Neutral Citation [2015] IEHC 677

THE HIGH COURT

[2013 No. 1 EXT]

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003

(AS AMENDED)

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

FRANCIS LANIGAN

RESPONDENT

JUDGMENT of Ms. Justice Murphy delivered on the 2nd day of September, 2015.

1. The following judgement should be read in conjunction with the preliminary ruling in this matter, delivered by this Court, on the 17th November, 2014 in which the background to this application is outlined as well as the Court's decision on various procedural and evidential issues which arose in the course of the section 16 hearing. The primary ground of objection to surrender is and remains that the respondent's life would be under threat if surrendered. The main findings of the Court following three days of hearing in July 2014 were as follows:

> a) The process on which the Court is engaged is not a trial nor an adversarial process in which the normal rights attendant on such a process would be engaged;
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> b) The process is a surrender process mandated by the Council Framework decision of 13th June 2002 and effected in this jurisdiction by the EAW Act 2003 as amended;
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> c) In giving effect to the surrender process, the Court is not an arbiter between conflicting parties. The Court's function is to ascertain whether the conditions set out in s. 16 of the European Arrest Warrant Act 2003 have been met and if so, that the Court is not required to refuse surrender under s. 21A, 22, 23 or 24 of the Act and/or that the surrender is not prohibited by Part 3 of the Act. The Court must be satisfied regardless of the urgings of the parties before making a decision to surrender;
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> d) In conducting that assessment the Court is not limited to the material placed before it by the parties as the Court might be in an adversarial hearing. The Court is specifically entitled by s. 20 of the Act to seek additional information or documentation from either the issuing judicial authority or the issuing state to allow it to perform its function;
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> e) The Court is entitled to seek, receive and act upon information from the issuing judicial authority and/or the issuing state;
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> f) That while a practice had developed of putting information from a judicial or state authority before the Court by exhibiting it on affidavit, such was not essential. What is essential is that the Court be satisfied as to the provenance and authenticity of the information and that it relates to the particular application upon which the Court is engaged;
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> g) That in the instant case, applying the test set out in *MJELR v. Rettinger* [2010] IEHC 206, there was evidence before the Court in the form of affidavits from the respondent and his solicitor of credible threats to his life such as to put the Court on inquiry both as to the nature of any threats and the capacity of the Northern Ireland authorities to protect his right to life;
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> h) The Court of its own motion sought information from the issuing state addressing concerns as to any potential threat to the respondent's life should he be surrendered to the issuing state.

2. Pursuant to that direction the Central Authority, by letter dated 27th November, 2014 wrote to the Central Authority in the UK seeking information addressing the specific concerns expressed by the respondent on affidavit regarding his perceived threat to his life. In particular the Central Authority was asked to advise "*whether it is accepted that there would be a real and immediate threat to the life of the respondent if he were surrendered*", and, having regard to the specific concerns expressed by the respondent on affidavit concerning the risk that paramilitary organisations may be able to commit murder in prisons in Northern Ireland, to "*advise as to whether the Northern Irish Prison Service would be in a position to provide the respondent with the effective protection against such a threat, should it exist, and by what means*".

3. In response to this request information was provided by Will Kerr, Assistant Chief Constable, Crime Operations of the PSNI, relating to the respondent's concern as to a threat to his life and from Brian Neil Donaldson of the Northern Ireland Prison Service relating to the capacity of the Northern Ireland Prison Service to protect those who may be under threat from other prisoners. This information was supplied to the Court on 8th December, 2014. The Court is satisfied as to the provenance and authenticity of the information provided and that the information relates to the specific circumstances of this case. The Court is so satisfied based on the correspondence between the Central Authority in this state and the UK Central Authority and the correspondence between the UK Central Authority and its state agencies.

4. Having been provided with the additional information sought by the Court, counsel for the respondent did not challenge the content

of the information supplied but rather sought to challenge once again, its admissibility. By notice of motion dated 8th December, 2014, counsel for the respondent also sought orders for discovery relating to communications between the applicant Minister, her servants, her agents and any official agency or official in the United Kingdom "*concerning possible answers to the applicant's contention that his surrender under European Arrest Warrant would pose a significant threat to his life*". The respondent also sought a referral to the Court of Justice of the European Union under Article 267 of the Treaty on the Functioning of the European Union of questions touching on whether or not Ireland, in giving effect to the Framework Decision, was obliged to depart from national rules of practice, procedure, evidence and the conduct of trials having regard to Article 12 of the Framework Decision. Counsel for the respondent also sought a reference in respect of the proper interpretation of Article 17 of the Framework Decision setting out time limits in respect of the process of surrender. Additionally the notice of motion sought to renew the respondent's application for bail.

5. The applicant was not on notice of the respondent's applications and the Court adjourned the matter to 15th December, 2014 for argument. By that date the respondent's application had morphed into an application to dismiss the application for surrender or in the alternative an application for a reference to the European Court of Justice of questions touching on the procedure adopted by Ireland in giving effect to the Framework Decision and the fact of non compliance with the time limits set out in Article 17 of the Framework decision. On the same date, the Court heard the respondent's renewed application for bail and the court granted him bail on stringent terms which included terms that he reside at a specific address and sign on daily at an adjacent Garda Station. Following a successful appeal on the amount of the independent surety set by this court the applicant was admitted to bail in July 2015.

6. As for the remainder of the application, notwithstanding the Court's specific ruling that the process upon which it was engaged was neither a trial nor an adversarial process, counsel for the respondent persisted in arguing that the information sought by the Court pursuant to s. 20 was inadmissible and that the respondent was being denied his rights, under the Constitution, the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union, to cross examine and test the evidence and consequently that the Court must disregard it.

7. In the course of the hearing of 15th December, 2014 counsel for the applicant drew attention to the decision of the European Court of Human Rights in *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, ECHR 2005-I in which the Grand Chamber of the European Court of Human Rights held that Article 6 of the ECHR is not applicable to extradition proceedings. Reliance in particular was placed on the statement by the Court at paragraph 82 of that decision:

> *"The Court reiterates that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6(1) of the Convention".*

8. The respondent countered that McKechnie J. in *O'Sullivan v Governor of Cloverhill Prison* [2011] IRLM 350 ruled that EAW proceedings are not extradition proceedings. That is a rather simplistic summary of the finding of McKechnie J. which involved detailed analysis of the issue of the constitutionality of s. 16(11) in respect of appeals from the decisions of this Court. What was held *inter alia* by McKechnie J. in that case was:

> *"That surrender under the European arrest warrant regime which was based on a significant level of integration and reciprocity, must be considered as a regime different , separate and distinct from extradition, which rested on materially different principles."*

In the Court's view if Article 6 rights are not engaged in extradition proceedings they can hardly be engaged in a process agreed between all Member States and whose objectives set out of recitals of one and five of the Framework Decision are:

> *"(1) … The formal extradition procedure should be abolished among the member states in respect of persons who are fleeing from justice after having been finally sentenced and extradition procedure should be speeded up in respect of persons suspected of having committed an offence.*
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> *(5) The objective set for the Union to become an area of freedom and security and justice leads to abolishing and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentence makes it possible to remove the complexity and potential for delay inherent in the present extradition procedure. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters covering both pre-sentence and final decision within an area of freedom, security and justice."*

9. The Court rejected the respondent's application for dismissal on the ground that it was based on an misconceived interpretation of the Framework Decision and the European Arrest Warrant Act 2003 (as amended), which gives effect to same in this jurisdiction, and on the grounds that the issues now being raised in respect of the additional information had already in effect been adjudicated upon by the Court in its ruling of 17th November, 2014. The Court similarly rejected the application for a reference on the grounds that the Court had already given its decision in respect of the procedural issues upon which a reference was being sought. The Court did however accede to the respondent's application for a reference in respect of the proper interpretation of Article 17 of the Framework Decision. In an ex-tempore ruling on 18th January, 2015 the Court held as follows in relation to the issue of a reference to the European Court of Justice:

> *"The Court has now had an opportunity to reflect on the submissions made by the parties on the issue of a reference to the Court of Justice of the European Union on the proper interpretation of the time limits set out in Article 17 of the Framework Decision.*
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> *If this proceeding were a trial, the applicant's objection to the respondent raising a new ground of objection at this late stage would be, in the Court's view, unanswerable. The respondent did not raise Article 17 in his original grounds of objection filed in November 2013, eleven months after his arrest and four months after he had been granted legal aid. He sought to raise it prior to the commencement of the section 16 hearing on 30th June 2014, but he did not pursue it during the hearing. He then seeks again to raise it after the substantive hearing. This would not be permissible in a trial setting.*
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> *However the Court has repeatedly stated that the process upon which it is engaged is not a trial. It is a surrender process, the parameters of which are set out in the Framework Decision as transposed into Irish law by the EAW Act 2003 as amended. As the Court ruled at paragraph 19 of its preliminary ruling delivered on the 17th day of November 2014:*

> *'Despite counsel for the respondent's repeated insistence that this is a trial in which the court is the arbiter between two parties and in which the full rights of due process attaching to a trial are engaged, the court is satisfied that this is not a trial. The outcome of this hearing will not determine the guilt or innocence of the respondent of the offences for which his surrender is sought. The process on which the court is engaged is a distinct process created by the Council Framework Decision of the 13th June 2002 providing for surrender procedures between member states of the European Union. The framework is predicated on the principle that each member state respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union. The system is further predicated on mutual trust and confidence between member states. The system is designed to favour surrender. This is reflected in our legislation by the insertion of various presumptions as to the conduct of requesting states. The requirement that the final decision on surrender be taken by a judicial rather than an administrative authority is to ensure proper scrutiny of the operation of the system, which in turn engenders faith in the propriety of the process. The Framework Decision envisages the exchange of information upon which the issuing and receiving states can act. This is a novel concept in our jurisprudence. Our courts are conditioned to act on "evidence" not "information". It is not surprising that it has taken time for our common law system to adjust to such a concept. The Framework Decision encourages communication between member states and their differing legal systems.'*
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> *This process has to date taken two years. That is clearly outside the time frame set out in Article 17 and referred to in Article 15. The Supreme Court grappled with the issue in Dundon v. Governor of Cloverhill Prison [2006] 1 IR 518 and concluded that the time limits did not create individual rights and that the duty to surrender subsisted after the expiration of the limits set out in Article 17. However Fennelly J stated at page 545, paragraph 65:*
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> > *'It has to be acknowledged, at once, that the legislation presents unusual problems of interpretation. The European arrest warrant is itself a novel instrument. It was adopted in the wake of the devastatingly tragic events of the 11th September, 2001. The drafting is extraordinarily loose and vague, particularly in the manner in which offences are defined. The court, on this appeal, has to consider an Act of the Oireachtas which implements a framework decision adopted pursuant to the provisions of Title VI of the Treaty on European Union. However, Ireland has not made the declaration which is necessary under Article 35 of the Treaty on European Union before the Court of Justice can exercise the interpretative jurisdiction envisaged by that Article. Hence, this court decides this question without any guidance from that court. The Court of Justice may, of course, be asked, on a reference from another member state, to rule on the interpretation of the 60 day period.'*
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> *It has recently become possible to seek the assistance of the Court of Justice of the European Union on this issue. It appears to the Court that our system cannot function within the limits set out in Article 17. The consequences of that inability are a matter of real substance and the Court, independently of the parties, would wish to have the assistance of the Court of Justice in interpreting Article 17 as the outcome could affect the Court's ultimate decision in this case."*

10. In the absence of agreement between the parties as to the content of the reference, the Court prepared the reference which was forwarded to the European Court of Justice on the 19th May, 2015. The questioned posed was:

> *(1) What is the effect of a failure to observe the time limits specified in Article 17 of the Framework Decision of the 13th June, 2002 on the European arrest warrant and the surrender procedures between member States (2002/584/JHA) read in light of Article 15 of the said Framework decision?*
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> *(2) Does failure to observe the time limits specified in Article 17 of the Framework Decision of the 13th June, 2002 on the European arrest warrant and the surrender procedures between member States (2002/584/JHA) give rise to rights on the part of an individual who has been held in custody pending a decision on his/her surrender for a period in excess of those time periods?"*

An expedited hearing was requested and granted having regard to the fact that the respondent had at that point been in custody for in excess of two years on foot of the European Arrest Warrant. The matter came on for hearing before the European Court of Justice on 1st July, 2015 and the judgment of that Court was delivered on 16th July, 2015.

11. In its judgment the Court of Justice considered the question referred in the context of the Charter of Fundamental Rights of the European Union and in particular Article 6 relating to the right to liberty and security and in the context of the police and judicial co-operation in criminal matters set out in the Framework Decision. The Court of Justice ruled:

> *"Articles 15(1) and 17 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as meaning that the executing judicial authority remains required to adopt the decision on the execution of the European arrest warrant after expiry of the time-limits stipulated in Article 17.*
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> *Article 12 of that Framework Decision, read in conjunction with Article 17 thereof and in the light of Article 6 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding, in such a situation, the holding of the requested person in custody, in accordance with the law of the executing Member State, even if the total duration for which that person has been held in custody exceeds those time-limits, provided that that duration is not excessive in the light of the characteristics of the procedure followed in the case in the main proceedings, which is a matter to be ascertained by the national court. If the executing judicial authority decides to bring the requested person's custody to an end, that authority is required to attach to the provisional release of that person any measures it deems necessary so as to prevent him from absconding and to ensure that the material conditions necessary for his effective surrender remain fulfilled for as long as no final decision on the execution of the European arrest warrant has been taken".*

12. It is clear from the judgment of the Court of Justice, which in substance accords with the decision of the Supreme Court in *Dundon v. Governor of Cloverhill Prison* [2006] 1 IR 518, that the obligation to execute the European Arrest Warrant subsists even after the time limits provided in Article 17 have expired. It is also clear that the Court of Justice is of the view that a properly and diligently executed surrender process pursuant to the Framework Decision is not amenable to challenge pursuant to Article 6 of the Charter of Fundamental Rights of the European Union, see paragraphs 53-58 of the judgment of the Court of Justice of the European

Union.

13. The Court of Justice of the European Union having delivered its decision on 16th July, 2015, this Court reconvened on the 20th July to hear such submissions as the parties might wish to make in respect of the content of the additional information from the Northern Ireland Authorities presented to the Court on 8th December, 2014.

Objections to Additional Information

14. The respondent did not address the Court on the content of the additional information but again raised objection on procedural grounds notwithstanding the clear earlier rulings of the Court in this respect. The respondent objects to the admission of such information on the grounds that the Court had no jurisdiction to make a direction seeking additional information in its preliminary ruling without first giving notice to the respondent and hearing his submissions in that regard. Once again, the respondent misconceives the process upon which the Court has embarked which is not an adversarial process but rather a distinct procedure provided for by the 2003 Act based on the exchange of information upon which the issuing and receiving states can act. The Court is specifically entitled by s. 20 of the Act, to seek additional information or documentation from either the issuing judicial authority or the issuing state, if the Court is of the opinion that what is before it is not sufficient to allow the Court to perform its functions under the Act. While the respondent further argues that there was "*sufficient information*" to enable the Court to reach its decision when the applicant closed its case on 4th July, 2014, for the reasons set out in its preliminary ruling, the Court does not agree that this was so.

15. The respondent further contends that even if the admission of such information is permissible, then the Court should afford it less weight on the grounds that the respondent's evidence as to the threat to his life was not cross-examined and the applicant has purported to use unsworn documentation that cannot be tested in cross-examination to contradict that evidence. He further submits that were the Court to hold otherwise this would contravene his right to equality under Art. 40.1 of the Constitution and Articles 20 and 47 of the European Charter on Fundamental Rights given that the information put before the Court in several other comparable cases, including *Minister for Justice v. Adams* [2012] 1 IR 140, was in affidavit form.

Yet again, counsel for the respondent misconstrues the surrender process. It has been clear since the Supreme Court decision in MJELR v Sliczyinski [2008] IESC 73 that the High Court as executing authority is entitled to have "*full regard*" to information supplied by the issuing state in for the purpose of deciding whether a person should be surrendered pursuant to a European Arrest Warrant. As held by Murray C.J. in MJELR v Sliczyniski [2008] IESC 73 at page 7

> *" In my view s.20(1) and (2) of the Act of 2003 as amended are provisions by which the Oireachtas sought to give effect to the system of surrender envisaged by the Framework Decision so as to ensure that information could be furnished by the requesting judicial authority to the executing judicial authority, the High Court. If further information is transmitted by the requesting judicial authority either on its own initiative or following a request it is the function of the central authority to transmit it to the executing judicial authority, in this country, the High Court. Section 20 must be interpreted in the light of the objectives of the Framework decision and its provisions. In my view it specifically gives effect to Article 15(2) and (3) of the Directive. In so providing I am satisfied that the Oireachtas intended consistent with the obligations of the State pursuant to the Framework Decision, that the High Court would have available to it the information provided by the issuing judicial authority and would have full regard to that information, in addition to information provided in the European Arrest Warrant itself, for the purpose of deciding whether a person should be surrendered on foot of a European Arrest Warrant.* ***Moreover to interpret the provisions of the Act otherwise would render them meaningless since if direct evidence had to be given of the information concerned every Judge or member of the issuing judicial authority providing information would either have to give evidence personally or swear an Affidavit of matters within their own knowledge. If that were the case the provisions referred to would serve no purpose." [emphasis added]***

Nor does the fact of this Court's procedural ruling that it is not essential that information received from an issuing state pursuant to s.20 of the EAW 2003 (as amended) be exhibited on affidavit, as long as the provenance and authenticity of the source is established, when previously such information was frequently exhibited on affidavit, amount to inequality of treatment either under the Constitution or the European Charter in the context of an EAW hearing.

In this case, had the additional information received from the Northern Ireland authorities been exhibited in an affidavit of an appropriate officer of the Central authority and had Counsel for the respondent sought and been given leave to cross-examine him, such cross-examination would be limited to the provenance of the information and not the substance thereof

Counsel for the respondent cited *McMahon v. Leahy* [1984] IR 525, as authority for the proposition that in extradition proceedings, where the State has previously adopted a particular position it cannot resile from that position without good explanation. In that case, the applicant, along with four others, escaped from court in Northern Ireland, while awaiting trial on a charge of attempting to escape from prison. Having escaped from Court all five escapees fled to this jurisdiction. On the 4th April, 1975, the four co-escapers were arrested within the State on the strength of warrants issued in Northern Ireland which recited their escapes from the courthouse, and proceedings were instituted under the Extradition Act 1965, for orders directing them to be delivered into the custody of the Northern Ireland authorities. Each of those four escapers claimed and obtained in the High Court an order directing his release under s. 50 of the Act of 1965 on the ground that his escape from the courthouse in Northern Ireland was a political offence or an offence connected with a political offence. In two of those actions the claim of the escaper to exemption from extradition on the ground of the political nature of his escape was not opposed and, in the other two actions, the claim of the escaper, if opposed, was opposed unsuccessfully. On the 31st March, 1983, the plaintiff was arrested in the State and on the same date the District Court made an order directing that he be delivered into the custody of the Northern Ireland authorities. The plaintiff issued a summons in the High Court and claimed an order directing his release from custody pursuant to s. 50 of the 1965 Act. That claim was dismissed in the High Court and the plaintiff appealed to the Supreme Court which held as follows:

> *"1. That the circumstances of the plaintiff's escape from the courthouse in Northern Ireland did not differ materially from the escapes of the other four escapers from that courthouse.*
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> *2. That the declaration that all citizens shall, as human persons, be held equal before the law (contained in Article 40, s. 1, of the Constitution) was a relevant factor in determining the plaintiff's appeal in view of the fact that the Chief State Solicitor had either acquiesced in, or had opposed unsuccessfully, the grant of an order of release under s. 50, sub-s. 1, of the Act of 1965 to each of the other four escapers on the ground that his escape from the courthouse was a political offence or an offence connected with a political offence.*
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> *3. That, in the special circumstances, the Court would not permit the defendant (who represented the State) to controvert the plaintiff's claim to an order for release under s. 50 of the Act of 1965.*

The "*special circumstances*" which arose in *McMahon*, was based on substantive equality before the law in a situation where the circumstances of his escape were not materially different to those of his co-escapees. No substantive equality issue arises in this case because regardless of how the additional information is put before the Court, be it by a series of correspondence or as an exhibit in an affidavit, the respondent has no entitlement to cross-examine the content of the additional information in an EAW surrender process. The Court considers that such argument, as advanced by the respondent in this regard again misconstrues the proceedings at issue as adversarial ones and fails to acknowledge that, by virtue of s. 20 of the 2003 Act, where the Court seeks additional information such information is admissible and properly before it. Whereas the practice may have developed of providing such information in affidavit form, the Court has held that this is not a requirement. As the Court stated in its preliminary ruling, it is not essential that information emanating from a judicial authority or an issuing state be exhibited on affidavit, even though, in many cases that is how the applicant has chosen to put information before the Court. What is essential is that the Court be satisfied as to the provenance and authenticity of the information.

16. The respondent again sought to revisit matters contained in the Court's preliminary ruling by arguing that the test to which the Court should have regard, when ascertaining the existence of a threat to the respondent's right to life, is as set out in s. 37 of the 2003 Act. The Court has already held that the appropriate test is the test set out in *MJELR v Rettinger* [2010] IEHC 206. In any event, the Court is of the view that the provisions of s. 37 are encompassed in the considerations contained in the *Rettinger* test.

Substantive Objections to Surrender pursuant to s. 16

Right to Life

17. In the context of the s. 16 application itself, the respondent's primary objection is his continuing assertion that his right to life would be at risk in the event of his surrender. The respondent's points of objection state *inter alia* that he has been threatened and attacked in Northern Ireland; that attempts were made on his life; that he was tortured at the hands of the police in the issuing State; that his solicitor was killed with the advance knowledge of officials and representatives of the issuing state; that there has been collusion between the police and paramilitaries such that there is a real risk to his safety if returned and that any presumption or undertaking given by the issuing State in relation to his safety thus stands rebutted and finally; that the respondent is at risk from loyalist and republican dissidents and that since there have been shootings and killings even within the Northern Ireland prison system, the issuing State would be unable to protect the respondent even if so inclined. In this regard the respondent, in his affidavit of 16th December, 2013, refers to his improper treatment in custody in Castlereagh Interrogation Centre in March 1984 in respect of which he later received compensation and to the murder of Billy Wright in the Maze Prison in 1997.

18. The applicant contends that the respondent's arguments in this regard are based on incidents of a historical nature with no evidence of present or recent difficulties arising for the safety of prisoners in Northern Irish prisons and that there is no information or evidence before the Court that the present state of prison conditions in Northern Ireland is such as to justify the respondent's surrender being refused.

19. It is in this context that the Court considers the additional information provided to it at its request on 8th December, 2014 which consists of a letter from William Kerr, Assistant Chief Constable of the PSNI and a letter from Brian Neil Donaldson, a governor in the Northern Ireland Prison Service. The Court is satisfied that this information emanates from the issuing State and that it relates to the respondent.

20. In his letter, dated 3rd December, 2014, Assistant Chief Constable Kerr states that the PSNI is not aware of any information which indicates a real and immediate threat to the life of the respondent should he be surrendered into the custody of United Kingdom authorities. He notes that the "*credible threats*" referred by Mr. Deery, the respondent's former solicitor are unspecific and that the PSNI were then in the process of contacting Mr. Deery to request further details from him. He further indicates that if any such threat were to materialise or become known then the operational measures which he goes on to discuss in detail would be considered for implementation. He points out that:

> *"PSNI has developed significant experience and expertise in dealing with threats to life. A range of procedures are in place in order to ensure that PSNI complies with its obligations in this regard …*
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> *Accordingly, should a threat be received or become know (sic) about in respect of the Respondent the PSNI would deal with it under its Service Procedure. This Service Procedure sets out in detail the PSNI's legal obligations and the operational steps to be taken in each case by officers dealing with threats to life. It sets out a range of recording, reporting and review requirements, so that once information regarding a threat to life is received by the organisation, clearly identifiable persons are responsible for dealing with it. A range of tactical options are available to the PSNI to deal with threats to life. Certain sections of the Service Procedure are available on the PSNI website, while other sections, dealing with specific actions to be considered in each case, involve police methodology and therefore cannot be disclosed to the public. I can reassure the Honourable Court that the PSNI approach to dealing with threats to life is effective and has sufficient resources devoted to it. In addition, it has been the subject of independent review and scrutiny, both by oversight agencies and the Courts in Northern Ireland, and no deficiencies have been found.*
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> *PSNI also has dedicated resources embedded in the Northern Ireland Prison Service on a full-time basis so that in the event that PSNI became aware of any information which could affect the safety of any person detained in prison, that information would be communicated to the Northern Ireland Prison Service immediately. PSNI would not restrict this to information which reveals a "real and immediate" threat, which is a very high threshold. In light of the particular responsibilities of the State and the Northern Ireland Prison Service towards detained persons, any information which could affect a person's welfare and safety is communicated to them."*

21. Mr. Kerr also sets out the various obligations of the PSNI to protect life as provided for by s. 32(1)(a) of the Police (Northern Ireland) Act 2000. In addition, he states that the right to life protected by Article 2 of European Convention on Human Rights has been indirectly incorporated in the UK by virtue of the Human Rights Act 1998. Section 6 of the Human Rights Act 1998 makes it unlawful for the police as a public authority to act in a manner incompatible with a person's protected human rights and the police can thus be held liable for a failure to comply with Article 2.

The respondent continues to assert in a non-specific way that there is an ongoing threat to his life should he be surrendered to the Northern Ireland authorities. The PSNI state that they have not been able to identify any real or immediate threat. Some support for the view of the PSNI can be gleaned from the fact that the respondent has chosen to take up bail subject to conditions that he reside in a particular place and sign on at a particular Garda Station. This willingness to live openly in this jurisdiction, little more than an hour away from those whom he alleges wish him ill, seems to the Court to support the view that any such threat is less serious than the respondent would have the Court believe..

22. Assuming however, that there is such a threat, the question then arises as to whether the requesting State has the operational measures in place to protect the life of the respondent if imprisoned in Northern Ireland. The Court received information from Mr. Donaldson, a governor in the Northern Ireland Prison Service (NIPS) with responsibility for security and information, as to the measures in force in the NIPS for the safekeeping of prisoners. Mr. Donaldson addresses the matters averred in the respondents affidavit as follows:

> *"In paragraph 11 of the Respondent's Affidavit he avers that 'in 1997 the INLA was able to get guns in the MAZE prison and "Crip" McWilliams shot and killed the loyalist LVF boss, Billy Wright'. The Respondent further avers that he believes that 'that raises credible concerns about the security systems that allowed that to happen given the previous incident involving McWilliams and guns in Maghaberry Prison some months earlier' and that 'in such circumstances there must be serious concerns for [the Respondent's] safety if surrendered to Northern Ireland'.*
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> *The murder of Billy Wright took place on 27 December 1997 at a time and in circumstances when Maze prison was a unique institution holding over 500 prisoners with specific paramilitary affiliations. In seeking to manage Maze, the NIPS was required to handle a range of very challenging situations, often operating under constraints beyond its control.*
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> *The Maze was closed in September 2000 and the events leading to the murder of Billy Wright were extensively examined by an Inquiry Panel headed by Lord Maclean and which reported in September 2010. The Inquiry Panel 'were not persuaded… that in any instance there was evidence of collusive acts or collusive conduct'. The Report did however detail a number of failings prior to Billy Wright's death but the Panel were clear that, where failings were identified, these were the result of negligence rather than intentional acts.*
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> *There were three recommendations in the Inquiry Panel's Report: these covered the retention of prison records; whether any relevant lessons can be learnt for HMP Maghaberry; and whether a process similar to the Patten reforms of the RUC should be established for the NIPS.*
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> *The NIPS published its response to the recommendations in the Inquiry Panel's Report on 4 November 2010. Recommendation one was addressed solely to the Secretary of State, while recommendations two and three were addressed to the Secretary of State and 'those with recently devolved authority'.*
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> *On recommendation one the Director General of the NIPS provided assurances that the necessary safeguards in relation to file retention and disposal procedures are in place to ensure satisfactory compliance with this recommendation.*
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> *Recommendation two required Ministers' to satisfy themselves that any relevant lessons from the Maze have been learnt for Maghaberry. In response to this recommendation the NIPS immediately commenced a review under the direction of a senior Governor to conduct a detailed audit of existing provision not only at Maghaberry, but across all three prison establishments. As a consequence remedial activities were carried out and some policies and guidance was updated.*
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> *In relation to recommendation three which asked for consideration of a "Patten Style" process within NIPS, Justice Minister David Ford announced on 21 June 2010 a "Review of the conditions of detention, management and oversight of all Prisons". The review team, which was led by Dame Anne Owers, took account of this recommendation as part of its deliberations.*
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> *As has previously been indicated to the Honourable Court, the NIPS is committed, as set out in its Statement of Purposes, Vision and Values, to 'serve the community by keeping in secure, safe and humane custody those committed by the courts…'. To achieve this, amongst the policy and operational areas, two are key, searching and dealing with prisoners who are under a significant degree of threat:*
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> > *(1) Searching is an integral part of the process in providing a safe environment for prisoners, staff and visitors. The function of searching is to detect contraband and to deprive prisoners of its use. The main threats to prison security which searching is intended to combat are weapons, escape material, drugs and moblile phones. There have been a number of critical incidents across the jurisdictions and these have resulted in a number of Reports, the Billy Wright Inquiry Report being one. The common threat running through the Reports is the acknowledgment that moving away from (or failing to implement effectively), established and proven search procedures, can ultimately lead to serious consequences for all concerned. No lesson was more acutely learnt and felt about the need for effective searching than that provided by the Billy Wright murder.*
> >
> > *(2) Dealing with threats against individual prisoners and groups of prisoners. This is something the NIPS regularly deals with. Each case has to be dealt with on an individual basis and the assessment of prisoners begins on committal. That assessment addresses confirmed or perceived threats and vulnerabilities. The NIPS preferred option is that all prisoners should be accommodated in the general population and many prisoners who are subject to threat can function adequately in the general population and NIPS successfully manages prisoners from different backgrounds who are the subject of enmities. Where, however, accommodation in the general population is not considered appropriate then a multi-disciplinary case conference approach is adopted to determine the most suitable area and the regime. There are a number of options in this regard ranging from total isolation, to Care and Support Units to Separated Accommodation. Each case has to be looked at on an individual basis so that the best option can be identified. A case conference can, where circumstances require, involve Healthcare, Psychology, Probation (both Prison and Community based), Learning and Skills Staff, Residential Management and the prisoner's legal representative. As it is essential to know the nature of the threat and the specific needs of an individual prisoner it is not possible to be definitive in setting out how a case should be managed but there are a variety of effective possibilities which are regularly deployed.*
>
> *Information relating to threats or indeed any information pertinent to the safety, welfare and wellbeing of a prisoner is exchanged and shared from and to the Police Service of Northern Ireland and Security Services. Such information is analysed and acted upon as considered necessary. The individual prisoner is also consulted to ascertain if they have any additional pertinent information.*
>
> *Accordingly, the NIPS is committed and satisfied that it can effectively protect the Respondent against any known threat*

by deployment of those measures it considers appropriate depending on the level and source of threat and the Respondent's specific needs. Further, the NIPS is satisfied that it can hold the Respondent, should he be surrender to Northern Ireland and committed to a prison here, in safe, secure and humane custody".

23. On the basis of this information, and applying the test set down in *Rettinger*, the Court is satisfied that by virtue of the unhappy history in the northern part of this island, the authorities in that jurisdiction have developed particular expertise in protecting those whose safety is in issue and it is clear that they have learned from the regrettable events of the past. The Court is therefore satisfied that the Northern Ireland authorities can and will take all reasonable measures to safeguard the life of the respondent, if he is surrendered to their custody.

Criminal Law Jurisdiction Act 1976
24. Ancillary to the arguments in relation to the right to life, the respondent advanced the argument that he should not be surrendered where a workable alternative to surrender existed, in this case prosecution pursuant to the Criminal Law (Jurisdiction) Act 1976.

25. The respondent submits that the offences in question are extraterritorial offences and, accordingly, are crimes against the law of the state pursuant to s. 9 of the Offences Against the Person Act 1861 as amended by S.I. 356/1973 and the Criminal Law (Jurisdiction) Act 1976. Section 2(1) of the Criminal Law (Jurisdiction) Act 1976 provides as follows:

"Where a person does in Northern Ireland an act that, if done in the State, would constitute an offence specified in the Schedule, he shall be guilty of an offence and he shall be liable on conviction on indictment to the penalty to which he would have been liable if he had done the act in the State."

The respondent notes that a file had not been sent to the DPP so that she could consider whether a prosecution would be feasible, that the letter sent by the Crown Solicitor on 24th April, 2014 indicates that the option of such a prosecution was never suggested to him and that the applicant has not adduced any evidence to suggest that such an option was ever so canvassed. The Court considers that while the Criminal Law (Jurisdiction) Act gives to the prosecuting authorities in this jurisdiction an enabling power to bring prosecutions for offences committed in Northern Ireland in this jurisdiction there is nothing in that Act which requires them to do so. As such, it is for the authorities to decide whether to engage the powers conferred on them by the 1976 Act and there is no provision in the 1976 Act by virtue of which a Court can compel them to do so, nor is there any provision in the 2003 Act which would authorise the Court to refuse a surrender in these circumstances.

26. In aid of his argument that surrender should be refused because of the provisions of the 1976 Criminal Law (Jurisdiction) Act the respondent relies on the decision of the European Court of Human Rights in *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, ECHR 2010 in which the European Court of Human Rights criticised the UK authorities for having transferred the applicants, who had been arrested by British authorities for the murder of British soldiers, to Iraqi custody without having first received any binding assurance that they would not be subjected to the death penalty which had recently been reintroduced by the new Iraqi regime. That case was very much decided on its own facts and the Court is of the view that to compare the surrender of this respondent, under the EAW procedure, to UK authorities in Northern Ireland, to the transfer of individuals to a regime which continued to enforce the death penalty for the crime of murder, is absurd. In *Al Saadoon* the European Court found that the applicants if surrendered, were at real risk of execution. No such fate awaits Mr. Lanigan who will have the benefit of a trial in due course of law with all the same safeguards he would enjoy if tried in this jurisdiction.

27. The respondent's latest submission in this regard is that since his right to life is in jeopardy, the EU law principle of proportionality in the context of fundamental rights requires that his surrender be refused since, were his surrender to be refused here, it does not follow that the respondent will escape trial for the alleged offences, as the option to prosecute him under the Criminal Law (Jurisdiction) Act 1976 remains open to the authorities in this jurisdiction. However, for the reasons set out above, the Court is satisfied that any danger to the respondent's right to life can be adequately protected by the relevant authorities in the issuing State and as such no issue in relation to proportionality arises at all since the Court is satisfied that all appropriate measures are in place in the issuing State such that the respondent's right to life will be sufficiently vindicated if surrendered.

s. 42 of the European Arrest Warrant Act 2003
28. In the respondent's original grounds of objection, he submits that his surrender is prohibited pursuant to s. 42 of the European Arrest Warrant Act 2003 which provides as follows:

"A person shall not be surrendered under this Act if—

(a) the Director of Public Prosecutions or the Attorney General is considering, but has not yet decided, whether to bring proceedings against the person for an offence, or

(b) proceedings are pending in the State against the person for an offence consisting of an act or omission of which the offence specified in the European arrest warrant issued in respect of him or her consists in whole or in part."

29. However the Court notes that in a letter to the respondent's solicitor dated 6th February, 2014, Raymond Briscoe, Senior Prosecution Solicitor in the Office of the DPP stated:

"The Office of the Director of Public Prosecutions has not received a file concerning these offences from An Garda Siochana. The Office of the Director of Public Prosecutions is not considering proceedings against Mr. Lanigan for the specified offences nor are proceedings pending for these specified offences in this jurisdiction."

As such, no objection under s. 42 of the 2003 Act arises.

Misprision of Felony
30. Late in the day, the respondent advanced a further objection, namely that the failure to prosecute the respondent in this jurisdiction constituted a misprision of felony, since the authorities here were, on the information before the Court, aware of the alleged offence for some time. Quite apart from the fact that the distinction between felonies and misdemeanours has been abolished by s. 3 of the Criminal Law Act 1997, the notion that authorities such as the Gardai and the DPP could be guilty of misprision of felony for failure to investigate and/or prosecute an offence committed in another jurisdiction is unstateable.

Delay
31. The respondent's final objection relates to delay. The original objection in this regard, as contained in the points of objection

dated 26th November, 2013, was that;

> *"There has been an unwarranted and undue delay in seeking the respondent's surrender in circumstances where the offence the subject matter of the warrant occurred some fifteen years ago in 1998 and the respondent's whereabouts were known. The respondent has been prejudiced by the delay and furthermore his convention rights have been infringed."*

32. The sequence of events in this case is as follows. The respondent is alleged to have been involved in the shooting of a Mr. John Stephen Knocker on 31st May, 1998. According to the explanation provided by the Crown Solicitor for Northern Ireland an investigation into the events of 31st May 1998 quickly established the respondent as a suspect however it was not possible to interview, arrest or charge him as he had fled the jurisdiction. Two others, Gregory Fox and Nuala Delaney were charged, prosecuted and convicted of offences connected with the events of 31st May, 1998 in February 2000. Mr. Fox appears to have been interviewed shortly after the event while Ms. Delaney surrendered herself to the authorities in 1999, having returned to Northern Ireland. According to the Crown Solicitor the Public Prosecution Service for Northern Ireland (PPSNI) and the PSNI periodically considered the available evidence over the years but concluded that there was not sufficient evidence to seek the respondent's extradition. Based on the information exhibited in the affidavit of Mr. Dockery, it would appear that authorities in this jurisdiction were aware of the potential identity of the respondent since 2007, and on 8th October, 2009 the Gardai retrieved a discarded coffee cup from the respondent which was subsequently tested for DNA and stored in evidence. On 5th May, 2010 the PPSNI submitted a request for mutual assistance to the Irish authorities and received a response to that request on 6th April, 2011. The information provided as a result enabled the authorities in Northern Ireland to develop and verify a DNA match and a report was submitted by the PSNI to the PPSNI on 20th October, 2012, pursuant to which the PPSNI directed that charges be brought against the respondent on 4th May, 2012. The issuing State issued a European Arrest Warrant seeking the surrender of Mr. Lanigan on 17th December, 2012.

33. The respondent argues in his affidavit of 16th December, 2013, that if his presence in the State was known to the authorities after the incident the subject matter of the EAW application then his surrender should have been sought in 1998 itself or within a short time thereafter when other defendants in the case were prosecuted in 2000. The respondent asserts that he has been prejudiced by such a delay and that his Convention rights have been infringed. The respondent has not specified the Convention rights allegedly infringed by the delay but he has outlined in his affidavit that he has a daughter in this jurisdiction with his partner.

34. The applicant contends that there is nothing in the respondent's affidavit to support the contention in his points of objection that he has been "*prejudiced*" by the delay. The applicant further contends that insofar as delay is argued by the respondent his flight from the issuing State must be incorporated into the assessment of any elapse of time involved as well as the fact of his living in this State under a false identity. The elapse of time has been explained in various additional information exhibited as set out above.

35. The Court is satisfied that there has been delay in this case, initially due to the fact that the respondent fled the jurisdiction and lived in this jurisdiction under a false identity. It appears on the information before the Court that the authorities in this jurisdiction were aware of the respondent's potential identity since in or about 2007 and that five years elapsed before his surrender was sought. The respondent has advanced no grounds indicating that he is prejudiced in his potential defence by reason of this delay. Should there be any such prejudice it will of course be open to the respondent to raise such issues in the context of his defence of the charges for which his surrender is sought.

36. Insofar as the respondent seeks to argue that the delay attending a decision to prosecute has prejudiced his family rights, his affidavit is silent as to the precise alleged interference with his family rights pursuant to Article 8 of the Convention. It does appear that he has a partner in this jurisdiction and a daughter by that relationship. Other than this, the respondent has not adduced evidence such that the Court is satisfied that his surrender to Northern Ireland, a jurisdiction of immediate proximity, would be a disproportionate interference with his family rights. The issue of delay and its impact on rights pursuant to Article 8 has been extensively considered by the Courts. The applicant relied on the principles arising from the test set out by Edwards J. in *Minister for Justice v. RPG* (Unreported, High Court, Edwards J., 18th July, 2013). In conducting the balancing exercise necessary in these cases the Court notes on the one hand that the offences with which the respondent is charged are grave offences at the top end of the criminal scale and that the public interest in his surrender is therefore strong. The respondent has placed little evidence before the Court to counterbalance the strong public interest in his surrender. As stated by Denham C.J. in *MJE v. Ostrowski* [2013] IESC 24:

> *"In almost all cases of surrender, family rights, Article 8 rights, are affected. However it is only in an exceptional case that Article 8 rights would outweigh the requirement to surrender. This is not such an exceptional case."*

This Court is similarly of the view that this is not such an exceptional case as would warrant a refusal of surrender.

37. The respondent made further arguments in relation to delay on the basis of the time frames set out in Article 17 of the Framework Decision. The Court submitted a preliminary reference to the Court of Justice of the European Union in this regard. In their judgment delivered on 16th July, 2015, the Court of Justice considered that even if excessive delay occurs, such delay does not invalidate the arrest warrant and the court in the executing State is still obliged to decide whether or not surrender is required. Accordingly, the respondent has acknowledged that his objection to surrender in that regard cannot succeed.

Decision

38. Section 16(1) of the European Arrest Warrant 2003 provides thatthe Court may make an order directing that a person be surrendered provided that-

> *"(a) the High Court is satisfied that the person before it is the person in respect of whom the European arrest warrant was issued;*

The Court is so satisfied.

> *(b) the European arrest warrant, or a true copy thereof, has been endorsed in accordance with section 13 for execution of the warrant;*

The Court has inspected the warrant and is satisfied that it has been endorsed in accordance with s.13.

> *(c) the European arrest warrant states, where appropriate, the matters required by section 45 (inserted by section 23 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012),*

This provision is not relevant to this application

> *(d) the High Court is not required, under section 21A, 22, 23 or 24 (inserted by sections 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005), to refuse to surrender the person under this Act,*

The Court is satisfied that it is not required to refuse surrender the respondent under any of the stipulated sections

> *and*
>
> *(e) the surrender of the person is not prohibited by Part 3."*

The Court is satisfied that the surrender of the respondent is not prohibited by Part 3 of the Act.

The Court being satisfied that the provisions of s. 16 have been complied with and that the Court is not required to refuse surrender under either s. 21A, 22, 23 or 24 (inserted by sections 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) *Act 2005*), nor is the Court prohibited from ordering surrender by Part 3 of the Act, on the basis of the matters set out herein and in its earlier rulings. The Court therefore considers that the respondent's surrender should be ordered to the issuing State, in accordance with s. 16 of the European Arrest Warrant Act 2003 as amended. And the Court so orders.