Neutral Citation: [2013] IEHC 455

THE HIGH COURT

Record No.: 2012/211 Ext.

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003

Between/

THE MINISTER FOR JUSTICE & EQUALITY

Applicant

-AND-

ADAM STUART BUSBY

Respondent

JUDGMENT of Mr Justice Edwards delivered on the 30th day of July, 2013.

Introduction:
The respondent is the subject of a European arrest warrant issued by Sheriff Alistair Noble, the Sheriff of Lothian and Borders at Edinburgh, on the 13th of July, 2012. The United Kingdom of Great Britain and Northern Ireland (hereinafter "the United Kingdom" or "the U.K.") seeks the rendition of the respondent on foot of this warrant for the purposes of prosecuting him for the seven offences particularised therein. The warrant was endorsed by the High Court for execution in this jurisdiction on the 17th of July, 2012, and it was duly executed on the 18th of July, 2012. The respondent was arrested by Sergeant Sean Fallon on that date, following which he was brought before the High Court later on the same day pursuant to s.13 of the European Arrest Warrant Act 2003 (hereinafter "the Act of 2003"). In the course of the s.13 hearing a notional date was fixed for the purposes of s.16 of the Act of 2003 and the respondent was remanded in custody to the date fixed. Thereafter the matter was adjourned from time to time, ultimately coming before the Court for the purposes of a surrender hearing.

The respondent does not consent to his surrender to the United Kingdom. Accordingly, this Court is now being asked by the applicant to make an Order pursuant to s.16 of the Act of 2003 directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him. The Court must consider whether the requirements of s.16 of the Act of 2003, both controversial and uncontroversial, have been satisfied and this Court's jurisdiction to make an order directing that the respondent be surrendered is dependant upon a judicial finding that they have been so satisfied.

Uncontroversial s.16 issues

The Court has received and has scrutinised a true copy of the European arrest warrant in this case.

The Court has also received an affidavit of Sergeant Sean Fallon sworn on 5th of July, 2013, testifying as to his arrest of the respondent and as to the questions he asked of the respondent to establish the respondent's identity, and the answers he received, which the Court notes correspond with information contained in Part A of the European arrest warrant. At paragraph 10 of the said affidavit Sergeant Fallon opines that the man he arrested on the 18th of July, 2012 and brought before the High Court on the same day is the same person as the Alan Stuart Busby named in the European arrest warrant. In addition, counsel for the respondent has confirmed that no issue arises as to either the arrest or identity.

Further, the Court has taken the opportunity to inspect the original European arrest warrant which is on the Court's file and which bears this Court's endorsement.

I am satisfied following my consideration of these matters that:

(a) The European arrest warrant was endorsed for execution in this state in accordance with s.13 of the Act of 2003;

(b) The warrant was duly executed;

(c) The person who has been brought before the Court is the person in respect of whom the European arrest warrant was issued;

(d) The warrant is in the correct form;

(e) The warrant purports to be a prosecution type warrant and the respondent is wanted in Scotland for trial in respect of the seven offences particularised in Part E of the warrant.

(f) The nature and classification of the offences alleged under the law of the issuing state are: one instance of "Threats" (a common law crime in Scots law), one instance of "Hoaxes involving noxious substances or things", contrary to s. 114(2) of the Anti-terrorism, Crime and Security Act 2001, and five instances of "Bomb Hoaxes", contrary to s. 51(2) and (4) of the Criminal Law Act 1977.

(g) The underlying domestic decision on which the warrant is based is an arrest warrant granted at Glasgow Sheriff Court on the 13th of July, 2012.

(h) The issuing judicial authority has invoked paragraph 2 of article 2 of Council Framework Decision the 13th June 2002 on the European arrest warrant and the surrender procedures between Member States, (2002/584/J.H.A.) O.J. L190/1 18.7.2002 (hereinafter referred to as "the Framework Decision") in respect of all seven offences listed in Part E by the ticking of a boxes in Part E.I of the warrant, namely that relating to "terrorism". Accordingly, subject to the Court being satisfied that the invocation of paragraph 2 of article 2 is valid (*i.e.* that the minimum gravity threshold is met, and that there is no basis for believing that there has been some gross or manifest error), it need not concern itself with correspondence;

(i) The minimum gravity threshold in a case in which paragraph 2 of article 2 of the Framework Decision is relied upon is that which now finds transposition into Irish domestic law within s. 38(1)(b) of the Act of 2003, as amended, namely that under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than three years. It appears from Part C of the warrant that the "Threats" offence carries up to life imprisonment, the offence characterised as "Hoaxes involving noxious substances or things" carries a term of imprisonment of up to seven years, and the five offences characterised as "Bomb Hoaxes" carry a term of imprisonment of up to seven years in each instance. Accordingly, the minimum gravity threshold is comfortably met;

(j) The offences are particularised within the warrant as follows:

> "Adam Busby is the self-proclaimed leader of an extremist group called the Scottish Liberation Army. His conduct giving rise to the offences is that:
>
> 1) On 27 November 2009 at the Scottish Sun Newspaper, the Guild Hall, 57 Queen Street, Glasgow he did, by means of telephone communication sent to Nicholas Sharp, an employee of the Scottish Sun Newspaper, Guild Hall, 57 Queen Street, Glasgow utter threats to said Nicholas Sharpe, did purport to represent an organisation called the Scottish National Liberation Army, and did threaten to contaminate the drinking water supplies of major English towns and cities with a noxious substance, with the intention of inducing in said Nicholas Sharpe, and others, a belief that there would be danger to human life and a serious risk to human health.
>
> 2) On 20 December 2009 at the Scottish Sun Newspaper, Guild Hall, 57 Queen Street, Glasgow he did by means of telephone communication send to the Scottish Sun Newspaper, Guild Hall, 57 Queen Street, Glasgow a text message, the content of which he knew or believed to be false, with the intention of inducing in employees of said Scottish Sun Newspaper a belief that various packages containing caustic, poisonous or other noxious substance had been sent to a number of political figures, including the then Prime Minister of the United Kingdom, Gordon Brown, which was capable of endangering human life or of creating a serious risk to human health: Contrary to the Anti-terrorism, Crime and Security Act 2001, Section 114(2)
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> 3) On 15 April 2010 at the Press Association, 1 Central Quay, Glasgow he did communicate, by telephone, information to Victoria Mitchell, Deputy Editor of the Glasgow branch of the Press Association with the Intent of inducing in her the false belief that a bomb, or other thing liable to explode or ignite, was present at the bridge at the Argyle Arcade in Glasgow.
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> Contrary to The Criminal Law Act 1977, Section 51(2) and (4).
>
> 4) On 15 April 2010 at the Glasgow branch of the Samaritans, 210 West George Street, Glasgow, he did communicate, by telephone, information to another person namely Margaret Foley, with the intent of inducing in her the false belief that a bomb, or other thing liable to explode or ignite, was present at The Hilton Hotel, Glasgow.
>
> Contrary to The Criminal Law Act 1977, Section 51(2) and (4).
>
> 5) On 9 June 2010 at the Edinburgh Evening News, Edinburgh he did communicate, by telephone, information to another person namely Simon Lyle, a Reporter there, with the intent of inducing in him the false belief that a bomb, or other thing liable to explode or ignite, was present at the Forth Road Bridge.
>
> Contrary to The Criminal Law Act 1977, Section 51(2) and (4).
>
> 6) On 9 June 2010 at the Scottish Daily Express Newspaper, Glasgow, he did communicate, by telephone, information to another person namely Tom Martin, Executive News Editor, with the intent of inducing in him the false belief that a bomb, or other thing liable to explode or ignite, was present at the Erskine Bridge, Glasgow.
>
> Contrary to The Criminal Law Act 1977, Section 51(2) and (4).
>
> 7) On 9 June 2010 at the Scottish Sun, Guild Hall, 57 Queen Street Glasgow he did communicate, by telephone, information to another person, namely Gail Cameron, a News Reporter there, with the intent of inducing in her the false belief that a bomb, or other thing liable to explode or ignite, was present at the Erskine Road Bridge, Glasgow.
>
> Contrary to The Criminal Law Act 1977, Section 51(2) and (4)."

There is no reason, upon a consideration of the underlying facts as set out above, to believe that the ticking of the three boxes relating to "terrorism" was in error;

(k) No issue as to trial *in absentia* arises in the circumstances of this case and so no undertaking is required under s. 45 of the Act of 2003;

(l) There are no circumstances that would cause the Court to refuse to surrender the respondent under s. 21A, s.22, s.23 or s.24 of the Act of 2003, as amended.

In addition, the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) Order 2004 (S.I. No. 4 of 2004) (hereinafter "the 2004 Designation Order"), and duly notes that by a combination of s. 3(1) of the Act of 2003, and Article 2 and the Schedule to the 2004 Designation Order, the United Kingdom of Great Britain and Northern Ireland is designated for the purposes of the Act of 2003 as being a state that has under its national law given effect to the Framework Decision.

The Points of Objection

The respondent initially relied upon six points of objection, but at the opening of the hearing withdrew one of those. Accordingly the objections in fact relied upon were as follows:

> "1. The surrender of the Respondent is sought in respect of seven offences of making threats by telephone to various people and places in the the United Kingdom between the 27th day November 2009 and the 9th day of June 2010. It is not dated in the Warrant where the Respondent was when these telephone calls were made, but it is pleaded that at this time he was residing in this jurisdiction. It is further pleaded that he was previously tried in this jurisdiction in respect of similar offences in 1997 and 2010. In such circumstances, it is submitted that the offences to which the said Warrant

relates were committed outside the territory of the issuing Stale and that accordingly the surrender of the Respondent in respect of these offences would be contrary to section 44 of the European Arrest Warrant Act 2003;

2. Insofar as the European Arrest Warrant purports to certify that the offences alleged occurred within the territory of the issuing State such certification is limited in its effect to the purposes of the United Kingdom Extradition Act, 2003 and in particular Section 142 of same. The certification is without any effect as regards Section 44 of the European Arrest Warrant Act, 2003.

3. In circumstances where the authorities in the State have previously sought to prosecute the respondent for similar offences on the grounds that same were committed within the State the present application amounts to an abuse of process and the State is estopped from surrendering the respondent for such offences. Further or in the alternative the respondent has resided in the State for a significant period of time. As such his surrender to another Member State for the purpose of facing charges which can and ought be prosecuted within the State amounts to an unwarranted, irrational and gross interference with his right to private and family life.

4. It is further pleaded that in the event of his surrender the respondent would be liable to a very significantly higher penalty than would apply were he to be prosecuted within the State. Same underlines the abusive nature of the process hereinbefore pleaded.

5. [Not proceeded with]

6. It is further pleaded that the Respondent is aged 65 and suffers from multiple sclerosis as a result of which he is confined to a wheelchair. He has been living in this jurisdiction for the past 30 years and in such circumstances, it is submitted that it would be a disproportionate interference with his right to bodily integrity to order his surrender to the issuing State, and that his surrender would therefore be contrary to section 37 of the European Arrest Warrant Act 2003."

The Respondent's Evidence
The Court has before it an affidavit of the respondent sworn on the 20th of June 2013. It states:

"3. I say that …my surrender is sought in respect of seven offences of making threats by telephone to various people and places in the United Kingdom between the 27th day November 2009 and the 9th day of June 2010. I say that I have lived in this jurisdiction since September 1983 when I came here from the issuing State. I say that I successfully opposed an attempt by the issuing State to extradite me before this Honourable Court in October 1984 on the grounds that my extradition related to political offences. I say therefore that at the time of the offences alleged in the said Warrant against me I was residing in this jurisdiction.

4. I say that while I have family in the issuing State, I also have two sons residing in this jurisdiction but that I have had no contact with my family in either jurisdiction for the past ten years.

5. I say therefore that I regard this jurisdiction as my home and that, to the extent that it might be relevant to my case, I have no difficulty with being prosecuted in this jurisdiction with the offences set out in the said Warrant. I say that my solicitor wrote in such terms to the Director of Public Prosecutions, and I beg to refer to a copy of this letter upon which, marked with the letters "AB1" I have signed my name prior to the swearing hereof.

6. I say further in this regard that I was previously tried and convicted in this jurisdiction of three counts of sending false telecommunications messages contrary to section 51 of the Post Office (Amendment) Act 1951, as amended, on three dates in May 2006. I say that the said messages concerned threats against property in the United Kingdom and it was argued at the outset of my trial that these were matters that were properly triable in the United Kingdom rather than in this jurisdiction. I say, however, that this argument was rejected by Judge Hogan in Dublin Circuit Criminal Court, and I beg to refer in this regard to a copy of the Transcript of this portion of my trial dated the 4th and 8th June 2010 upon which marked with the letters "AB2" I have signed my name prior to the swearing hereof.

7. I say also that I am aged 65 and suffer from multiple sclerosis as a result of which I am confined to a wheelchair, and that I have to take 20 tablets every day to manage my pain and muscle spasms, and I beg to refer to a medical report in this regard upon which marked with the letters "AB3" I have signed my name prior to the swearing hereof.

8. I say, therefore, that in circumstances where I have lived in this jurisdiction for the past 30 years, and have been tried for similar offences here, that it would be a disproportionate interference with my right to bodily integrity to surrender me to the issuing State in view of my medical condition. I therefore pray this Honourable Court not to make the order sought by the Applicant herein."

The Court has read and taken due account of the contents of the letter to the Director of Public Prosecutions exhibited at "AB1", the partial transcript of the respondent's trial in Ireland exhibited marked "AB2", and the medical report exhibited marked "AB3". It is not necessary for the purposes of this judgment to quote specifically from "AB1" or "AB3", as the Court is satisfied that they are fairly summarised and characterised within the respondent's affidavit.

The partial transcript at "AB2" is of particular relevance to the arguments being advanced by the respondent under the headings of "alleged abuse of process" and "extraterritoriality", and some specific reference should be made to its contents. It establishes the following matters:

- In early June of 2010 the respondent was tried on indictment before the Dublin Circuit Criminal Court in respect of a number of charges of sending a message, which he knew to be false, by means of the telecommunications system operated by a licensed operator for the purpose of causing annoyance, inconvenience or needless anxiety to another, contrary to s. 13(1) of the Post Office (Amendment) Act 1951 as substituted by s.7 of the Postal and Telecommunications Services Act, 1983 (hereinafter referred to as "s. 13 of the Act of 1951 as substituted").

- While the transcript does not disclose the precise circumstances in which the alleged offences were said to have been committed, the broad outline of what was alleged is apparent i.e., that the defendant, using a computer in a public library

at Charleville Mall, North Strand, Dublin 1, sent false messages by e-mail to an address or addresses in the United Kingdom, for the purpose of causing annoyance, inconvenience or needless anxiety to another or others.

• It was submitted by defence counsel at the said trial that the offences in question were committed extraterritorially because the apprehension or fear caused was to a person or persons in the UK. Consequently, it was submitted, the Court had no jurisdiction to try the defendant.

• In reply to this submission, counsel for the prosecution had argued that there were two types of crimes, viz., conduct crimes and result crimes. It was further submitted (Day 3, p.36, line 34 – p.37, line 6.) that:

> *"what we have is not …a result crime, what we have is a conduct crime, which is the sending of a message with an intent and … therefore that crime is committed in the place where the conduct occurred. It's not dependent on any result. The conduct by itself is the completed offence. And … therefore if it's a conduct crime and is committed in a place where the conduct occurred …this Court must have jurisdiction over it because the conduct occurred in this jurisdiction."*

• The trial judge accepted the submission by counsel for the prosecution, ruling that the offences were indeed conduct offences, and that as the conduct complained of had occurred within the territory of this State the Court had jurisdiction to try them.

Relevant Additional Information

At the conclusion of the respondent's surrender hearing on the 11th of July, 2013 this Court reserved judgment. Before doing so, concerned that the information provided to it might not be sufficient to enable it to perform its functions under the Act of 2003, the Court invoked its powers under s. 20(1) of the said Act and requested certain additional information from the issuing state. The request was conveyed by letter dated the 18th of July, 2013 from the Irish Central Authority to the International Co-operation Unit, Crown Office and Procurator Fiscal Service of the issuing state at Edinburgh, in the following terms:

> "The Presiding Judge in this case (Edwards J.) has directed this office to obtain clarification from the issuing judicial authority on the following point:
>
> *18 In the event that the High Court concludes that the offences for which surrender is sought were committed or alleged to have been committed in a place other than the issuing state can the issuing judicial authority specify the basis upon which jurisdiction to try the offences is claimed?*

The request was most comprehensively replied to in a letter dated 24th July, 2013 from Mr. David Dickson of the Crown Office and Procurator Fiscal Service at Edinburgh. Mr. Dickson stated:

> "We are grateful for the opportunity to respond to the question.
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> General Principles on Establishing Criminal Jurisdiction in Scotland
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> Renton and Brown (the main Scottish text on criminal procedure) provides that in common law offences:
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> 'It is not essential to the jurisdiction of a court that the whole of the acts constituting the crime should have been done within the area of its jurisdiction. There is jurisdiction if the main act has been committed there: Macdonald, 191: Gordon, paras 3.41 to 3.47; *Laird v HM Advocate* 1985 J.C. 37. Offences committed by sending communications from one place to another may be tried in any court having jurisdiction over either place: *Lipsey v Mackintosh* (1913) 7 Adam 182. It has been held that there was jurisdiction in Scotland where money was obtained by an Englishman by means of fraudulent advertisement in Scotland: *Wm Allan* (1872) 2 Couper 402 where a Scots bankrupt uplifted money in England to defraud his creditors: *John McKay* (1866) 5 Irv. 329 and in forgery cases where uttering has taken place in Scotland: Hume ii. 53; *Wm Jeffrey* (1842) 1 Broun 337. Where an Englishman, by means of false representations contained in letters addressed by him to traders in Scotland and posted in England, obtained from such traders goods, without paying or intending to pay therefore, it was held that the Scottish courts had jurisdiction to try the offence: *John Thomas Witherington* (1881) 4 Couper 475; *Wm Edward Bradbury* (1872) 2 Couper 311. Where a fraudulent scheme to obtain money is formed in Scotland and some material actings, such as the sending of false communications to England, take place there, the Scottish courts have jurisdiction even where the money is obtained in England on the presentation there of forged documents: *Laird v HM Advocate* 1985 J.C. 37.'
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> Charges in Scotland
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> Mr Busby has been indicted under two statutory provisions: Anti Terrorism, Crime and Security Act 2001 s.114(2)and Criminal Law Act 1977 s51(2).
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> Charge 1 is indicted with reference to Anti Terrorism, Crime and Security Act 2001 s. 114(2) which provides:
>
> '114 Hoaxes involving noxious substances
>
> s.114 (2) A person is guilty of an offence if he communicates any information which he knows or believes to be false with the intention of inducing in a person anywhere in the world a belief that a noxious substance or other noxious thing is likely to be present (whether at the time the information is communicated or later) in any place and thereby endanger human life or create a serious risk to human health.
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> (3) A person guilty of an offence under this section is liable—
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> (a) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum (or both); and
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> (b) on conviction on indictment, to imprisonment for a term not exceeding seven years or a fine (or both).'

Charges 3-7 on the indictment are charged under Criminal Law Act 1977 s.51(2) which provides:

'51 Bomb hoaxes.

s.51(2) A person who communicates any information which he knows or believes to be false to another person with the intention of inducing in him or any other person a false belief that a bomb or other thing liable to explode or ignite is present in any place or location whatever is guilty of an offence.

(3) For a person to be guilty of an offence under subsection (1) or (2) above it is not necessary for him to have any particular person in mind as the person in whom he intends to induce the belief mentioned in that subsection.

(4) A person guilty of an offence under this section shall be liable—

> (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding £1,000, or both;
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding seven years'

Establishing Criminal Jurisdiction in Scotland

Anti Terrorism. Crime and Security Act 2001 s.114(2)

In relation to jurisdiction, the former section provides a person may be guilty of such an offence where their criminal conduct has the intention to induce 'a person anywhere in the world' to the belief there is a noxious substance or thing in any place that may endanger life or create serious risk to human health. It is alleged Mr Busby communicated such a belief to people in Glasgow. In my view, the location of the recipient of the threat who was induced to the necessary belief establishes the *locus delicti* for the offence. It is my submission, that the intention of the section requires criminal intent be directed towards a person anywhere in the world and the location of the recipient of the threat establishes jurisdiction. The location of the noxious substance is irrelevant to establishing the locus for criminal jurisdiction.

Criminal Law Act 1977 s.51(2)

In my submission, the same approach is taken in this section. The focus of the criminal conduct is on the communication of information (known to be false) which has the intention of inducing a false believe in a person. Where the recipient of that false belief is located provides the forum for criminal jurisdiction.

More generally, the Scottish courts have considered the question of criminal jurisdiction in relation to other cross border crime.

In *Clements v HM Advocate* 1991 JC 62 the court considered whether the conviction of two men of being concerned in the supply of drugs where their conduct was in England. The court found that the determinative factor in relation to establishing criminal jurisdiction was the place where the drugs were to be supplied. The High Court of Justiciary sitting as an appeal court, found that the underlying mischief was determinative and as that was the supply of drugs to Scotland all criminal consult which contributed to that criminal purpose could be prosecuted in Scotland irrespective where such conduct took place. It followed from that it was unnecessary to establish knowledge on the part of the accused that the intention was to deliver the drugs to Scotland. This was so even where the court recognised that other parts of the United Kingdom may also have jurisdiction, as the overall intention was to cause criminal harm in Scotland.

The issue was considered again in *HM Advocate v Megrahi* 2000 JC 555. This case concerned the bombing of a civil passenger aircraft over Lockerbie, Scotland. The court there took the view that where conspiracy was charged and the crime has been committed in furtherance of the conspiracy, it was 'illogical to say that that country has no interest in putting the conspirators on trial for their part in what has happened, even though their activities were all carried out abroad. Defence counsel recognise that this is undoubtedly so in relation to the charge of murder in Scotland. I see no logical reason why the same principle should not apply to the charge of conspiring to commit the final criminal act, which is alleged to be the culmination and the whole purpose of the conspiracy.'

The court posed the question at paragraph 17:

> 'But why should an overt act be necessary to found jurisdiction? In the case of conspiracy in England the crime is complete once the agreement is made and no further overt act need be proved as an ingredient of the crime. The only purpose of looking for an overt act in England in the case of a conspiracy entered into abroad can be to establish the link between the conspiracy and England or possibly to show the conspiracy is continuing. But if this can be established by other evidence, for example the taping of conversations between the conspirators showing a firm agreement to commit the crime at some future date, it defeats the preventative purpose of the crime of conspiracy to have to wait until some overt act is performed in pursuance of the conspiracy.
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> Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England. Accordingly a conspiracy entered into in Thailand with the intention of committing the criminal offence of trafficking in drugs in Hong Kong is justiciable in Hong Kong even if no overt act pursuant to the conspiracy has yet occurred in Hong Kong.
>
> 18. I accept that the situations posed in the cases of *Doot* and *Liangsiriprasert* rely to some extent on the specific target being the country seeking jurisdiction, and it might be argued that a country not a specific target cannot have jurisdiction. If the conspiracy never reached fruition and if there was no overt act to carry on the conspiracy in the country concerned, I appreciate that that would be a formidable objection.'

Both cases referred to *Somchai Liangsiriprasert v The Government of the United States* where the House of Lords considered criminal jurisdiction. In that case the House of Lords observed:

> 'But looking at the obverse side of the coin what should be the position if a conspiracy is entered into in Germany to commit a crime in England? Such a conspiracy is obviously a threat to English and not to German society and it would appear that the Court of Criminal Appeal and Lord Tucker considered that such a conspiracy would constitute an indictable crime in this country.'

Conclusion

The House of Lords referred to these cases in *Office of the King's Prosecutor*; *Brussels v Armas and others* [2006] AC 1. The crucial issue for determination was 'whether the Belgian request falls within section 65 of the 2003 Act' namely whether the criminal conduct took place in Belgium or the United Kingdom since part of the conduct relied on had occurred in the United Kingdom and was accordingly excluded by section 65(2) (a), and section 65(3) would not apply since the relevant conduct had not occurred exclusively in Belgium, The Court held that that 'conduct' for the purposes of section 65 was that complained of or relied on in the warrant and it occurred 'in' the requesting state irrespective of the physical presence of the defendant so long as the intended effect of his actions was felt there.

It is my submission, that as a matter of general principle of Scots law as well as with reference to the terms and mischief sought to be criminalised under the relevant statutory offences, jurisdiction for Mr Busby's alleged criminal conduct can be established in Scotland. In addition, with reference to international comity, in such cross border criminal conduct, the House of Lords drawing upon the case law above determined that as a matter of international comity, extradition ought to be made to facilitate trial in the most appropriate forum where the impact of the alleged criminal conduct is most keenly felt and the jurisdiction which is the target of the alleged criminal conduct.

While in charge 1 reference is made to England, on any view whether at common law or with particular reference to the statutory provisions creating the offence, jurisdiction may still be established in Scotland standing the focus of the criminal intention was made to a person/people located in Scotland."

The Abuse of Process Objection

The objection raised by the respondent may be stated simply in the following terms. The respondent contends that the offences for which his surrender is sought are "similar offences" to those for which he was prosecuted, tried (and it is understood) convicted in 2009. The respondent contends that the State, having taken the position at his said trial that the offences in question were conduct based offences and, on that account, were not offences committed extra territorially, cannot now take what is characterised as the "polar opposite" position that such offences are result based offences committed extraterritorially in terms of this State but territorially in terms of the issuing State. It is suggested that to do so would be an abuse of this Court's process.

This Court would immediately comment that the position being taken by the applicant in this case is not nearly so black and white as is painted in the argument put forward on behalf of the respondent. It is not simply a case of the applicant saying that the offences in question are not extra-territorial and the respondent saying that they are. What the applicant is in fact saying is that the offences were capable of being simultaneously committed in both jurisdictions and are in fact capable of being prosecuted in either jurisdiction. This is a matter I will return to.

Be that as it may, in this Court's view the abuse of process argument is problematic and untenable on two grounds. The first relates to the suggestion that a polar opposite position is being taken in these proceedings by "the State" to that which it took previously in the respondent's 2009 trial. The Court considers that this contention is based upon a flawed analysis. The second relates to counsel for the respondent's contention that the trial in 2009 was for "similar offences" to the offences which are the subject of the European arrest warrant. The Court considers that this conclusion, although technically correct on one view of matters, represents an over-simplistic analysis and one that ultimately fails to reflect a more complex reality. In particular the Court believes that the suggestion that the offences the subject matter of the warrant must be regarded as either conduct based offences or result based offences represents an outdated approach that is not fit for purpose when considering transnational crimes involving the communication of hoax threats, or indeed actual threats, using instantaneous, or nearly instantaneous, telecommunications media, and regardless of whether it be with terrorist intent or simply mischievous intent. In this Court's view, these particular offences are not capable of being wholly characterised as one or the other, and are in fact both conduct and result based offences.

The contention that "The State" has adopted inconsistent positions

In this Court's view it is inappropriate to equate the role of Central Authority in these proceedings with that of the Director of Public Prosecutions at the trial of the respondent in 2009, and to characterise him as being synonymous with "The State". To approach matters in this way is to ignore the special position of the Central Authority under the Act of 2003, and the role of such entities as provided for under the Framework Decision, and within the European Arrest Warrant system generally.

The European arrest warrant system as conceived within the Framework Decision, and transposed and operated under domestic legislation, is predicated upon the idea that both the issuing of a European arrest warrant and execution of a European arrest warrant (in the sense of surrender) is a judicial process, performed by judicial authorities. The system allows participating member states, if they wish, to establish a Central Authority to act in a facilitative role to assist the relevant judicial authorities. They are not obliged to do so. Accordingly, while some participating member states, and Ireland is one of them, have established a Central Authority to perform that role, others have not done so.

To appreciate fully the relationships and interplay between the Irish Central Authority, Judicial Authorities (both issuing and executing), and "The State" it is necessary to have regard to relevant provisions of the Framework Decision and of domestic legislation.

In this context recitals 5, 6, 8 and 9 to the Framework Decision are of particular relevance. They are in the following terms:

> "(5) The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States 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 sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. 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

decisions, within an area of freedom, security and justice.

(6) The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the 'cornerstone' of judicial cooperation.

[…]

(8) Decisions on the execution of the European arrest warrant must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender.

(9) The role of central authorities in the execution of a European arrest warrant must be limited to practical and administrative assistance."

Moreover, within the operative part of the Framework Decision Articles 6 and 7, respectively, provide:

"Article 6

Determination of the competent judicial authorities

1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.

2. The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State.

3. Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law.

Article 7

Recourse to the central authority

1. Each Member State may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent judicial authorities.

2. A Member State may, if it is necessary as a result of the organisation of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and reception of European arrest warrants as well as for all other official correspondence relating thereto.

3. A Member State wishing to make use of the possibilities referred to in this Article shall communicate to the General Secretariat of the Council information relating to the designated central authority or central authorities. These indications shall be binding upon all the authorities of the issuing Member State."

In Ireland these provisions have been transposed into domestic statute law by means of the Act of 2003, which variously provides as follows:

S. 2(1) thereof provides definitions and, for present purposes, provides (*inter alia*):

"In this Act, except where the context otherwise requires—

'Central Authority in the State' shall be read in accordance with section 6;

'issuing judicial authority' means, in relation to a European arrest warrant, the judicial authority in the issuing state that issued the European arrest warrant concerned;

Sections 6, 9, 10, 12(1) & (2), 13(1), 20(2) and 34, respectively, of the Act of 2003 (as amended where relevant) are also of central importance in this context, and provide respectively:

"6.—(1) The Minister shall be the Central Authority in the State for the purposes of this Act.

(2) The Minister may, by order, designate such persons as he or she considers appropriate to perform such functions of the Central Authority in the State as are specified in the order and different persons may be so designated to perform different functions of the Central Authority in the State.

(3) For so long as an order under subsection (2) remains in force, a reference in this Act to the Central Authority in the State shall, insofar as it relates to the performance of a function specified in the order, be construed as a reference to the person designated by the order to perform the function concerned.

(4) The Minister shall, by notice in writing, inform the General Secretariat of the Council of the European Union of the making of an order under this section and of the names of the persons designated under the order.

(5) The Minister may, by order, amend or revoke an order under this section (including an order under this subsection).

(6) The Central Authority in the State shall, in each year, prepare a report on the operation, in the preceding year, of Part 2, and shall cause copies of each such report to be laid before both Houses of the Oireachtas as soon as may be after it is so prepared."

"9.—For the purposes of the Framework Decision, the High Court shall be the executing judicial authority in the State."

"10.—Where a judicial authority in an issuing state issues a European arrest warrant in respect of a person—

(a) against whom that state intends to bring proceedings for the offence to which the European arrest warrant relates, or

(b) who is the subject of proceedings in that state for an offence to which the European arrest warrant relates,

(c) who has been convicted of, but not yet sentenced in respect of, an offence in that state to which the European arrest warrant relates, or

(d) on whom a sentence of imprisonment or detention has been imposed in that state in respect of an offence to which the European arrest warrant relates,

that person shall, subject to and in accordance with the provisions of this Act be arrested and surrendered to the issuing state."

"12.—(1) A European arrest warrant shall be transmitted by, or on behalf of, the issuing judicial authority to the Central Authority in the State and, ….

(2) Such undertakings as are required to be given under this Act shall be transmitted by, or on behalf of, the issuing judicial authority to the Central Authority in the State, …"

"13.—(1) The Central Authority in the State shall, as soon as may be after it receives a European arrest warrant transmitted to it in accordance with section 12, apply, or cause an application to be made, to the High Court for the endorsement by it of the European arrest warrant, or a true copy thereof, for execution of the European arrest warrant concerned."

"20. — (2) The Central Authority in the State may, if of the opinion that the documentation or information provided to it under this Act is not sufficient to enable it or the High Court to perform functions under this Act, require the issuing judicial authority to provide it with such additional documentation or information as it may specify, within such period as it may specify."

"34.—A European arrest warrant issued under section 33 shall be transmitted to a Member State by the Central Authority in the State."

These provisions, and others within the Act of 2003, make it clear that the role of the Central Authority is entirely facilitative.

Moreover, in *Minister for Justice Equality & Law Reform v. Sliczynski* [2008] IESC 79 (unreported, Supreme Court, 19th December, 2008) both Murray C.J. (as he then was) and Macken J. emphasised the unique and *sui generis* nature of proceedings under the Act of 2003.

Murray C.J stated:

"As I pointed out in *Attorney General –v- Park* (unreported, Supreme Court, 6th December, 2004) which concerned extradition under the Act of 1965, as amended, "*The burden of proof of facts which may rest on the applicant in these proceedings is not that of a criminal trial. I hasten to add that the learned High Court Judge did not approach this matter on such a basis and it is just that I consider it appropriate at this point to distinguish between extradition proceedings and other forms of proceedings, criminal and civil. An extradition proceeding pursuant to the relevant Acts has its own special features which in a certain sense makes it sui generis*." Later in the judgment it was stated "*The role of the requested State, indeed its duty, is to give effect to a lawful request from a requesting State once it is determined that the request fulfils the criteria laid down by the relevant legislation …. The responsibility for bringing a person named in a warrant before the High Court clearly rests with authorities in the State. Once that is done the task in determining whether all legal requirements for the making of an Order pursuant to s. 47 are fulfilled rests with the High Court Judge. That is an inherently inquisitorial function*." It seems to me that the same considerations apply to applications for surrender pursuant to the Act of 2003 and indeed s. 20 of the Act, as cited above, highlights the inquisitorial dimension of the proceedings."

Similarly, in the course of her judgment in the same case, Macken J. stated:

"It is a well established principle of European Arrest Warrant law that the scheme provided for under the Framework Decision, and in turn under the Act of 2003, is a scheme *sui generis*, not identical with the former extradition legislation which was itself, according to the case law, *sui generis* in nature."

In the earlier case of *Minister for Justice, Equality and Law Reform v. McGrath* [2006] 1 I.R. 321 Macken J, then a member of the High Court, had stated:

"… it seems to me that the type of investigation which the court is engaged in ... is no different to that which previously existed in the State pursuant to then extant legislation on extradition. In that regard I gain considerable assistance and guidance from the decision of the Supreme Court in *Attorney General v. Parke*, [2004] IESC 100 (unreported, Supreme Court, 6th December, 2004) and in particular the judgments of Murray C.J., and Denham, J. As Murray, C.J., pointed out, the inquiry is not of an adversarial nature, but rather is in the nature of a *sui generis* inquiry. At page 11, he stated:

"… I should first of all state the obvious, namely, that although extradition may entail serious consequences for a person subjected to it, such as the loss of liberty, extradition proceedings are not a criminal process and are not in the nature of a criminal trial. The burden of proof of facts which may rest on the applicant in these proceedings is not that of a criminal trial. … An extradition proceeding, pursuant to the relevant Acts, has its own special features which in a certain sense makes it *sui generis*."

And it is clear why the Court considered it be so. Referring to the judgment of Walsh, J. in *Wyatt v. McLoughlin* [1974] I.R. 378 in which he had considered the nature of extradition and its provenance in, *inter alia*, treaties, Murray C.J.

continued:

> "These reciprocating arrangements referred to by Walsh J. may arise from bilateral arrangements or, as is more often the case nowadays, multilateral treaties".

As to the arrangements then existing between Ireland and the United Kingdom, he said:

> "The role of the requested State, indeed its duty, is to give effect to a lawful request from a requesting State once it is determined that the request fulfils the criteria laid down by the relevant legislation."

In the judgment of Denham, J. in the same case [*Attorney General v. Parke*], supra, she stated, regarding the nature of the inquiry at p. 7:

> "The role of the trial judge in an application for an order of extradition is unique. The hearing is not a criminal trial, in the adversarial sense, where the State must prove the guilt of the accused beyond all reasonable doubt. Nor is it a civil case between parties. It is a unique procedure where the court holds an inquiry as to whether the criteria set out in the Extradition Act 1965, as amended, has been met. Further this law has been established against the backdrop that the State has entered into an agreement with the requesting State that there be extradition arrangements between the two States. Thus these cases are founded on the comity of nations and the comity of courts."

Notwithstanding that these extracts refer to the position arising under treaties or arrangements existing prior to the Framework decision and the Act of 2003, they nevertheless make clear how I should approach the enquiry in this case, arising from obligations flowing, not merely from a bilateral or multilateral treaty, but from the Council Framework decision itself.

Having regard to the foregoing, I am satisfied that, contrary to what the respondent contends for, this is not an enquiry in which there is an onus on the applicant to prove beyond reasonable doubt that the respondent is the person sought to be surrendered. Nor is it appropriate, as was stated by Denham J. in the above case, to adopt the civil standard of proof "on the balance of probabilities", although this might be closer to what is apt. In my view the obligation on the court is to take full account of the warrant and the accompanying materials and affidavits filed and make all appropriate enquiries which I consider necessary, including, pursuant to the Framework decision, requesting further information from the issuing authority, with a view to reaching my decision as to whether the respondent is the person in respect of whom the warrant issued.

As to what is meant, in that context, by "satisfied" in s. 16 of the Act of 2003, it means, I believe, no more than that the court should be in a position to make up its mind, on the facts and materials presented and/or on its own enquiry, and come to a conclusion on the matter before it, without having a genuine or reasonable doubt in that regard. It may well be that, in the course of the exercise, certain doubts will arise in relation to one or more of the facts or materials before the court, but overall those doubts should not be of a nature to prevent the court coming to a view which is conclusive and certain on the decision required."

This Court has consistently applied the approach commended in the jurisprudence cited above in it's judgments in cases such as *Minister for Justice, Equality and Law Reform v. Gorka* [2011] IEHC 121 (unreported, High Court, Edwards J,, 29th March, 2012; *Minister for Justice, Equality and Law Reform v. Walkowiak [*2011] IEHC 182 (unreported, High Court, Edwards J., 6th May. 2011); *Minister for Justice and Equality v. Guz* [2012] IEHC 388 (unreported, High Court, Edwards J., 31st July, 2012; and other cases.

To characterise the applicant in this case, i.e., the Irish Central Authority, as "the State" and, as such, being in the same position as the Director of Public Prosecutions in the trial of the respondent before the Circuit Criminal Court in 2009 is to ignore the wholly facilitative role played by the applicant.

The request for the respondent's surrender is not the Central Authority's request, rather his surrender is being requested by the issuing judicial authority.

The Central Authority is therefore not a party interested in the outcome of the proceedings (other than in the technical sense of being the entity having carriage of the proceedings in a purely facilitative role). Although entrusted with carriage of the proceedings the Central Authority acts neither as an agent of this State nor as an agent of the issuing state. Neither the role itself, nor the working relationships envisaged between the Central Authority and relevant judicial authorities, permit of such an agency relationship.

Moreover, the proceedings are predominantly non-adversarial and, although they do bear some adversarial features, the Central Authority bears no burden of proof. There is therefore no contest *inter partes* as such. The Court is primarily engaged upon a form of inquiry wherein the parties, or their representatives, participate with a view to assisting the Court in evaluating the evidence and applying the law, each admittedly approaching the task from different perspectives and with different agendas.

Accordingly, counsel for the Central Authority in making submissions as to matters of law or fact at a surrender hearing in a European arrest warrant case is not representing the State as such. Moreover, his or her role is wholly different to that of prosecuting counsel in a criminal trial.

In a criminal trial, such as the trial of the respondent in 2009, the State is a party in every real sense. The proceedings are brought by the people of Ireland at the suit of the Director of Public Prosecutions. The Director of Public Prosecutions is not merely a facilitator. She very definitely represents "the State" and is wholly interested in the outcome of the proceedings. There is a very definite contest *inter partes* and that contest is criminal, not civil. The proceedings are entirely adversarial and the State bears the very significant burden of proving the case against the accused to the standard of beyond reasonable doubt.

In conclusion on this issue, this Court is firmly of the view that "the State" has not in fact attempted to take polar opposite positions, to the prejudice of the respondent, in different proceedings before the Courts in this jurisdiction in circumstances that could amount to an abuse of this Court's process. The applicant is not synonymous with "the State". Accordingly, his counsel was perfectly entitled to urge upon this Court the position that she has adopted on the territoriality / extraterritoriality issue that arises for consideration in this case. The duty of counsel for the applicant was to make appropriate submissions to assist this Court in correctly evaluating the evidence, and in applying the law to that evidence. The Court is satisfied that counsel for the applicant has discharged that duty

properly and in good faith. The fact that some years ago another counsel, acting for a different party i.e., the Director of Public Prosecutions, took a different position on a related issue in different proceedings also involving the respondent, is in this Court's view irrelevant.

Similar Offences

A complex argument was constructed by counsel for the respondent as to why the offences the subject matter of the warrant ought to be regarded as offences "similar to" the offences arising under s.13 of the Act of 1951 as substituted and of which the respondent was tried and convicted in 2009. Before describing his argument it is necessary to set out the terms of s. 5 of the Act of 2003. Section 5 states:

> "5.—For the purposes of this Act, an offence specified in a European arrest warrant corresponds to an offence under the law of the State, where the act or omission that constitutes the offence so specified would, if committed in the State on the date on which the European arrest warrant is issued, constitute an offence under the law of the State.".

Counsel for the respondent contends that the application of s.5 of the Act of 2003 is not confined to those circumstances where this Court is required to determine whether or not dual criminality can be demonstrated in respect of an offence not covered by reliance upon Article 2.2 of the Framework Decision. He has argued that it must also be applicable to any consideration of whether an offence corresponds to an offence under the law of the State for the purposes of determining issues as to territoriality and extraterritoriality. This is because, he submitted, "*the reason that extraterritoriality and territoriality are there is to in fact keep alive the concept of dual criminality vis à vis extra territorial and territorial offences*" even where Article 2.2 has been invoked. In support of this he cited the following passage from *The European Arrest Warrant in Practice*, by Professor Keijzer (2009: TMC Asser Press.) (at p.92, para 2.1.2) :

> "In the European commission's proposal for a framework decision regarding European arrest warrants the territoriality exception had been completely omitted. During the negotiations regarding this proposal the exception has returned, again not in an absolute but in an optional mode, via article 4.7A. This return was not inspired by the principle of territorial jurisdiction, however, but by the need to compensate for the partial abolition by article 2.2 of the framework decision of the dual criminality rule, the rule which demands that conduct be punishable in both the requested and the requesting State. This had been a special concern of the Netherlands and Belgium who wanted to protect persons carrying out abortions or euthanasia against other states' claims of extraterritorial jurisdiction, if such acts had met the legal conditions under their laws. The exception, as laid down in article 4.7A, is not restricted to conduct that the requested state considers lawful, however, but in line with article 7.1 ECE concerns any conduct that is located in its territory. Since the introduction of article 4.7A therefore the territoriality exception serves not so much the interest of requested member states in local crimes being prosecuted in their own courts but, in contrast in the first place, it serves their interest and certain conduct that is lawful under their law not to be prosecuted at all."

Counsel for the respondent has argued that in both contexts, i.e., the determination of whether an offence corresponds for the purposes of dual criminality, and also the determination of whether it corresponds for the purposes of a territoriality/extraterritoriality issue, one is required to look at "the act or omission that constitutes the offence" i.e., the conduct complained of, rather than the mischief intended to be addressed by the statute or law in question, i.e., the result.

In counsel's submission the conduct that constitutes the offences that are the subject matter of the European arrest warrant in this case is the same as that for which the respondent was prosecuted in 2009. It will be recalled that in the trial, counsel for the prosecution characterised it as "*the sending of a [false] message with an intent*". It seems to this Court that viewed in that simplistic way all of the offences contained in the warrant are indeed "similar offences".

However, for reasons that the Court will elaborate on, it is wholly artificial to view them in that simplistic way. Though they are conduct based offences on one view of it, they are also result based offences on another view of it. They are in reality a hybrid exhibiting features of both, but predominantly the features of a result based offence. This is the position taken by the Central Authority, and the Court notes that it is also the position taken by Mr Dickson of the Procurator Fiscal's Office in the issuing state.

Adopting this analysis it seems to this Court that it was entirely open to prosecuting counsel to contend, as he did, that the offences contrary to s.13 of the Act of 1951 as substituted, and for which the respondent was tried and convicted in 2009, were conduct based offences sufficient to ground jurisdiction to try the defendant in this jurisdiction. Equally, it is also open for counsel for the applicant in the present case to argue that, as the results of the offences the subject matter of the present warrant were felt in Scotland, sufficient territorial jurisdiction exists to enable the respondent to be tried for those offences in Scotland without the need arising for the issuing state to invoke or rely upon an extraterritorial jurisdiction. Accordingly, notwithstanding the "similarity" of the offences, the adoption by counsel operating in two entirely different contexts, one involving adversarial criminal proceedings and the other involving *sui generis* civil rendition proceedings on foot of a European arrest warrant, of opposite, but legally permissible, positions could not, in and of itself, and without something more, amount an abuse of this Court's process.

The s. 44 "extraterritoriality" objection

The relevant statutory provision

S.44 of the Act of 2003 provides:

> "A person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State."

S. 44 as interpreted by the Supreme Court

The meaning and application of s. 44 of the Act of 2003 was considered by the Supreme Court in *Minister for Justice, Equality and Law Reform v Bailey* [2012] IESC 16 (Unreported, Supreme Court, 1st March, 2012). The Court has considered carefully all of the judgments in that case. It may be helpful in the context of the present case to quote some passages from that of Denham C.J who stated:

"19. The Framework Decision provided grounds for optional non-execution of a warrant. It states in Article 4 that the executing judicial authority may refuse to execute the warrant in a number of circumstances, including, in paragraph 7:-

> '4.7: where the European arrest warrant relates to offences which:
>
> (a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such;
>
> or
>
> (b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.'

20. The Framework Decision thus provides two options in Article 4.7 for non execution of a warrant. The choice of applying the options was made by the Oireachtas.

21. In Ireland, the initiating legislation was the Act of 2003. Article 4.7(a) was ultimately not incorporated as part of Irish legislation, and thus it is not an option open to the Court.

22. The option described in Article 4.7.b of the Framework Decision was implemented by the legislature in the provisions of s. 44 of the Act of 2003, which has not been amended in any later legislation and which retains the same wording since its enactment.

23. It appears to me that the words of s. 44 are clear: a person shall not be surrendered if two specific conditions are satisfied. The first part of the section states that:-

"A person shall not be surrendered under this Act if the offence specified in the European Arrest Warrant in respect of him or her was committed in a place other than the issuing State …"

The first of these conditions is that the offence was committed or alleged to have been committed in a place other than the issuing State. In this case the offence of murder of Mme. Toscan du Plantier took place in Ireland and thus outside the issuing State, which is France. Therefore, the first condition is met. However, this finding is insufficient to prohibit surrender under s. 44 of the Act of 2003 and it is necessary to consider the balance of the section, the second condition.

24. This first issue therefore turns on the meaning of the words in the balance of s. 44, which sets the second condition as:-

"and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State".

It is helpful to read the third phrase before the second, in construing the meaning of the section. This would thus be:

"and the act or omission of which the offence consists does not constitute an offence under the law of the State, by virtue of having been committed in a place other than the State".

These are clear words and so may be considered and applied literally. The section prohibits the surrender of a person where the act of which the offence consists does not constitute an offence in Ireland by virtue of having been committed, i.e. because it was committed, in a place other than Ireland.

25. The terms of s. 44 are an option, exercised by Ireland, grounded on Article 4.7.b. of the Framework Decision.

26. The European Arrest Warrant procedure is based on the concept of mutual trust and confidence between judicial authorities of the Member States. However, Article 4.7 of the Framework Decision and s. 44 of the Act of 2003 reflect other principles also. It is necessary to analyse the Article and the section to determine the issue raised by the appellant.

27. The travaux préparatoires on Article 4.7 of the Framework Decision, and thus on the foundations of s. 44 of the Act of 2003, are of interest. It is unfortunate that they were not opened to the Court by counsel.

28. The concept of reciprocity has long been utilised by States in making extradition treaties.

29. The European Convention of Extradition 1957 provided in its Article 7:

> Article 7 - Place of Commission
>
> '1. The requested Party may refuse to extradite a person claimed for an offence which is regarded by its law as having been committed in whole or in part in its territory or in a place treated as its territory.
>
> 2. When the offence for which extradition is requested has been committed outside the territory of the requesting Party, extradition may only be refused if the law of the requested Party does not allow prosecution for the same category of offence when committed outside the latter Party's territory or does not allow extradition for the offence concerned.'

30. Article 26 provided for reservations, stating:-

> '1. Any Contracting Party may, when signing this Convention or when depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention.

2. Any Contracting Party which has made a reservation shall withdraw it as soon as circumstances permit. Such withdrawal shall be made by notification to the Secretary General of the Council of Europe.

3. A Contracting Party which has made a reservation in respect of a provision of the Convention may not claim application of the said provision by another Party save in so far as it has itself accepted the provision.'

31. The Explanatory Memorandum on Article 7 states:-

'Paragraph 1 permits a Party to refuse extradition for an act committed in whole or in part within its territory or in a place considered as its territory. Under this paragraph it is for the requested Party to determine in accordance with its law whether the act was committed in whole or in part within its territory or in a place considered as its territory. Thus, for example, offences committed on a ship or aircraft of the nationality of the requested Party may be considered as offences committed on the territory of the Party.

Paragraph 2 was inserted in order to take into account the law of countries which do not allow extradition for an offence committed outside the territory of the requesting Party. This paragraph provides that extradition must be granted if the offence has been committed outside the territory of the requesting Party, unless the laws of the requested Party do not authorise prosecution for an offence of the same kind committed outside its territory, or do not authorise extradition for the offence which is the subject of the request.

Under the terms of Article 26, a reservation may be made in respect of this paragraph, making it subject to reciprocity.'

32. Thus, under the previous Extradition system, where treaties were made between states, the specific treaty could make provision for a reservation, and make it subject to reciprocity.

33. The document dated 4th December, 2001, from the Permanent Representatives Committee, to Council, entitled "Proposals for a Council Framework Decision on the European Arrest Warrant and the surrender procedures between Member States", 14867/01 COPEN 79 CATS 50 stated:

'3. Grounds for optional non-execution.

3.1 Grounds linked to the place where the act on which the grounds for the European arrest warrant was committed:

Several delegations (NL/EL/IRL/L,/DK/A and S) wanted to introduce additional grounds for optional non-execution, making it permissible to refuse to execute a European arrest warrant issued for acts committed in whole or in part on the territory of the executing Member State or committed outside the territory of the issuing Member State, if the law of the executing Member State does not allow prosecution of offences of the same type committed outside the territory of the executing Member State. This question should be examined together with the French proposal referred to in point 1 above.

The Presidency will make a proposal to COREPER/COUNCIL on this point as part of an overall compromise.'

The Framework Decision annexed (as of 4th December 2001) included:

"7. [Where the act on which the European arrest warrant is based was committed in whole or in part in the territory of the executing State or in a place treated as the territory of that Member State, and the competent authority of the executing State undertakes to conduct the prosecution or to execute the sentence 2.]"

The footnote 2 stated:-

"NL (supported by EL/IRL/L/DK/A and S) has made a broader proposal, based on Article 7 of the 1957 European Extradition Convention:

'Where the European arrest warrant envisages offences which:

(1) are regarded by the law of the executing Member State as having been committed in whole or in part in its territory or in a place treated as the territory of that Member State;

(2) have been committed outside the territory of the issuing member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside the territory of the executing Member State.'"

Thus, Ireland was one of the delegations seeking to introduce additional grounds for optional non-execution at this stage of the consideration of the proposed Framework Decision.

34. At the 2396th Council Meeting - Justice, Home Affairs and Civil Protection - Brussels, on the 6th and 7th December, 2001, the Council examined a draft Framework Decision on the European Arrest Warrant and the surrender procedures between Member States, on a compromise proposal. The Presidency was able to record the agreement of 14 delegations on its compromise. One delegation was unable to support the proposal. The main features of the compromise were:-

- The arrest warrant is broad in scope. In particular, it gives rise to surrender in respect of 32 listed offences …

without verification of the double criminality of the act and provided that the offences are punishable in the issuing Member State by a custodial sentence of a maximum of at least 3 years.

• A territoriality clause making it optional to execute an arrest warrant in respect of offences committed in the executing State for acts which took place in a third State but which are not recognised as offences by the executing State.

• A retroactivity clause making it possible for a Member State to process requests submitted prior to the adoption of the Framework Decision under existing instruments relating to extradition.

35. On the 6th December, 2001, the Presidency noted agreement of 14 delegations on the draft Framework Decision, one delegation could agree only on a narrower list of offences in Article 2(2). The draft Article 4 was headed as grounds for optional non-execution. It contained seven sections by which "[t]he executing judicial authority may refuse to execute the European arrest warrant" if the conditions in any section were adopted into domestic law. The draft Article 4.7 was:-

'The executing judicial authority may refuse to execute the European arrest warrant […]

7. Where the European arrest warrant envisages offences which:

(3) are regarded by the law of the executing Member State as having been committed in whole or in part in its territory or in a place treated as the territory of that Member State;

(4) have been committed outside the territory of the issuing member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside the territory of the executing Member State.'

This draft indicates an agreement that the second option not to surrender would lie when the offence in issue had been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offence when committed outside the territory of the executing Member State.

36. The final wording agreed upon for Article 4.7 of the Framework Decision was:-

'7. where the European arrest warrant relates to offences which:

(a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such;

or

(b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.'

37. Ireland did not opt for Article 4.7.a. But the roots of Article 4.7.b. may be seen in Article 7 of the European Convention on Extradition, 1957, and there is a clear line of thought through to Article 4.7.b. of the Framework Decision.

38. Whether one classifies it as an option as to extra-territoriality or reciprocity, Article 4.7.b. makes provision for an exception to the requirement of surrender which is a fundamental principle of the Framework Decision.

39. Article 4.7 has been described as an example of the principle of reciprocity in the Framework Decision. As stated in Blextoon and van Ballegooij, eds., *Handbook on the European Arrest Warrant*, (T.M.C. Asser Press, 2005) in chapter 6. The Principle of Reciprocity, by Harman van der Wilt at p. 74:-

"Only one provision in the Framework Decision alludes to the principle of reciprocity. According to Article 4, s. 7 sub. (b), the executing judicial authority is allowed to refuse the execution of a European Arrest Warrant, whenever such a warrant envisages offences which have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside the territory of the executing Member State. In the corresponding situation the executing state would simply not be able to issue an arrest warrant due to a lack of jurisdiction. The provision restores the equilibrium by offering this state the possibility to restrict the scope of its performances to its own expectations in similar circumstances. This section mirrors Article 7, s. 2 of the European Convention on Extradition."

s. 44 - the first condition

As Denham J.'s analysis indicates, for s.44 of the Act of 2003 to be engaged at all two conditions must be satisfied. The first of these is that "*the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state*".

The evidence in the present case is silent concerning from where the communications which are the subject of the charges in the European arrest warrant were initiated. Conversely, there is clear evidence that the results of those communications were experienced or felt in the issuing state. Counsel for the respondent submits that in circumstances where the respondent was living in Ireland at all material times the only reasonable inference is that the communications were initiated here. The case is made that because the conduct complained of, i.e., the act or omission constituting the offence, was committed in this jurisdiction that is sufficient to satisfy condition the first condition of s. 44.

In elaboration of that argument counsel for the respondent said the following in the course of his oral submissions to the Court

(transcript 11 July 2013, p.23 lines 7-28):

> "The final point then that I just want to deal with is, as I say, to adopt the suggestion made by the State, by way of the affidavit, to the effect that the offences can of course be committed in both places at the same time and assuming that to be so one goes back to the provisions of section 44 and the Court is well familiar with it and it simply provides that "A person shall not be surrendered under this act if the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state" and the second leg doesn't concern us just at this point. So, where an offence can be described legitimately as having been committed in both places it certainly can be described as having been committed in a place other than the issuing State because otherwise had the Oireachtas intended to approach it in a different way they would of course have expressed it in the negative but expressed in the positive. So, the fact that it was committed in both places means it still comes within the terms of section 44 and that must be so because when one goes back to consider the underlying policy in terms of the residual aspect of dual criminality and so on one couldn't have a situation whereby the extraterritorial offence becomes something other than an extraterritorial offence and the conduct that was lawful here let's say is liable to prosecution in respect of the conduct that happened here because some other aspect might be regarded as being within the territory of the other state. So, I say that the argument …that it can be committed in both places actually doesn't in any sense disengage section 44, in fact, by definition, if one adopts that logic, it means that section 44 must be engaged."

In the Court's view this submission is correct. Although the Court has taken the view that these are hybrid type offences that are both conduct and result type offences, in consequence of which they must be regarded as being both territorial and extra-territorial offences, i.e., offences prosecutable in both jurisdictions, s. 44 of the Act of 2003 is nonetheless potentially engaged to the extent that they are extraterritorial. Accordingly, the first condition of s. 44 is satisfied in the circumstances of this case.

S.44 –the second condition.

The second condition within s. 44 of the Act of 2003 that requires to be satisfied is that "*the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State*". As suggested by Denham C.J. it is more easily grappled with if the third phrase is read before the second. Thus, recast in this way it would read "*the act or omission of which the offence consists does not constitute an offence under the law of the State, by virtue of having been committed in a place other than the State*".

Counsel for the applicant relies upon s. 6 of the Criminal Justice (Terrorist Offences) Act 2005, which states:

> "6.—(1) Subject to subsections (2) to (4), a person is guilty of an offence if the person—
>
> (a) in or outside the State—
>
> (i) engages in a terrorist activity or a terrorist-linked activity,
>
> (ii) attempts to engage in a terrorist activity or a terrorist-linked activity, or
>
> (iii) makes a threat to engage in a terrorist activity,
>
> or
>
> (b) commits outside the State an act that, if committed in the State, would constitute—
>
> (i) an offence under section 21 or 21A of the Act of 1939, or
>
> (ii) an offence under section 6 of the Act of 1998.
>
> (2) Subsection (1) applies to an act committed outside the State if the act—
>
> (a) is committed on board an Irish ship,
>
> (b) is committed on an aircraft registered in the State,
>
> (c) is committed by a person who is a citizen of Ireland or is resident in the State,
>
> (d) is committed for the benefit of a legal person established in the State,
>
> (e) is directed against the State or an Irish citizen, or
>
> (f) is directed against—
>
> (i) an institution of the European Union that is based in the State, or
>
> (ii) a body that is based in the State and is set up in accordance with the Treaty establishing the European Community or the Treaty on European Union.
>
> (3) Subsection (1) applies also to an act committed outside the State in circumstances other than those referred to in subsection (2), but in that case the Director of Public Prosecutions may not take, or consent to the taking of, proceedings referred to in section 43 (2) for an offence in respect of that act except as authorised by section 43 (3).
>
> (4) Subsection (1) does not apply in respect of—
>
> (a) the activities of armed forces during an armed conflict insofar as those activities are governed by international humanitarian law, or
>
> (b) the activities of the armed forces of a state in the exercise of their official duties insofar as those activities are

governed by other rules of international law.

(5) To avoid doubt, the fact that a person engages in any protest, advocacy or dissent, or engages in any strike, lockout or other industrial action, is not of itself a sufficient basis for inferring that the person is carrying out an act with the intention specified in paragraph (b) of the definition of "terrorist activity" in section 4 .

(6) Where a person is charged with an offence under subsection (1), which in the opinion of the Attorney General was committed in or outside the State with the intention of—

(a) unduly compelling the government of a state (other than a member state of the European Union) to perform or abstain from performing an act, or

(b) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of such a state,

then, notwithstanding anything in this Act, no further proceedings in the matter (other than any remand in custody or on bail) may be taken except with the consent of the Attorney General.

(7) Where in proceedings for the offence of engaging in or attempting to engage in a terrorist activity—

(a) it is proved that the accused person committed or attempted to commit an act—
(i) that constitutes an offence specified in Part 1 of Schedule 2 , or

(ii) that, if committed in the State, would constitute an offence referred to in subparagraph (i),

and

(b) the court is satisfied, having regard to all the circumstances including those specified in subsection (8), that it is reasonable to assume that the act was committed, or the attempt was made, with the intention of—

(i) seriously intimidating a population,

(ii) unduly compelling a government or an international organisation to perform or abstain from performing an act, or

(iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a state or an international organisation,

the accused person shall be presumed, unless the court is satisfied to the contrary, to have committed or attempted to commit the act with that intention.

(8) The circumstances referred to in subsection (7), include—

(a) whether the act or attempt referred to in subsection (7)(a)—
(i) created or was likely to create a collective danger to the lives or physical integrity of persons,

(ii) caused or was likely to cause serious damage to a state or international organisation, or

(iii) caused or was likely to result in major economic loss,

and

(b) any other matters that the court considers relevant.

(9) Where the Director of Public Prosecutions considers that another Member State of the European Communities has jurisdiction to try a person for any act constituting an offence under this section, the Director—

(a) shall co-operate with the appropriate authority in that other Member State, and

(b) may have recourse to any body or mechanism established within the European Communities in order to facilitate co-operation between judicial authorities,

with a view to centralising the prosecution of the person in a single Member State where possible."

Counsel for the applicant contends that on the basis of this provision, the respondent being resident in this State, the acts of which the offences consist do in fact constitute offences under the law of the State even if those acts were committed in a place other than the State, and accordingly the second condition of s. 44 is not satisfied. The Court considers this submission to be correct, and it is clear from the contents of the letter of additional information dated the 24th of July, 2013 that the reciprocity requirement is met.

In circumstances where the second condition of s.44 is not capable of being satisfied, the s.44 objection must be rejected.

For completeness, two other matters should be recorded. First, the applicant relied upon the decision of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Hill* (Supreme Court, *ex tempore*, Fennelly J., 11th November, 2010). While this decision certainly lends support to a suggestion that hoax crimes are at least in part result crimes, and that such crimes are capable of being prosecuted both where the conduct is committed and where the result is felt, the Court considers that it is perhaps somewhat distinguishable in that the mechanism of communication was the conventional postal system and not an instantaneous telecommunications medium such as was used here. In *Hill* it was possible to temporally isolate and separate what occurred in Ireland on the one hand, from what occurred in the UK on the other hand. In the present case it is difficult to do so because the threats were in effect transmitted from Ireland and received in Scotland simultaneously due to the miracle of electronic communications.

The other matter that requires to be recorded is that counsel for the respondent has drawn to the Court's attention an English case that he conceded was entirely against him in so far as his abuse of process argument was concerned. This was the decision in the conjoined cases of *R (Bermingham and others) v. Director of Serious Fraud Office; R (Bermingham and others) v. Government of the United States of America* [2007] Q.B. 727. The Court has already indicated to counsel that he was in fact under no obligation to draw this decision to the Court's attention as it is of persuasive influence only and not a binding precedent in this jurisdiction. Nevertheless, in making the Court aware of it counsel acted properly and ethically and he is to be commended for doing so and for his professionalism.

Conclusion
It is appropriate for the Court to make an Order pursuant to s. 16(1) surrendering the respondent to the issuing state to face trial for all seven offences the subject matter of the European arrest warrant in this case.