleasure was to be set by the Secretary of State after consultation with the Lord Chief Justice and with the trial judge if available. The tariff runs from the date of the first remand in custody and includes all periods in custody. It constitutes the "punitive" period of sentence that must be served so as to satisfy the requirements of retribution and deterrence.

34. The tariff must generally be served in full. Mr. Sykes stated that the key distinction of detention at Her Majesty's pleasure is that, unlike adult mandatory lifers, all Her Majesty's pleasure detainees are entitled to a continuing review of their tariff in light of their rehabilitative progress and with a view to reducing the tariff. The review of Her Majesty's pleasure detainees, who were children at the time of their offence, must also incorporate the welfare principle. Therefore, the development of the child in custody is a relevant consideration to the review of the offender's progress and the impact of continuing custody.

35. He referred to various principles relevant to the review of a tariff, as found by the High Court of England and Wales in the case of *Andre Thompson* [2017] EWHC 33 44 (QB). He also referred to various criteria that may be relevant to the respondent such as "*successful engagement in work (including offending behaviour, offence related courses) with a resulting reduction in areas of risk".*

36. Mr. Sykes explained that the expiry of the punitive period does not lead to the automatic release of the prisoner. Instead, this merely permits the parole board to consider directing the release of the prisoner on licence. The prisoner remains in custody as part of a new and indefinite preventative period of their sentence.

37. Mr. Sykes also gave information about the legal requirements of those who may be released on licence. Mr. Sykes explained that also that in 1972, the minimum term would have been set by the Secretary of State. In 2002, it was ruled that the setting of tariffs by the Secretary of State was incompatible with Article 6 European Convention on Human Rights. The tariff for a period of detention at Her Majesty's pleasure is now fixed by the judge in open court at the conclusion of the trial. Mr. Sykes confirmed that given the EAW stated that his tariff expired on the 1st December, 1985, the respondent would have been in preventative detention since that date. He said that he would return to indefinite preventative detention if returned to the United Kingdom.

38. Mr. Sykes then gave his legal opinion on the parole board. He said that when considering the application of a life prisoner for release during the preventative portion of the sentence, the primary concern of the parole board is whether that prisoner poses a continuing risk to the public. He said there was no definitive test prescribing the conditions or circumstances in which a prisoner should be released.

39. The parole board acts independently of the Secretary of State in deciding what licence conditions to impose or how to dispose of cases. When considering a case, the parole board appoints one chairperson and no fewer than four other members drawn from its membership. The panel must include someone who has held judicial office, a psychiatrist, someone with experience of aftercare for released prisoners, and someone who has studied the causes of delinquency or treatment of offenders.

40. It was stated that the parole board exercises a judicial function. The statutory tests for release are worded so that its decision directs, rather than recommends, release. The Secretary of State has to release a person on licence where the release is directed by the parole board.

41. He confirmed that the life prisoners may require the Secretary of State to refer their cases to the parole board once their tariff expires and then at least every two years thereafter. After the first review is carried out, which must be done expeditiously, further reviews, if necessary, should be carried out at reasonable intervals.

42. Mr. Sykes said there was no strict guideline as to how often a prisoner's case should be reviewed by the parole board within the two year interval. The ECHR did not provide guidance by prescribing a minimum period. Instead, the overarching rule is that the parole board should proceed with reasonable dispatch having regard to all the material circumstances of each case. Failure to do so may constitute a breach of Article 5(4) of the European Convention on Human Rights. Mr. Sykes referred to the case specific approach of the parole board by citing different results to challenges arising from delays. In one challenge, a delay of fifteen months was held to be in breach of Article 5(4) of the European Convention on Human Rights. In another case a delay of eighteen months was held not to constitute a breach.

43. Mr. Sykes explained the general basis upon which reviews are carried out. This includes a duty to provide written reasons. The prisoner also has to be informed of the reasons and advised of the date of his next review. He said that as a matter of general principle, reviews must be conducted whenever fairness to the prisoner requires it. He said that the only remedy to challenge a decision of the parole board was to issue judicial review proceedings in the administrative court.

44. Mr. Sykes explained that it was not the parole board's duty to provide prisoners with rehabilitative services; that was the responsibility of the Secretary of State. It is the Secretary of State who bears the duty to provide prisoners with the resources necessary to demonstrate that they are no longer dangerous. Mr. Sykes referred to a Ministry of Justice policy entitled "Transforming Rehabilitation" that sought to reduce recidivism by introducing programmes to facilitate rehabilitation and release. These included direct therapeutic interventions to address psychological causes of criminality as well as academic programmes, vocational courses and employment opportunities to prepare offenders for reintegration into the community after release. This has been criticised in the 2017 Annual Report of HM Inspectorate of Probation for England and Wales which claimed that *"regrettably, none of the government's stated aspirations for transforming rehabilitation have been met in any meaningful way".*

45. Mr. Sykes said that the failure to provide suitable rehabilitative services has been remarked upon in the higher courts. A breach of the duty to provide rehabilitative services entitles a prisoner to seek a remedy and damages but not a declaration that their detention is unlawful and therefore they should be released.

46. In terms of the issue of absconding from prison, Mr. Sykes confirmed that absconding from prison was not an offence but was only a breach of discipline. He would undergo a disciplinary procedure if he was returned and an adjudicator would decide on an appropriate punishment. These punishments varied in severity including cellular confinement for a period up to 21 days.

47. In relation to developments since the respondent had been sentenced, he confirmed that in 1972 there were no established legal safeguards in place to prescribe when the respondent's detention should be reviewed. Furthermore, the current procedural safeguards under the parole board regulations were not in existence. He said that when the respondent was sentenced, the contemporary attitude was that those who committed a heinous crime had only a hope of serving part of their sentence on licence.

Further Information from the Issuing State

48. The central authority of this state (the minister) requested information from the issuing state about the respondent's temporary release, his failure to abide by conditions and his subsequent flight. The issuing state was asked to consider the respondent's affidavit and provide a detailed response to the factual issues averred to by the respondent. Information about his record in prison, the previous occasions when he absconded, and the basis for the parole board's decision not to release him was also requested. Comment was invited on the respondent's allegation that he will be subjected to severe disciplinary sanctions if returned to prison in the United Kingdom. Clarification was sought as to his entitlement to apply to the UK parole board again for review.

49. The issuing state, by way of reply from the Crown Prosecution Service ("CPS") dated the 30th November, 2018, answered certain queries raised by the central authority. Mr. Samples of the CPS stated that "*the court was assisted by the affidavit of laws prepar[ed] by Christopher Sykes*". The CPS enclosed a statement from a D/Sgt. Miller which detailed information about Mr. Kenyon's release and subsequent flight. The CPS stated that the respondent's affidavit had not been enclosed.

50. Unfortunately, not every question was answered in the letter of the 30th November, 2018. It appeared that the UK's central authority were under a mistaken belief that the affidavit had not been enclosed and it took some considerable time before they responded in full detail. This resulted in some further delay in this case occasioned by the correspondence back and forth between the central authority in this jurisdiction and the central authority in the United Kingdom.

51. Despite the respondent's affidavit not being addressed by the UK authorities at that time, in their letter of the 30th November, 2018, the issuing state gave certain detailed information about the respondent's history in prison and before the parole board in the United Kingdom. The CPS also confirmed that before the decision to apply for the EAW was made, the issue of proportionality was considered. The CPS confirmed that the respondent appeared to indicate to the Gardaí that he intended to surrender voluntarily but subsequently appeared to disengage with the Gardaí and therefore information was gathered to support the application for the European Arrest Warrant. The CPS stated that the European Arrest Warrant Handbook 2010 was considered and they had to assess a number of important factors. These were an assessment of the seriousness of the offence, the possibility of the suspect being detained and the likely penalty imposed if the person sought is found guilty of the alleged offence. Other factors also include insuring the effective protection of the public and taking into account the interests of the victims of the offence.

52. The CPS enclosed a statement from a Michael Taylor who is a senior prison officer at HMP Leyhill. He said that the records demonstrated that the respondent had been released on a temporary release licence but had failed to return at the specified time. He said that HMP Leyhill and Avon and Somerset Constabulary support the charging of those who failed to comply with their licence conditions so that others who may be considering escaping from lawful custody, or not complying with release on temporary licence are deterred. He stated that the powers at the disposal of the courts outweigh those of the internal prison disciplinary system.

53. In the view of the Court, the statement of Mr. Taylor is a curious inclusion in the response of the issuing state. In a later letter from the CPS, it is expressly stated that no authorisation for a criminal prosecution in respect of the absconding had been given and that the EAW does not seek his return for this purpose. I am satisfied that despite the statement of Mr. Taylor, there is no intention to prosecute the respondent for an offence arising out of the absconsion. If there was such an intention, then in the absence of inclusion of that offence in the EAW, the Court would be bound to refuse the extradition on the basis that it would be prohibited by the rule of specialty as contained in s. 22 of the Act of 2003. The presumption that there is no such intention to prosecute has not, on the totality of the information before me, been rebutted. Section 22 of the Act of 2003 does not therefore prohibit his surrender.

54. Detective Sergeant Miller also gave a statement confirming the information she received concerning the presentation by the respondent with the Gardaí in Tullamore. She stated that a male by the name of Alan McFarland had contacted the Gardaí. She indicated that she checked original paperwork stored in the Crime Management Unit and electronic records linked to the respondent. She stated that on the 28th May, 2003 the respondent was reported as not having returned to Brigstocke Hostel in Bristol following a temporary release on licence from HMP Leyhill. She noted that the call was logged with the police at 9.45am on the 29th May, 2003. They were notified by the prison that his licence had been revoked, that he was unlawfully at large and that they were requested to arrange for his arrest and return to the prison. Detective Sergeant Miller noted that various addresses that the respondent had connections with, were contacted in other police areas but there were no sightings of him. The respondent was noted as wanted on the police national computer and the local wanted system.

55. Over a number of years, sporadic checks were again made. In 2012 there was a comprehensive review of the respondent's case and a number of actions undertaken. They contacted people previously known to the respondent and there was nothing to suggest he had left the country or had ties with anyone outside of the United Kingdom. A passport check was carried out. They had a number of documents from the prison which mentioned inter alia previous absconding, poor behaviour and difficulty forming relationships with anyone. Having received information from the Gardaí in 2017, further inquiries were undertaken to ensure the man who presented himself was in fact the respondent. Fingerprints were sent over and the current photograph was compared to the latest photograph the police had for Mr. Kenyon.

56. Early contact was made with the CPS regarding the application for the European Arrest Warrant. The Gardaí informed the respondent that he could make his way to Northern Ireland and it would be arranged to arrest him from there. After that the respondent appeared to disengage with the Gardaí and it was believed he was evicted from his address. In December, 2017, the UK court issued an EAW which was then sent to the National Crime Agency and the warrant went live on the 9th February, 2018 having been approved by the National Crime Agency.

57. A memorandum from Senior Prison Officer Songhurst dated the 30th May, 2003 was enclosed. This said that the respondent had a large number of previous adjudications which were mostly drug related. The most recent adjudication had been in January 2003 for drugs. It recorded his history of breaches of failing to return to prison or absconding from prisons previously. He also had breached his licence by consuming alcohol previously, although he was not placed on report for that. It was said that there was a large amount of security information at the prison for his continued involvement in the use and supply of both class A and class B drugs. The respondent was targeted for a mandatory drugs test just prior to his temporary release and reacted badly to being so targeted. His overreaction was noted and reported to the security department. It was suspected that the sample would be positive and that may account for his breach of the licence.

58. Further particulars of his prison records were said to have been requested by the CPS from a Mr. James Hough, Team Leader in the Public Protection Casework Section within the Public Protection Group in Her Majesty's Prison and Probation Service. The letter stated that the respondent's records could not be located but inquiries were continuing. Mr. Hough provided information that if the respondent is returned, he will be eligible for future release if the parole board considers that he is safe to release. He also confirmed that he will be reviewed at least every two years until he is released on a life licence. It was said that as he absconded from open prison conditions he would be presumed unsuitable for a return to open conditions absent exceptional circumstances. It was also stated that following his return he would be given the opportunity to make representations to the Secretary of State in relation to whether or not he had absconded and whether any exceptional circumstances apply to his case necessitating a move to open conditions notwithstanding his absconsion. He also confirmed that as regards to setting the next review date, each case was considered on its merits but that generally most reviews are set in the region of between 14-16 months. The process for setting the review in cases of indeterminate sentenced prisoners was set out in the attached documentation which contained various chapters of the prison service instruction.

59. The central authority also sent a further letter dated the 13th December, 2018 requesting information concerning issues that the respondent raised. There was an issue about whether the sentence was enforceable due to a lack of clarity over its release and whether or not it was authorised by the parole board. The CPS responded by giving details about the rules for the temporary release of prisoners. They confirmed that he had been granted temporary release. A person who is granted temporary release is deemed unlawfully at large if the period for which temporary release has expired. It stated that he had failed to return to the hostel.

The respondent's first supplemental affidavit

60. Shortly before the hearing on the 19th February, 2019, the respondent swore a supplemental affidavit responding to the information provided by the issuing state. He stated that he had no adjudications for supplying drugs during his time in custody. He said that he had approximately four adjudications relating to drug tests which were positive for cannabis in his system. He said that these were issued when he was in the HMP Wayland in the 1980s. He said there was possibly one further drug related adjudication in the 1990s.

61. The respondent said that he was subsequently moved to open prisons after his time in HMP Wayland and this was indicative of the fact that he did not have an issue with drug abuse. He said it was particularly noteworthy that HMP Leyhill is an open prison and therefore he was clean from drugs when he was moved there in 2000 and would have been drug tested to confirm this. He said that he was placed on an opiate based pain killer called DF118 while he was held in the UK prison system. He said that this meant on certain occasions he tested positive for opiates. He said that when those tests came back, prison officers would usually check with the present medic and then disregard the test result which had been returned. He said that he had not abused drugs or had any drug related issues since leaving custody in the United Kingdom. He said that matters were therefore not quite as Officer Songhurst had presented in his memorandum.

Further information from the Issuing State

62. After the hearing on the 19th of February, 2019, the respondent's further affidavit was sent over to the United Kingdom and comments were invited. By letter dated 27th March, 2019, Mr. Samples of the CPS responded by providing the respondent's adjudication history which had been given to him by Mr. Hough.

63. A detailed response to the averments in the respondent's first affidavit was also requested from the issuing state, as well as detailed additional information in respect of his prison record and in respect of the parole board hearings. By letter dated the 14th March, 2019, Mr. B. Samples of the CPS replied to that request. It appears that records relating to the respondent between the year 2000 and 2003 could not be located. A more detailed response to his second affidavit could not be provided therefore.

64. In response to his first affidavit filed on the 16th October, 2018, the CPS had no observations to make in respect of many of the paragraphs. The most relevant response was that if the respondent is returned, he will be detained until the parole board is satisfied that his detention is no longer necessary for the protection of the public. In relation to his recollection as to where he was held between 1971 and 1991, the CPS set out the institutions responsible for his detention and said that his recollection was not supported by the records. It also appeared that he had previously absconded in October, 1985 until he was arrested in December, 1985. This was a significant difference between the respondent's first affidavit in which he said that he had only absconded for a number of days.

65. The CPS stated that the respondent is subject to a life sentence for murder. As such: –

> *"He is required to be detained until the parole board is satisfied that it is no longer necessary for the protection of the public. The respondent's risk has not been assessed by the parole board since he absconded. All previous reviews concluded that his continued detention was necessary".*

66. The CPS stated that he had been unlawfully at large for a significant period of time having absconded while serving a life sentence for murder. Mr. Samples in the letter said "it was submitted" that his surrender was proportionate giving the seriousness of the offence.

67. The CPS said that the records do not support the respondent's contention that he was reviewed on six occasions. The record showed that his sentence was reviewed on ten occasions and was in the process of being reviewed again at the time he absconded in 2003. It also appeared that his recollection on the first two reviews were eight years apart was incorrect, as these reviews were within two-year periods. The date of these reviews were set out and it demonstrated that his third review occurred in 1983. A further review was due to take place in 1985 but he absconded from educational parole on the 29th October, 1985 until he was arrested attempting to leave the country on the 29th December, 1985. It was stated that at the respondent's ninth review in 1998, the Secretary of State expressed a concern that staff continued to witness verbal outbursts from the respondent and saw evidence of a loss of control.

68. The reply stated that the respondent's attendance on some courses was confirmed in the attachment. It was also said that the parole board had conducted regular reviews and concluded that the respondent's continued detention was necessary. It was said that the records do not support the respondent's claim that there was a substantial delay between reviews. Any delay was caused by the respondent's conduct. His recollection as to the number of reviews was significantly at odds with the official record.

69. The respondent also absconded on the 10th June, 1995 and was arrested on the 14th June, 1995 after which he moved to HMP Pentonville. It was confirmed that his continued detention will be reviewed should he be returned to the United Kingdom. No criminal prosecution had been authorised in relation to his absconsion. The EAW did not seek his return for that purpose.

70. Various witness statements were provided including one from Mr. Hough. He confirmed that the respondent would be eligible for future release if the parole board considered it safe to release him. There were eleven parole files for the respondent but they had been unable to locate them all, in particular the last two. It appeared however that he had ten parole reviews and the eleventh was cancelled due to absconding. The 1999 parole dossier was enclosed. This set out in some detail his history and in particular a summary of the latest reports and recommendations.

71. The dossier demonstrated that a considerable number of reports were available to the parole board in 1999. There were reports from the lifer liaison governor, the wing principle officer, the wing senior officer, the personal officer, the prison probation officer, the field probation officer, the senior psychologist, the medical officer, and the work party instructor. There was also a summary of reports of progress in prison, including the history of a number of previous parole board reviews. The memorandum of the previous parole board review in 1997 was also included therein. The report of the various officers was included. A letter from the respondent was also included. The decision of the parole board dated the 2nd February, 1999 was included in the dossier. The contents of the reports will be referred to when necessary.

Further affidavit of Mr. Sykes BL

72. Subsequent to the initial hearing, Mr. Sykes also swore a supplemental affidavit on the 14th March, 2019. He addressed four questions:-

> (1) What is the test to be applied by the parole board when considering whether to release a prisoner serving the preventative part of a sentence of detention at Her Majesty's pleasure?
>
> (2) What burden of proof applies to the application made by the life prisoner to the parole board for release on licence?
>
> (3) What outcomes may be ordered by the parole board if the application for release on licence is unsuccessful?
>
> (4) What is the average period of time spent by life prisoners in custody before being released on licence? Was the respondent imprisoned for longer than the average period?

73. In answer to question (1), Mr. Sykes referred to the statutory test for release as follows:

> *"The Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."*

He said that the parole board had to decide whether the statutory test was met with reference to the type of risk and the level of risk posed by the prisoner. In relation to the type of risk, he said that risk must mean a risk of dangerousness. Nothing else suffices, it must mean that there is a risk of the prisoner repeating the sort of offence for which the sentence was originally imposed, in other words, a risk to life and limb. It was however stated that the threat to life and limb was expanded to include serious harm. This would include harm physical or psychological including sexual offences. The risk in question had to be of similar or different type to the risk posed by the offence for which the prisoner was sentenced. If such a risk exists, the parole board will proceed to consider the level of that risk posed by the prisoner.

74. The level of risk had to be assessed as being at an unacceptable level so that continued detention was necessary. A prisoner who poses some risk but at a level that is manageable or acceptable may be capable of passing statutory tests for release on licence.

75. In relation to the burden of proof, Mr. Sykes said that the courts of England and Wales refute the existence of any burden of proof on the prisoner. He said there appears to be a divergence between principle and practice. He said in practice, the authorities suggest that there is a presumption against release on licence that must be displaced by the prisoner. This prisoner arguably bears the burden of proving that his release will not put the public at unacceptable risk. He referred to a number of cases which showed that the courts have said that the prisoner does not bear any such burden of proof. The civil standard of proof applies, which is the balance of probabilities. He said that there was an almost invariable presumption that life prisoners pose a risk to the public. He said that in practice, the only party that would endeavour to prove such a risk is low enough to permit release is the prisoner himself. He said that the Secretary of State meanwhile is under no obligation to prove the risk remains high enough to justify continued detention. He referred to a 2009 observation by Lord Hope that the default position was that: -

> *"The prisoner is to remain detained unless the Board are satisfied he can be safely released."*

76. Mr. Sykes said that an overwhelming majority of cases are complex and therefore require a fine balance between the competing interests of the prisoner and the wider interests of public protection. The authorities indicated that any conflict between those competing interests is to be resolved in favour of the latter. In his view the practical effect of all the authorities was that the applicant prisoner must prove to the civil standard that he does not pose an unacceptable risk to the public. A failure to do so equates to a failure to displace the presumption in favour of public protection.

77. In relation to the outcomes of the hearing, he said that the parole board oral hearings guide established three potential outcomes to an application for parole made by a life or indeterminate prisoner. These are:-

(a) The Board directs his immediate release on licence.

(b) The Board gives advice on the prisoner's progression to or continued suitability for, open conditions.

(c) The Board does not direct release and instead advices on what outstanding risk factors exist.

He said that the parole board may advise the Secretary of State to transfer a prisoner to open conditions. A Secretary of State is not obliged to accept that advice to transfer a prisoner to open conditions. The period spent in custody in open conditions does however still constitute the preventative period of custody.

78. In relation to the length of detention the respondent has spent in custody, Mr. Sykes said the available statistics suggest that he has spent an unusual or even exceptional period of time in custody. He said that time in custody for life prisoners appeared to be lengthening. He said that the status of the respondent as a child at the time of his sentencing was a complicating factor. He did not benefit from the more progressive approach to child offenders following the decision in 1997 of *R v. Secretary of State for the Home Department, Ex parte V. and Reg. v. Secretary of State for the Home Department, Ex parte T* [1997] UKHL 25. His status as a child would not have had the same effect on his tariff or parole as it would today. It may however have had no effect at all.

79. Mr Sykes said that the respondent had spent longer than average in punitive custody. The fact that he was a child at the point of sentencing does however only make his sentence appear even more unusual and excessive in retrospect.

Response of the Issuing State to the further affidavit of laws

80. Mr. Samples of the CPS responded to the further affidavit of Mr. Sykes. He said the CPS had no observations to make in respect of the answers provided to the first three questions. In relation to the fourth question a number of observations were made. He said that the question failed to appreciate the fact that parole board decisions were made on a case by case basis. Mr. Samples said that the risk a prisoner is considered to pose would be different depending on that individual. References to averages was unhelpful. It was also said that references to reports in the media or other sources were providing generalisations.

81. The CPS stated that the respondent was an adult when his risk was assessed on ten separate occasions. The fact that he was sentenced as a child is irrelevant to the test applied by the parole board to assess risk when he was an adult. The CPS also said if the point made at para. 40 is accepted, that he has spent longer than average in punitive custody, it must equally be accepted that he was considered to be a greater risk than the average prisoner.

Further supplemental affidavit of the respondent

82. The respondent then swore a further affidavit on the 28th March, 2019 which offered an explanation for the differences between the respondent's recollection and the official record of his custody in the United Kingdom.

83. The respondent said that he accepted the accuracy of the detailed record of the institutions in which he was detained. He said his account had represented his best effort at recollecting precise details.

84. In relation to the period of time he absconded, the respondent said again he fully accepted the accuracy of those reports. He said that his recollection of the detail of his time in custody in the UK were genuine errors caused by the passage of a significant amount of time. He said he did not intend to mislead the Court.

85. In relation to the various reviews, the respondent accepted that some of the reviews occurred and that he was present for some of them. In respect of others, he said that he did not recall the reviews at all. Again he said his account had been his best recollection.

86. The respondent referred to the note in the parole board dossier hat he had received four adjudications since his last review and that two were positive mandatory drug tests. He said to the best of his recollection these two adjudications related to positive tests for Zimovane which he had been prescribed in custody. He denied the contention set out in the dossier that he had admitted to using cannabis throughout his sentence. He said that to the best of his recollection the adjudications were issued in the 1980s.

87. The respondent said he noted the contention in the parole board dossier that he had made a serious attempt to take his own life by way of an overdose. He said in one section it is claimed that this was an overdose in heart medication which had been prescribed to him and on another it said he had overdosed on paracetamol instead. The respondent denied that he ever overdosed on paracetamol or heart medication. He said he did not have a heart condition nor was he prescribed heart medication. He only remembered being brought to hospital whilst in custody in the UK on one occasion when he was complaining of dizziness. An ECG was

performed.

88. The respondent noted that in the parole dossier it was alleged that he had raped another prisoner in 1991. The respondent said that was the first he heard of that allegation and he utterly refuted it. The dossier had also referred to another allegation of sexual assault. He said he denied that and had been informed of it at the time by the prison authorities and he also denied it then. The respondent said that he had completed an anger management course and a reasoning and rehabilitation course while in HMP Grendon. He had previously started both courses when in HMP Wayland but had not finished them due to staff shortages. He recalled attending one to one sessions with a prison psychologist and also undertook educational day release while in Bristol.

Response by the Issuing State to the affidavit of the respondent

89. In response to the respondent's further affidavit, the CPS sent over a further reply from Mr. Hough which contained a full adjudication history of the respondent. That history showed that the most recent proven adjudication for unauthorised use of a controlled drug was dated the 21st January, 2003; shortly before he absconded. The most recent proven absence without permission is dated the 5th November, 2002. It was also said that 19 offences in custody were proven against Mr. Kenyon throughout his period of time. The record also showed that in July and May 2001 there was also a proven unauthorised use of a controlled drug. On another date in July, 2001, there was a dismissal of an offence of an unauthorised use of a controlled drug.

Submissions

On* beh*alf of the respondent

90. Counsel for the respondent submitted that the starting point had to be the identification of the nature of the sentence imposed. Counsel referred to the decision of the ECtHR in *Stafford v. United Kingdom* [2002] ECHR 470, at para. 74 in which it was stated that a sentence of detention at Her Majesty's pleasure was not the same as detention for life. That was because it would give rise to issues regarding Article 3 of the ECHR and it would have conflicted with various United Nations instruments. Counsel also referred to the affidavit of laws by Mr. Sykes. He said there was nothing inconsistent in the affidavit with ECHR law. It is noted that Mr. Sykes indicated that the sentence of detention at Her Majesty's pleasure was a sentence of life imprisonment. Counsel submitted that what Mr. Sykes said in his affidavit about the sentence including the welfare principle was another way of saying what the ECtHR had said in *Stafford*. This was that the sentence had to be linked to the offender's development and maturity.

91. Counsel relied primarily on the Supreme Court decision in *Minister for Justice and Equality v. Balmer* [2017] 3 IR 562. This was unsurprising as the decision in *Balmer* is the leading authority on the issue of whether surrender to serve life sentences involving preventative detention would be incompatible with our obligations under the ECHR or would contravene a provision of the Constitution.

92. In *Balmer*, the requested person had been convicted of murder in the UK and received a mandatory life sentence. A minimum tariff of 12 years had been fixed which was later extended to 15 years. That tariff was the punitive element after which the respondent could only be detained further if he was considered to pose a risk to the community if released. After serving 27 years the requested person, though still subject to a life sentence, was released on licence subject to strict conditions including permanent residence in a specific location and a requirement not to travel outside the UK without prior permission. A year later the licence was revoked on grounds of poor behaviour and having allegedly committed a further offence. The requested person was recalled to prison. The requested person did not comply. As he was living in Ireland, the authorities issued a European Arrest Warrant.

93. In his judgment, with which the rest of the Supreme Court agreed, O'Donnell J. identified the important issues in the case when he stated at para 18: -

> *"The facts in this case focus the issue with particular clarity since it is clear that the respondent, if returned to custody, would be in detention as determined by the assessment of his risk to the public. However, if the respondent is correct, it would appear difficult to surrender anyone to the UK if charged with murder, and conceivably to surrender any person to a country which has in its sentencing regime elements of prevention, where at least explicit periods of detention, dependant on an assessment of risk. This is obviously of enormous practical importance, but at a broader level, the case is also important because it requires further consideration of an important conceptual question in relation to the extent and nature of the intersection between the guarantees contained in the Irish Constitution and matters occurring abroad pursuant to the laws of states with whom this country has made agreements, whether directly or indirectly as a consequence of membership of the European Union."*

94. In *Balmer*, O'Donnell J. queried whether Irish sentencing principles would as a matter of constitutional necessity prohibit any aspect of preventative detention, but in assuming it did, he queried what would be the impact of such a regime in the UK on surrender to that jurisdiction. O'Donnell J. stated at para 59 that: -

> *"The fundamental and difficult issue for an Irish court is whether that difference, and putative unconstitutionality, is, in the words of [Minister for Justice, Equality and Law Reform v.] Brennan [[2007] IESC 21, [2007] 3IR 732], so egregious, and such a fundamental defect in the legal system, or is something which departs 'so markedly from the scheme in order envisaged by the Constitution' (Nottinghamshire [County Council v. K.B. 2011, IESC 48, 2013 4IR 662)] as to require a court to refuse to surrender a person under an EAW, either for trial, where conviction would lead to such a regime being imposed, or, as here, to serve a sentence imposed and manage under that regime."*

95. Counsel for the respondent laid particular emphasis on the following dicta of O'Donnell J. in *Balmer*. At para. 68 O'Donnell J. stated: -

> *"It is necessary to make some concluding observations. It is clear that in cases in which it arises, s.37(1)(b) of the EAW Act requires close analysis and sometimes fine judgments which can be markedly affected by the facts. I would venture to suggest that some of the difficulties with the UK regime, at least from the perspective of Irish constitutional law, are not merely the labelling and the colloquial description of detention as being purely preventive, but also follow from the fact that such detention is maintained unless the parole board is satisfied that a person poses no risk. Given the difficulty of any analysis of, and adjudication on, propensity, and given the nature of decision making, this can lead to a situation of prolonged incarceration for periods well in excess of what a person convicted of a similar offence in Ireland would expect. Length of sentence is a matter specifically addressed by the Framework Decision and is clearly a matter of some concern to Member States. This judgment only addresses the argument of principle that the UK tariff-setting system requires refusal of surrender under section 37(1)(b). Just as under the ECHR, it cannot be ruled out that exceptional cases on the facts may arise in which the courts may have to consider the obligation of surrender in the light of the length of the sentence served."*

96. At para. 69, O'Donnell J. noted that the information provided in that case had contained only the scantiest detail. O'Donnell J. stated that the court had no reason to doubt the decision to recall the respondent: -

> *"However, there is no reason in principle why more information should not be provided to a court which is required to consider whether such an order for surrender is in accordance with both the Constitution and the Convention."*

97. In the submission of the respondent, the present case was one where very little information had been provided by the issuing state about the circumstances in which the continued detention of the respondent had occurred. While some of the submissions made in this case at the original hearing were no longer valid in light of the further information provided, the respondent maintained that the information was insufficient. Furthermore, the respondent stated that this was a case where the records could not be located. The situation was that the UK could no longer find the file relating to his most recent parole board hearing.

98. In particular, however counsel for the respondent submitted that it would be an egregious departure from the rights contained in the ECHR to send him back to the UK almost fifty years after he had committed the offence. This was in circumstances where it was not a true sentence of life imprisonment but an indeterminate sentence. There was also no evidence to suggest he was a danger to the public. It was clear that he was capable of surviving in a non-custodial setting and he had not come to the attention of the Gardaí. In counsel's submission, the real question was whether there was any natural basis for saying that he posed a risk to the public. Counsel submitted that had to be answered in the negative. Counsel submitted that he had worked and attended courses as directed. While he had some consumption of drugs at an earlier stage, these were not sufficient.

99. Counsel laid great emphasis on the fact that this respondent had been a child when he committed the offence and that there was a very significant difference between his case and *Balmer*. He also submitted that the respondent in *Balmer* had actually served less time in custody and in fact had been somebody who had been released on licence. Counsel also submitted that even if it could be said that there had been decisions in 2003 that he posed a risk at that time, it did not follow that he should be returned to serve his sentence in custody.

100. In his submissions made after the more detailed information was provided by the issuing state, counsel laid great emphasis on the lack of what he said was a risk to the public in those papers. Counsel reiterated that the most recent decisions were unavailable and that was a remarkable state of affairs. Counsel submitted that was an element of the exceptional nature of this case, which brought it within the parameters envisaged in *Balmer*. Counsel also pointed to the history that was set out in terms of his release. Counsel submitted that it appeared that for the fourth time in his prison career, he had almost been at the point of long term release. In fact, he had been on a temporary release licence when he had breached the terms of that licence and left the hostel and ultimately the country. It was said by counsel that the contention that continued detention was necessary might have been formally true, but it was equally clear that he was going in the direction of being released. Counsel raised the issue about the failure in the most recent report to give an assessment of risk.

101. Counsel went through the contents of the reviews in detail as summarised in the parole board dossier. It appeared that back in 1985 a local review committee had been in favour of the respondent's release. In counsel's submission, it was a tragic feature of the respondent's case that there was a pattern in his behaviour. He got moved towards the prison door but once he got there, he did not abide by rules and the procedures relating to his release. He did not however show himself to be dangerous because he did not assault anyone and there was no threat of violence. Indeed, he pointed to the Governor's report in the prison dossier which said that he was institutionalised but had not committed further offences.

102. It was submitted that the issue was not a question of whether the respondent had been a model prisoner, the issue was whether he constituted a risk to the public. The onus had been on the respondent in accordance with what Mr. Sykes had stated which was not disagreed with to prove he was entitled to release. The reason he had not been released was his inability to cope with release. Counsel went through the reports contained in the parole dossier to demonstrate that each time the respondent made it to being released, an issue had arisen and he had to start back at the beginning. In particular, he had absconded in 1985 and his next review was in 1988 but it was not until 1990 that there was a transfer request to send him to an open prison. Counsel submitted that it appeared to take him five years to get back to where he was before he had transgressed the rules. It was September, 1992 before his situation was reviewed again but the Secretary of State rejected the recommendation. He was reviewed further after twelve months and put back again until January, 1995 when a transfer to open conditions was recommended. In April, 1995 there was a recommendation and he was sent there in May, 1995. In June, 1995 he absconded and was found a number of days later.

103. Counsel submitted that the respondent was a child offender deemed suitable for release but that when he failed to comply with matters, it took him five years to get back to where he had started. Counsel relied heavily on the fact that this respondent had never committed another offence but kept losing privileges for certain matters in prison. The respondent's real issue was his personality and how his manner of dealing with things was perceived by others in the prison.

104. Various prison officers or professionals had referred to the respondent's loss of control. In counsel's submission, this type of justification for failure to release him, fell far short of the ECtHR decisions and indeed the applicable law in the United Kingdom. He referred to the probation officer who had sought a further period of testing in relation to his social skills and anger management. In counsel's submission that was a neat summary of the position in that the focus was on behavioural issues and coping skills. This was something one might expect a prison to concentrate on, but none were indicative of a concern about his behaviour being at the same risk of offending at the same or a comparable level.

105. Counsel referred to the fact that the respondent had been in custody for so long. It was also inappropriate that the issuing state had referred to the fact that the length of time he had been in custody was indicative of his risk. That was an argument from circumstances. The reality was that he was at a greater risk because he failed to comply with conditions.

On behalf of the minister

106. Counsel for the minister submitted that the respondent had not reached a threshold where it could be said that his rights under Article 3 and Article 5(1) of the ECHR were being violated by surrendering him. He submitted that the respondent's case was primarily based upon the fact that he had served a considerable length of time for an offence committed as a juvenile and the fact that he had not offended during the period that he had lived in this state under an assumed name. Counsel submitted that, the fact that a person who is a fugitive from justice living for the most part under a false name has not come to the adverse attention of the authorities in this state, could not be safely relied upon to suggest that he did not pose a continuing risk to the public.

107. Counsel's primary submission however was that it was a matter for the UK parole board to determine whether he should be released on a life sentence. It was not the function of the High Court, in the context of surrender proceedings, to review or second guess the decisions that the parole board made in the past on refusing to release the respondent, or to step into the parole board's

shoes now to determine how much weight, if any, should attach to the fact that the respondent had not come to the adverse attention of the authorities in this jurisdiction since he fled from justice in the United Kingdom. Counsel relied upon the decision in *Balmer* in which the Supreme Court determined that where an issue arose under s.37(1)(a) of the Act of 2003, the Irish court was entitled to apply a presumption that the national court of the requesting state was best placed to make a determination as to compliance with the ECHR at least in the first place. Counsel submitted that there was nothing in the present papers to indicate that the respondent's state would not comply with its obligations under the European Convention on Human Rights.

108. Counsel submitted that the respondent had failed to address the full extent of ECtHR decisions on this area. He relied in particular on the case of *Vinter and Others v The United Kingdom* [2013] ECHR 645 which post-dated *Stafford*. In that decision the ECtHR stated at para. 108 that *"a life sentence does not become irreducible by the mere fact that in practice it may be served in full. No issue arises under Article 3 if a life sentence is de jure and de facto reducible*." The ECtHR proceeded to state at para 110 that *"[t]here are a number of reasons why for a life sentence to remain compatible with Article 3, there must be both a prospect of release and a possibility of review."*

109. Counsel also distinguished the case of *Stafford* in the UK in which the person had been recalled to prison having been released on licence. In the present case, the respondent had absconded while in fact serving the original sentence imposed upon him. Counsel relied upon the dicta of O'Donnell J. in *Balmer* to the effect that the ECtHR had never found that detention based on risk is *per se* incompatible with the ECHR and: -

> *"There are a number of countries in Europe where the criminal justice system involves some element of preventative detention and those regimes have been upheld as compatible with the ECHR." (para 12 of Balmer).*

Counsel submitted that the appropriate place for the respondent's argument on his current risk was before the parole board in the United Kingdom.

110. Counsel for the minister also referred to the decision in *Balmer* which had applied the principles affirmed in *Minister for Justice, Equality and Law Reform v. Brennan* [2007] IESC 21. It was submitted that the respondent had failed to identify an egregious circumstance or fundamental defect in the system of justice in the United Kingdom. Indeed, on the contrary he submitted that the evidence tended to show that the system of justice in the UK was more than able to provide the respondent with a remedy should he believe his rights have been breached following surrender.

111. In respect of exceptional circumstances, counsel submitted that the Supreme Court had merely left open the possibility that there may be rare cases that would justify a refusal to surrender. In counsel's submission this was not an acknowledgement that those cases did exist, but merely that they may exist.

112. Counsel submitted that the decision in *Balmer* did not leave open the possibility that the UK life sentencing regime was a matter of degree.

113. Counsel however submitted that in the present case there was no evidence that the degree had been reached or that this was an exceptional one. He submitted that the length of time was not in itself exceptional given the length of time that had been spent in custody in *Balmer*. Furthermore, he submitted that the respondent had been given a number of opportunities to demonstrate that he was suitable for release on licence but that he had violated certain conditions. Counsel also referred to various passages in the parole dossier that had been given to the Court. This demonstrated in counsel's submission that he was "far from a model prisoner". Counsel relied upon the breaches of conditions, the absconsion from detention, the drug offending, the issues with loss of control and behavioural matters. Counsel submitted that it could be observed that this respondent had less reason to complain in contrast to Mr. Balmer. In his submission the latter had successfully demonstrated to the parole board that he no longer posed a risk to community resulting in his release on licence. The thirty-one years that this respondent had spent in custody was logically connected to rehabilitation, or more properly the absence of it. Counsel also relied upon the observations of Dunne J. at para. 95 of Balmer in which she said that even in this jurisdiction a "prisoner does not have a right or entitlement to temporary release. What is permitted is a consideration of whether it is appropriate to consider the temporary release of the prisoner having regard to the statutory criteria." Dunne J. held at para. 96 that *"a prisoner sentenced to life imprisonment not granted temporary release by the Minister following a consideration of the criteria under s.2 of the 1960 Act does not have a sentence thereafter converted into a form of preventative detention."*

Analysis and determination of the Court

114. Having set out the collated points of objection, the relevant evidence and the submissions in some detail, it is necessary to highlight the gravamen of the respondent's objection to surrender. The respondent's case is that his surrender for the purpose of his continued detention on his preventative indefinite sentence in the issuing state will amount to a breach of his ECHR rights and his constitutional rights. His objection is not based upon a clam that his incarceration from in or about December 1985 when his tariff expired, up to and including April 2003, had violated his rights under the ECHR. His incarceration could not have violated the Constitution as that had no operation to a sentence imposed and being served in the United Kingdom.

115. At the level of principle, the decision in *Balmer* established that preventative detention in the context of life sentences is not of *itself* a ground for holding that such detention is incompatible with our Constitution or would amount to a breach of the European Convention on Human Rights. Moreover, the affidavit of Mr. Sykes, the legal expert relied upon by the respondent as to the position in UK law on release and life sentences including sentences of detention at Her Majesty's pleasure, does not raise concerns about the operation of the parole board and compatibility with either Article 3 or Article 5(1) or (4) of the European Convention on Human Rights. On the contrary, despite the respondent's claim in his affidavit, Mr. Sykes demonstrated that sentences at Her Majesty's pleasure are not sentences that are irreducible in law or in fact. It is only irreducible sentences, including those that are *de facto* irreducible, that will be held in breach of the provisions of Article 3 ECHR which prohibit inhuman and degrading treatment. The issuing state has accepted the legal position set out by Mr. Sykes.

116. The case of *Vinter* unequivocally stated that a life sentence does not become irreducible by the mere fact that in practice it may be served in full. The mere fact that the respondent may have spent a significant amount of time in detention is not *per se* evidence that his sentence is irreducible. Furthermore, the ECtHR emphasised at para 108 that *"no Article 3 issue could arise if, for instance, a life prisoner had the right under domestic law to be considered for release but was refused on the ground that he or she continued to pose a danger to society. This is because States have a duty under the Convention to take measures for the protection of the public from violent crime and the Convention does not prohibit States form subjecting a person convicted of a serious crime to an indeterminate sentence allowing for the offender's continued detention where necessary for the protection of the public."* The ECtHR referred to two cases from the UK which dealt with child offenders.

117. The ECtHR proceeded to state at para 111;

> *"[i]t is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. As was recognised by the Court of Appeal in Bieber and the Chamber in its judgment in the present case, these grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated"*

118. There is no doubt therefore that the respondent's sentence (being a life sentence albeit an indeterminate one at Her Majesty's pleasure) was Article 3 compliant as it was reducible *de jure* and *de facto*. It was not contrary to Article 3 to continue his detention where there was a legitimate penological ground for that detention. Such a ground includes public protection. The information from the issuing state, and from the respondent's expert, is that the parole board must direct release if it is satisfied that the incarceration of the prisoner is no longer necessary for the protection of the public.

119. The respondent's expert on UK law has stated that the type of risk is a risk of dangerousness. In this case it must be a risk to life and limb as it is a risk related to the sort of offence for which the sentence was imposed. Despite his reliance on the decision in *Stafford*, the respondent has not identified through evidence or submission any real deficiency in UK law as regards compliance with Article 3 of the European Convention on Human Rights.

120. Although this was not contained in his points of objection, counsel for the respondent in his oral submissions invited the Court to hold that the continued refusal of the parole board to direct his release amounted to a violation of the statutory test as set out in UK law. This was a surprising submission in light of the absence of any expert evidence from the UK that the decisions of the parole board were contrary to UK law. Mr Sykes did not give this evidence. Indeed, although the original letter of instruction was not included in his affidavit, it seems Mr. Sykes may not have been asked to comment on it. Moreover, there was no evidence from an expert in penology that the approach of the UK parole board in the respondent's case, namely to encourage incarceration in an open prison, to encourage participation in certain courses, to encourage and assess his behaviour on temporary release and to assess his overall behaviour prior to making a formal decision to release him, amounted to a breach of the test because his release could and should have been ordered without taking those steps.

121. Moreover, the evidence filed on behalf of the respondent and the information given by the issuing state, reveal that the respondent has never made any complaint to the courts in the UK or to the ECtHR that his detention violated ECHR standards or the UK statutory provisions. Indeed, the decision in *Stafford*, upon which the respondent relied, was given a full year prior to his absconsion. If the respondent had held concerns about his detention at that time, one would have expected him to make those complaints in an appropriate forum. The respondent has not demonstrated that he had no remedy in the UK in the past or that he would have no remedy in the UK in relation to such a claimed violation.

122. It is also necessary to state that the expert evidence of Mr. Sykes which was agreed with by the issuing state, demonstrates that the test which the parole board must apply at present before directing the release of prisoners is the same regardless of whether a life sentence or an indeterminate sentence (e.g at Her Majesty's pleasure) is involved. The more progressive regime that followed the decision in *Ex parte V*, which involved the welfare principle, appears on the affidavit of Mr. Sykes, to be related to the rehabilitative process as a child or indeed to the tariff. In the intervening time since that decision in 1997, the respondent has not sought any remedy about any failure to have regard to his status as a child offender in the context of release decisions.

123. The Supreme Court, in both *Brennan* and *Balmer*, has indicated that it would only be where an egregious breach of a constitutional right has been demonstrated that the Court would refuse surrender. This would be a situation such as a defect in the system of justice in the issuing state. As has been stated in the case of *Minister for Justice and Equality v. Rostas* [2014] IEHC 391 by the High Court (Edwards J), it is only in the most exceptional circumstances that the Court would be prepared to find a breach of a fundamental right in the issuing state (in that case a breach of a fair trial). In the present case, the evidence reveals no egregious defect in the law of the UK; on the contrary it appears fully compliant with ECHR law. The respondent's claim that the particular circumstances of his case demonstrate egregious defects in how he was treated does not withstand scrutiny. Not only did he receive frequent reviews but it appears that the parole board was close to making a decision to release him. On each occasion he violated a condition by either breaching his licence or by absconding. Furthermore, he never challenged his failure to be released in the UK despite the existence of the remedy of judicial review.

124. I return then to the respondent's main claim, that his surrender is prohibited as he is required to serve an indeterminate period of preventative detention on the basis that he poses a risk to the public where, he submits, the evidence demonstrates that there is no such risk. His claim is that in all the circumstances of his previous lengthy incarceration and his offence free existence for about fifteen years, it would be egregious to surrender him to serve a sentence of preventative detention. Under this objection, the respondent is in terms asking this Court to make a decision based largely on an assessment of his risk based on his present situation which includes almost fifteen years at liberty in this jurisdiction.

125. In reliance on this ground, the respondent referred to the fact that he was a child when he was convicted of the offence, that he has no subsequent convictions for offences of violence, that most of his offending against prison discipline occurred in his early years, that he could work outside custody for certain periods, that he attended various courses as directed and that he had been close to release but had violated conditions in a non-violent manner, thereby sabotaging his own chances of securing full release. Counsel submitted that those circumstances are such that it would be egregious for this Court to return him to the UK where he no longer poses a risk to the public.

126. In his attempts to demonstrate that his future detention in the UK will violate the ECHR and the Constitution, the respondent has by necessity been required to focus on what he said are deficiencies in the previous adjudication on his levels of dangerousness. The respondent has made complaints that the burden was effectively placed on this respondent to demonstrate that he was not and would not pose a risk to the public and in doing so pointed to the absence of any offences of violence which would show a causal link to his original offence. As stated above, those are matters that he did not raise within the UK legal system.

127. Counsel for the respondent has woven a narrative before this Court in which the respondent is merely an institutionalised prisoner who has demonstrated, by affirmation of his present living conditions in this jurisdiction, that he is no longer a risk to the public. Counsel submitted that the issues around his verbal outbursts and control of aggression are no more than his lack of social graces, as appeared to have been accepted by some members of the prison staff and that he posed no risk.

128. In the view of the Court, counsel's submissions amount to an invitation to this Court to adjudicate upon both the legality of the parole board's previous decisions and the factual basis for those conclusions. Furthermore, when the submissions are pared down and examined in detail, counsel is asking this Court to make an assessment of the risk this respondent represents to the public when he asked the Court to reach a determination that the respondent's surrender would be incompatible either with our Constitution or with the European Convention on Human Rights.

129. In addressing that submission it is appropriate to consider what might have occurred if the respondent had not lived for fifteen years or thereabouts in this jurisdiction, but had been immediately arrested as soon as the Act of 2003 came into force. The High Court would have had to assess whether his surrender ought to be refused on the basis that to return him would violate the Constitution and/or Article 3 of the European Convention on Human Rights. That could only have been determined by assessing whether the regime in the UK for parole was incompatible with Article 3 ECHR or that under the Constitution it would have been egregious to surrender him. As this Court has already stated, nothing in the parole board's manner of adjudicating on sentenced prisoners such as the respondent, as identified by Mr. Sykes and the issuing state, would have been held to have been a violation of Article 3 or Article 5(4) of the European Convention on Human Rights.

130. In terms of the question of whether it would be egregious to send him back as a person who committed the offence of murder as a child and had spent a very long time in custody at that time, I am of the view that those factors were not of themselves egregious. The point of a risk based assessment is precisely that; it is based upon risk. It is not formulaic. It does not equate to a statement that because a prisoner has served X amount of time he must be released. As O'Donnell J observed, detention based upon risk is not incompatible with the European Convention on Human Rights. Consequential lengthy detention where risk has been assessed is not egregious as a matter of principle and as a matter of fact, it cannot be said to be egregious where the detention was for a sentence following the offence of murder and was punctuated by regular parole hearings taking place within a formal and transparent process.

131. The Court is required to make its decision based upon the fact that he was arrested in 2018 and that the hearing took place in 2019. Nonetheless, the earlier observations remain valid. There is nothing incompatible with fundamental rights about preventative detention based upon a risk assessment related to the original offence. It is not egregious of itself for a person sentenced to life imprisonment as a child for murder to be in preventative detention where he has had an entitlement, and will continue to have an entitlement if surrendered, to regular parole hearings taking place in a formal and transparent process based upon an assessment of risk to the public in the sense of dangerousness.

132. At the present moment in time, if this Court were to order the respondent's surrender to the UK, the respondent would continue to serve his life sentence at Her Majesty's pleasure. He would be entitled to seek his release from that sentence and would have a review within at least two years and probably before then. No sustained complaint has been made that the review period would not be Article 5(4) ECHR compliant. This is rightly so as the evidence disclosed that the review period is case-specific in the UK and in any event would not go beyond an outer two year period. The parole board would be made up of people with a cross-section of experience from relevant disciplines. As a matter of law, his sentence would not violate Article 3 of the ECHR as it would be reducible in law and in fact.

133. The main case made by the respondent is that this Court should refuse his surrender as it would be egregious to send him back to serve a preventative part of his sentence of life imprisonment where he has demonstrated by his behaviour that he is no longer a risk to the public and in light of his lengthy custodial sentence already. As a matter of law the respondent's argument is flawed. The use of the word "egregious" in *Brennan* and *Balmer* is followed by an example, "*such as a defect in the system of justice*". That is the type of "egregious" circumstance that is at issue when assessing whether surrender to serve a life sentence is prohibited. It must be something so fundamental that the system of mutual trust and confidence that is at the heart of the surrender procedure under the Framework Decision must be set aside.

134. To surrender a convicted murderer, albeit a child at the time of the commission of the crime, who was sentenced in a human rights compliant manner and who was subject to human rights compliant reviews of his sentence but who breached his licence or absconded, including an offending free period of fifteen years while living under an assumed name and who will have an opportunity to be heard by a parole board is not egregious in that sense. Indeed to hold otherwise would be to interfere with the test that is to be applied when a person has legitimately been sentenced to a term of life imprisonment – is the continued detention is necessary for the protection of the public? It cannot be egregious as a matter of law to require a person who has absconded while serving a life sentence to return to the issuing state where they will have the full panoply of their ECHR rights available to them.

135. I have considered the submissions urged upon the Court concerning the absence of records on the 2003 parole hearing. In the view of the Court, the absence of those records does not make the surrender egregious or incompatible with fundamental rights as a matter of law or as a matter of fact in this case. The legal basis for the decision making process of the parole board has been set out. As a matter of statutory law, the parole board's jurisdiction has been set out. It is not incompatible with the European Convention on Human Rights. On the evidence before me, the respondent did not make any complaint within the UK legal system at the time of the final review as to his continued detention. That was the appropriate time and place to make any such complaint. Furthermore, his own affidavit contains his own recollection of that review and nothing in that recollection demonstrates a *prima facie* breach of his fundamental rights.

136. I have also considered the issue of the respondent's access to rehabilitation. There appears to be no reality to this issue. The evidence reveals that the respondent was given access to many courses at various stages in his incarceration, but most importantly was on a path towards release, when he, through his own decision, absconded from his temporary release. There is no causal link between any perceived lack of access to rehabilitation courses and his continued detention. Furthermore, I am not satisfied in any event that it has been established as a matter of law that a lack of access to rehabilitation courses would render detention incompatible with the ECHR or amount to an egregious defect. In any event, under s. 4A of the Act of 2003, there is a presumption that a member state will comply with its obligations under the Framework Decision. I am not satisfied that it has been demonstrated that the UK would fail to comply with its obligations in that regard.

137. The respondent complained that each time he absconded, this resulted in him being placed at the bottom of the penal ladder and having to work his way up again. Counsel claimed that the absconding behaviour had to be seen in the context of his frustration but also in the context of his lack of committal of any offences, of violence or otherwise. In the context of a person who has been sentenced to life imprisonment, it cannot be said to be egregious *per se* to place such a person in a closed prison on recapture. It must be recalled that on an earlier occasion when the respondent absconded he was caught trying to leave the country. In 2003 he succeeded in leaving the issuing state when he absconded. This is indicative of a person who does not want to be monitored and of itself raises significant concern about his risk to the public. Moreover, the respondent has placed no evidence before the Court to demonstrate that in penological terms, absconding could not or should not be taken into account as a risk factor. I am satisfied that it has not been demonstrated that it would be egregious to return him to the UK because he will be returned to a closed prison in

circumstances where he will have the opportunity in due course to apply to be moved to open prison conditions. Furthermore, the fact that the respondent absconded and spent 15 years living in the community in this jurisdiction is a matter to be considered by the appropriate body to determine his risk, namely the UK parole board.

138. This Court is satisfied that even if this Court was entitled or indeed required to act as a quasi-parole board in determining whether the respondent's detention was no longer necessary for the protection of the public, it has not established that he is no longer a risk of danger to the public. Under s. 37 of the Act of 2003, the burden is on the respondent to demonstrate that there are substantial grounds for believing he would be at real risk of being subjected to inhuman and degrading treatment if surrendered. The respondent would only be at real risk of such prohibited treatment if it is the case that he demonstrates that his detention is no longer necessary for the protection of the public.

139. The respondent has made assertions as to his behaviour while living in this jurisdiction under an assumed name. He has not presented any professional evidence as to his rehabilitation which would assist this Court in reaching the basic conclusion that he wishes the Court to make i.e. that he no longer poses a risk. The respondent has also failed to give any particular details about the dispute which lead to him going to the Gardaí. The respondent has also told untruths as regards his level of engagement with the UK authorities in terms of his earlier releases. While the Court understands that he may have been mistaken as to the places of detention and length of time he was there, the Court does not accept that his earlier period of absconding for a period of months and not days could have been forgotten by him. Importantly, the Court rejects his contention that he had not engaged in the unauthorised use controlled drugs. The respondent was less than forthcoming in his earlier affidavits and when the final evidence was provided it demonstrated that he did not have an excuse for his use. The records indicate that on certain occasions the charge of unauthorised use was not so found against him, but that in January 2003 he was found to have engaged in the unauthorised use of controlled drugs. Therefore, I do not accept the respondent's claim that the drug was in his system because it had been prescribed by a medical professional. While on their own the use of the drug and the lies surrounding it might not be evidence of the risk of danger, it is a factor to take into account in assessing that risk.

140. The respondent is a person convicted of murder, he has demonstrated throughout his period of time in prison and in his engagement with the parole board, that he wishes to control the time and circumstances of his release from custody. It is not egregious on the facts as set out in this judgment to return him, as a person who has unlawfully absconded to this jurisdiction, to serve out his sentence in circumstances where his right to be considered for future release is guaranteed. I am satisfied from all the facts that the respondent has not demonstrated that his detention is no longer necessary for the protection of the public. As has been stated previously, the appropriate body to make that decision is the UK parole board.

141. In all the circumstances set out in this judgment, as a matter of law and as a matter of fact, this is not an exceptional case where it would be egregious to return the respondent to serve his sentence of life imprisonment, at Her Majesty's pleasure, in the United Kingdom. I therefore reject the respondent's points of objection under s. 37 of the Act of 2003.

Brexit

142. In his points of objection, the respondent claimed that because the UK had triggered the mechanism for its withdrawal from the EU ("Brexit") there was a real and substantial risk that surrender would place the respondent outside the scope of the effective application of rights and entitlements guaranteed by EU law. He expressly said that he was not advancing the objections based upon this ground. The Court is satisfied that based upon the decision of the Court of Justice of the European Union ("CJEU") in the case of Minister for *Justice and Equality v. R.O.* (C-327/18 PPU) and in the absence of substantial grounds to show that there was a risk of being deprived of his EU right, there was no basis for this objection.

Conclusion

143. For the reasons set out in the judgment above, I reject each of the respondent's point of objection. In those circumstances, I may make an order under s. 16(1) of the Act of 2003 for the surrender of the respondent to such other person as is duly authorised by the issuing state to receive him.