Neutral Citation Number: [2010] IEHC 210

THE HIGH COURT

2009 60 Ext

Between:

Minister for Justice, Equality and Law Reform

Applicant

And

Anthony Patrick Gorman

Respondent

Judgment of Mr Justice Michael Peart delivered on the 22nd day of April 2010:

The surrender of the respondent is sought by a judicial authority in the United Kingdom under a European arrest warrant which issued there on the 14th February 2007. Following its transmission to the Central Authority here, the warrant was on the 4th March 2009 endorsed for execution by the High Court, and in due course on the 12th May 2009 the respondent was arrested on foot of same, and he was thereafter brought before the High Court as required, and from where thereafter he has been remanded from time to time pending the hearing and determination by the Court of the application for surrender.

No issue is raised in relation to the identity of the respondent, and I am satisfied in any event from the affidavit evidence of Sgt. Kirwan, who arrested him, that the person arrested is the person in respect of which this warrant has been issued.

His surrender is sought so that he can be prosecuted for two offences which are set forth in the warrant, namely murder and conspiracy to murder. Each offence satisfies the minimum gravity requirement under the Framework Decision and the Act, and each has been marked as being an offence within the list of offences specified in the Framework Decision as being ones in respect of which correspondence /double criminality is not required to be verified. An issue has been raised to the effect that the judicial authority has marked 'terrorism' as well as 'murder' in the Article 2.2 list and that there is nothing in the warrant itself to suggest that these offences are related to terrorism. It is unnecessary to address that objection, since I am satisfied in any event that each alleged offence corresponds to an offence in this State. That point is also made on the basis that since there is no detail of any terrorist offence set forth in the warrant, it would appear that there may be a breach of the rule of specialty since upon surrender the respondent may be prosecuted for a terrorist offence not set forth in the warrant. In my view that is a far-fetched submission, and not capable of being sustained on any reasonable reading of the warrant. In my view the presumption in relation to specialty is not rebutted.

These offences are alleged to have been committed by the respondent in 1992, and it is appropriate at this point to note that in 1994 the respondent was arrested here for the purpose of extradition to the United Kingdom in respect of the same offences, and brought before the District Court pursuant to the provisions of Part III of the Extradition Act, 1965, as amended. He was remanded in custody on a couple of occasions until a date in April 1994 when Counsel for the Attorney General informed the Court that no evidence was being offered and the respondent was discharged. The background to those events include that another person, Joseph Magee, had also been arrested for the purpose of his extradition on similar charges, but the application for his extradition was refused by the High Court here, on the basis that the offences constituted political offences and that the case against him had been the subject of such adverse publicity in the United Kingdom that his right to a fair trial had been prejudiced. It was in the light of that situation that no evidence was offered in relation to the application for the respondent's extradition in 1994, and he was discharged. Prior to his being discharged, the respondent has been in custody for approximately two months.

That background will be relevant to some of the Points of Objection which are argued on the respondent's behalf by Aileen Donnelly SC. I will come to those objections and submissions.

There is no reason to refuse to order surrender under any provision of sections 21A, 22, 23 or 24 of the Act.

It remains to determine whether there is any reason under Part III of the Act or the Framework Decision, or generally, that his surrender is prohibited and the order sought be refused.

Points of Objection:

Points of Objection were filed in July 2009, but these were replaced by Amended Points of Objection filed on the 21st October 2009, and it is the latter to which I shall refer.

The issues relied upon can be addressed under the following headings:

1. Delay in the issue of the European arrest warrant/Abuse of process
2. Delay – fair trial
3. Legitimate expectation that he would not be surrendered/extradited – constitutional rights

4. Legitimate expectation re: family rights

5. Res Judicata/Issue Estoppel

6. Surrender sought for prosecution on account of his political opinion

7. Minimum gravity – Belfast Agreement.

The respondent's grounding affidavit and supplemental affidavit:

In his first affidavit the respondent gives detail as to what occurred in 1994 when the first attempt to extradite him for these offences was made, and to the fact that in due course, as I have already set forth, he was discharged from those proceedings since no evidence was being offered following the refusal of the extradition of James Magee to which I have referred. In addition he goes on to state that the said James Magee was subsequently arrested in the United Kingdom in relation to the same matters, and that thereafter in July 1994 he pleaded guilty on the understanding that he would be released under the terms of the Good Friday Agreement, and that he was subsequently released under the terns of that Agreement. In addition to that information, the respondent states in that affidavit that since his own release from the previous extradition proceedings he has reside at all times in this State and that his four young children reside with him, they being aged 2, 3, 10 and 16 respectively. He states that in addition to those children he has two other children who live with their mother in Co. Armagh, and also that he has worked for the past twelve years with Carton Brothers in Shercock, Co. Cavan as a sub-contractor working in steel manufacturing and maintenance.

In his supplemental affidavit, the respondent repeats the same evidence in relation to the previous extradition proceedings, but goes on to add some information in relation to his family circumstances. In that regard he states that since 1994 he has resided at Bailieborough, Co. Cavan with his wife and four children, and states also that he has two other children from a previous marriage who live with their mother in Co. Armagh. He states that his workplace is close to where he lives and that he is an involved member of his community and has what he refers to as "rooted ties" in his local community where two of his children attend school.

He goes on to state that he has lived his life since 1994 on the basis that he neither could nor would be extradited or otherwise ordered to go back to the United Kingdom for trial on the charges the subject of this European arrest warrant. He has lived his life since then, during which time his children have been born, in the knowledge, as he believed, that he would not in the future be extradited to the United Kingdom. He believed that matter to have been finalised following his release in 1994, and his belief in that regard was, he says, strengthened when Joseph Magee was arrested in the United Kingdom, since it affirmed to him his belief that he could not be arrested if he was in Ireland.

Delay in the issue/endorsement of the European arrest warrant/abuse of process:

It is submitted under this heading of objection that the issuing judicial authority/the UK authorities have been dilatory in the issue of this European arrest warrant, and that even since its issue on 14th February 2007 there was a further two year delay before any application was made by the Central Authority here to have the warrant endorsed for execution.

Ms. Donnelly has referred to some additional information which has been supplied to the Central Authority which sets out a chronology of events from 1992 in relation to the extradition of the respondent. She refers to the fact that in 2005, following the decision of the Supreme Court here in the Dundon case further consideration was being given to the possibility of seeking the extradition of the respondent and another man, named Duffy, by the Derbyshire Police, and to the fact that it appears that in July 2005 the Crown prosecution Service in the United Kingdom spoke to the authorities here seeking advice about the matter. The Attorney General was also consulted since that officer had had an involvement in the case in 1995, and even though in relation to any European arrest warrant request, the Attorney General would have no specific function. Eventually a point was reached, as appears from the information supplied, where draft European arrest warrants were submitted to the authorities here, and on the 19th February 2007 a warrant was issued in respect of the respondent, and in respect of Mr Duffy who, according to that information, was due for release from Castlerea Prison on 19th February 2007.

I should refer to the fact that an affidavit has been filed by Jean Murray, a solicitor in the Chief State Solicitor's Office, who gives information as to what occurred following the transmission of these European arrest warrants in February 2007. She says that following receipt thereof further information was sought from the UK authorities, and that in April 2007 a statement of law signed by the issuing judicial authority was received here, and that, given what is described as the complexity of the case, the Attorney General's Office sought the opinion of counsel, which was furnished on the 7th October 2007. This affidavit refers to further communications between the applicant and the UK authorities in November 2007 and in January 2008 seeking confirmation from those authorities that the application for surrender was to be proceeded with. She goes on to state that on 8th May 2008 the UK authorities wrote seeking certain further clarifications on legal issues, which in turn led to a request by the Applicant to the Attorney General's Office for further legal advices. The applicant wrote further to the UK authorities on the 18th June 2008 in relation to those legal issues, and on 1st December 2008 the UK authorities wrote confirming that they wished the Minister to proceed with the application. Some further information was received here on the 26th January 2009, and at that stage, following a further consultation with Counsel, it was considered appropriate to move the application for the endorsement of the warrant in respect of the respondent and this application was made on the 4th March 2009.

This delay is part of the delay relied upon generally in this case, which I will come to, but the first issue is whether the applicant in this case has complied with the provisions of s. 13 of the Act which requires that following the receipt of a European arrest warrant the Central Authority shall "as soon as may be" apply to have that warrant endorsed. It is submitted that there has not been compliance with that requirement, and that the warrant was not therefore properly endorsed. It is submitted also that this delay constitutes an abuse of process.

In my view, particularly given the unusual and protracted history of this case, as appears from the chronology of events supplied by the applicant via the UK authorities and by Ms. Murray's affidavit, the delay or passage of time which has occurred is, though, lengthy, explained. I am sure some of the delay could have been avoided if some matters had been attended to, responded to, more quickly, but in the unusual background of this case, it is reasonable that all concerned should have sought relevant advices from time to time, given legislative changes which occurred. The implications of this legislation and any relevant case-law would be relevant to any decision to seek again the extradition of the respondent, and it is understandable that some caution would be exercised in that

regard before proceeding. I cannot regard what occurred as amounting to an abuse of process. Neither in the circumstances can I consider that the warrant was not endorsed "as soon as may be" following its receipt. There is no evidence that the warrant simply sat on a file in the offices of the Central Authority or the Chief State Solicitor's Office with nobody taking any action in relation to it. In fact, the evidence is to the contrary. It was acted upon in the sense that relevant personnel sought what was thought to be necessary advice and sought additional information. That undoubtedly took time to complete, but that is not a reason to find that the endorsement of the warrant was so delayed as to be outside the somewhat flexible concept of "as soon as may be". This ground of objection must fail.

Delay – fair trial:

There is a general pleading contained in the Points of Objection to the effect that the passage of time from the alleged date of these offences has resulted in the impossibility of a fair trial, and that he should not therefore be surrendered since to do so would breach his constitutional and Convention right to a trial with reasonable expedition. There is no particular prejudice asserted in that regard. Written submissions have stated merely that "the facts of the instant case are such as to show prejudice to the Respondent as a result". I take this to be a plea as to presumed prejudice, but I am satisfied that given the jurisprudence which has developed in relation to delay generally, and in the light of the judgments of the Supreme Court in cases such as Stapleton, any question of whether the respondent can obtain a fair trial is something to be decided by the courts of the issuing state. While, as was submitted, it has been clarified by Denham J. in *Minister for Justice, Equality and Law Reform v. Hall* [IESC] 1, that there may be cases where the Court in this jurisdiction might have to consider an issue such as delay, in my view the present case is not such a case. This point of objection must fail.

Res Judicata/Issue Estoppel:

It is submitted under this heading of objection that the discharge of the respondent from the earlier proceedings in 1994 when the Attorney General, through Counsel, informed the Court that no evidence was being offered, has determined the legal questions and in particular that the respondent may not be surrendered/extradited to the United Kingdom on these charges. It has been submitted that this arises since, on the basis of a consent between the parties, the determination by Mr Justice Flood of the issues in question which resulted in the refusal to extradite Joseph Magee, means that those issues have been effectively decided also in respect of this Respondent, and that an estoppel operates against the issue being ventilated again as to whether or not the respondent may be extradited, even though since that time new arrangements between Member States have been put in place by virtue of the Framework Decision given effect to by the 2003 Act, as amended. Some support has been sought to be gained from a passage of my own judgment in *Minister for Justice, Equality and Law Reform v. Ó Fallúin* where I stated in relation to estoppel:

> *"The situation regarding estoppel might be different if she had refused to order surrender for some particular reason, and the applicant judicial authority sought by the issue of a second warrant to have the respondent again arrested and surrendered, and on exactly the same basis as the first unsuccessful attempt. In such a case the question of issue estoppel or res judicata would legitimately arise."*

I would probably agree that the decision reached in the Magee case could operate as an estoppel in the case of the respondent if a second attempt was made under Part III of the 1965 Act where the same issues would be in play. Certainly that could be the situation in relation to the question of whether these offences are political offences for the purposes of that Act, as amended. It would not necessarily follow of course that the question of an unfair trial on the basis of adverse publicity in the UK could not be re-ventilated since in the intervening period a 'fade factor' would undoubtedly come into play. It is unnecessary to say more on that particular matter, since I am of the view that the decision in the Magee case in 1994 cannot act as an estoppel in relation to an application now being brought under a totally different extradition/surrender regime, namely the Framework Decision for the European arrest warrant. Very different issues arise under this new regime which replaces all former arrangements between Member States of the European Union. There is for example no longer the 'political exception'. But it is a very different regime and the issues arising must be considered other than by reference to a decision reached under Part III of the 1965 ct. This point of objection must fail.

Minimum gravity – Belfast Agreement:

It is submitted under this heading that because following his conviction and sentence in relation to the same offences Joseph Magee, having received a life sentence was released after serving only two years, and pursuant to the Good Friday Agreement as a qualifying prisoner, and because the respondent would so qualify if convicted, it is certain that in his case the maximum sentence which he could face would be two years imprisonment. In that regard reference has been made to the provisions of Section 38 (1)(b) of the Act which provides:

> *"38. – (1)… A person shall not be surrendered to an issuing state under this Act in respect of an offence unless –*
>
> *(a) …*
>
> *(b) the offence is an offence to which paragraph 2 of Article 2 of the Framework Decision applies … and under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than 3 years."*

The warrant in this case indicates at paragraph c thereof that the maximum penalty for murder and for conspiracy to murder is life imprisonment. In my view, even though Mr Magee benefited from the prisoner release provisions of the Good Friday Agreement, being considered a qualifying prisoner, that does not alter in the respondent's case the fact that when imposing sentence following any conviction on these charges, the Court could impose a life sentence. The question of whether following sentence the UK executive would or even must consider that the respondent is also entitled to the benefit of that Agreement and be released after two years, does not in my view mean that his surrender is prohibited by the provisions of s. 38 of the Act. The question of early release is an executive decision and is discretionary in nature, as far as I recall. I could usefully refer to the offence (i.e. murder/conspiracy to murder) being within Article 2.2, and to the offence being punishable by a maximum of not less than three years. It makes no reference to the particular respondent actually receiving a sentence or being punished with a sentence of not less than three years. That is another reason why I believe that this point of objection should also fail.

Surrender sought for prosecution on account of his political opinion:

This is not an argument that the offences which are the subject of the European arrest warrant are political offences or offences connected with a political offence as provided for in s. 11 of the 1965 Act as amended. The Framework Decision adopted by EU Member States made no provision for such an exception, and accordingly it finds no place in the 2003 Act, and of itself does not provide a basis for surrender being prohibited.

Nevertheless, the Framework Decision states at Recital (12):

> *"…… Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons."*

Section 37 of the 2003 Act reflects this statement and provides as relevant:

> *"37.— (1) A person shall not be surrendered under this Act if—*
>
> *(a) ……*
>
> *(i) ……*
>
> *(ii) ……*
>
> *(b) ……*
>
> *(c) there are reasonable grounds for believing that—*
>
> *(i) the European arrest warrant was issued in respect of the person for the purposes of facilitating his or her prosecution or punishment in the issuing state for reasons connected with his or her sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation, or*
>
> *(ii) in the prosecution or punishment of the person in the issuing state, he or she will be treated less favourably than a person who—*
>
> *(I) is not his or her sex, race, religion, nationality or ethnic origin,*
>
> *(II) does not hold the same political opinions as him or her,*
>
> *(III) speaks a different language than he or she does, or*
>
> *(IV) does not have the same sexual orientation as he or she does,*
>
> *or ……" (*my emphasis*)*

The respondent is submitting that his surrender is prohibited under these provisions on the basis that he is being prosecuted on account of his political opinion. She submits that since the underlying offences are without doubt offences which would have come within the concept of a political offence, it comes within the meaning of political opinion for the purposes of s. 37 of the Act. She characterises the conduct which is alleged to give rise to the alleged offences as being the expression of a political opinion, and that when prosecuted for such an offence a person is in reality being prosecuted on account of his political opinions, and therefore in the present case the surrender of the respondent is prohibited.

Ms. Donnelly has referred to the judgment of Mr Justice McCombe in the Queens Bench Division in *Asliturk v. The Government of Turkey* [2002] EWHC 2326 (Admin) in support of her submission that a wide meaning should be given to the term "political opinion". The applicant in that case was a Turkish politician who was arrested in the UK on foot of a request for his extradition to Turkey where she was sought to be prosecuted for offences of conspiracy to defraud, fraudulent trading and misfeasance in a public office. That applicant sought to avail of s. 6 of the UK Extradition Act which is in similar but not identical terms to the relevant portion of s. 37 of the 2003 Act here, and prohibits surrender, *inter alia*, if it appears that the request for extradition *"(though purporting to be made on account of an extradition crime) is in fact made for the purpose of prosecuting him or punishing him on account of his race, religion, nationality or political opinions".* The Court was satisfied on the evidence which had been adduced in that case, and which had not been challenged by the authorities, that the prosecution of the applicant in Turkey was not being brought in good faith in the interests of justice, and that it would be unjust to extradite her. The Court went on to state, perhaps obiter, that the statutory expression "political opinions" should be given a wide meaning. Seeking support from this judgment, Ms. Donnelly urges this Court to adopt a wide approach to what is intended in s. 37 by "political opinion" and that it should embrace the facts behind these alleged offences for which the surrender of the respondent is sought.

Shane Murphy SC for the applicant has submitted firstly that there is a clear distinction between the concept of a political offence and the concept of political opinion, the former no longer being a reason for prohibiting surrender. In so far as the respondent is arguing that he is being prosecuted on account of his political opinions and relying on s. 37 of the Act, Mr Murphy submits that the respondent has put no evidence before the Court to make such a case. He submits that the respondent has not described in any way in his affidavit what his political opinion is, or in what way it is established that the warrant has been issued for the purpose of facilitating his prosecution for reasons connected with his political opinions. Mr Murphy has also referred to Article 2.2 of the Framework Decision which includes within that list of categories of offence for which double criminality is not required to be verified/established offences of 'terrorism'. He submits that it is clear that such offences are within the ambit of the Framework Decision, and that the facts of these offences which are set forth in great detail in the warrant can be seen as giving rise to a terrorist-type offence, and certainly are not sufficient to exclude the offences from the ambit of the Framework Decision, and therefore the Act. He submits that the surrender of a respondent for prosecution on offences of this kind is not intended to be nor is prohibited by the provisions of the Act or the Framework Decision.

I agree with Mr Murphy that the respondent in this case has not laid any evidential basis for his plea that he is being prosecuted on

account of his political opinions. There must be a distinction between being prosecuted or punished on account of one's political opinions, and the commission of a political or politically motivated offence, the latter being no longer an offence for which surrender is prohibited as such. In the present case, there can be little doubt that in so far as the offences in 1992 are concerned they were political offences within the meaning which would have been given to that term at the time when his extradition was first requested. They appear to be offences which were committed in the context of the political troubles extant at that time, and are similar to offences which were the subject of judicial decisions in those days which found them to be political offences. But in order to come within the ambit of s. 37 of the Act, it would, in my view, be necessary to establish not simply that the offences committed or alleged to have been committed were political offences, as understood by that term, but that the warrant has been issued in order to facilitate prosecution which is brought not simply in respect of such an offence but "on account of his political opinions". There is a distinction. I suggest that it would be necessary to show that the respondent, holding certain political opinions, is being prosecuted for an offence because he holds those opinions, whereas another person, not holding those particular opinions and who might commit the same offence, would not be prosecuted for that same offence. In my view, section 37 provides a protection from this type of discrimination, as well as the others set forth therein, and is not intended to embrace, *sub silentio*, the former political exception. I do not believe that the judgment of McCombe J. in *Asliturk* is of much assistance in this case.

The respondent has failed to establish the necessary ground for submitting that his surrender is prohibited on the basis put forward, and this ground of objection must also fail.

Legitimate expectation that he would not be surrendered/extradited:

It is submitted that the respondent was entitled to rely on a legitimate expectation, following the offering of no evidence in pursuit of the previous application and the discharge of the respondent from the earlier proceedings in 1994, that he would never again be the subject of any application for his extradition. He has stated in his affidavit that he lived his life thereafter, including by the begetting of children, in the belief that he would no longer be sought for extradition so that he could be prosecuted for the offences in question. He believed that all legal issues in relation to his extradition had been finally disposed of by that offering of no evidence and his discharge, following the refusal to extradite Joseph Magee, and he proceeded to plan and live his life on that basis and with the comfort of that knowledge.

Ms. Donnelly has referred to the judgment of Barr J. in *Cannon v. Minister for Marine* [1991] 1 I.R. 82 (approved of by Fennelly J. in his judgment in the Supreme Court in *Daly v. The Minister for the Marine* [2003] 1 I.R. 523), where it states:

> *"… the concept of 'legitimate expectation', being derived from an equitable doctrine, must be reviewed in the light of equitable principles. The test is whether in all the circumstances it would be unfair or unjust to allow a party to resile from a position created or adopted by him which at that time gave rise to a legitimate expectation in the mind of another that that situation would continue and might be acted upon by him to his advantage."*

Ms. Donnelly has also sought support in the judgment of Keane CJ in *Eviston v. DPP* [2002] 3 I.R. 260 where a person had been informed by the respondent hat she would not be prosecuted for a certain offence, and, without further notification to her, that decision for no apparent reason was reviewed, thereby causing additional stress and anxiety. The Chief Justice was "forced to the conclusion that in circumstances where the respondent candidly acknowledges that there was no new evidence before him when the decision was reviewed, the applicant was not afforded fair procedures to which, in all the circumstances she was entitled. It follows that the requirements of the Constitution and the law will not be upheld if the appeal of the respondent in the present case were to succeed."

That was a case entirely different on its facts to the present one of course. The review procedures within the DPP's office were not procedures provided for by any law, and the applicant could not have been aware of the fact that such a decision might be reviewed. However, the Chief Justice made the point that if those procedures were part of the law of the land, the applicant would have to be taken to be aware "however artificially" of that law.

But Ms. Donnelly has submitted also that the very lengthy delay between the decision to not proceed with the application for his extradition and the issue of the European arrest warrant strengthens the argument that it is unjust to once again seek his extradition, because in her submission it must be assumed that the more time that passes from a decision the greater is the expectation that the decision will not be altered or resiled upon.

Mr Murphy has submitted by way of response that the mere fact that the State offered no evidence in the previous application for the respondent's extradition is insufficient to give rise to a legitimate expectation that at no stage in the future, if circumstances may change or permit, would his extradition again be sought, and that he would never be prosecuted for the offences in question if for whatever reason he was again in the United Kingdom, either voluntarily or otherwise. He submits that there is no evidence at all of any actual assurance given to the respondent that he would not again be sought for extradition, and that without such an assurance being given, no legitimate expectation in the legal sense can arise.

I am satisfied that if the surrender of the respondent is prohibited under the Framework Decision or the Act by virtue of the passage of time and other circumstances identified in this case by the respondent, it is not because of any legitimate expectation in the legal sense. He may well have assumed that after his discharge in 1994 from the earlier application he could get on with his life and that any question of his extradition was a thing of the past. But that is not the same as saying that the doctrine of legitimate expectation operated against the UK authorities in circumstances where new extradition arrangements were adopted by Member States in 2004, offering a renewed opportunity to seek his surrender without the obstacle being present (political offence exception) which inhibited the previous application from being pursued to a conclusion. This ground of objection fails.

Constitutional/Convention rights – Article 8 family rights:

Clearly the factual basis for this objection is that the respondent believed that after his discharge from the first extradition proceedings he could get on with his life in the safe belief that he could not be extradited to the United Kingdom, and he did so including by having a number of children as averred by him in his supplemental affidavit to which I have already referred. It is submitted that this belief on his part was a reasonable and rational one and in no way far-fetched given the events as they had occurred. While it is always the case that a law may be altered, it is submitted that even if the respondent is to be regarded as accepting that possibility, the position is that even when the law was changed by the passing into law of the 2003 Act on the 1st

January 2004, there was excessive and unnecessary delay on the part of the UK authorities in issuing a European arrest warrant under the new arrangements. It appears that Joseph Magee was arrested in 2004 while he was in the United Kingdom and that he pleaded guilty in July 2004. Nevertheless it was not until 14th February 2007 that the warrant in the present case was issued by the issuing judicial authority, and it is noted that this warrant was not endorsed for execution until an application for its endorsement was made in March 2009. During all of this time the respondent was not made aware that another effort would be made to have him surrendered in relation to these offences. Ms. Donnelly has submitted that the respondent was entitled to enjoy the presumption that he could lead and enjoy the family life which he had embarked upon following his release from the earlier application. In this regard it is noted that his children are still very young (aged 2, 3, 10 and 16 respectively).

Ms. Donnelly has submitted that the family rights guaranteed by Article 8 of the Convention are engaged in the present case given the unusual background facts. In such circumstances, it is submitted that this Court is obliged to ensure that surrender is prohibited if the Court is satisfied that to order surrender would be incompatible with the State's obligations under the Convention. It is submitted that the respondent had at all material times the constitutional right to found a family and to enjoy a family life, and in that regard, reference is made to the fact that the respondent is married and that accordingly is part of a family unit which has constitutional protection under Article 41.1.1 and Article 41.1.2 of the Constitution.

Ms. Donnelly accepts of course that family rights which she identifies are not absolute rights, and may be curtailed in the interests of the common good and in a proportionate way. It is submitted that in the absence of any evidence being adduced or submitted by the applicant as to any injury to the common good by a refusal to surrender the respondent, it is not open to the applicant to state that the right of the respondent to his family life must be weighed against the common good. Unlike certain asylum and immigration cases which have dealt with proportionality in the context of a deportation order, and where the background to the common good arguments is that there were and are a great number of such cases, the present case is one of only very few such cases, and the common good is not engaged in the same way as in asylum and immigration cases. It is submitted that this Court must balance the respondent's individual right to enjoy his family rights on the individual facts of this particular case against the competing rights, such as the maintenance of effective extradition arrangements and this State's international obligations arising thereunder.

It is submitted that the applicant has not shown in any way whatsoever why the surrender of the respondent could be justified in the face of a breach of his constitutional/Convention rights. It is submitted that an order of surrender on the unusual facts of this case would be a disproportionate measure, and would constitute a breach of constitutional rights in relation to the family and Article 8 Convention rights, and would in all the circumstances be unjust and oppressive.

In support of her submission that the delay by the UK authorities in seeking the respondent's surrender, for so long after the change in the law was enacted to enable it to do so, is an important feature of the case which this Court can have regard to in balancing the competing right of the respondent to those of the requesting authority, Ms Donnelly has referred to the speech of Lord Bingham of Cornhill in *EB Kosovo (FC) v. Secretary of State for the Home Department* [2008] UKHL 41. Although that case was against an asylum background, it is submitted that it also supports a delay argument in the context of proportionality in the context of extradition. At the heart of that case was an uncontested unreasonable delay in reaching a decision on an asylum application, and hence an issue as to what bearing that delay of four and a half years had on the applicant non-national's rights under Article 8 of the Convention. Lord Bingham saw relevance of delay in three ways, two of which I feel are worth setting out:

> *"It does not, however, follow that delay in the decision-making process is necessarily irrelevant to the decision. It may, depending on the facts, be relevant in any one of three ways. First, the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of the delay, the likelier this is to be true. To the extent that it is true, the applicant's claim under Article 8 will necessarily be strengthened. It is unnecessary to elaborate this point since the respondent accepts it.*
>
> *Delay may be relevant in a second, less obvious way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is the more true where the other party to the relationship is aware of the precarious position. This has been treated as relevant to the quality of the relationship …… A relationship so entered into may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeed year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. The result depends on no legal doctrine but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal.*
>
> *Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes."*

Ms. Donnelly has also referred to what was stated by Lord Bingham said in relation to what questions must be considered by an adjudicator hearing an appeal against removal on Article 8 grounds. In that regard ha stated as follows:

> *"In R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27, [2004] 2 AC 368, para. 17, the House summarised, in terms to which all members of the committee assented and which are not understood to be controversial, the questions to be asked by an adjudicator hearing an appeal against removal on article 8 grounds. It said: "In a case where removal is resisted in reliance on article 8, these questions are likely to be: (1) will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life? (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8? (3) If so, is such interference in accordance with the law? (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others? (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?" In practice the fourth and fifth questions are usually, and unobjectionably, taken together, but as expressed they reflect the approach of the Strasbourg court which is … that 'decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued."*

It is submitted that there is no evidence in the present case that the surrender is at this very late stage necessary as stated at (4) above, but that even if it could be thought to be so, the surrender could not be, and has not been shown to be "*justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued*". In this regard, Ms. Donnelly emphasises the

distinction between the immigration context of proportionality where a great number of cases and individuals are involved and where a floodgates type argument is open, and the present case where the respondent can be regarded as being in a unique situation, and where not man other persons, if any, are likely to be similarly affected, given the unusual features of the background to the present application.

Shane Murphy SC for the applicant has responded to these submissions by first of all referring to the fact that Article 5(1)(f) of the European Convention on Human Rights contemplates extradition as something which can legitimately interfere with a citizen's rights, in so far as that Article provides, *inter alia*, that no one shall be deprived of his liberty save in a number of particular cases including *"the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."*

Mr Murphy submits that any right to family life guaranteed by Article 8 of the Convention is necessarily a confined right and not absolute in nature, and may be curtailed in circumstances such as where it is necessary in the interests of the common good, such as where a parent is required to serve a period of imprisonment, and that it is no different in circumstances where the respondent if surrendered may be required to serve a period of time in prison in the event that he was to be convicted for the offence in question. He submits also that it is important to keep in mind that it is not the act of surrender itself which could potentially adversely impact upon his family rights, but rather any term of imprisonment which may be imposed upon conviction following surrender.

Mr Murphy has referred also to the fact that while Article 8.1 of the Convention declares that "everyone has the right to respect for his private and family life, his home and his correspondence", that right is limited expressly by Article 8.2 which permits an interference with these rights where that is achieved in accordance with law and where it is necessary in a democratic society in the interests of, *inter alia*, for the prevention of disorder and crime. In so far as the respondent's surrender may interfere with his family rights, it is submitted that it is within the categories of exception set forth in Article 8.2 of the Convention.

Mr Murphy has referred to a judgment of this Court in *Minister for Justice, Equality and Law Reform v. Gheorgie*, (Unreported, High Court, 9th April 2009) and to certain comments by Fennelly J. in his judgment in the Supreme Court in the same case on appeal.

That was a case decided on very different facts to the present case. Briefly stated, the respondents were husband and wife who left Romania and came to this State in August 2000, but in due course their surrender was sought on European arrest warrants so that they could be surrendered to serve lengthy sentences of imprisonment imposed upon them in their absence for offences of fraud committed in 1999/2000. The warrants had been issued in January 2007. The respondents had stated in affidavits that they had left Romania in August 2000 in order to make a new life elsewhere and were unaware, until much later, that they were being accused of certain offences. They went on to say that since their arrival in this State they had integrated into their local community here and had also had two children born here who were attending school here. It was submitted that an order for the surrender of both parents of these children would constitute a breach of family rights under the Constitution and under Article 8 of the Convention. Deciding that particular issue, I stated as follows:

> *"In my view this objection must be rejected in limine. There can be no basis for the contention that persons, who have by absconding settled in another jurisdiction, cannot be the subject of a surrender order pursuant to extradition or surrender arrangements entered into between states. No authority has been put forward on behalf of the respondents in this regard, and it could not possibly be the case, since the circumstances in which the respondents contend such breaches arise are likely to arise in very many cases where persons have left one jurisdiction and, by the time their surrender or extradition is sought, have settled in another jurisdiction with other members of their family. It is nowhere contemplated that such circumstances could prevent an order of surrender or extradition being made."*

In his judgment in the Supreme Court, Fennelly J. stated in relation to the same issue:

> *"Like Peart J, I would also dismiss the third ground of appeal in limine. It is a regrettable but inescapable incident of extradition in general and, as in this case, surrender pursuant to the system of the European arrest warrant, that persons sought for prosecution in another state will very often suffer disruption of their personal and family life. Some states have historically refused to extradite their own nationals, but that is a special case. The Framework Decision expressly provides that, in Article 1, that it does not "have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in article 6 of the Treaty on European Union." No authority has been produced to support the proposition that surrender is to be refused where a person will, as a consequence, suffer disruption, even severe disruption of family relationships."*

Mr Murphy submits that the Court should take the same view on the issue raised in relation to family rights in the present case.

Ms. Donnelly in response to these submissions has sought to distinguish the Gheorgie case on the basis, inter alia, that in that case the respondents had absconded from Romania and come to this State, and that such a situation is very different from the respondent herein as described above. She distinguishes the situation of someone who has absconded from the present case because in the former instance the person's position here must be regarded as being precarious and that such persons must be taken to expect that at some stage they may be sought under a European arrest warrant, that situation being very different indeed from one where since 1994 he has had good reason to believe that he would never again be sought for extradition, and where even for five years following the introduction of the new surrender arrangements under the Framework Decision, he heard nothing further in relation to any such intention.

Ms. Donnelly has referred also the judgment of the European Court of Human Rights in *Slivenko v. Latvia* [application 48321/99], judgment 9 October 2003 for a submission that Article 8 of the Convention applies to, *inter alia*, extradition cases. In that regard she has referred to paragraph 94 of the judgment of the Court which makes reference to the Court's case-law *"relating to expulsion and extradition measures" and that "the main emphasis has consistently been placed on the "family life" aspect which has been interpreted as encompassing the effective 'family life' established in the territory of a Contracting State by aliens lawfully living there, it being understood that 'family life' in this sense is normally limited to the core family*".

That was a case where the applicants (mother and daughter) had been expelled from Latvia. The mother had moved to Latvia in 1959 at the age of one month. She met her husband there and they married in 1980. He was a member of the Soviet defence forces and had been transferred to Latvia in 1977. The second named applicant was their daughter who was born in 1981 and lived there until she was 18 years of age.

Following Latvian independence in 1991, a treaty was entered into in 1994 between Latvia and Russia on the withdrawal of Russian troops. Under its provisions the mother's husband was required to leave Latvia with his family. The husband apparently returned to

Russia in 1996, but a deportation order was later issued in respect of mother and daughter, the applicants. Various unsuccessful attempts were made to appeal their removal from Latvia, but in due course, in any event, they left Latvia and rejoined the husband in Russia, but it was accepted by all that their departure had been against their will. It is unnecessary to elaborate on the precise facts of the case. But the Court had to consider whether the removal of the applicants had constituted an interference with their Article 8 rights, and if so whether such interference was in accordance with law, and if so whether it pursued a legitimate aim, and whether it was justified as being necessary in a democratic society within the meaning of Article 8.2 of the Convention.

The Court was satisfied that their removal constituted an interference with Article 8 rights to their 'private life' and to their 'home'. However, because the entire 'core' family was to be removed it was not an interference with the 'family' as such, in the sense of the 'core family' as described above. That is a distinction to the present case where, if surrender is ordered, the measure affects only the respondent father and husband, and it can therefore be inferred that if the present case on its facts was to come before that Court it might take the view, whatever about the remaining aspects of Article 8, that at least what was at stake was an interference with the 'family right' since if surrendered the respondent (being a husband a father) would be removed from the core family unit.

As to whether that interference with the Slivenko applicants' private rights and rights to 'home' was 'in accordance with domestic law', the Court was satisfied that the removal was on the basis of the treaty provisions in question, and considered that "*the applicants must have been able to foresee to a reasonable degree, at least with the advice of legal experts, that they would be regarded as covered by the treaty provisions requiring the departure of relatives of Russian military officers affected by the withdrawal*".

As to whether the removal constituted a legitimate aim, the Court was satisfied that following the gaining of independence by Latvia it was a legitimate aim in the interests of national security to have arrangements in place whereby Russian troops would be repatriated to Russia, and that accordingly the removal of the applicants could be regarded as a measure imposed in pursuance of a legitimate aim in accordance with Article 8.2 of the Convention.

When considering whether the removal was necessary in a democratic society, the Court referred to the fact that it was a feature of military life that families would have to move from time to time depending on where the military member was stationed. It referred also to the fact that even though the applicants' husband/father had retired from military service soon after the deadline for doing so in order to avoid repatriation under the treaty provisions, the fact was that from 1994 onwards, and during the proceedings concerning the legality of the applicant's remaining in Latvia, that fact made no difference to the determination of the applicants' status in Latvia. The Court referred to certain information provided which showed that in some 900 other cases, the authorities had made exceptions in hardship cases and had allowed relatives of Russian military officers to legalise their status in spite of their situation as relatives of such military personnel, and that they considered that "*they had some latitude which allowed them to ensure respect for the private and family life and the home of the persons concerned in accordance with the requirements of Article 8".* The Court was of the view that the authorities had not considered whether the applicants presented a specific danger to national security or public order, and neither had any allegation been made in that particular case that the applicants presented such a danger, and that instead the public interest seemed to have been perceived in abstract terms. At paragraph 122 of its judgment, the Court stated as follows:

> *"The Court considers that schemes such as the present one for the withdrawal of foreign troops and their families, based on a general finding that their removal is necessary for national security, cannot as such be deemed to be contrary to Article 8 of the Convention. However, application of such a scheme without any possibility of taking into account the individual circumstances of persons not exempted by the domestic law from removal is in the Court's view not compatible with the requirements of that Article. In order to strike a fair balance between the competing interests of the individual and the community, the removal of a person should not be enforced where such measure is disproportionate to the legitimate aim pursued. In the present case the question is whether the applicants' specific situation was such as to outweigh any danger to national security based on their family ties with former foreign military officers."*

The Court was satisfied that significant roots had been put down by the applicants during the years that they had lived in Latvia, and regarded them as having integrated into Latvian society. The Court concluded:

> *"Having regard to all the circumstances, the Court considers that the Latvian authorities overstepped the margin of appreciation enjoyed by the Contracting Parties in such a matter, and that they failed to strike a fair balance between the legitimate aim of protection of national security and the interest of the protection of the applicants' rights under Article 8. Therefore, the applicants' removal from the territory of Latvia cannot be regarded as having been necessary in a democratic society".* (my emphasis)

Ms. Donnelly has submitted that it falls to this Court on the present application before it, to reach a determination for the purposes of s. 37 of the 2003 Act as to whether Article 8 rights will be breached if surrender is ordered. If so, surrender is prohibited. This Court in reaching a conclusion in that regard is required to have regard to the jurisprudence of the European Court of Human Rights, and is obliged to act in accordance with this State's obligations under the Convention. In that regard, I am satisfied that Article 8 applies in extradition cases, though it will not of course be the case that an order for surrender in every case will constitute a breach of Article 8. Every case will have to be considered on its own facts. Many cases will be cases such as *Gheorgie*, and similar cases, to which the remarks of Fennelly J. in *Gheorgie* will be apposite. But there will be the exceptional case, with particular, exceptional and clearly established facts, where the Court may consider that a submission under Article 8 should not be dismissed *in limine*, as happened in *Gheorgie,* given the requirement under s. 37 of the Act that surrender is prohibited if "his or her surrender would be incompatible with the State's obligations under— (i) the Convention or (ii) the Protocols to the Convention."

I have set out some detail of the European Court of Human Rights consideration of the facts of the Slivenko case since it is helpful to see the process by which it arrives at its conclusion as to whether a breach of Article 8 has occurred in that case. Section 4 of the European Convention on Human Rights Act, 2003 mandates that "a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions and judgments" i.e. those set forth in (a), (b) and (c) of section 4 which includes those of the European Court of Human Rights. Section 2 of that Act requires this Court to interpret any statutory provision in a manner compatible with the State's obligations under the Convention, one being to guarantee respect for private and family life in accordance with Article 8 of the Convention.

It seems to me to follow that for the purposes of the present application for the respondent's surrender, this Court is required to consider the following questions in arriving at a conclusion as to whether an order for the surrender of the respondent to the United Kingdom would constitute a breach of this State's obligations under the Convention or its Protocols: (1) does surrender constitute an interference with the respondent's private/family right; (2) if so, is that interference one that is in accordance with law; (3) if further so, is the interference, by surrender of the respondent, in pursuit of a legitimate aim or objective; (4) and further if so, whether that

interference is necessary in a democratic society (the latter meaning that it is justified by a pressing social need) and proportionate to the legitimate aim pursued.

Before considering these matters, it is important to keep in mind that it is the surrender of the respondent, rather than what may or may not happen on foot of any conviction for the offences, which must be considered in the context of Article 8.

Taking these issues in order, I am satisfied that the surrender of the respondent would constitute an interference with his family right. It is inevitable that for the purpose of surrender the respondent will be taken into custody and handed over to the relevant authorities of the United Kingdom, and that he will at least for a time be in custody in the United Kingdom, the length of that time being dependent on whether or not bail is granted pending his trial. He will be separated from his 'core family'. Even in the event of bail being granted, one can reasonably anticipate that there would be a condition that he remain at an address in the United Kingdom and not leave that jurisdiction, especially given the previous and the present application for his extradition/surrender. The possibility that his family members could accompany him and be in the United Kingdom while he may have to remain there is not something to be taken into account in considering the question of whether or not surrender constitutes an interference with his private and family rights under Article 8.

As to the second question, there can be no doubt but that the interference would be in accordance with law, being on foot of an order made under s. 16 of the 2003 Act.

As to the third question as to whether the interference is in pursuit of a legitimate objective, there can be little doubt but that this must be answered in the affirmative. Extradition arrangements between sovereign states recognise the comity of nations and the interest of maintaining national security, public safety and the maintenance of law and order, facilitating the cross-border pursuit of persons accused of crimes and/or sentenced to periods of imprisonment. That is a legitimate objective, and specifically in the present case, the prosecution of a person alleged to have committed serious crimes must be seen as a legitimate objective.

The fourth, and critical question in the present case, is whether the interference with the respondent's Article 8 rights is necessary in a democratic society within the meaning of Article 8.2 of the Convention, and proportionate to the legitimate aim pursued.

The question of whether the interference is necessary in a democratic society involves, *inter alia*, whether it can be justified on the basis of a pressing social need. The European Court of Human Rights has of course had to consider such an issue in a number of cases coming before it, albeit not in an extradition context. Such a case was *Sezen v. Netherlands* [2006] 43 EHRR 621. The Court's consideration of the question of whether the interference was "necessary in a democratic society" appears at paragraphs 41 et seq. and refers to other previous cases in which this has been considered.

As to the methodology to be used for assessing this question the Court stated the following at paras. 41-42:

> "Therefore, the Court's task consists in ascertaining whether in the circumstances of the present case the refusal struck a fair balance between the relevant interests, namely the applicants' right to respect for their family life, on the one hand, and the interests of public safety and the prevention of disorder and crime, on the other.
>
> *42. Where continued residence is refused to an alien who settled in the host country when already an adult, the Court applies the following guiding principles in its examination of the question whether that refusal was necessary in a democratic society (see Boultif, cited above):*
>
> *- the nature and seriousness of the offence committed by the applicant;*
>
> *- the length of the applicant's stay in the country from which he or she is to be expelled;*
>
> *- the time elapsed since the offence was committed and the applicant's conduct during that period;*
>
> *- the nationalities of the various persons concerned;*
>
> *- the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;*
>
> *- whether the spouse knew about the offence at the time when he or she entered into a family relationship;*
>
> *- whether there are children of the marriage, and if so, their age; and*
>
> *- the seriousness of the difficulties which the spouse is likely to encounter in the applicant's country of origin."*

The Court's task involves striking a fair balance in the present case between the respondent's right to family life, and this State's obligation, as it appears, under the Framework Decision, and subject *inter alia* to the provisions of s. 37 of the Act, to surrender the respondent under the European arrest warrant. In my view it cannot be the case that the obligation of this State to surrender the respondent so that he can be prosecuted for serious offences in the United Kingdom would on all occasions trump any family or other rights of a respondent, as otherwise the provisions of s. 37 of the Act would have no relevance or meaning. That section requires the Court in cases such as the present one, where facts are established, to determine whether the surrender of the respondent would constitute a breach a Convention right of the respondent, and if so, to prohibit surrender.

There is no doubt that the offences for which surrender is sought for the purpose of prosecution are serious offences, but nevertheless are ones in respect of which the respondent enjoys a presumption of innocence. It is of some relevance in the weighing exercise that the offences date back to April 1992 – some 18 years ago, and it is of some relevance that some five years have passed since the 2003 Act was passed and it was only in May 2009 that the respondent was arrested here. That matter may speak to proportionality and I will come to that again.

The respondent was born in Northern Ireland in 1969, and having lived in Armagh during his childhood and early adulthood, appears to have come to this jurisdiction sometime prior to his arrest here in February 1994, when he was 24 years of age. At that time he was unmarried. He has therefore been living in this jurisdiction at least for a period of 16 years, during which time he has married and from which marriage he has four children whose ages range from 2 to 16.

As to the time which has elapsed from the commission of the offence, it is about 18 years, and there is no evidence that since he came to reside in this jurisdiction he has come to adverse attention to the authorities.

I have no information as to the nationalities of his wife but she has been living here for many years now. His children have all been born here, and as I have said, he was born in Northern Ireland. The warrant describes him as being of 'British' nationality. Whether he qualifies for Irish citizenship is something of which I have no evidence but it is not of much importance in the circumstances of the present case.

The respondent's family situation has already been fully described. He has clearly been either married to, or a partner of, his children's mother for a very lengthy period. His children are born and being schooled in this jurisdiction, and they are integrated in their community in a normal family and community life.

As to whether the respondent's spouse knew about the alleged offences when she joined her life to that of the respondent by way of marriage or otherwise, one can assume that she did I think, though there is no direct evidence in that regard. But, equally, I think it can be assumed that she also was aware that in 1994 her partner/husband was no longer the subject of the extradition proceedings and that the application for his extradition had been withdrawn following the refusal of the application in respect of Joseph Magee. In other words, she would have assumed, as did the respondent, that he would not be forced to return to the United Kingdom to face prosecution on these offences.

As to the seriousness of the difficulties which the spouse is likely to encounter in the respondent's country of origin, one can transpose that consideration into one as to the difficulties which the spouse and children in this case would be expected to face by moving over to the United Kingdom to resume family life in the United Kingdom if the respondent were to be surrendered. In the circumstances of the present case, which are of course very different to the facts and circumstances of the Sezen case, the situation is that if surrendered the respondent would have to face a trial, which presumably would be assumed to take place within a reasonable time. He may be acquitted and if so he would be free to return to this jurisdiction to resume his life here. His spouse and children can choose not to go to the United Kingdom, and in the event of an acquittal, the separation may not be that lengthy, although it must be assumed that it could be perhaps more than a year. If he is convicted and sentenced the separation would depend on the sentence imposed, and whether he would benefit from the release of prisoner arrangements under the Good Friday Agreement, that being a matter of executive discretion and decision, and not a matter for the courts. But clearly any order of surrender presents a significant risk that the respondent will be required to spend a lengthy period of time, for whatever reason, away from this jurisdiction. Even if the spouse and children decided to move to the United Kingdom to be nearer to him, or even with him were he to be granted bail pending trial, this Court can assume that it would present the usual and significant difficulties for spouse and children to uproot themselves and their belongings and move to another jurisdiction. They would be parted from their friends, family and community and would be required to re-establish themselves in another environment. There are significant matters and ones which this Considers would in all probability result more likely than not in a decision to remain here. That as a matter of probability, in my view, means that a surrender of the respondent would result in a separation of the respondent from his wife and family if he is surrendered, and this Court must make its decision on the assumption therefore that his family would not feel able to go and join him.

It is also an undoubted fact that for whatever reason, and these have been explained in the evidence before the court as I have set forth, there has been a lengthy passage of time from 1994 until the possibility presented itself again to seek the respondent's surrender under the new surrender procedures under a European arrest warrant. But there has been further delay from 1st January 2004 until the respondent was arrested in May 2009. Advices were taken from a number of sources and this and other factors, such as awaiting the result of the Dundon decision, caused delay. But the period of 8 years from the enactment of the 2003 Act is something to weigh in the balance when considering the extent of the pressing social need in a democratic society to achieve the surrender of the respondent. In that regard I refer again to the comments of Lord Bingham in *EB Kosovo (FC) v. Secretary of State for the Home Department* [*supra]* as to the relevance and effect of a delayed decision on the question of family rights.

In my view the pressing social need or other need or obligation to surrender the respondent is diluted by the delays which have been encountered in this case, for whatever reason they have occurred, and in that regard, it is not necessarily the case that much of the delay was unreasonable given the unique background to the present application. It is reasonable that advice and care should have been considered necessary. Nevertheless it is the case that at no point during that period of time was the respondent made aware that moves were afoot to again seek his surrender. In so far as two of his children are aged 2 and 3 respectively, they were born some considerable time after the 2003 Act was enacted and came into force on the 1st January 2004.

In assessing the question of the balance to be struck between this State's obligation to surrender and the rights of the respondent to family and private rights, I am of the view that proportionality is not satisfied on the unique and exceptional facts of this case. In my view, the obligation to surrender which this State is under by virtue of its international obligations must yield to the Article 8 rights of the respondent, and in my view therefore his surrender is prohibited by the provisions of section 37 of the Act.

I therefore refuse to grant the application for his surrender.