Neutral Citation: [2016] IEHC 568

THE HIGH COURT

[2015 No. 215 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

A.M.

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered the 14th day of October, 2016.

1. On 16th September, 2015 a judicial authority of the United Kingdom ("U.K.") issued a European Arrest Warrant ("EAW") for the arrest and surrender of the respondent for criminal prosecution. It is alleged that the respondent committed nine sexual offences against his niece between 1960 and 1967 when she was aged between about two years and fourteen years. His surrender is also sought in respect of an alleged single count of indecent assault against a separate then thirteen year old niece in the early 1970s.

2. The respondent objects to his surrender on a number of grounds. A central objection is that the respondent says that surrender would breach his right to respect for his personal and family rights under Article 8 of the European Convention on Human Rights ("ECHR"). He also claims that, due to the delay since the date of the alleged offences and the prejudice he has suffered thereby, his right to a fair trial will be violated. Just prior to the date listed for hearing of this matter, the U.K. held a referendum in which a majority voted in favour of leaving the European Union ("E.U."). It is common knowledge that no formal step has been taken by the U.K. to trigger her exit from the E.U., nonetheless the respondent claims that the present situation has implications for his surrender. The respondent submitted that there are implications for the court's assessment of his right to a fair trial, in particular with respect to the issue of delay, because the principles of mutual trust which underpin the Council (EC) Framework Decision of 13th June, 2002 (2002/584/JHA) on the European arrest warrant and the surrender procedure between Member States ("the 2002 Framework Decision") will no longer apply in the event of the U.K.'s exit from the European Union. He also claims that specific guarantees granted by the 2002 Framework Decision, for example, on the rule of speciality, will no longer be protected.

Section 16 of the European Arrest Warrant Act, 2003, as amended

Uncontentious issues

Identity
3. I am satisfied on the basis of the affidavit of Sgt. Seán Fallon, member of An Garda Síochána, the affidavit of the respondent and the details set out in the EAW that the respondent, A.M., who appears before me, is the person in respect of whom the EAW has issued.

Endorsement
4. I am satisfied that the EAW has been endorsed in accordance with s. 13 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003") for execution.

Section 21A, 22, 23 and 24 of the Act of 2003
5. Having scrutinised the documentation before me, I am satisfied that I am not required to refuse the respondent's surrender under the above provisions of the Act of 2003.

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

Contentious Issues

Section 38 of the Act of 2003
7. Two of the offences alleged against the respondent concern rape and attempted rape. The issuing judicial authority has ticked the "box" listing rape at point E.I. of the EAW and in doing so, is relying on the list offences set out in Article 2.2 of the 2002 Framework Decision; therefore dual criminality is not required to be proven for these particular alleged offences. The offence of rape and attempted rape carry a maximum sentence of imprisonment of greater than three years and minimum gravity is thereby satisfied. In those circumstances, where there is no manifest error in the reliance on Article 2.2 of the 2002 Framework Decision, the respondent's surrender is not prohibited by s. 38 of the Act of 2003 in relation to these two alleged offences.

8. There are also six offences of indecent assault alleged against the respondent in respect of both his nieces, each of whom were under the age of thirteen years at the time of the alleged offences. The details in the EAW expressly state that he indecently assaulted these children under the age of thirteen. The EAW also gives further detail as to the specific nature of the indecent assaults which it is unnecessary to outline here. I am quite satisfied that if these acts were committed in the State on the date in which the EAW was issued, they would constitute offences of sexual assault. The alleged offences are punishable in the U.K. by imprisonment for a maximum period of not less than 12 months (the maximum sentence of imprisonment outlined in the EAW in relation to these offences is 5 years). In all the circumstances, the respondent's surrender on these six allegations of indecent assault is not prohibited by s. 38 of the Act of 2003.

9. The final two offences allege indecency with a child. In particular, it is alleged that the respondent committed acts of gross indecency with or towards a child between the ages of 3 and 6, for the first such offence, by masturbating onto her, and, for the second such offence, by forcing her to touch his penis. These offences also carry, in the U.K., sentences of imprisonment for a maximum period of not less than 12 months (the maximum sentence of imprisonment outlined in the EAW in relation to these offences is 2 years).

10. An issue was raised with respect to correspondence on the basis that no assault was being alleged. It certainly seems to the Court that, in the second of the two allegations of indecency with a child, wherein it is stated that the respondent forced the

complainant to touch the respondent's penis, there exists an element of assault. To place a person in fear that he or she is likely immediately to be subjected to force or impact on his or her body is an assault. To do so in circumstances of indecency is a sexual assault. The word "force" in this EAW must be given its plain and ordinary meaning in the context in which it arises. There is no doubt that the use of the word "force" here is used in the context of an assault being perpetrated on the child. A child under the age of 15 years cannot consent to a sexual assault. In the circumstances, this alleged act, if committed in this State, would also constitute a sexual assault.

11. It is unnecessary to consider if the first of the two allegations of gross indecency amounts also to an assault because I am satisfied that the particular allegations of gross indecency set out in the EAW, correspond with other offences in this jurisdiction. I am quite satisfied that these allegations, if committed in the State on the date of issue of the EAW, would constitute an offence of sexual exploitation of a child contrary to s. 3(2)(a) of the Child Trafficking and Pornography Act, 1998 ("the Act of 1998"). Sexual exploitation means in relation to a child, *inter alia*, inviting, inducing or coercing the child to engage or participate in any sexual, indecent or obscene act or inviting, inducing or coercing the child to observe any sexual, indecent or obscene act for the purpose of corrupting or depraving the child. The details of the alleged offence, especially in light of the age of the child and the activity at issue, amount by necessary implication to sexual exploitation within the meaning of s. 3 of the Act of 1998.

12. Finally, I am satisfied that these allegations of gross indecency would, if committed in the State on the date of the issue of the EAW, amount to offences contrary to s. 246(1) of the Children Act, 2001, amounting to wilfully exposing the child in a manner likely to cause unnecessary suffering or injury to the child's health or seriously to effect her well-being. I am satisfied that the allegation is such that the respondent at the time of the alleged offence had actual control of the child and therefore is presumed to have care of the child. To deliberately carry out such sexual activities with or on a child amounts to a wilful exposure of the child to unnecessary suffering or injury to her health or to seriously affect her well-being.

13. In all the circumstances, I am quite satisfied that the surrender of the respondent is not prohibited by the provisions of s. 38 of the Act of 2003.

Section 11 of the Act of 2003
14. In his points of objection, the respondent objected to his surrender on the grounds that the place of the offences had not been specified in the European Arrest Warrant. A request was made by the central authority to the issuing judicial authority for that information. By letter dated 11th July, 2016, the issuing state responded through a letter from the Crown Prosecution Service indicating, in significant detail, the places where the alleged offences took place. Where precise detail could not be given, an explanation as to why was stated. For example, the offences of rape and attempted rape are alleged to have occurred at the respondent's flat, but the complainant is unclear as to the precise location of the flat, but thinks it was in the Camden area of London. I am satisfied that the provisions of s. 11 of the Act of 2003 have been complied with and I consider the details in the EAW sufficient to comply with the requirements of s. 11 of the said Act.

Section 37 of the Act of 2003
15. The respondent submitted that, in light of all the circumstances present in this case, it would be a disproportionate interference with his right to respect for his personal and family rights under the Constitution and under Article 8 ECHR to surrender him. The submissions focussed on rights under Article 8 ECHR and it was not submitted that there would be any difference in outcome in reliance solely on constitutional rights. It was accepted that, in terms of the law in this area, there was little, if any, controversy.

16. Counsel for the respondent referred to the decision of this Court in *Minister for Justice and Equality v. Srecko Medakovic* (Unreported, High Court, Donnelly J., 1st February, 2016) in which it was stated at para. 40:

> "*The tests that the Court must apply in this regard have been well ventilated by the High Court in cases such as* Minister for Justice and Equality v. P.G. *[2013] IEHC 54*, Minister for Justice and Equality v. T.E. *[2013] IEHC 323 and further discussed in cases such as* Minister for Justice and Equality v. E.P. *[2015] IEHC 662 and* Minister for Justice and Equality v. D.S. *[2015] IEHC 459. The issue is whether there is an interference with Article 8 rights and whether that interference, being for the purpose of the prevention of disorder and crime through an extradition process, is necessary in the interests of a democratic society. In calculating the necessity for the surrender in the circumstances of the particular case, the Court must assess the pressing social need*.

In *Medakovic* at para. 42, the Court repeated what it had said in the earlier case of *E.P.* at para. 100: "*[…][t]he consideration of an Article 8 point is fact specific to each case*.." This statement was accepted by the parties to this case.

17. In the present case, the respondent relied upon the evidence contained in his own affidavit, in the affidavit of his daughter and in the medical reports exhibited in those affidavits. In brief, the respondent was born in Dublin in June 1938 and is now 78 years of age. He lived in England between 1961 and 1975, and met and married his wife there in 1962. His wife has recently died. In his affidavit, the respondent asserts his innocence in relation to these allegations.

18. A feature in the case is that an EAW also issued for the arrest and surrender of the respondent's wife arising from the allegations of abuse made against the respondent. The EAW for his wife was issued in circumstances where the respondent's niece alleges that on one occasion, when she was being raped by the respondent, the respondent's wife had walked in, but despite being aware of the abuse, his wife had done nothing.

19. After the respondent moved back to Ireland in 1975, both he and his wife continued contact with the family of the complainant up to in or about 2001. In or about June 2005, the respondent received a letter from Mr. S., the father of the complainant, in which veiled allegations of sexual abuse by the respondent of Mr. S.'s daughter were made. The respondent stated in his affidavit that he was shocked by the contents of the letter and that he wrote a reply denying the allegations. The respondent was not able to find the original letter written by Mr. S., but he had kept a copy of his own reply to Mr. S.. This was seized by relevant personnel carrying out a search of his house in Dublin under mutual assistance orders in June, 2015.

20. In the EAW, it is also alleged that the respondent brought another man to the complainant for the purpose of abusing her by forcing her to masturbate both this man and the respondent. As appears from exhibited communication between the Metropolitan Police and the respondent's solicitor, it seems that the Metropolitan Police are searching for this third suspect. The respondent referred to this in the context of issues around the antiquity of the case and his ability to defend himself fairly, where both this man and the respondent's wife are apparently unavailable.

21. The respondent's medical history is complicated and includes that he suffers from ischaemic heart disease. He had a heart attack in 1985 and a coronary artery bypass graft in 2005. He suffers from atrial fibrillation, hypertension and cerebrovascular disease having

suffered a transient ischaemic attack (TIA)/stroke in 2007. He has bilateral hip replacements, uveitis, and was diagnosed with basal cell carcinoma in 2015. His G.P. was of the opinion that, given his multi-morbidities and the severity of his wife's illness (now deceased), that the respondent was under a huge amount of stress at present and a potential court case would only be detrimental to his health. She was of the view that he would not be fit physically or psychologically to travel to or to attend court. The Court observes that this opinion on his fitness to attend court was not borne out as he attended court throughout these proceedings without any apparent side effects. The final report from his G.P., dated 11th July 2015, stated that "[g]iven Mr. M's multi-morbidities, cognitive impairment and the distress at the loss of his wife, I feel he is under a huge amount of stress at present and a potential court case could be detrimental to his health, both from a physical and psychological point of view."

22. His consultant cardiologist provided a report in 2013. This indicated that the respondent was leading an entirely normal life with breathlessness only on hills. Since his TIA in 2007, he had no further problems. He was bothered by his eye problems. He had well-controlled atrial fibrillation. The cardiologist indicated in that report that at over eight years post surgery and in view of his breathlessness, they were going to "redeliniate the coronary and graft anatomy". No updated report has been placed before the court and the appropriate inference to draw is that this has not given rise to any particular issue. It appears from the consultant ophthalmologist's report of August 2015 that his eye problem has settled down since in or about 2013.

23. In June 2016, the respondent was seen by Dr. John G. Doherty, Consultant Physician in Adult and Elderly Care Medicine. He attended with two of his daughters who gave an account that he had some memory issues over the past 8 months, *e.g*. he could not recall who had visited his house at various stages. The report states that he continues to function highly nevertheless and is independent, including dressing, washing, shaving and toileting. He can make tea and toast but more complex and main meals are provided by one of his daughters who lives nearby. It was clear that he was being assessed also for the purposes of considering whether he might have a fair trial if extradited to the U.K. and whether his health might deteriorate if he was remanded in prison. The impression of Dr. Doherty was that the respondent has "a mild degree of cognitive impairment and in particular difficulties with delayed recall and construction.". This, he says, in the context of his vascular history, would warrant investigation, including blood tests, *etc*. His conclusion is as follows:

> "Certainly it would be ideal if the patient did not have to go to the United Kingdom and this is not only in the context of a degree of cognitive impairment and an extensive medical history but also the recent death of his wife from metastatic carcinoma."

24. What is contended for on the part of the respondent is that there are a number of factors specific to this case which, especially when taken together, reveal that it is disproportionate to surrender him for prosecution for these alleged offences. Counsel for the respondent listed the following:

> a. The respondent has just turned 78.
>
> b. He is the father of 5 daughters, ranging in age from 35 to 53.
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> c. He has been residing in Ireland since 1975.
>
> d. He is a grandfather.
>
> e. The loss of his wife is a matter of some importance – he is grieving and it would not be consistent with respect for his privacy to surrender him at a time when he is grieving. His family ties are still applicable although he is older.
>
> f. His health is a factor that has to be taken in account. What has to be taken into account is the totality of his conditions.
>
> g. The antiquity of the offences. Counsel submitted that this was an important factor in this case. It was a case in which the offending was alleged to have been committed as far back as 54 years ago while the most recent alleged offending was 43 years ago.

25. With respect to the issue of the antiquity of the alleged offences, counsel submitted that there were a number of factors which should be taken into consideration in the case. There was no suggestion of absconding here, the respondent had gone back and forth to the U.K. on many occasions since the alleged offences and had stayed with the complainant and her family. Counsel submitted that while he did not have to show exceptional circumstances, there were in fact exceptional circumstances here in respect of the length of time since the offences. Counsel submitted that factors the Court could take into account were that the alleged offending had been brought to the attention of others by the complainant at an earlier stage. He referred to the letter sent by her father and to the acknowledgement sent by the issuing state that the complainant had first reported the allegations to the Metropolitan Police in 2005. It is stated that it appears she was unsure at that time whether she wanted to proceed with the allegations and they were not taken forward. The complainant reported the allegations again to the police in August 2014. The police investigated the case and passed the file to the Crown Prosecution Service who reviewed the case and completed letters of request to the authorities in Ireland to assist in interviewing the respondent. He was interviewed in Ireland on 2nd June, 2015. Authority to charge was given by the Crown Prosecution Service on 1st July, 2015 and on 14th July, 2015, a first instance warrant was obtained but it was necessary to obtain another first instance warrant on 13th August, 2015. The EAW was prepared on 13th August, 2015 and issued then on 16th September, 2015.

26. The respondent submitted that these are matters that ought to lead the Court to the conclusion that the surrender should be refused. At the time the initial complaint was made in 2005, the respondent was younger and his wife was still alive. The issues of memory were also put forward as reason why the delay should give the Court cause for concern in respect of this matter.

27. Counsel for the minister submitted that the twenty-two point test as set out in *Minister for Justice and Equality v. P.G.* [2013] IEHC 54 was applicable, save for the caveat that such test should now be read in the light of the Supreme Court judgment of O'Donnell J. in *Minister for Justice and Equality v. J.A.T. (No. 2)* [2016] IESC 17. Counsel laid emphasis on the nature of the charges and especially the age of the children. He submitted there was no delay on the part of the prosecuting authorities, at most there was a lapse of time rather than a delay. These are serious crimes of violence that are alleged against this respondent. He submitted that there was no evidence in this case of particularly harmful or injurious consequences to this respondent and that there was nothing in particular, either individually or taken together, that made it disproportionate to surrender him.

28. With regard to the issue of delay, it was submitted that it had been urged upon the court by the respondent that delay was a factor that the court had to take into account in the matter. Counsel for the minister submitted it was only in the context of the

question of whether the public interest in surrender had been diluted because of the delay, was the delay itself relevant. He submitted that the court should have regard to the offences and to the reason for the delay. There was an explanation for the lapse of time. There was a high public interest in the respondent's surrender and there was no disproportionate interference with his right to respect for his private and family life.

Analysis and determination of the Court on the Article 8 ECHR issue
29. In carrying out the fact-specific examination required, the Court must consider the public interest in the surrender of this particular respondent and then consider the respondent's personal circumstances. The Court must thereafter balance the public interest in any surrender as against those personal interests in accordance with the tests as laid down by the Superior Courts.

30. It is appropriate at the outset, to refer to the judgment of O'Donnell J. in *J.A.T. (No. 2)* in which he stated at para. 1:-

> *"I would, however, emphasise that this is a rare, and indeed exceptional case. While exceptionality is not in itself a test, it can be a useful description, and it is, in my view, only cases which can truly be so described that will be those rare cases in which it may be said that surrender would offend due process and interfere with the rights of the appellant to such an extent that it must be refused. It is, however, necessary to explain both the factors that apply and the weight to be given to them which lead to that conclusion. I do not think that we should take refuge in the observation that all cases depend on their own facts; that would mean that, in theory, all cases raising any arguable issues would have to be the subject of appeal, with all the delay, inconsistency and unpredictability that entails."*

31. In *J.A.T. (No. 2)*, O'Donnell J. also cautioned against determining Article 8 ECHR claims on the basis of personal sympathy, rather are the circumstances such as would render it unjust to surrender a respondent. Indeed, O'Donnell J. went on to say at para. 10 of his judgment: "*It will almost always be the case that considerations such as these, which undoubtedly evoke some sympathy, would never, in themselves, be remotely a ground for refusing surrender any more than they would be a ground for prohibiting a trial in this jurisdiction*." It is important, therefore, that the court must, in conducting a fact-specific adjudication, be mindful of the principles which underpin the law relating to Article 8 ECHR and its application in extradition.

32. As was set out in the twenty two principles outlined by Edwards J. in *P.G.*, the gravity of the crime is relevant to the assessment of the weight to be attached to the public interest. The graver the crime, the greater the public interest. Undoubtedly, a case involving allegations of rape, attempted rape, and sexual assault of a child between the ages of 2 and 14 are of the utmost seriousness with the public interest at its highest. The gravity is compounded by the existence of another alleged offence of sexual assault of another child. The Court is obliged, however, to consider the fact that there has been a substantial lapse of time in these cases when calculating the public interest in surrender.

33. The allegations date back to a period of time in or about a half a century ago. In this particular case, it appears that when the complainant went to the police station in 2005, she stated she still was not in a position to proceed with the complaint. Furthermore, it is abundantly clear from the time she made her formal complaint in August 2014 the investigation and decision to prosecute were carried out with commendable speed.

34. As the Supreme Court has held in the case of *S.H. v. Director of Public Prosecutions* [2006] 3 I.R. 575, referring to the decision in *P.O'C v. Director of Public Prosecutions* [2000] 3 I.R. 87, the courts can take judicial notice of the fact that children find it difficult to report abuse and that these difficulties continue into adulthood. In domestic prosecutions, the focus of the test when seeking to prevent a trial on the grounds of delay, is on the prejudice rendered to an accused by that delay. In the case of an EAW, the court must also use that judicial knowledge in considering how to categorise the delay of a person who alleges child sexual abuse. It would not be appropriate for the court to engage in an enquiry into the reasons for the specific delay on behalf of the specific complainant, rather the court must accept that there is a public interest in prosecuting historic cases and that blameworthy delay is to be calculated in accordance with the delay on the part of the prosecution authorities rather than on any alleged victim. This Court makes clear that the delay itself also falls to be considered on the other side of the equation, when considering the impact that it has had on the respondent's personal and family life.

35. This is a case of alleged historic sexual abuse where the court takes judicial notice that there may be reasons why a complainant delays in reporting to the investigating authorities. In that sense, the delay has been explained. From the time of reporting to the issue of the EAW and transmission of same to this jurisdiction, there has been no delay on the part of the prosecuting authorities. In short, there is no culpable delay. In circumstances where the offences are for alleged serious sexual offences against children and where the subsequent delay in prosecuting or seeking the respondent's surrender was not the fault of the authorities in the issuing state, the Court is satisfied that the public interest in surrendering this respondent to face trial for these allegations is extremely high.

36. The Court must still assess the particular family and personal circumstances of this respondent. The Court considers, subject to further comment below, that the matters raised by counsel for the respondent are matters that the Court can and should, and indeed does, take into account in considering whether it would be disproportionate to surrender him. The Court further considers that a cumulative set of circumstances could amount to a disproportionate interference with personal and family rights, even if no individual circumstance would be sufficient on its own. The Court accepts that the grief the respondent has for the death of his wife is a matter that the Court should take into account in considering an aspect of his family life.

37. The only issue at which the Court departs from counsel for the respondent's list is in respect of those matters which touch on the delayed trial. The absence of his wife and the apparent absence of the other alleged perpetrator are matters which are more properly directed towards the issue of fair trial. Indeed, it may be that the reference to the respondent's difficulty with memory may more properly be considered a matter of fair trial (although the evidence before this Court does not establish a lack of fitness to be tried), nonetheless the Court will have regard to it as an aspect of ill-health. The Court is of the view that Article 8 ECHR concerns matters of family and personal rights and does not consider that it properly incorporates aspects of fair trial rights. Those must be considered separately and it is not for the Court to conflate the two. That is not to say that the impact of facing a trial and/or a sentence at a particular age, long past the time of the alleged offence, cannot be taken into account under Article 8 of the European Convention on Human Rights. Such matters are part and parcel of the matrix of personal circumstances which require consideration when assessing whether surrender amounts to a disproportionate interference with family and personal rights.

38. The position in this case is that the respondent is a man of 78 years of age, an age at which defendants in this jurisdiction have been prosecuted. Although he has a number of medical conditions, which is perhaps unsurprising for a man of his age, it appears that he lives an independent life. I have carefully considered the report by his consultant, Dr. Doherty and have reached the conclusion that the report is quite limited in terms of what it says about the impact that surrender itself would have upon the respondent. His view is that "[c]ertainly it would be ideal if the patient did not have to go to the United Kingdom and this is not only in the context of a degree of cognitive impairment and an extensive medical history but also the recent death of his wife from metastatic cancer." Ideal

circumstances rarely exist for any person who faces being uprooted from their home of many years to face trial for alleged offences dating back decades. However, the issue is whether the particular circumstances amount to a disproportionate interference with his family and personal rights.

39. There are no particularly injurious consequences for this respondent if he were to be surrendered. While the number of medical conditions is to be considered multiplicity on its own is not the test. It is the impact of those conditions on him by surrender that must be taken into account. Those conditions will make it more difficult for him to be surrendered than a healthy younger man but the reports do not demonstrate any particular difficulties for him on surrender. The loss of his wife, the fact that he is a grandfather and indeed the fact that he has lived his live in this jurisdiction for many decades since the time of the alleged offences, even when combined with his health and other factors, may make surrender difficult but these are not factors which together result in particularly injurious consequences. Indeed, nothing has been put before the Court that would demonstrate that this is a man who could not be prosecuted in this jurisdiction by virtue of any of these issues relating to his personal and family life.

40. There is a high public interest in bringing those accused of sexual abuse allegations (including historic allegations) to trial and only exceptionally will it be the case that surrender to face such allegations would amount to a disproportionate interference with rights. The Court bears in mind that exceptionality is not the test but reflects the outcome. There is simply nothing in the circumstances of this particular respondent that would amount to such a disproportionate interference with his family and personal rights.

41. In light of the extremely high public interest in his surrender in relation to these particular allegations, I find that the factors applicable to his case, either individually or when taken together, would not amount to a disproportionate interest with regard to his private and family life. It is also observed that as the offences in the EAW amount to allegations of "serious crimes of violence", even the circumstances set out in *J.A.T. (No. 2)*, may not, in the opinion of O'Donnell J. in that case, be sufficient to prevent surrender for such alleged offences. The respondent's circumstances are less severe than the circumstances set out in *J.A.T. (No. 2)*. The Court recognises the difficulty for a 78 year old recently bereaved widower with chronic health conditions and a mild cognitive impairment to be uprooted from his home in this country to face trial in the U.K.; recognition of those difficulties does not make the surrender unjust, when balanced against the high public interest in his surrender.

42. Therefore, his surrender is not prohibited on the grounds of s. 37 of the Act of 2003 as a disproportionate interference with his personal and family rights under Article 8 of the European Convention on Human Rights.

The respondent's health
43. The respondent also objects to his surrender on the basis that his ill-health means that his surrender would constitute a breach of Article 3 of the ECHR in circumstances where no declaration has been forthcoming from the issuing judicial authority that the respondent, if imprisoned, will receive the medical treatment which his doctors in Ireland have prescribed. The Supreme Court in the case of *Minister for Justice and Equality v. Rettinger* [2010] 3 I.R. 783 has laid down the principles to be applied where surrender is being objected to on the basis of an allegation of breach of Article 3 European Convention on Human Rights. There is an onus on a respondent to produce cogent evidence of substantial grounds for believing that there is a real risk of him/her being subjected to inhuman and degrading treatment.

44. The respondent has not put forward any evidence to support his simple assertion that he will not receive appropriate medical treatment. This Court is bound to have regard to the presumption under s. 4A of the Act of 2003 that the issuing state will respect the respondent's rights under the 2002 Framework Decision; respect for such rights includes respect for his fundamental rights. I therefore reject this point of objection.

45. Moreover, insofar as the evidence of ill-health or indeed risk to life is being relied upon, I am of the view that it does not establish any such risk to life or indeed further ill-health by his surrender. At their highest, the statements in the reports from his doctors say, in terms, that it would be preferable if he did not have to be surrendered. The evidence in this case is nowhere near as strong as the evidence that was available in *Minister for Justice Equality & Law Reform v. S.M.R.* [2008] 2 I.R. 242; a case in which the Supreme Court considered there was no prohibition on surrendering that respondent. The respondent has not reached the evidential threshold to establish a real risk to his life (or indeed further ill-health) by his surrender. I reject the respondent's objection to surrender on grounds related to his ill-health.

Delay and fair trial

The Impact of the United Kingdom referendum on leaving the European Union
46. In his points of objection, the respondent claimed that "[b]y reason of inordinate and inexcusable delay by the complainants and the prosecuting authorities in the Issuing State the surrender of the respondent would be in contravention of s. 37 of the 2003 Act insofar as the delay has caused prejudice to the respondent to such an extent that there is a real risk that he will not receive a fair trial if surrendered". The details of the prejudice relied upon by the respondent have been referred to above and relate to his wife, an alleged witness to one of the alleged acts and the absence of another alleged participant. Furthermore, the respondent relied upon his more recent difficulties with memory. The respondent asserted that there has been unexplained delay on the part of the prosecution but, as this Court has found above, the reason for the delay has been fully explained and is accepted by this Court.

47. The respondent acknowledges that, in relation to fair trial rights, the courts have shown a preference for ordering surrender on the explicit understanding that the issuing state's legal system will allow for the surrendered person's rights to be vindicated in the courts of the issuing state. In *Minister for Justice Equality & Law Reform v. Stapleton* [2008] 1 I.R. 669, Fennelly J. indicated that the more efficient and more convenient place in which a debate over delay should be resolved is in the courts of the issuing state. In *Minister for Justice & Law Reform v. Hall* [2009] IESC 40, Denham J. (as she then was) stated at para. 19 that:

> *"Issues such as delay and the right to a fair trial are more appropriately raised in the requesting state, if there is a remedy available in that state."*

48. Denham J. (as she then was) noted that there is a presumption, "*based on the existence of remedies*" that issues such as prosecutorial delay and its consequences are more appropriately litigated in the requesting state which is the state of trial. In *Minister for Justice Equality & Law Reform v. Adam* [2011] IEHC 68, the High Court (Edwards J.) referred to the decision of Denham J. (as she then was) in *Hall* and referred to the fact that the requesting state was a member of the E.U. and thus obliged by the Charter of Fundamental Rights of the E.U. to respect fundamental rights when acting within the scope of European Union law and was a signatory to, and had ratified, the European Convention on Human Rights. In other words, there was a presumption that there would be an effective remedy in the requesting state.

49. On the morning of the hearing, the respondent sought to adduce an additional point of objection so that he could argue that the

result of the recent referendum in the U.K., culminating in a vote that the U.K. should leave the E.U., affected the situation with regard to a fair trial. The Court gave leave to argue that point and the matter was put back for further written and oral submissions. Counsel submitted that the position adopted by the Superior Courts with regard to the consideration of fair trial issues was premised on the high level of confidence between member states of the European Union. This confidence was because membership of the E.U. required and expected states to have, within the laws of each state, certain minimum standards of fair procedures and protection of fundamental rights. In particular, counsel relied upon the following passage from the decision of *Stapleton* at p. 689 as follows:

> "*The principle of mutual recognition applies to the judicial decision of the judicial authority of the issuing member state in issuing the arrest warrant. The principle of mutual confidence is broader. It encompasses the system of trial in the issuing member state. The Court of Justice has ruled, in its recent decision in* Advocaten voor de Wereld v Leden van de Ministerrad (Case C-303/05) *(Unreported, European Court of Justice, 3rd May, 2007), that the issuing member state, as is "stated in Article 1(3) of the framework decision, must respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union*"
>
> *It follows, in my view, that the courts of the executing member state, when deciding whether to make an order for surrender, must proceed on the assumption that the courts of the issuing member state will, as is required by Article 6.1 of the Treaty on European Union, "recognise[s] the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union […]". Article 6.2 provides that the Union is itself to: "respect…human rights and fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."*
>
> *Article 1.3 of the 2002 Framework Decision, read with the recitals to the 2002 Framework Decision and, as further explained by the Court of Justice in the decision in* Advocaten voor de Wereld v. Leden van de Ministerrad (Case C-303/05) *(Unreported, European Court of Justice, 3rd May, 2007), imposes these obligations, which in turn impose the obligations found in Article 6 of the ECHR on each issuing member state when seeking the surrender of a person and, necessarily, in any subsequent trial process*."

50. It was submitted that the Court would not be justified in proceeding on an assumption that the issuing state will continue to consider itself bound to follow the requirements of Article 6 on the Treaty of European Union ("TEU") and that any failures in that regard will not be actionable. Counsel referred to the presumption of future compliance with the requirements of the Framework Decision in s. 4A of the Act of 2003, which said presumption applies "unless the contrary is shown". It was submitted that the presumption of future compliance is itself inextricably linked to the high level of confidence between member states. In *Minister for Justice Equality & Law Reform v. Altaravicius* [2006] 3 I.R. 148, Murray C.J. (as he then was) had referred to that section being couched in the future tense. Counsel submitted that if the presumption that the issuing state will comply with the requirements of the 2002 Framework Decision is not valid, then this gives rise to a basis on which the Court could refuse surrender, for example under specialty. It was submitted that, should the U.K. decide to cease to comply with the 2002 Framework Decision by, for example amending its Extradition Act, 2003, there would be no mechanism for requesting the consent of the Court to prosecute for another offence or to further surrender or to extradite a person. It was submitted that, in the absence of certainty regarding the future of the legal landscape in the issuing state and in the absence of any assurances emanating from the issuing judicial authority, surrender should be refused. It was submitted that, at a minimum, there was a real risk that the trial of this respondent may not occur pre the decision of the U.K. to leave the European Union.

51. Counsel for the minister responded that no affidavit of laws had been put before the Court. As matters stand, Article 50 of the TEU has not been invoked by the U.K. and that it was for the Court to proceed on the basis that the U.K. is a member of the European Union. The U.K. is bound by the 2002 Framework Decision and must comply with it. Furthermore, the U.K. is a signatory to the European Convention on Human Rights. It was submitted that this additional point of objection was in the realms of speculation.

Analysis and determination on issues of delay, fair trial and the consequences of the vote by the population of the U.K. to leave the European Union

52. The Court has no hesitation in finding that, in raising the recent referendum in the U.K. to leave the E.U., the respondent is asking this Court to enter into the realms of fanciful speculation. Nothing has been put on affidavit to set out what is a true position with regard to the U.K. and on that basis alone, the Court would be entitled to reject this point of objection. However, the Court is prepared to take judicial notice of the referendum result and to acknowledge that there is, at least, a significant risk, that in light of the referendum result, the U.K. will invoke Article 50 of the TEU for the purposes of leaving the European Union. Nonetheless, as is accepted by the parties, there has been no triggering of Article 50 at the present time. It is also clear that Article 50 will require a two-year negotiation period, which said period may be extended.

53. Despite the existence of the risk of the U.K. leaving the E.U., the court is required to make a decision on this otherwise valid EAW in accordance with the provisions of the Act of 2003. The court would not be acting in accordance with law if it was to adjourn, or postpone, or otherwise refuse this surrender application on the basis of an event which may take place in the future, the parameters of which have not been delineated. At present, the U.K. is bound by its commitments under E.U. law and under the 2002 Framework Decision in particular. The court is bound to act upon the presumption set out in the Act of 2003 and the 2002 Framework Decision that the U.K. will comply with its obligations under the 2002 Framework Decision in so far as this surrender is concerned.

54. Moreover, the Court is quite clear that there is nothing to support the submission that there is a real risk that the U.K. would, even supposing its leaves the E.U., renege on any commitments as to speciality, fundamental rights or otherwise, given while it was party to surrenders carried out under the EAW process. In short, there is no evidence giving rise to any reason to believe that the U.K. would not respect and uphold the specific guarantees that are contained within the 2002 Framework Decision, or indeed to believe that there is even a risk that the U.K. will not respect those guarantees. There is no evidence to suggest that any single aspect of the guarantees that the U.K. gives in seeking surrender under an EAW with regard to how it will treat a person who has been surrendered will be at risk.

55. Not only is there a lack of evidence but common sense dictates that the U.K. will have a vested interest in ensuring that it does comply with any guarantees she has given with respect to surrenders completed under the EAW process. If the U.K. is to leave the EAW Framework Decision procedure, she will have to engage in extradition treaties with the other states if she is to ensure that those sought by her to face trial or punishment can forcibly be brought within the U.K.'s jurisdiction. A disregard of commitments made in respect of surrenders under the EAW procedure would make entering into any other extraditions treaties extremely difficult. Thus, it is in the self interest of the U.K. to comply with her obligations.

56. Specifically,, the Court rejects the argument made on behalf of the respondent that it is membership of the E.U. that is a

particular gel binding states to comply with obligations in relation to surrender/extradition. On the contrary, the Irish courts have operated on the basis that the request for extradition is made under extradition arrangement between two sovereign states based on reciprocity and mutuality. This was repeated by Murray C.J. (as he then was) in the above mentioned *Altaravicius* case, when he stated at para. 41:

> "*Although I have concluded that the presumption referred to in s. 4A is not relevant to the circumstances of this case it is undoubtedly the case that extradition arrangements, whatever their form, between this country and other states have been applied by the courts on the presumption that those states have complied or will comply in good faith with their obligations under the relevant treaty or statutory provisions governing those arrangements. Generally speaking extradition arrangements and the like are based on recipricocity and mutuality. Each country enters into such arrangements on the presumption that the other country will comply with their requirements and apply them in good faith. In* Ellis v. O'Dea (No. 2) *[1991] I.R. 251 at p. 262 McCarthy J. stated*:-
>
> > *'The making of the extradition arrangements presupposes that the Government and the Oireachtas are satisfied, amongst other things, that, an Irish citizen being extradited to the United Kingdom, as in this instance, or to any other state with which Ireland has such arrangements, will not have his constitutional rights impaired.'*
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> In *Wyatt v. McLoughlin* [1974] I.R. 378 at p. 390 Finlay J. stated:-
>
> *'I am satisfied that I am entitled to have regard to the fact that an extradition Act is necessarily the consequence, … of an agreement between two sovereign states reposing confidence in each other, and that I should not, in the first instance, suppose that the court and the other authorities of the country by which extradition is sought are using a deceit so as to secure the apprehension of the plaintiff.'"*

57. It is also apposite to quote at some length from the decision of the Supreme Court in the recent case of *Balmer v. Minister for Justice and Equality* [2016] IESC 25 which dealt the "*important conceptual question in relation to the extent and nature of the intersection between the guarantees contained in the Irish Constitution and matters occurring abroad pursuant to the law of states with whom this country has made agreements, whether directly, or indirectly as a consequence of membership of the European Union*" (O'Donnell J. para. 18). Although the case dealt with the specific aspect of how the U.K. treats life sentence prisoners, the observations of the Supreme Court have a wider applicability in all areas of fundamental rights under extradition arrangements and are not limited to the procedure under the 2002 Framework Decision.

58. In particular, the Supreme Court (O'Donnell J.) in *Balmer* at para. 44 stated:

> *"Article 29 of the Constitution outlines that Ireland affirms its 'devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality'. This statement encapsulates a key principle applicable to the circumstances of this case. Cooperation implies some give and take. It also focuses attention on reciprocity, and the equality of sovereign states. The making of an extradition treaty, adherence to a convention on extradition, the implementation of a framework decision, and adherence to international decisions in areas of family law may all raise issues when surrender or return is sought. It is also necessary to appreciate that those issues arise under the same instrument which permits Ireland to seek the surrender of suspects for trial of offences alleged to have occurred in Ireland in respect of which Ireland has jurisdiction, or for the return of individuals to the jurisdiction of the Irish courts. It is not, therefore, a case of the Irish Constitution controlling events abroad (in which case the only question would be whether the acts alleged amount to a breach of the Constitution); it is, as already observed, rather that the Irish court is observing events abroad. Moreover, those events are observed through the lens of Article 29, requiring friendly cooperation, and Articles 1 and 5, which, in asserting sovereignty, require the respect of the sovereignty of other countries. The events, with which we are concerned here, are not private transactions between individuals. They are, by definition, the application of the criminal law within the territory of a sovereign state (in most cases to, and in respect of, its own citizens), or the execution of sentences imposed by their courts. These are key attributes of sovereignty of foreign friendly states, whose sovereignty we are bound by the Constitution to respect, in the same way as we expect respect for matters within our own jurisdiction. […]".*

59. The Supreme Court in the same paragraph went on to speak of the particular effect of s. 37 of the Act of 2003, but did so in terms which indicate that the approach of the courts is similar when considering the issue of fundamental rights generally in extradition law. As per O'Donnell J: "*This is why, in my view, it is correct to speak of s.37 of the EAW Act as applying only to matters of 'egregious' breach of fundamental principles of the Constitution or when something is so proximate a consequence of the court's order and so offensive to the Constitution as to require a refusal of surrender or return. It may be that the concept of friendly cooperation may also permit or require steps to be taken which would not have been taken in an earlier age, and not merely because the provisions of the Irish Constitution have been altered, but also because the area and content of international cooperation has extended. Such cooperation is, however, not unlimited. It is, for example, by the terms of the Constitution itself subject to justice and morality. There are also examples of limitations on this principle by consent, or international agreement or otherwise. It* [is] *neither necessary nor desirable to explore these circumstances here, since they were not adverted to in argument. It is enough to identify the focus of the analysis for the purpose of s.37, which, in my view, explains the application of the Brennan approach*."

60. From the foregoing, it can be readily understood that all extradition arrangements involve reposing confidence in another state that guarantees will be relied upon and that rights will be respected. In the absence of specific evidence of a risk to rights that requires extradition/surrender to be refused, the courts must operate the extradition/surrender procedures actually in place on the basis of the spirit of co-operation, confidence, reciprocity and equality of sovereign states. In the present case, there is no reason to believe, or indeed no reason to suspect, that the U.K., a sovereign nation with whom this State co-operates at an international level, will not adhere to the guarantees it gave in respect of the surrenders which had already taken place under the 2002 Framework Decision even if she were to leave the European Union.

61. Furthermore, the U.K. remains a signatory to the European Convention on Human Rights. It is even going beyond the bounds of fanciful speculation to suggest that, by leaving the E.U., the U.K. will thereafter decide to no longer be bound by the European Convention on Human Rights. Under the law relating to extradition generally and not just confined to EAW surrender, the courts in this jurisdiction have firmly indicated the approach that must be taken when there is an apprehended breach of fundamental rights. If the specific issue of fair trial is at stake, as pointed out in *Stapleton*, a case upon which the respondent relies, parity of criminal procedure is not required between this country and the requesting country. As Fennelly J. stated at para 73: "*The trial judge was mistaken in seeking parity of criminal procedure in the issuing member state. It is apparent that, even under the long established jurisprudence, as it applied between some member states prior to 2004 and, as it still applies between this country and third*

countries, such a comparison was not required. Extradition does not demand that there be parity of criminal procedures between contracting states.[…]".

62. Fennelly J. went on to refer to the judgment given by the Supreme Court in *Minister for Justice, Equality and Law Reform v. Brennan* [2007] 3 I.R. 732 which held that a fundamental defect in the legal system of another state must be established before surrender would be refused on the basis of an apprehended breach of rights. It is by now well established that the law relating to extraditions to non-E.U. countries, under the Extradition Act, 1965 also requires that a respondent must establish a real risk of this type of egregious breach of fundamental rights before the Court will refuse extradition on the basis of an apprehended breach of those rights. Examples of this approach is to be found in the recent case law involving extraditions to the United States such as *Attorney General v. Lee* [2015] IEHC 340, *Attorney General v. Damache* [2015] IEHC 339 and *Attorney General v. Marques* [2015] IEHC 798.

63. In the present case, the respondent has not put forward any evidence to suggest that if surrendered to the U.K. he will not be entitled to raise the issue of delay and the issue of prejudice to his trial by reason of the delay. He has obliquely raised a possible issue as to his fitness to be tried by virtue of his memory loss, but raised it as part of the overall issue of delay and prejudice; he has submitted no evidence to even suggest that this could not be raised in the U.K. at or before his proposed trial. Similarly, he has not raised any evidence to support his submission that there is a real risk that he will not have the benefit of the rule of specialty (or any of the other guarantees in the 2002 Framework Decision) after surrender, or more specifically in the aftermath of the anticipated exit of the U.K. from the European Union.

64. The respondent has not established that his extradition would amount to a violation of his fundamental rights (or indeed any other rights under the 2002 Framework Decision). No evidential threshold has been reached to even suggest that there are any grounds for believing that there is a real risk that his fundamental rights will be violated by ordering his surrender to the U.K. to face trial on these offences. There is simply nothing to suggest that, at any point in the future, he is at risk of being subject to "a clearly established and fundamental defect in the system of justice of [the] requesting state" (see Murray C.J. in *Brennan*). Taking this case from the standpoint of the law as applies to this application for surrender at the present moment, the respondent has not even attempted to put forward any evidence which would give rise to a concern that his rights under s. 37 of the Act of 2003 would be violated on surrender. Furthermore, it is clear from the foregoing cases that the approach of the courts to requests for extradition generally, and not merely to EAW requests, is that a similarly high evidential threshold is required before extradition will be refused. At the risk of repetition, there is no such evidence before the court.

65. The potential exit of the U.K. from the E.U. is raised as an issue at the level of the theoretical and it is not based in the reality of the principles underpinning extradition procedures. No evidence whatsoever has been adduced to show that the risk of a future exit from the E.U. by the U.K. gives rise to a risk of a breach of fundamental rights that would require this Court to refuse surrender.

66. The risk that the particular system of extradition between Ireland and the U.K may be amended does not amount to a risk that the U.K. will jettison its specific obligations with regard to surrenders that have already taken place or will take place under the present system. The risk of a change in extradition procedures does not give rise, *per se*, to a change to the system of justice in the U.K. to such an extent that it would be a breach of constitutional or ECHR rights to surrender a person there. No other evidence has been produced to substantiate any particular risk.

67. In light of the foregoing, the Court rejects the objection by the respondent that his surrender should be prohibited on the grounds of delay and the prejudice he has suffered.

Conclusion

68. For the reasons set out above, the Court is satisfied that there is correspondence between the offences for which this respondent is sought in the U.K. and offences in this jurisdiction.

69. The court is satisfied that the EAW gives sufficient details to comply with s. 11 of the Act of 2003.

70. The Court is satisfied that the surrender of the respondent is not prohibited on the basis that it is a disproportionate interference with his personal and family rights under Article 8 ECHR to surrender him.

71. The Court is satisfied that surrender is not prohibited on the basis that, by virtue of his ill-health, the respondent is at real risk of being subjected to inhuman and degrading treatment if surrendered, or indeed that there is a risk to his life.

72. The Court is satisfied that the appropriate place for the respondent to raise issues of delay and fair trial is in the issuing state. The Court observes that the respondent has not shown that he would be denied the opportunity of raising those matters in a court of the United Kingdom.

73. Finally, the Court is quite satisfied that there is no basis for holding that his surrender should be prohibited or at least postponed because of the implications of the recent referendum in the U.K. in which the electorate voted to leave the European Union.

74. I therefore may make an Order under s. 16 of the Act of 2003 for the surrender of this respondent to such other person as is duly authorised to receive him.