Neutral Citation [2015] IEHC 698

THE HIGH COURT

[2015 No. 64 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

M.T.

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered the 11th day of November, 2015.

1. This judgment concerns the capacity of the respondent to give instructions to his solicitor and counsel in these proceedings under the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"). The background is that the respondent was arrested on 9th June, 2015 pursuant to a European Arrest Warrant ("EAW") issued by a United Kingdom ("U.K.") issuing judicial authority. The EAW indicates that the respondent had pleaded guilty to an offence of wounding contrary to s. 20 of the Offences against the Person Act, 1861 for which he was sentenced to three years imprisonment. He was released on licence but failed to comply with the conditions of that licence and in due course the EAW was issued for the purpose of requiring him to serve the remaining 493 days of his sentence.

2. The respondent has been remanded in custody since his arrest on foot of the warrant. At a very early stage in the surrender proceedings, it was indicated to the High Court that he wished to consent to his surrender to the issuing state. On 23rd June, 2015, an application under s. 15 of the Act of 2003 for an Order for surrender on consent was commenced. This application reached the stage where the respondent gave evidence that he had been advised and understood the consequences of his return. When the respondent was asked to sign a document recording his surrender, however, he refused to do so. The matter was then adjourned for the purpose of fixing a s. 16 hearing in this matter.

3. Prior to the hearing of the application for surrender under s. 16 of the Act of 2003, concerns emerged in relation to his mental health. Expert psychiatric reports were obtained by the respondent's legal representatives from Dr. Conor O'Neill, who is a consultant forensic psychiatrist at the Central Mental Hospital, Dundrum and visiting psychiatrist to Cloverhill Prison where the respondent was held on remand.

The Evidence of Dr. O'Neill

His reports

4. In his first report of 16th July, 2015, Dr. O'Neill stated "I formed the opinion that [the respondent] did not meet criteria for fitness to be tried at the time of his most recent assessment on 3rd July, 2015, due to the gravity of his acute psychotic symptoms. His capacity to instruct counsel is likely to be impaired by his ongoing paranoid delusional beliefs. This is likely to change following admission to hospital and appropriate treatment". On being shown that report, the Court expressed concerns about the issue of fitness to be tried and also the jurisdiction of the court to deal with this matter should the respondent be found to be unfit to give instructions.

5. The case was adjourned from time to time over the summer months while a further report was obtained in relation to the respondent. At an early stage in the detention of the respondent, a request had been made by Dr. O'Neill to have him transferred to the Central Mental Hospital. Dr. O'Neill indicated in evidence the unfortunate reality was that, although in his view the respondent was in need of treatment and was near the top of the list for admission, he lost priority due to other even more needy prisoners. Due to the lack of psychiatric hospital places within the prison service, he was only transferred to the Central Mental Hospital on 21st October, 2015.

6. In his second report dated 2nd October, 2015, Dr. O'Neill states as part of his conclusions as follows:

> "14.1 Regarding Diagnosis and Current Mental State
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> [The respondent] has an established diagnosis of paranoid schizophrenia. This a serious mental illness and meets criteria for a Mental Disorder as defined in the Criminal Law (Insanity) Act, 2006.
>
> His condition is complicated by substance misuse and poor compliance with treatment. He is currently actively psychotic and his condition at the time of the most recent assessment on 29th September, 2015, was such as to meet criteria for a Mental Disorder as defined in the Mental Health Act, 2001.
>
> 14.2 Regarding Fitness to be Tried
>
> I formed the opinion that [the respondent] did not meet criteria for fitness to be tried at the time of most recent assessment on 29th September, 2015. His capacity to instruct counsel was impaired by his ongoing paranoid delusional beliefs. He remained guarded, thought disordered and deluded. He reported a history of apparently delusional beliefs regarding prison staff in the United Kingdom which may be influencing his decision making capacity. This is likely to change following admission to hospital and appropriate treatment."

7. Those reports are verified on affidavit. The minister did not seek to have the respondent assessed by a second psychiatrist as is her prerogative; no criticism of that decision is in any way intended or implied. The minister sought to test the evidence of Dr. O'Neill by way of cross examination. That hearing took place before me on 16th October, 2015.

The oral evidence of Dr. Conor O'Neill

8. Cross examination elicited that the respondent had given his consent for the preparation of the report in circumstances where he understood the limits of confidentiality. Dr. O'Neill explained the screening process for persons newly remanded to prison. The respondent was seen as a person who required psychiatric assessment for a number of reasons. It appears that he was known to the psychiatric services within the prison system. Indeed much of his longitudinal history was taken from his previous presentations.

9. The respondent was able to provide the doctor with various information about his background and his current family circumstances. In some of the interviews, it was very difficult to obtain information from him as he was extremely guarded, suspicious, and irritable.

10. Dr. O'Neill said that the respondent had stated on a number of occasions that he does not feel himself to be suffering from an illness. Dr. O'Neill's view, and that of his treating team, was that the respondent was suffering from a psychotic illness and was in need of hospitalisation at that time. When Dr. O'Neill was asked to confirm that the respondent had been in a position to recall the incident giving rise to the EAW, Dr. O'Neill replied that "this is highly likely to reflect a delusional belief that he has over time described delusional beliefs relating to prison officers both in Ireland and other jurisdictions, including England, he has described delusional beliefs that he is being persecuted by people from his own home town, by people in Dáil Éireann and a wide range of other individuals. He is certainly able to describe these delusional beliefs."

11. Dr. O'Neill confirmed that the respondent had told him on 3rd July, 2015 that he wished to fight the extradition proceedings and avoid having to return to the United Kingdom. He said that the respondent had given various accounts of where he would like to stay if he was not extradited to the United Kingdom. On 29th September, 2015, Dr. O'Neill said that he was aware that an application was being made for him to be extradited to the U.K. but the respondent was reluctant to go into that in any detail. Dr. O'Neill was asked by counsel for the minister with respect to delusions concerning extradition proceedings, lawyers or the courts. Dr. O'Neill stated that the respondent had described, at different times in the recent past, his belief that the officer in the U.K. that he assaulted was a person who had travelled to or been from his hometown and arranged for his uncle to have an accident in a road traffic accident. Indeed, Dr. O'Neill had seen the respondent more recently on 7th October, 2015 and he elaborated on that issue. He told him that the man was in part responsible for the extradition order being applied to him and that he wanted to cause him harm whether in Ireland or the United Kingdom.

12. Dr. O'Neill said in relation to the capacity issue "my concern was that his capacity to instruct in relation to the extradition matter and his reason for opposing it is coloured by a delusional belief system that incorporates persons working in the U.K. prison system, people working in the government system." His reasoning around matters relating to the extradition matters is significantly impacted upon by this complicated delusional belief system "that a range of people are trying to cause him harm in a range of different places".

13. Dr. O'Neill was then asked by counsel, considering that the grounds upon which a person can surrender to another country are legal grounds, whether the respondent's capacity was impaired in dealing with those. Dr. O'Neill repeated his beliefs that the respondent's views of the conspiracy against him was entirely delusional and that it preoccupied the respondent to a very extreme extent. In circumstances where much of his cognition and thinking is given over to these delusional matters, Dr. O'Neill was of the view that it would be very difficult for him to focus on the specifics of complex legal issues at that time. Dr. O'Neill also confirmed that his opinion had changed from believing that the respondent's capacity was "likely to be impaired" to "was impaired" in October.

14. Under continued cross examination, Dr. O'Neill confirmed that the respondent was a man who needed to be in hospital under mental health legislation whether that be under the Criminal Law (Insanity) Act, 2006 or under the Mental Health Acts. In answer to questions from myself concerning the extent to which his particular mental illness could be said to impair his capacity, Dr. O'Neill said "[The respondent] is clear that he wants to oppose the extradition order. He has given various reasons for that. Partly they are due to very understandable reasons. He has described his wish to be near and beside his family and to have access to them and on the other hand he gives reasons that are delusional and that do not make sense. So, his capacity is certainly impaired by these beliefs".

15. Dr. O'Neill then went on to say "in my opinion, his capacity is impaired in relation to decision making around the extradition process because he is deluded as to the reason why the extradition is going ahead. He has told me of his belief that it is being driven, that is what he told me on the 7th October, this is being driven by the specific officer that he assaulted in the U.K. That he may be brought back to the U.K. to be harmed. These are delusional beliefs and not based in reality but these are in part, as I understand, the reason why he is instructing his counsel as he is. On the other hand, there are perfectly understandable reasons that are also contributing to his decision to instruct counsel in the way he is. They are a combination, as I would see it, of understandable and real beliefs and delusional beliefs."

16. Dr. O'Neill also acknowledged that his assessment of fitness was different to the more usual fitness to plead issue in criminal law. He said that he understood the test as one in terms of capacity to instruct counsel to oppose the extradition order. Dr. O'Neill stated that the respondent is not at the lower end of mental illness. He is severely unwell and has been for an extended period. As the Court had run out of time to deal with the issue on the day, the case was put back to 2nd November, 2015 for continued hearing with a specific focus on the test to be applied in assessing capacity to instruct counsel in an extradition case and also the powers of the court in an extradition case following on from a finding of unfitness to plead.

The test for incapacity

17. Counsel for the applicant and the respondent made helpful written and oral submissions on the test for incapacity. By and large, there was no disagreement as to the test to be applied by the court; the disagreement lay in how it should be applied to the evidence in this case. Both parties relied upon the decision of the High Court in Nolan v. Carrick [2013] IEHC 523 where Dunne J., having reviewed Irish and English authority and the presumption of capacity, propounded the following test at para. 117:- *"was the defendant's cognitive ability impaired to the extent that he did not sufficiently understand with the assistance of such proper explanation from legal advisors and such experts as the nature of the case may have required, the issues on which his decision was likely to be necessary, the nature and effect of the decisions made in the course of the litigation, and the consequences of the decisions made by him for the litigation at that time?"*

18. Although EAW proceedings stem from accusations of criminal offences or a conviction on criminal offences, they are not considered criminal proceedings in this jurisdiction. As has been stated by the Supreme Court in *Attorney General v. Parke* [2004] IESC 100 they are proceedings which are *sui generis* in nature. The court has an inquisitorial role in the proceedings. Insofar as they are not an exercise of the administration of criminal justice in this jurisdiction, the proceedings should be viewed as taking place on the civil side.

19. The High Court, in two cases concerning the same respondent (*Minister for Justice and Equality v. B.H.* [2014] IEHC 403 and *Minister for Justice and Equality v. B.H*. (No. 2) (*ex tempore,* 31st July, 2015) had previously dealt with issues of "fitness to plead" in EAW cases. The High Court had on each occasion identified ability to instruct lawyers in the proceedings as crucial to any determination and had indicated that the test under the Criminal Law (Insanity) Act, 2006 was not the appropriate test. In *B.H.* (No. 2), the High Court stated at para. 44: *"[i]n circumstances where the respondent is facing loss of his liberty through the process of surrender, it is appropriate, where the interests of justice require, that enquiry is conducted into the ability of the respondent to comprehend what is going on in the proceedings, to make judgments with respect to the various aspects of the proceedings in respect of which his judgment is required or was required and to give appropriate instructions."*

20. Therefore, the test for capacity is one applicable in civil proceedings. The test identified by Dunne J. in *Nolan v. Carrick* is a distilled, yet detailed, version of the tests identified in the two *B.H.* cases. In the interest of consistency of approach to questions of capacity, it is appropriate to adopt the *Nolan v. Carrick* test for capacity as that which applies to a case under the EAW procedure.

The application of the test of incapacity

Submissions
21. At issue is whether Dr. O'Neill's evidence relating to capacity passes the test for capacity as set out above. Counsel for the minister submitted that the following were relevant considerations; the respondent's awareness that the U.K. sought his surrender to serve a custodial sentence; that he wished to oppose his surrender to the U.K.; that he wanted to serve his time in a prison in Ireland; that he could provide extensive details of the circumstances in which he came to be serving the sentence in the U.K.; that he understood the nature and purpose of the reports being prepared by Dr. O'Neill and had no difficulty providing consent; that he was able to give detailed family history including details of background psychiatric information; that he was open about his non-compliance of medical treatment; that he was clear as to the fact that he did not want to be in prison and would like to go home but would be prepared to go to a hospital; that the delusional system that he portrayed was a widespread one and that the U.K. officer had been in part responsible for "the extradition order being applied for"; and that this officer wanted to cause him harm whether in Ireland or in England.

22. In light of the evidence of Dr. O'Neill, the relevant parts of which have been set out above, counsel submitted "there is no suggestion that he has delusions with respect to the extradition proceedings themselves (as opposed to the motivation for the request for surrender) or that it is not possible for him to focus on the specifics required of him, even if he has delusions as to why his extradition is sought". Counsel submitted that, even if his delusional belief with respect to the motivation for surrender are "in part" the reason why he is instructing his lawyers to defend the proceedings, the evidence is that there are also perfectly understandable reasons that are also contributing to that decision. In counsel's submission, notwithstanding these delusions, his entitlement to be heard in opposing surrender for perfectly understandable reasons or understandable reasons and beliefs, may be vindicated by lawyers acting on his behalf.

23. Counsel for the minister also submitted that there was no evidence that the respondent is not in a position to provide factual information that might be relevant to advancing any particular legal defence to the application for his surrender. While it was accepted that it might arguably be different if a person wished to consent to surrender in a delusional belief as to the consequences of that surrender, there was no evidence here that the delusional beliefs affected the ability to instruct counsel to defend the particular circumstances.

24. Counsel on behalf of the respondent submitted that many of the points submitted by the minister in support of her contention that the respondent had capacity, concerned matters not directly related to the extradition, such as family. It was submitted that while the respondent was aware he was not taking his medication, this was not consistent with the finding of capacity. In my view that is correct, the respondent clearly lacks insight and his failure to appreciate that he is mentally unwell may be viewed as a symptom of his mental ill health.

25. Counsel for the respondent submitted that the key issue was that while the respondent understands that his surrender to the U.K. is sought, he has a false basis for understanding why that is so. His reasoning and ability to make decisions as to the course of the proceedings and to instruct his lawyers are directly influenced by his delusional beliefs. Counsel referred to the decision of the English Court of Appeal in *Masterman-Lister v. Brutton & Co. (Nos. 1 and 2)* [2003] 1 W.L.R. 1511 which was cited by Dunne J. in *Nolan v. Carrick*. A helpful *dictum* from that case is cited as follows: "[c]apacity requires an ability to make and communicate, and where appropriate give effect to, all decisions required in the context: this in turn requires the ability to recognise a problem, obtain and receive, understand and retain relevant information, including advice; to weigh the information (including that derived from advice) in the balance in reaching a decision, and communicating that decision. In short, it requires an ability to understand the transaction when it is explained by advisors. Although the court should have regard to the complexity of decisions under consideration it should not have regard to its own valuation of the gravity of those decisions because it is not for the court to decide in a non medical treatment case, what is or is not serious in the light of the person before it."

26. Counsel for the respondent also took issue with the suggestion that EAW surrender applications are dealt with on technical legal defences only. Counsel pointed to s. 37 of the Act of 2003 which explicitly contemplates that non-technical matters may be relied upon. She highlighted that the instructions from the respondent so far indicate that he says that while he pleaded guilty to the offence, he did not have the benefit of any legal advice. It is submitted that while the ramifications of this for the purposes of s. 37 could be explored, it is difficult to see how that could occur in circumstances where the respondent himself is not able to judge whether or not it is in his own best interest to make those arguments. Other tactical decisions may be made by a respondent in a case. Furthermore, the respondent's counsel brought to the attention of the court that the respondent, despite having sat in court and heard the arguments, believes that his transfer to the Central Mental Hospital has been brought about by the application made by his own lawyers in the proceedings.

Determination
27. As Dunne J. has set out in *Nolan v. Carrick*, the question of capacity must be considered in the context of the particular transaction at issue in the proceedings. The court, by virtue of the circumstances of that case, had been required to look back at a particular transaction that had taken place in the course of those legal proceedings. It was, therefore, necessary to look at the decisions made in the context of those proceedings by that defendant.

28. I am of the view that I am also entitled to have regard to the surrounding circumstances in this case regarding the decision I have to make. I do have regard to the fact that this is a man who initially appeared willing to consent to his surrender but, although prepared to tell the court he wished to consent to surrender, was not prepared to sign any documentation to that effect. In hindsight, this reluctance may have been influenced by his wider conspiratorial beliefs which, on the basis of the uncontested evidence of Dr. O'Neill, are delusional in nature. Viewed in this light it demonstrates an impact on how he was prepared to deal with these matters as his agreement to surrender was affected by his delusions.

29. That incident is not in any way determinative of the issue. It is more an observation that appears to corroborate the evidence that I have heard in this case. That evidence is to the effect that the respondent is a man who is severely mentally unwell with a diagnosis of paranoid schizophrenia and that he has conspiratorial delusions that impact on his ability to deal with this case.

30. A diagnosis of mental ill health in and of itself does not negate capacity. There is a presumption of capacity. Those suffering from mental ill health, including delusions, may have a capacity to instruct lawyers and generally to take certain decisions as to where their own best interest lies. The court, when dealing with issues of capacity, must always be scrupulous respect the autonomy of the

person appearing before it. Each person, acting with capacity, is entitled to make decisions and judgments that on an objective basis may not seem to be in his or her own best interests. It is only on the test outlined above that the court is entitled to hold that a person lacks capacity.

31. I have taken into account that the respondent also has quite rational and understandable reasons for refusing surrender. In general, it can be observed that respondents to applications for extradition may decide to consent to surrender for various reasons, including an understanding or indeed a hope that they will obtain greater benefits in the issuing state if they consent to surrender, be it bail, reduced sentence or early release. On the other hand, respondents may take a view that they would prefer to remain on bail in this jurisdiction for as long as possible or, if in custody, they may prefer to serve the sentence already imposed, or a sentence that may be imposed, in what they may perceive as the more advantageous (to them) prison conditions in Ireland. However, this respondent's ability to fully understand the consequences of his decision to oppose surrender is impaired because that understanding is affected in a very real sense by his delusional belief relating to the U.K. prison officer.

32. As stated above, the Court is conscious that each individual is entitled to autonomy and the freedom to make good or bad decisions about their own cases. In this case, objectively speaking, it could be a good decision to stay in this jurisdiction, close to family and to a psychiatric service that has a familiarity with him. It might also be a bad decision as it is possible that he might even now obtain an earlier release date in the U.K. than might apply if he is detained here. Neither decision is for this Court to make on his behalf. The respondent is the only person who can make that decision.

33. In the present circumstances, however, the respondent's delusions touch and concern an important issue relating to the extradition proceedings. I accept that he has a belief that the extradition proceedings are motivated by the desire of the U.K. prison officer to harm him and that he has a belief that he will be so harmed if surrendered. On the basis of the evidence of Dr. O'Neill, I accept that these are delusional beliefs which are the product of his severe mental illness. Unfortunately for the respondent, his capacity to understand the consequences of his decision to oppose surrender is impaired by his delusional beliefs. His understanding of the consequences is affected by those delusional beliefs. The apparent rationality and indeed, objectively speaking, other good reasons for resisting surrender, do not demonstrate that he is not cognitively impaired. His ability to understand consequences of his decisions are impaired by his delusional beliefs as to the desire of the U.K. prison officer to do him harm.

34. In those circumstances, his ability is impaired to the extent that, even with proper explanation, he does not sufficiently understand the consequences of the decisions made by him for the litigation at this time. Therefore, on the evidence before me, the respondent has a cognitive impairment to the extent that he does not sufficiently understand with the assistance of such proper explanation from legal advisors and other experts the consequences of the decisions made by him in respect of this extradition. In all the circumstances, I am quite satisfied that the respondent's ability to make those decisions as to consequences for his surrender is impaired by reason of the particular delusions he has stemming from his paranoid schizophrenia, to the extent that he no longer lacks legal capacity.

The consequences of the finding of lack of capacity

35. Again, both parties have made helpful submissions in relation to the power of the court where a finding of lack of capacity is made. The starting point is s. 13(5) of the Act of 2003. Section 13(5)(a) provides that the High Court shall, if satisfied the arrested person is the person in respect of whom the EAW has issued, remand the person in custody or on bail (and for that purpose the High Court shall have the same powers in relation to remand as it would have if the person were brought before it charged with an indictable offence).

36. The High Court must fix a date for the hearing of the s. 16 matter within a period of 21 days from the first appearance of the person before the court on arrest. The High Court is not bound to determine the issue as to whether an order for surrender should be made on that date as s. 16(1) provides that the High Court may upon such date as is fixed under s. 13 or such later date as it considers appropriate make an order for the person's surrender. Section 16(2A) also provides for the power of the High Court to remand the person before it in custody or on bail where no order for surrender is made. That subsection also states that the High Court shall have the same powers in relation to remand as it would have if the person were brought before it charged with an indictable offence.

The Criminal Law (Insanity) Act, 2006

37. Under the Criminal Law (Insanity) Act, 2006 ("the Act of 2006"), the court has specific powers to deal with an accused person who is found unfit to be tried. In particular, under s. 4(3) of the Act of 2006, the court can either commit a person to a specified designated centre if the person is in need of in-patient treatment or make such order as the court thinks proper in relation to the accused person for outpatient treatment in a designated centre. Under s. 4(5)(c), if the determination is made by a court other than the District Court, the proceedings may be adjourned until further order and the court has the option to commit to the specified designated centre or make the appropriate order for out-patient treatment.

38. Counsel for the minister pointed to s. 13(5) of the Act of 2003 and the reference therein to the power of the court to remand the respondent. It is the submission of the minister, with which counsel for the respondent agrees, that the limitation set out in s. 13(5) by the words "for this purpose" is an indication that the entire statutory regime set out under the Act of 2006 does not apply to proceeding under the Act of 2003. Counsel for the minister submitted that to hold otherwise would be unworkable within the statutory framework as set out at present. As an example, the powers of the review board are centred on a determination as to whether the respondent is unfit to be tried in the context of criminal proceedings.

39. I agree with the submissions made to me concerning the applicability of the provisions of the Act of 2006. The limitation of the powers of remand have been made clear by the use of the phrase "for that purpose". The powers of remand of the High Court under the Act of 2003 are for the purpose of ensuring the attendance of a requested person before the court for their s. 16 hearing and his or her availability for any surrender order that may be made in the particular proceedings.

General power to adjourn

40. Counsel for the minister submitted that the High Court has a general power to adjourn the proceedings under s. 16(1) of the Act of 2003. Counsel referred to the wide variety of reasons for which this court has granted adjournments. These have included physical health issues on the part of a respondent. It was submitted on the same basis that the High Court has a power to adjourn by reference to mental health issues. The respondent asserted that where a finding that there is a lack of capacity to deal with the proceedings, the court should either refuse to surrender the respondent or strike out the application for surrender or make no order.

41. In relation to the submission that the court should refuse to surrender the respondent, it seems to me that refusal to surrender on this ground at the present time at least, would be incompatible with the High Court's duty under s. 10 of the Act of 2003, which requires that a person shall, subject to and in accordance with the provisions of the Act, be arrested and surrendered to the issuing

state. Section 16(1) clarifies the circumstances in which an order for surrender may be made, thereby limiting the grounds for refusal of surrender. Lack of capacity, per se, is not a ground for refusal of surrender. That is not to say that a situation may not exist, or may not be reached, where the surrender of a person is prohibited by s. 37 of the Act of 2003 as being prohibited by a provision of the Constitution or of the European Convention on Human Rights ("ECHR"). At issue at the present time is whether there is a power to adjourn his case where he has impaired capacity to instruct his lawyers.

42. In support of the contention that this court has no power to adjourn the matter where a person is incapable of giving instructions, the respondent has relied on the case of *O'C. v. The Judges of the Dublin Metropolitan District and the Director of Public Prosecutions* [1994] 3 I.R. 246. The decision in this case involved circumstances where an issue arose prior to the preliminary examination of an indictable matter in the District Court as to the capacity of the applicant to follow the proceedings.

43. The Supreme Court held at pp. 251-252 in *O'C.* that *"[a] preliminary examination pursuant to the Act of 1967 is clearly […] a judicial exercise of considerable importance in a criminal matter to the accused person, as well as to the public. It is the only method by which, in the absence of a waiver of it by an accused person fully informed and capable of waiving it, a person can be put on indictment in any court other than the Special Criminal Court. Under those circumstances it is quite clear in my view that it would be constitutionally quite impermissible that such a proceeding could go forward in circumstances where a person through no fault of his own was incapable of following the proceedings as they went and of giving instructions in regard to the rights which an accused person has in such a preliminary investigation. That constitutional impermissibility of such a proceeding outweighs all considerations that have been put forward in my view as to possible benefits (and they are only possible there being alternative disadvantages also a possibility), arising from the postponement of the issue. In order to postpone the trial of the issue a judge of the District Court will be asked or directed to carry out a preliminary investigation in the knowledge that it was quite likely that the accused person who would be very importantly affected by it was incapable of understanding it or following it. Such a procedure is in my view quite inconsistent with the Constitution and as such can not be permitted."*

44. In the particular circumstances of that case, the Supreme Court indicated that what should happen was that the matter be returned to the District Court, the judge to carry out an investigation as to whether the person was fit to plead and if he was, the matter should proceed as normal. If the conclusion was reached that he was not fit to plead, then the judge had to decline to enter upon the preliminary examination and should make no order of any description with regard to the further attendance of the accused or with regard to his custody.

45. Counsel for the respondent submitted that, given the lacuna in the Act of 2003 as regards to explicit provisions regarding a situation where a respondent is found to be incapable of giving instructions, the court should adopt the position taken by the Supreme Court in the *O'C.* case. It is submitted that by analogy with *O'C.*, which prohibited any form of judicial proceedings taking place when an accused was incapable of following the proceedings or giving adequate instructions, it follows that it would be incompatible with the constitutional right to fair procedures to allow an application for surrender to proceed when a respondent is suffering from a similar incapacity. It was submitted that as the conclusion of the Supreme Court was that no order should be made of any description, that the application for surrender should be dismissed at this stage.

46. The respondent's counsel took issue with the contention that the proceedings should be adjourned generally or more particularly adjourned to a specific date to await the outcome of the treatment that the respondent is undergoing. Counsel submitted that the appropriate course is to let any issue of involuntary incarceration be decided under the relevant provisions of the Mental Health Act, 2001. It was submitted that the respondent should not be left with the surrender proceedings hanging over him in the particular circumstances of the case.

47. Counsel for the respondent submitted that where there is no current intention to surrender, due to the impossibility of the proceedings continuing due to the respondent's incapacity, the provisions of the Act, which are designed to further the purpose of that system and which include the power to remand, cannot be left hanging over the respondent. More specifically, the powers of remand and arrest can only be for the purposes of surrender under the Act of 2003 and the Framework Decision. It was submitted that if there is no current intention to surrender by reason of the incapacity, continued remand and detention would become unlawful and indeed unconstitutional. Reference is made to the case of *Ojo v. Governor of Dóchas Centre & Ors* [2003] IEHC 622 in which it was confirmed that the power under the Immigration Act, 1999, as amended, only arose so long as there was a current intention to deport.

Analysis and determination by the court

48. The decision of the Supreme Court in *O'C. v. The Judges of the Dublin Metropolitan District and the Director of Public Prosecutions* established that it is constitutionally impermissible to engage in a judicial exercise of considerable importance in a criminal matter in circumstances where the accused is incapable of participating in the proceedings. The particular lacuna identified in *O'C.* has been rectified with the passage of the Criminal Law (Insanity) Act, 2006. In those circumstances, the court has, as previously outlined, powers to adjourn the proceedings and make appropriate orders as to committal or out-patient treatment. Moreover, the court of trial, be it the District, Circuit or Central Criminal Court, has a power to adjudicate as to whether or not the accused person did the act alleged and if the court is satisfied that there is a reasonable doubt as to whether the accused did the act alleged, the court must should order the accused to be discharged. (See s. 4 ss. 8 of the Act of 2006).

49. That power of adjudication is designed to be in ease of a person accused of a criminal offence who, on the evidence before the court, could never be convicted, but who is not capable of participating in a trial that would reach such a conclusion. Section 4 (ss. 8) is presumed constitutional. The process that the court embarks upon under that subsection can be distinguished from the process involved in *O'C.*. That was a preliminary examination, then a required step in every criminal proceedings and one of importance to an accused person. It was in those circumstances that it was constitutionally impermissible to have that constituent, although procedural, element of any criminal trial be held without the participation of the accused. The new provision under the Act of 2006 is exceptional, coming about specifically because of the incapacity of an accused and designed to assist the accused.

50. In the present case, there can be no question of the court being in a position to hear the s. 16 application. That is a hearing that can only take place when the respondent has capacity in the sense outlined above. The issue is whether the court is entitled to adjourn the matter pending treatment of the accused person. This is of particular importance having regard to the fact that he is in custody. It must be acknowledged that circumstances can arise where a respondent is unable either to attend court, or attend with sufficient ability to instruct counsel, due to physical ill health. Such a person may in fact be in custody. In those circumstances, the court retains a power to make a continuing remand, either on bail or in custody, for the purpose of facilitating treatment, which will have as its result the ability of the respondent to participate in the proceedings.

51. Physical ill health may differ from mental ill health in that a respondent may be able to instruct his or her legal advisors as to his or her circumstances. Indeed, the respondent may desire to have the adjournment. However, physical ill health could mean in a given

case, for example, where an injury is perhaps recent and the person is undergoing treatment by way of surgery or otherwise, that a respondent's capacity to instruct lawyers is non-existent or significantly curtailed. In those circumstances, it would appear uncontroversial that the court retains a power to remand the case further for the purpose of fixing a further hearing date. Such further date can be fixed immediately but more usually it may be fixed with a view to receiving an update on the condition of the respondent and getting information as to when the case can proceed. Physical ill health and mental ill health should not, as a matter of routine, be treated as requiring a different approach. It is the ill health of a particular person that is at issue and not the root of the reason for the ill health. In the case of an adjournment for physical ill health reasons, it is not and could not be submitted that this means there is no longer an intention to surrender. It is difficult to see why the mental ill health of a person amounts to evidence of lack of intention to surrender.

52. I have considered case the Ojo decision upon which counsel for the respondent relies. At issue there was s. 3(1A) of the Immigration Act, 1999, as amended, which provided that a person subject to a deportation order may be detained in accordance with the provisions of the Act "for the purpose of ensuring his or her deportation from the State." In my view, the Ojo decision can be distinguished from the facts at issue here. In Ojo, there was no court process in being; the power of detention was given by the Act for a particular purpose, i.e. to give effect to deportation. On the facts of that case, no deportation could take place until the minister gave a decision on an application for residency by virtue of the applicant's Irish born child. There was then, in the words of the High Court (Finlay Geoghegan J.), no "*definite or concluded intention to deport.*"

53. In the present case, the remand in custody is for the purpose of enabling a s. 16 hearing to be held. That was the purpose of the initial remand and it has remained the purpose of all of the remands. The power to detain in *Ojo* was for the purpose of deportation – there had to be a definitive or concluded intent to deport. On the other hand, a remand (whether in custody or on bail) under s. 13 and s. 16 of the Act of 2003 is to enable a s. 16 hearing to be held.

54. There is no indication in this case that the U.K. authorities no longer seek the surrender of the respondent. It is incumbent upon the High Court to give effect to that request for surrender provided such surrender is not prohibited under the terms of the Act of 2003. The central authority has a lesser role to play but in so far as it is relevant, there is an intention on the part of the central authority to ensure that the provisions of the Act of 2003 are applied and that where not otherwise prohibited that surrender be ordered.

55. What has occurred here is that the respondent is lacking capacity to take part in the surrender application. His ill-health has affected the ability to hold a hearing into his surrender but it has not affected the current intention to hold such a hearing. He is being treated at present and the Court had been told that 2-3 months of in-patient care would be necessary before a significant improvement would be seen. That is undoubtedly a significant length of time for a person to be remanded in custody but it is not an altogether unusual length of time in the context of the type of adjournments that this court is often asked to grant so that persons can, even where in custody, prepare their cases.

56. In my view, the High Court has, by virtue of the Act of 2003, a power to adjourn the hearing of a s. 16 (or s. 15) application. That power includes a power to remand the person in custody or on bail. The power to adjourn envisages remands for a variety of reasons, perhaps relating to the inability of a case to proceed due to lack of time for instructions, lack of time for the gathering of evidence, or ill health of a respondent. Ill health can, and does, include mental ill health. Therefore, even though the respondent has a present lack of capacity to give instructions, there is the possibility and power to remand the proceedings to allow for a period of treatment.

57. The period of remand must only be for the time period indicated as necessary to provide treatment to the respondent. If there was no likelihood of recovery, or indeed if the likelihood of recovery was only within a timeframe that would be excessive (by reference to its inherent length or by reference to the length of the sentence for which a respondent is due to serve in the issuing state or indeed likely to serve in the issuing state), then the remand in custody would cease to have the necessary causal link to the application for surrender. In those circumstances, the remand in custody would cease to be for the purpose set out in the Act of 2003 as amended. The situation in this case does not demonstrate the unlikelihood of recovery or that such recovery will only occur within an excessive period of treatment. Neither of those situations arises at present in this case. In those circumstances, I hold that I am entitled to adjourn this case. I will remand him in custody to a date to be agreed with counsel but which is to be no later than the three month period indicated as sufficient for his treatment. I will observe, however, that in future cases the State may have to be in a position to provide treatment within a reasonable period of time as otherwise the period for an adjournment might be considered excessive. In this case, by the time the issue was actually heard by the Court, the respondent was already in treatment.

Further Powers of the High Court

58. The High Court, by virtue of its duty and power to enquire into any application for surrender, and also by virtue of its inherent jurisdiction to control the processes of the court, is entitled to take any necessary steps to assist a respondent who may find him or herself experiencing a lack of capacity to instruct lawyers. In any application for surrender there are, what may be termed, the more usual legal matters that the court has to consider under s. 16 of the Act of 2003. Examples are issues such as correspondence, the format of the warrant and indeed the issue of trial in absentia under s. 45 of the Act of 2003. On this last point, I note the concern raised by counsel for the respondent as to the respondent's present instructions that he had no legal advice at the trial.

59. I am satisfied that I have jurisdiction to, and that it is appropriate to, examine these s. 16 matters, in the absence of the respondent but in the presence of his lawyers. Furthermore, and in ease of the respondent, I propose to exercise my powers under s. 20(1) of the Act of 2003 to ask at this juncture of the U.K. judicial authority to indicate whether he was legally represented at the time he entered his plea of guilty into this matter. In light of the situation which has arisen regarding capacity to instruct, the information I have is not sufficient to enable me to carry out my functions.

60. This enquiry is, naturally, without prejudice to the respondent's right to re-open matters on recovering his capacity to instruct, should I find that surrender is not prohibited. I propose to conduct this enquiry, in his absence, at an early date in advance of the date set for the remand of the respondent. Should the Court find that his surrender is indeed prohibited by any of the matters set out in s. 16, his surrender will be refused and he will be released from custody. This in no way interferes with his right to oppose surrender or indeed his right to surrender under s. 15. As regards the latter, it should be recalled that the High Court has a supervisory jurisdiction even where a person consents to surrender.

61. In summary, the Court will exercise its powers of enquiry to consider whether a ground or grounds exists which would prohibit the surrender of the respondent. This will be conducted in the absence of the respondent who does not have capacity to participate. It will be in the presence of his lawyers. It is without prejudice to his right to have all s. 16 issues considered afresh if and when he acquires capacity.

Conclusion
62. For the reasons set out above, I am satisfied that the respondent lacks capacity to participate in the s. 16 application for his surrender to the U.K.. I am satisfied that I have power to adjourn the s. 16 application to permit him undergo treatment and I do so adjourn in the circumstances of this case. I also have the power to make enquiry as to whether there are legal grounds apparent from the papers to show that his surrender is prohibited. In order to facilitate the enquiry I intend to carry out, I am exercising my power under s. 20(1) of the Act of 2003 to ask the U.K. issuing judicial authority whether the respondent was legally represented when he pleaded guilty and was sentenced in this matter.