[2019] IEHC 119

THE HIGH COURT

[2018 338 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

JOHN DOWNEY

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 1st day of March, 2019

1. The surrender of the respondent is sought on foot of a European Arrest Warrant ("EAW") issued on 31st October, 2018 by a judicial authority of the United Kingdom of Great Britain and Northern Ireland ("the UK") for the purpose of conducting a criminal prosecution in respect of three offences. The EAW is based on three national arrest warrants issued on the 31st October, 2018 in respect of two alleged offences of murder and an alleged offence of aiding and abetting the causing of an explosion likely to endanger life. The alleged offences relate to an incident which occurred on the 25th August, 1972 in Northern Ireland. Two members of the Ulster Defence Regiment were killed in a car bomb explosion and a number of army personnel sustained non-life threatening injuries in the explosion.

2. Interlinked with claims as to delay and disproportionate effect on his personal life, the respondent objected to surrender on the ground that it would be an abuse of process to surrender him arising from a letter addressed to him from the Northern Ireland Office ("the letter of assurance"). The respondent also objected to surrender on the basis that the letter of assurance amounts to an amnesty/pardon. Overall, he submitted that arising from the cumulative factors that arose in this exceptional case, it would be oppressive to surrender him.

3. In order to understand the context of the letter of assurance, it is necessary to give some detail of what is stated in the EAW about the investigation into the offences leading to the prosecution. Further context is provided in the affidavit of the respondent. Having described the explosion and its consequences, the EAW states at part E:-

> *"An ammunition technical officer attended the scene and determined that the explosion was caused by a car bomb containing between 100lb – 200lb of an unknown explosive. In a statement he confirmed the bomb was "command wire initiated by 100m of single – strand copper wire, blue and brown plastic covered. Attached to the end of the wire was a battery pack consisting of 6 x 4.5v Ever Ready 126 batteries, and one Ever Ready 1 R 376 battery, wiere (sic) in series." A scene of crime officer, Sgt. Hugh McCormack, attended the scene and observed that "The car bomb had been detonated on a footpath . . . causing a large crater in the footpath and road . . .. from the edge of the crater to a hillside nearby ran a length of wire attached to a battery power pack . . . the power pack consisted of seven Ever Ready batteries held together by black adhesive tape." Sgt. McCormack is deceased and a hearsay application will be made to adduce his evidence. The battery power pack found at the detonating point was delivered on the 31st August 1972 to Sgt. Gamble, fingerprint department, RUC. Fingerprints of John Anthony Downey (DOB 19/01/1952), Cabra, Cootehill, Co. Cavan were obtained by D/Sgt. Aidan Murray, AGS, on the 10th December 1979. The fingerprints were forwarded to the RUC in 1980 for intelligence purposes. Sgt. Gamble confirmed a positive comparison of a finger imprint found on the black insulating tape, which he marked as "LA 45/72 L" with the left forefinger impression recorded as taken from John Anthony Downey by D/Sgt. Murray. He confirmed they agreed in sequence of ridge detail. Sgt. Gamble is deceased and a hearsay application will be made to adduce his evidence and related documents. Imprint "LA 45/72 L" has since degraded however photographs taken of the imprint at the time have been confirmed by a fingerprint expert as authentic and of good quality. The expert confirmed a positive comparison of these photographs with a fingerprint imprint taken by the Metropolitan Police (Met) following Mr. Downey's arrest on 19th May 2013 at Gatwick Airport on suspicion of his involvement in the Hyde Park bombing in 1982. The subsequent prosecution of Mr. Downey in respect of the Hyde Park bombing was stayed as an abuse of process. The prosecution will seek to adduce the Met fingerprints and, if they are held to have been unlawfully obtained, will rely on the authority of R. v. McKee & Elliot [2013] UKSC 32. The prosecution will seek to adduce evidence of bad character, namely: - Evidence pertaining to the conviction of Mr. Downey in 1974 for membership of the IRA and evidence pertaining to the recovery of Mr. Downey's fingerprints and palm prints from locations related to two other terrorist incidents. The DPP NI decided on 27 June 2018 to prosecute Mr. Downey for two offences of murder and one of aiding and abetting an explosion. Mr. Downey resides in ROI and has not been served with papers."*

4. The reference to the Hyde Park bombing is a reference to a bombing that was carried out in Hyde Park, London, on the morning of Tuesday 20th July, 1982. In that case, a car bomb was detonated as "the Guard" (consisting of sixteen members of the Blues and Royals Regiment of the Household Cavalry and their horses accompanied by two mounted police officers) was passing en route from Knightsbridge Barracks to Horse Guards Parade for the Changing of the Guard. Four members of the Guard were murdered in the explosion and a total of 31 other people were injured. The respondent appeared before the Central Criminal Court of England and Wales in January, 2014. On the 21st February, 2014, following legal submissions, Sweeney J. stayed the prosecution on the ground that it would be an abuse of process to try him because of the letter of assurance he had received on the 20th July, 2007 from the Northern Ireland Office.

5. The background to the letter of assurance is set out in the affidavit of the respondent. He says the letter was given to him by Mr. Gerry Kelly to whom it was addressed. According to the respondent:

> *"The letter is one of such letters that were sent to former Republican activists over that time as part of the ongoing Peace Process and in contemplation of the Good Friday Agreement."*

6. The letter is headed "Northern Ireland Office, Political Directorate – Rights and International Relations Division" and it is signed by Mark Sweeney, Head of Division. On the left hand side, it said "Mr. John Anthony Downey via Gerry Kelly". It is dated the 20th July, 2007 and reads as follows: -

> *"The Secretary of State for Northern Ireland has been informed by the Attorney General that on the basis of the*

information currently available, there is no outstanding direction for prosecution in Northern Ireland, there are no warrants in existence, nor are you wanted in Northern Ireland for arrest, questioning or charge by the police. The Police Service of Northern Ireland are not aware of any interest in you from any other police force in the United Kingdom. If any other outstanding offence or offences come to light, or if any request for extradition were to be received, these would have to be dealt with in the usual way".

7. Prior to determining the contested issues in this case, the High Court, as executing judicial authority, must be satisfied that the formal proofs required under the European Arrest Warrant Act 2003 as amended ("the Act of 2003") have been satisfied.

Identity
8. I am satisfied on the basis of the information contained in the European Arrest Warrant and the affidavit of the respondent, that the respondent who appears before me is the person in respect of whom the EAW has been issued.

Endorsement
9. I am satisfied that the EAW has been endorsed in accordance with s. 13 of the Act of 2003 for execution in this jurisdiction.

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

Part 3 of the Act of 2003
11. Subject to further considerations of s. 37, 38 and s. 39, 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. The Court notes that the provisions of s. 45 are not relevant to the issues of surrender as he is wanted for prosecution. Those provisions are directed towards trial *in absentia*. There has been no trial in this case.

S. 38 of the Act of 2003
12. Under the provisions of s. 38(1)(b) of the Act of 2003, surrender is not prohibited if the offence for which surrender is sought has been designated as a list offence (within the meaning of Article 2, para. 2 of the 2002 Framework Decision on the European Arrest Warrant ("the 2002 Framework Decision") and is an offence of the required minimum gravity (three years). The issuing judicial authority has ticked the box of "murder" in respect of the two murder offences. The circumstances in which those alleged offences were committed have been set out in part E of the European arrest warrant. The maximum sentence of imprisonment that may be imposed is one of life imprisonment. The surrender of the respondent is therefore not prohibited under s. 38 of the Act of 2003 for those offences.

13. The respondent is alleged to have aided and abetted an offence of unlawfully and maliciously causing by certain explosive substances and explosion of a nature likely to endanger life or to cause serious injury to property as set out in the Explosive Substances Act 1883. The said Act of 1883 is still in force in this jurisdiction. The facts set out in the warrant are such that, if committed in this jurisdiction, they would amount to an offence contrary to s. 2 of the Explosive Substances Act, 1883. As that section carries a maximum sentence of life imprisonment in the issuing state, it also reaches the terms of minimum gravity. Therefore, the surrender of the respondent is not prohibited by s. 38 of the Act of 2003.

S. 39 of the Act of 2003
14. The respondent claimed that his surrender is prohibited under s. 39 because he had been granted an amnesty or pardon from prosecution or punishment. He submitted that the letter of assurance of the 20th July, 2007 constituted a letter of amnesty on its face. It was submitted that the letter does not reference the possibility of future prosecution if evidence becomes available. The respondent said he was relying on the letter of assurance in travelling to Great Britain, when he was arrested on the 19th May, 2013 in Gatwick Airport. He said his right to liberty was violated at that time because of the existence of the letter of assurance.

15. S. 39(2) of the Act of 2003 provides as follows: -

"(2) A person shall not be surrendered under this Act where he or she has, in accordance with the law of the issuing state, become immune, by virtue of any amnesty or pardon, from prosecution or punishment in the issuing state for the offence specified in the European arrest warrant issued in respect of him or her."

16. The respondent sought to distinguish the findings of the High Court (Donnelly J.) in *Minister for Justice and Equality v. Corry* [2016] IEHC 678. The respondent submitted that the circumstances of the present case were markedly different.

17. The case of Corry also involved a claim that the provisions of the Good Friday Agreement lead to a system of amnesty. In *Corry*, this Court stated at paras. 14, 15 and 16: -

"14. In his points of objection, the respondent asserted that the provisions of the 1998 Good Friday Agreement (also known as the Belfast Agreement), meant that the State operated an amnesty on punishment in respect of offences of this sort and therefore his surrender was prohibited by means of s. 39 of the Act of 2003. In the course of the hearing, counsel for the respondent expressly conceded that he was not arguing that s. 39 of the Act of 2003 amounted to an amnesty.

15. For the avoidance of doubt, the court is quite satisfied that s. 39 of the Act of 2003 which refers to 'immunity from prosecution or punishment for an offence ' does not apply to a situation where a person remains liable in law to be tried for, and/or if convicted, sentenced in respect of the offence set out in the European arrest warrant. The prospect of future early release from any possible sentence that may be imposed does not come within any of the subsections of s. 39 of the Act of 2003 which prohibit surrender. I am quite satisfied, therefore, that his surrender is not prohibited under s. 39 of the said Act.

16. In relation to the claim concerning discriminatory or arbitrary treatment, it was clarified at the hearing of the action that this was not being advanced as a stand-alone ground, rather it was the respondent's inability to benefit from the Good Friday/Belfast Agreement that formed part of the consideration of the right to respect for his family and personal rights. Counsel for the respondent also submitted that the fact that the Good Friday/Belfast Agreement provisions would not apply to him if surrendered to Germany, but would apply if he were to be prosecuted in this jurisdiction in relation to the same offences, meant that his surrender would be oppressive. This submission will be addressed later in this judgment."

18. For surrender to be prohibited under s. 39, it is necessary that the person has become immune from prosecution or punishment *in accordance with the law of the issuing state* by virtue of an amnesty or pardon. The High Court, as executing judicial authority, must apply the principles of mutual trust in accordance with the 2002 Framework Decision and s. 4A of the Act of 2003 in considering whether the issuing state has issued an EAW for offences which are covered by amnesty or pardon in the issuing state. If surrender is to be refused on the basis that there is in fact an amnesty or pardon, the requested person would have to place cogent evidence before the court that such an amnesty or pardon existed.

19. In the present case, the respondent has not produced any evidence that the letter of assurance provides an amnesty or pardon in the issuing state. This omission is particularly noteworthy where the respondent relied upon the evidence of other members of the legal profession in the United Kingdom. The respondent presented the opinion of a QC in England and Wales in respect of a certain aspect of the law relating to admissibility of evidence. He also provided an affidavit from his solicitor in the proceedings relating to the 1982 Hyde Park bombing offences. This related to the procedures concerning the trial and the disclosure that was made to the respondent's solicitors for the purposes of that trial. This demonstrates that it was open to the respondent in this case to obtain opinions from the most eminent of legal practitioners in the UK if he had so desired. There is simply no evidence before the Court that the letter of assurance amounts to an amnesty in accordance with the law of the issuing state.

20. The Court rejects the submission that it is a matter for this Court to construe that letter on its face as amounting to an amnesty according to the laws of the United Kingdom. Whether or not it is an amnesty is something that can only be established by reference to the laws of the United Kingdom. In the absence of such evidence, I reject this point of objection.

21. Moreover, what is before the Court is the judgment of Sweeney J. in the proceedings R*. v. Downey* [2014] EW Misc 7 (CCrimC) in respect of the 1982 Hyde Park bombing offences. That judgment is before the Court not so much as evidence of UK law, but as evidence of fact as to what occurred in the previous prosecution. It is a matter of fact evident from the judgment, that Sweeney J. did not hold that the letter was an amnesty in respect of offences predating the letter.

S. 37 of the Act of 2003
22. Section 37(1)(a) provides that a person shall not be surrendered if his or her surrender would be incompatible with the state's obligation under the European Convention on Human Rights ("ECHR"). Section 37(1)(b) prohibits surrender where surrender would constitute a contravention of any provision of the Constitution. The applicable principles to apply in determining whether s. 37 prohibits surrender is well established in case-law.

23. In particular, where a person is claiming that there has been a breach of fair trial rights in the issuing state, and that surrender would contravene a provision of the Constitution, the Supreme Court in *Minister for Justice and Equality v. Brennan* [2007] IESC 21 held that the mere fact that the legal system or system of trial in another jurisdiction differed from that envisaged by our Constitution would not mean that surrender would contravene our Constitution. Murray C.J. went on to state that: -

> *"That is not by any means to say that a court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may well be egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting state, where a refusal of an application for surrender may be necessary to protect such rights. It would not be appropriate in this case to examine further possible or hypothetical situations where this might arise. The sole matter which I wish to make clear here is that the mere fact that a trial or sentence may take place in a requesting state according to procedures or principles which differ from those which apply, even if constitutionally guaranteed, in relation to a criminal trial in this country does not of itself mean that an application for surrender should be refused pursuant to s. 37(2) of the Act."*

24. Judgment was given in the case of *Minister for Justice v. Stapleton* [2008] 1 IR 669 shortly after the decision in *Brennan*. The Stapleton case concerned a prospective trial in the issuing state. The Supreme Court (Fennelly J.) quoted with approval the dicta of Murray C.J. in Brennan. Fennelly J. identified the principles of mutual trust and mutual recognition as being at the heart of the EAW system. Fennelly J. stated that the principle of mutual confidence was broader than the principle of mutual recognition. Mutual confidence encompassed the system of trial in the issuing state. It followed therefore 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, "*respect human rights and fundamental freedoms".*

25. Fennelly J. went on to link the principle as regards the need to find a clearly established and fundamental defect in the system of justice of the requesting state to both a claim under constitutional and ECHR breaches. It is against that background that this Court must consider the respondent's claim regarding issues pertaining to his trial in the issuing state. Separate considerations arise where there is a claim that surrender would breach the right to respect for family and personal rights. Those will be dealt with further below.

Brexit
26. The respondent submitted that the operation of the Act of 2003 was contingent on the issuing state being a member of the European Union ("EU") and party to the European Convention on Human Rights. It was submitted therefore, that this Court should adjourn the application pending conclusion of the exit of the United Kingdom from the European Union ("Brexit").

27. The issue of Brexit was considered by the Court of Justice of the European Union ("CJEU") in the case of Minister for Justice v. R.O. (C-327/18 PPU). The CJEU set out the duty imposed by the 2002 Framework Decision in respect of a member state which has notified its intention to withdraw under Article 50:

> *"in the absence of substantial grounds to believe that the person who is the subject of the EAW is at risk of being deprived of rights recognised by the Charter of Fundamental Rights of the European Union, and Council Framework Decision 2002/584/JHA of 13th June 2002 on the European Arrest Warrant ("the 2002 Framework Decision") and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26th February, 2009 ("the 2009 Framework Decision"), following the withdrawal of the EU of the issuing Member State, the executing Member cannot refuse to execute that EAW while the issuing Member State remains a member of the European Union"*

28. In the present case, the respondent has not placed any evidence before this Court or even identified any right protected by the EU Charter of Fundamental Rights ("EU Charter") or the 2002 Framework Decision of which he is at risk of being deprived in the event of Brexit. Similarly, he has not identified any constitutional right of which he is at risk of being deprived in the event of Brexit. In short, therefore, there is no factual or legal basis for this argument based on the Article 50 notification by the United Kingdom. The Court must proceed on the basis that the UK is still a member of the EU, and will comply with its obligations under the Framework

Decision. The Court rejects this point of objection.

Delay

29. The respondent laid particular emphasis on the delay in the application for an EAW in this case. Delay of itself, was not so much urged by the respondent as a standalone ground, but as a ground which fits more easily into his claims of abuse of process and his right under Article 8 ECHR not to be surrendered.

30. It is well established in this jurisdiction that the passage of time itself will not be sufficient to prohibit the surrender of a respondent. Delay must be tied to a breach of a constitutional or an ECHR right before surrender will be prohibited. As part of a claim to a fair trial right, it is more correct to say that the requested person must demonstrate egregious circumstances, such as a breach in the system of justice in the issuing state, before delay will be a ground for prohibiting surrender. Delay and its consequences are more appropriately litigated at trial in the issuing state. which is the state of the trial.

31. In his judgment in *Stapleton*, Fennelly J. stated as follows: -

> *". . . it is demonstrably more efficient and more convenient that those matters be debated before the courts of the country where the respondent is to be tried. The prosecuting and police authorities as well as other witnesses are available to and amenable to the jurisdiction of the courts of that country. Documentary evidence, of the type demanded by the respondent, will be more readily available there. If not, its absence may be more readily explained. There may, in addition, be arguments or points of domestic law, whether based on precedents or otherwise, which the respondent can advantageously argue or rely upon which may not be available to him in this jurisdiction and of which an Irish court might not necessarily be aware. I would echo and adapt the words of Simon Brown L.J. in Woodcock v. Government of New Zealand [2003] EWHC 2668 (Admin), [2004] 1 W.L.R. 1979 and say that the English courts "will have an altogether clearer picture than we have of precisely what evidence is available and the issues likely to arise …"."*

32. In the present case, all the factors identified by Fennelly J. are in existence. It is noteworthy that the respondent sought in a very lengthy notice of motion discovery of documentation which he said was given to his solicitor in the course of the Hyde Park bombing application. Apparently this information concerned the investigation into those offences and certain materials surrounding the letter of assurance. That motion for discovery was not proceeded with at the hearing. On the legal principles, it is difficult to see how such discovery could possibly be ordered in these proceedings.

33. The respondent filed an affidavit sworn by Gareth Peirce, who was his solicitor in the Hyde Park proceedings. In the view of the Court, her affidavit serves to confirm that documentation was in existence and was distributed to his then solicitors under strict controls as to dissemination. Given the nature of the issues raised by the respondent, it is demonstrably the case that the courts of Northern Ireland are in a better position to have the full picture before it when deciding on issues of delay and fair trial. Furthermore, as the judgment of Sweeney J. demonstrates, which has never been disputed by the respondent, these issues of delay and its consequences are capable of being dealt with within the UK legal system. In line with the decision in *Stapleton*, the courts of Northern Ireland are the appropriate venue in which to deal with issues of delay and its consequences.

34. Therefore, the submission that the delay of *itself* prohibits surrender is not accepted by the Court. Delay is, nonetheless, a factor that the Court must take into account in assessing the overall objections by the respondent to his surrender.

35. I will deal with the impact of delay on the other issues below. It is appropriate at this point to refer to the three separate areas of delay identified by the respondent:

> (a) The time between August 1972 up to the 19th May, 2013. In respect of this period of delay, the respondent indicated that no attempt was made to either extradite him to Northern Ireland or indeed to prosecute him here under the Criminal Law Jurisdiction Act, 1976. The respondent submitted that this indicates that they did not have sufficient evidence to bring a case against him until May 2013 (para 21 of his submissions).
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> (b) The period from the 19th May, 2013 up to February, 2014. It is submitted that the respondent was in the UK on bail for approximately nine months before being released. His fingerprints were taken on the 19th May, 2013 and would have been available from shortly thereafter to the Northern Ireland authorities. He submitted it would be inconceivable that they did not know he had been arrested and that fingerprints would have been taken. Despite that, no effort was made to arrest him at that time. The respondent submitted that it seems that the UK authorities, having failed to prosecute him successfully in respect of the Hyde Park bombing are seeking a second bite at the cherry.
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> (c) February, 2014 to October, 2018. There is no explanation as to why it took so long to indicate an intention to prosecute him and subsequently to apply for the European Arrest Warrant.

Right to a Fair Trial: Flagrant denial of justice

36. In his points of objection, but not stressed in his oral submissions, the respondent objected to his surrender on the basis that the evidential rules in the UK would amount to a flagrant denial of justice. To surrender him in these circumstances would amount to a breach of his constitutional rights in this jurisdiction or a breach of his ECHR rights. In making this submission, he relied on the statement in the EAW that, despite witnesses being dead, fingerprint evidence would be admissible as hearsay and that "bad character evidence" would be introduced against him.

37. The respondent did not refer to any case law from the European Court of Human Rights or any other international tribunal to the effect that relying on hearsay evidence or indeed "bad character evidence" and in particular the rules in the UK would amount to a breach of fair trial rights. Moreover, this point has already been dealt with by the High Court (Edward J.) in *Minister for Justice and Equality v Shannon* [2012] IEHC 91 which held that to ask the court to engage in this exercise is fundamentally misconceived in light the decisions in *Brennan* and *Stapleton*. This Court is satisfied that it has not been demonstrated that the use of this type of evidence would amount to a flagrant denial of justice in the issuing state so as to render his surrender a breach of s.37 of the Act of 2003.

38. The respondent relied upon an expert report of Mark Summers QC as regards the use in evidence of the respondent's fingerprints which were taken by the Metropolitan Police in 2013 in any forthcoming proceedings. It was his view, the retention of those fingerprints was not rendered lawful by the operation of a particular section of the Police and Criminal Evidence Act, 1989 in England and Wales. He submitted, therefore, it was impermissible and unlawful as a matter of English law to use them as part of the

prosecution in the 1972 proceedings. This entire opinion seems to have been based upon an assumption that there had been no application made to a District Judge to extend the retention period in relation to the respondent's fingerprints. The basis for such a claim is not indicated in the expert report or in any other affidavit or document relied upon by the respondent. As a result, this opinion is of no evidential value.

39. Even taking the contents of the opinion at face value, the evidential value of it is also questionable. Mr. Summers QC referred to the case of *R. v. McKee & Elliott* [2013] UKSC 32 which was referred to in the European Arrest Warrant. He was of the opinion that this case would not operate to render the fingerprints inadmissible despite their unlawful retention under the Police and Criminal Evidence Act, 1989. The reference to *R. v. McKee & Elliott* in the EAW, however, is a reference to the fingerprints having been unlawfully obtained in the first place. Even on that basis, it is unclear what is the precise relevance of his opinion to the issues this Court has to deal with.

40. More importantly and most fundamentally, the issue of whether the fingerprints were unlawfully obtained and/or unlawfully retained in the issuing state, is a matter for the proceedings in the issuing state. Any claim to the contrary is misconceived (per *Shannon* above). There is no evidence of an egregious defect in the system of justice operating in the issuing state such as to render it necessary to prohibit his surrender on the basis that he could not get a fair trial because of issues arising out of the legality of how his fingerprints were taken and dealt with in the issuing state.

41. The respondent also referred to the proposed use of evidence pertaining to the recovery of the respondent's finger and palm prints from locations related to two other terrorist incidents. The respondent claimed this would be a denial of his rights; particularly in light of the letter of assurance. It would be especially unfair, he submitted, if one of those incidents was the Hyde Park bombing.

42. The issue of reliance on evidence from other alleged crime scenes is a matter of admissibility of evidence. No attempt was made to demonstrate that there is anything egregious about the admissibility of such type of evidence in general. It is not established that there is an egregious breach in the system of justice in a state that would allow such evidence be admitted.

43. In so far as it relates to evidence form other crime scenes including the Hyde Park bombing, that is also a matter for the trial. Even if it is accepted that the reference relates to the Hyde Park bombing, it has not been demonstrated that it would be egregious to allow evidence relating to a connection to that crime even though there has been an acquittal. In any event, even if such a matter would not be permitted in this jurisdiction or under the ECHR (neither of these legal propositions have been established), there is no reason to believe that the UK would not abide by its duties under the ECHR and ensure that a fair trial takes place. The UK is presumed to comply with the EU Charter and with the Framework Decision. Therefore, the respondent's surrender is not prohibited under s. 37 of the Act of 2003.

44. The respondent also submitted that the issuance of the letter of assurance to him, leading him to travel through Gatwick Airport amounted to "an entrapment (either consciously or unconsciously) by analogy." The issue of entrapment is also a matter for the trial in the issuing state. There is no evidence before this Court that such an issue cannot be raised in the issuing state. The Court is not satisfied that egregious circumstances have been established, such as a defect in the system of justice in the issuing state, that would prohibit his surrender under s. 37 of the Act of 2003.

Breach of constitutional rights – evidence from this jurisdiction

45. The respondent referred to the statement in the EAW that his fingerprints were supplied by An Garda Síochána to the Northern Ireland authorities in 1980. The respondent submitted there was a real risk that his constitutional rights would be violated on surrender where no legal justification was apparent for the taking or retention of these fingerprints, but they were mentioned in the EAW as potential evidence. In this regard, the respondent relied on the case of *Larkin v. O'Dea* [1995] 2 IR 485. The Supreme Court held that where evidence taken in breach of constitutional rights in this jurisdiction would be potentially admitted in the trial in the requesting state, the court was obliged to prohibit extradition.

46. In the present case, the EAW referred to fingerprints being forwarded by An Garda Síochána in 1980 for "intelligence purposes". It stated they were obtained in Cavan by Det. Sgt. Aidan Murray on the 10th December, 1979. There is then a reference to Sgt. Gamble confirming a positive comparison of a finger imprint found on the black insulating tape which held together the power pack, which he marked as la 45/72L, with the left forefinger of the respondent. The EAW stated that Sgt. Gamble is deceased and a hearsay application will be made to adduce his evidence and related documents. It is of note that the EAW then stated that the imprint la 45/72L has since degraded. However photographs taken of the imprint are of good quality and authentic. It can be seen that Sgt. Gamble's evidence would be necessary to establish the provenance of la 45/72L which forms the basis for the fingerprint comparison with the respondent's fingerprint.

47. At the end of part E in the EAW, it is definitively stated that "*the prosecution will seek to adduce the MET fingerprints"* i.e. the fingerprints taken by the London Metropolitan Police when the respondent was arrested in Gatwick Airport on suspicion of his involvement in the Hyde Park bombing. That, in my view, is an unambiguous statement that the other fingerprints will not be relied upon.

48. Not only is the statement unambiguous but it is also the only interpretation that makes logical sense. The reference to the fingerprints taken in 1979 indicated that they were provided for "intelligence purposes". Such a purpose is precisely what it says, for use in intelligence. It is not for use evidentially. That interpretation accords with the rest of the contents of the EAW because if the fingerprints provided for "intelligence purposes" were to be relied upon, there was no need to await the Gatwick Airport fingerprints. Moreover, this interpretation also accords with the respondent's view, as he averred at paragraph 24 of his first affidavit, that the prosecution in the present proceedings intended to rely on a fingerprint that was allegedly taken from him at the time he was arrested in the UK in 2013. It is also acknowledged by the respondent in his submissions at para 21, which stated that the only conclusion that can be drawn from the circumstances is that there was insufficient evidence to bring proceedings against him until the 19th May, 2013.

49. In those circumstances, the respondent's claim under *Larkin v O'Dea* must fail. As the fingerprint taken in 1979 is not evidence to be used against him at trial, there is no basis at all for his claim that his surrender is prohibited because evidence obtained unconstitutionally would be used against him.

50. In light of the finding that the 1979 fingerprints are not part of the evidence upon which the prosecution will rely in the issuing state, it is perhaps unnecessary, therefore, to deal with the respondent's further submissions on the fingerprint. For the sake of completeness, I will do so. The respondent claimed *Larkin v O'Dea* prohibited his surrender because the evidence to be used at trial in the issuing state was obtained unconstitutionally. It is necessary to examine closely the nature of the claims he makes in that regard.

51. The respondent swore an affidavit which stated that he did not remember being specifically arrested on the 10th December, 1979 and did not remember having given his fingerprints on that occasion either. According to him, about that time he was repeatedly arrested by Gardaí attached to different barracks, including Ballyshannon Garda Station. He stated his fingerprints were frequently taken without his consent. He referred to the judgment of Sweeney J. at para. 20 in which it is stated that the London Metropolitan Police were in possession of what was said to be a set of his fingerprints as taken by members of An Garda Síochána on the 7th July, 1980 and he had no recollection of the taking of those fingerprints either.

52. The respondent said he believed that the only occasion he was convicted of an offence was in 1974 (the offence of Membership of an Unlawful Organisation). He said he was not charged with any offence until the 19th May, 2013 apart from once in 1976 and another occasion in the early 1980's. He said on neither occasion was he convicted of any offence.

53. The minister has not sought to adduce any evidence in respect of the taking of his fingerprints in this jurisdiction or the transmission of the fingerprints to the Northern Irish or British authorities. Instead, the minister relied upon the legal position which is that the taking of fingerprints is an issue for the trial in Northern Ireland. The minister submitted that contrary to the situation in *Larkin v O'Dea*, there is no evidence that constitutional rights have been violated. Furthermore, the minister pointed to the decision in Cash above regarding the retention and use of fingerprints to ground an arrest. The minister also relied upon the decision in *People (DPP) v J.C.* [2015] IESC 50.

54. Section 30 of the offences Against the State Act, 1939 permits the taking of fingerprints of a person in detention. Section 7 of the Criminal Law Act, 1976 permits the Gardaí to take or cause to be taken, fingerprints and palm prints of any person in custody under, *inter alia*, the provisions of s. 30 of the Act of 1939.

55. With respect to the issue of the taking of his fingerprints, the only evidence before this Court, is that he does not remember being specifically arrested on the 10th December, 1979. That is no evidence that there was in fact a breach of his rights in the taking of those fingerprints. Reference to repeated arrests and the taking of fingerprints without consent does not establish illegality. It is for the respondent to establish on cogent evidence that there has been a breach of his constitutional rights in the taking of the fingerprints. He has not done so. His point of objection in respect of the taking of his fingerprints is therefore rejected.

56. Section 9 of the said Act of 1976 states: -

> *"(1) Where in the course of exercising any powers under this Act or in the course of a search carried out under any other power, a member of the Garda Síochána, a prison officer or a member of the Defence Forces finds or comes into possession of anything which he believes to be evidence of any offence or suspected offence, it may be seized and retained for use as evidence in any criminal proceedings, or in any proceedings in relation to a breach of prison discipline, for such period from the date of seizure as is reasonable or, if proceedings are commenced in which the thing so seized is required for use in evidence, until the conclusion of the proceedings, and thereafter the Police (Property) Act, 1897, shall apply to the thing so seized in the same manner as that Act applies to property which has come into the possession of the Garda Síochána in the circumstances mentioned in that Act."*

57. In those circumstances, it appears that there is a time limit for retention of fingerprints. There is no specific time period set out however. The fingerprints may be retained for use as evidence in any criminal proceedings for such period from the date of seizure as is reasonable. What is reasonable will depend on the circumstances. If proceedings have been brought, the fingerprints are only to be retained until the conclusion of the proceedings. Where a criminal investigation is still open into particularly serious offences such as murder, that reasonable period would be far greater than an enquiry for example into the theft of a mobile phone from a car.

58. While there is no evidence that the Gardaí were undertaking any particular criminal investigation in this jurisdiction, there is no evidence to the contrary. Moreover, it is a reasonable inference to draw that they were assisting serious criminal investigation in another jurisdiction at the time of the transfer of the fingerprint for intelligence purposes. Most importantly, the respondent has not indicated any case law which supports the proposition that a failure to destroy fingerprints which have been retained for longer than the statutory period, amounts to a breach of a constitutional right requiring a decision to exclude such fingerprints from evidence.

59. In respect of the transmission of those fingerprints for intelligence purposes abroad, the respondent has not indicated a particular right that has been violated. Moreover, he has not indicated that such a right, if violated, could only be vindicated by this Court refusing surrender.

60. Even if the respondent were to argue that the transmission of his fingerprints by An Garda Síochána caused his arrest in Gatwick Airport, which in turn lead to his prosecution for the 1972 offences, this does not avail him. In this jurisdiction there is no onus on the prosecution to prove the lawful provenance of material relied upon by a member of An Garda Síochána to form reasonable cause justifying an arrest. In *DPP (at the suit of Detective Garda Barry Walsh) v Cash* [2010] IESC 1 the Supreme Court rejected an argument that the prosecution had to prove the lawfulness provenance of the fingerprints which proved the basis for the reasonable suspicion for a Garda to arrest the accused. In Cash, Fennelly J. confirmed at para 41 that:-

> *"The lawfulness of an arrest and the admissibility of evidence at trial are different matters which will normally be considered in distinct contexts. Infringement of any of the basic rules regarding the first may give rise to a challenge to the lawfulness of the detention extending potentially to the jurisdiction of the court of trial. Normally, such matters require to be asserted in advance of trial."*

61. The issue of breach of constitutional rights was dealt with by this Court in *Minister for Justice v Mangan* [2017] IEHC 233 and later by the Court of Appeal [2017 IECA 329. As this Court stated at paras 102 and 103 of *Mangan*:-

> *"102. The facts in Larkin v. O'Dea were entirely different. In that case, the issue was identified by Hamilton C.J. in the Supreme Court at p. 504 as not whether the applicant would get a fair trial in Northern Ireland "but rather the violation of and failure to defend and vindicate the constitutional rights of the applicant within the jurisdiction of this State, by the members of the Garda Síochána who arrested the applicant […] on foot of a warrant issued by a judge of the District Court […], which is conceded to be bad for the reasons set forth in this judgment." It was during that unlawful and unconstitutional detention that he made certain admissions both in writing and verbally with regard to his participation in the offence the subject matter of the warrant. That evidence was made available to the members of the Royal Ulster Constabulary and would be admissible in the prosecution of the applicant for the offence. Hamilton C.J. stated that the court would be failing in its constitutional obligation to defend and vindicate the constitutional rights of the applicant if it were, in the particular circumstances of that case, to give effect to the extradition provisions. In her judgment at p. 508, Denham J. (as she then was) phrased the question as one of whether "[…] this Court would be vindicating the*

constitutional rights of the applicant by allowing him to be extradited in circumstances where evidence is available which was obtained unconstitutionally in this country and which would be inadmissible in this country at trial and which would not on the face of it be inadmissible at trial in the other jurisdiction; whether the fruit of an unconstitutional act in this jurisdiction by servants of this State could be used in another jurisdiction against a citizen of this State as a result of an application for rendition."

103. At stake in Larkin v. O'Dea was whether it would be a failure to vindicate the requested person's rights to extradite him where evidence obtained by unconstitutional acts carried out by the servants of the State could be used in the prosecution against him in the requesting country. However, this case is clearly different in that, first and foremost, there is no evidence that any (purported) breach of the respondent's constitutional rights occurred in this jurisdiction. On its own, that is enough to distinguish the case of Larkin v. O'Dea as no breach of the respondent's constitutional rights has been established to have taken place in this jurisdiction. The court does not have to decide whether there would be any difference in outcome arising from the breach being carried out in this jurisdiction by organs of the requesting state, as there is simply no evidence that any such breach has occurred at all.

62. The facts of the present case are also entirely different to the facts in *Larkin v O'Dea*. The respondent did not point to any particular claim of unlawful and/or unconstitutional behaviour. Instead his affidavit was vague and merely suggestive of a breach of his rights. The Court is not satisfied that a breach of his constitutional rights has been established with regard to the taking of his fingerprints, the retention of those fingerprints or the transmission of those fingerprints. The Court is therefore not satisfied that that there is a real risk that surrender would violate his constitutional rights.

63. The respondent has also claimed that his rights were violated by the unlawful obtaining of photographic evidence. This point is rejected for the same reasons as set out above. It is also rejected because he has not established that such evidence (whether taken lawfully or unlawfully) has any relevance to the trial for the 1972 offences. What relevance there is refers back to what the respondent perceived as unlawful behaviour with regard to the Hyde Park bombing investigation by members of An Garda Síochána.

64. In all the circumstances, the Court rejects the point of objection relating to evidence procured in violation of his constitutional rights.

Article 8

65. For some considerable time now there has been an acceptance by the courts in this jurisdiction that surrender ought to be prohibited where surrender would amount to an unjustified or disproportionate interference with respect for the personal and family rights of a requested person. The approach to be taken by the courts has been carefully analysed by the High Court in the cases of *Minister for Justice and Equality v. T.E*. [2013] IEHC 323 and *Minister for Justice and Equality v. R.P.G.* [2013] IEHC 54. In those cases, Edwards J. outlined twenty-two principles on which the court should operate. It is unnecessary to set out those tests in full. What is required of the Court is a balancing the public interest in surrender against the personal and family interests of the requested person. It is only where there is a pressing social need for surrender that it will be justified.

66. It is important also to note that the Supreme Court has, in the case of *Minister for Justice and Equality v. J.A.T. (No. 2)* [2016] IESC 17 clarified that while exceptionality is not the test, it will only be in a truly exceptional case that extradition will be refused. At the heart of all of these principles is that this is a case specific analysis. The claim is generally made on the basis of Article 8 of the ECHR but can be made under the relevant provisions of the Constitution. There is no difference to the approach the Court must take based upon whether the claim is made under the Constitution or under the European Convention on Human Rights.

67. In support of his claim that surrender would breach his right to respect for his personal and family rights, the respondent referred to his personal circumstances including his continued residence in this jurisdiction with his wife and family. He relied upon his medical conditions, one of which, high blood pressure, he was only told of following his arrest in 2003 when he was informed by the prison doctor. Since that time he has had various treatment including the insertion of a pacemaker in September 2018. He has also suffered from various gastric conditions for which he is being followed up. He developed a separate bowel condition in 2015 which continues to flare up. He was diagnosed with sleep apnoea in 2016. His doctor concluded in a medical report of the 8th January, 2019, that the respondent *"has suffered from at least seven chronic conditions, mostly dating from 2013, and I would consider him to be in poor health."*

68. The respondent has pointed to his travels to and from Northern Ireland since 1998. He said he attended meetings of organisations engaged in the Peace Process. He said some activities were held in private but would have been known in the community. On other occasions he attended public events including the Sinn Féin Ard Fheis in Belfast in 2012. He did not travel in secret. He also had been to Great Britain on at least 10 occasions. Some of these involved flights from Derry to Birmingham where he presented his passport. He also made a journey to Canada during the application process for which he revealed his previous conviction in 1974 and the fact that he had been publicly identified as a person who was wanted in respect of the Hyde Park bombings. Notwithstanding that, he was granted permission to travel to Canada.

69. In *Corry*, this Court also dealt with an application under Article 8 to prevent surrender. In that case there had been significant culpable delay on the part of the authorities of the Federal Republic of Germany in seeking the surrender of that respondent. A request for his extradition had previously been rejected under the provisions of the 1965 Extradition Act on the grounds of his Irish citizenship. Despite that, the Federal Republic of Germany showed no urgency in seeking his surrender from this jurisdiction subsequent to the Act of 2003 for which citizenship was no longer an issue. He was sough in respect of an allegation of the mortar bombing of a British Army barracks in Germany. Despite that, the Court held that the gravity of the offence outweighed the private interests of that respondent.

70. In the present case, there has been some identifiable delay on the part of the prosecution authorities. It is not entirely clear why there was such a delay, although it is clear that they did not have sufficient evidence prior to 19th May, 2013 to prosecute the respondent. The Northern Ireland authorities have not been asked to explain the delay. The Court would only be engaging in speculation as to why that was so in the absence of an explanation from the authorities in Northern Ireland. If this case was a marginal one under Article 8, the Court would be obliged to ask for an explanation from the issuing state.

71. This is a case where there was at least a suspicion since 1980 that he had committed the offence. There were provisions which allowed for prosecution of the offences in this jurisdiction. That was not done and again the Court would be engaging in speculation if it dwells on why this might have been so. The Court has to have regard to the principle of mutual trust and confidence and that any decision made by the authorities in the issuing state were made for *bona fide* purposes. The Court is prepared to assume however for the purposes of the Article 8 considerations, that much of the delay, especially since 1998 when the respondent was freely travelling in the United Kingdom, particularly by air, was culpable delay. The delay since 2013 is also particularly noteworthy as the Northern

Ireland authorities must have had knowledge of the fingerprint evidence that had been obtained. On the other hand, the Court is entitled to acknowledge that a decision to prosecute in the present case, given the decision in the Central Criminal Court of England and Wales, would be complex and therefore require some time for analysis.

72. Even accepting that there has been culpable delay since 1998 but especially since 2013, this Court concludes that for such serious offences of violence, the high public interest in surrender is not significantly diminished. That remains the position even if there was earlier culpable delay in not taking every step possible to ensure his early prosecution. When considering his situation as a discrete point under Article 8, the public interest would outweigh the private interests of the respondent. His medical circumstances, although they have deteriorated even since his acquittal on the Hyde Park bombing, are not such that on their own, it could be said to be disproportionate to the pressing social need for his surrender. They are not of themselves of such severity that would make a trial or indeed imprisonment particularly onerous. They are mostly matters which are under control with the assistance where appropriate of medication. His family situation is again unremarkable. Undoubtedly, surrender would cause an interference with his relationships but there is nothing raised by him beyond what would be expected in any extradition. On the other hand, the offences for which he has been sought are offences of the utmost gravity. Even with the passage of time and his change of circumstances, the pressing social need for surrender outweighs his personal and family interests.

Abuse of process

73. Under the heading of abuse of process, the respondent relied on the cumulative effects of all the issues he had raised in the course of his points of objection. These included the delay, his Article 8 personal and family rights, the letter of assurance, the manner in which his case had been dealt with as regards the Hyde Park bombing, evidential issues at the trial and the use of his fingerprints obtained by Gardaí in this jurisdiction. The Court has dealt with these individually above and is satisfied that no point of objective taken individually establishes a ground upon which his surrender is prohibited. Nonetheless, it is necessary to consider these issues collectively in the context of whether they amount to an abuse of process. That entails examining what may amount to an abuse of process.

74. In their submissions on abuse of process, both parties relied upon the case of *J.A.T. (No. 2).* In that case, the High Court (*Minister for Justice and Equality v J.A.T.* [2014] IEHC 320) found that there was a *de facto* abuse of process as the requested person had suffered unjust harassment in the manner in which the requests for his surrender has been dealt with. The High Court held that the abuse of process could be addressed appropriately by an admonishment of the parties responsible. The question on the appeal to the Supreme Court (*Minister for Justice and Equality v. J.A.T. (No. 2*) [2016] IESC 17) asked if admonishment was a sufficient answer to a finding of an abuse of process. The Supreme Court was therefore acting on the basis of the finding of fact that had been made in the High Court.

75. The Chief Justice, in her judgment, held that where the High Court had found, correctly in her view, that there had been an abuse of process, she was satisfied that the factors taken cumulatively were such that there should not be an order for the surrender of the appellant. O'Donnell J., in his judgment, held that where a true abuse of process is established, it would normally follow as a matter of logic that the proceedings should not be further entertained and should normally be struck out. He said there may be cases where the abuse itself is one capable of remedy which might not lead to such a strikeout. In his view, if matters could properly be addressed by admonishment then it was open to doubt that the conduct amounted to an abuse *de facto* or otherwise.

76. O'Donnell J. stated that he would agree that the real issue in the case was whether an abuse of process had been established. He said that he accepted that while abuse of process normally involves an improper motive (and certainly can be more readily identified when that is present), it is not necessarily confined to such circumstances. In that regard, O'Donnell J. stated: -

> *"It may be that a situation can be arrived at in an individual case, perhaps without culpability and certainly without improper motive, but where it can nevertheless be said that to permit proceedings to continue would be an abuse of the Court's process in the sense that it would no longer be the administration of justice. I also do not rule out the possibility that there may be a case where the facts are so extraordinary that they call for explanation. However, in the present context, it must be kept in mind that the issue for an Irish court, in respect of which it is required to administer justice, relates principally to the surrender, and it is the process in relation to that which must be the primary focus of any such inquiry."*

77. In the UK, the concept of abuse of process is highly developed in the criminal sphere. In the Irish criminal context, the abuse of process jurisdiction is more rarely used. That it because there is a far greater reliance here upon the constitutional requirement for fair procedures; applications to stay a trial in this jurisdiction are generally based on the concept of fair procedures or fair trial. In the UK, there appears to be a power to stay proceedings on the grounds of an abuse of process in two categories of cases, namely: -

> (i) Where it will be impossible to give the accused a fair trial,
>
> and/or
>
> (ii) Where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case or where trying the accused would undermine public confidence in the criminal justice system and bring the criminal justice system into disrepute. (Judicial Review of Criminal Proceedings, Derek Dunne, Round Hall, 2011).

78. It was this latter part of the abuse of process jurisdiction that was at issue in the decision of Sweeney J. in respect of the prosecution of the respondent regarding the Hyde Park bombing. At para. 175, Sweeney J. concluded: -

> *"That this is one of those rare cases in which, in the particular circumstances, it offends the court's sense of justice and propriety to be asked to try the defendant."*

79. The minister's submission as regards abuse of process was similar to that with respect to the consideration of fair trial issues in surrender/extradition proceedings. The minister submitted that the appropriate jurisdiction in which to deal with these matters was that of the issuing state. The minister relied on the fact that in the case of the Hyde Park bombing, the issuing state operated the jurisdiction to stay those proceedings on the basis of the abuse of process. It could not, therefore, be said that there was an egregious defect in the system of justice operating within the issuing state that meant the respondent's surrender had to be prohibited. Furthermore, the minister submitted that a true examination of the issue of abuse of process could only really be carried out in the issuing state as it was the issuing state which had all of the information.

80. In the view of this Court, it is undoubtedly true that the issuing state is the most appropriate place to deal with the question of

an abuse of process as regards the criminal proceedings. The respondent has not asserted that there is any egregious defect in the system of justice in the issuing state that would prohibited him from relying on such a process to prevent his surrender to that state. That is not the end of the consideration for this Court, however. The real issue in these proceedings is whether it is an abuse of the process of this Court to *surrender him* in light of all the relevant facts. While the judicial authorities in the issuing state will undoubtedly be in a position to exercise control over the criminal proceedings and prohibit a trial where there has been an abuse of the process of their courts, it is for the High Court, as executing judicial authority, to determine if there is an abuse of process in surrendering him to face trial in the circumstances of this case.

81. In seeking to determine what might form an abuse of process, it is important to recall O'Donnell J. in *J.A.T. (No. 2)* said that considerations of "harassment and oppression" of "*de facto* abuse of process" require greater refinement and precision. In his view something was either an abuse of process or it was not. He said that while abuse of process did not require *mala fides* it was important not to dilute the jurisdiction by allowing the legal test to spread into one of negligence (see para 3 of the judgment).

82. It is perhaps helpful to quote from Barron J. in *Ryan v. DPP* [1988] IR 232 for an understanding of an abuse of process, although that case concerned a criminal prosecution in this jurisdiction. In that case, Barron J. stated: -

> *"The expression "abuse of the process of the court" is one which refers to a contamination of the entire proceedings. . . . the objection is to the fundamental basis upon which the proceedings are brought. . . . . Justice must be done and must be seen to be done. Where proceedings are commenced which violate this principle, then they are an abuse of the process of the court."*

That dicta accords with the dicta of O'Donnell J. in *J.A.T. (No. 2)* when he referred to "an abuse of the Court's process in the sense that it would no longer be *the administration of justice"* (emphasis added).

83. The respondent placed a great deal of significance in his oral proceedings on what he said were attempts to fabricate evidence against him. He relied upon an issue as regards an identifying picture that was to be used in the prosecution of the 1982 offences. He submitted that the picture was in fact a direct copy of a photograph of him that had been obtained from the Gardaí and that the purpose of it was to give a misleading impression that there was independent evidence linking him to the offence. He said that those facts were established during the hearing before Sweeney J.. I do not read the judgment of Sweeney J. as a finding that there was any impropriety in what had been done in respect of the photograph. In any event, his finding of fact is not binding on this Court or even evidence that the particular fact is true. It is simply evidence that he found that fact. Most importantly, the relevance of the respondent's claim that members of An Garda Síochána "*may have also engaged in the unlawful obtaining of photograph evidence*" (para 34 of respondent's submissions) to either his trial on the 1972 matters or to these proceedings has not been established. Even if there was some tangential relevance, it has not been established with sufficient cogency that this has any impact on his surrender in these proceedings.

84. The Court is also satisfied that issues about admissibility of evidence based upon a claim about different laws in this jurisdiction, do not have relevance to the question of abuse of process. This is so even where the offences are offences which could have been prosecuted in this jurisdiction. To hold otherwise would be to transfer the choice of trial venue to an executing judicial authority at the invitation of a requested person. That would not accord with the principle of mutual trust and in particular mutual recognition.

85. Furthermore, even where delay has changed the evidential picture e.g. death of witnesses and reliance on hearsay, the Court is not satisfied that this has any meaningful impact on consideration of abuse of process where the person's surrender is sought for prosecution for such serious offences. As stated above they are matters to be determined in the trial in the issuing state. All of these issues must be weighed in light of the following dicta of O'Donnell J. in *J.A.T. (No. 2):*

> *"These factors – repeat application, lapse of time, delay, impact on the appellant's son, and knowledge on the part of the requesting and executing authorities of those factors – when weighed cumulatively, are powerful. Even then, and without undervaluing the offences alleged here, it is open to doubt that these matter would be sufficient to prevent surrender for very serious crimes of violence. This illustrates that the decision in this case is exceptional, and even then close to the margin."*

86. Of major concern to the respondent is that the letter of assurance says on its face that he is not wanted for questioning by the Police Service of Northern Ireland ("PSNI") and was not wanted for prosecution. It was his submission that this assurance did not include a statement that this could change if other evidence was forthcoming. The respondent relied in his submissions on the Sweeney J. decision and to certain findings in the judgment. He relied, for example, on the finding that the respondent was entitled to rely upon the letter of assurance as an "unequivocal statement" that he was not wanted for any particular crime and that he would not be arrested for historical offences "unless new evidence came to light" or there was a new application for extradition (para 173(8) of the judgment, para 16 of respondent's submissions). It is unclear how this Court could be expected to come to a conclusion that the letter could only mean that he could not be prosecuted even if new evidence came to light.

87. Moreover, the respondent has not sought to establish by way of expert evidence from the UK that the judgment was binding on a Northern Ireland court as to the 1979 bombing offences. He has not sought to rely on evidence that it is certain or even likely that the judgment would be followed even if not binding. This Court must place mutual trust in the issuing state that it is intended to prosecute him, that he will be put on trial and that the decision to prosecute is made in good faith. In the absence of any evidence to the contrary, this Court cannot make a determination that the decision to prosecute in Northern Ireland and the issue of this EAW were designed to harass or oppress the respondent because the prosecution has no hope of success. The principle of mutual trust requires this Court to accept that this is a *bona fide* prosecution by the relevant authorities in Northern Ireland. Furthermore, it is necessary for this Court to have mutual trust in the ability of the issuing state to deal with these issues of an abuse of process; a contention that has not been put in issue.

88. As stated above, the real issue for this Court is whether there would be an abuse of the process *to surrender him*. The high point of the respondent's argument is that the letter of assurance exists and on the basis of that assurance, he travelled back and forth to Northern Ireland on a number of occasions. Furthermore, he travelled to London through Gatwick Airport on the basis that he was not being sought. It was the obtaining of the fingerprint in Gatwick Airport that became the catalyst for the prosecution of the offences the subject matter of this application for surrender.

89. Whether there has been an entrapment is clearly a matter for the trial in the issuing state. The question of abuse of the process of this Court, based upon his reliance on the letter of assurance, is a separate matter. Does reliance on the letter of assurance contaminate these proceedings so as to prohibit surrender as an abuse of process? Would it no longer be the administration of justice to allow this application for surrender to proceed in those circumstances?

90. The Central Criminal Court in England and Wales has already prohibited his trial for the Hyde Park bombings as an abuse of process. The findings of Sweeney J. at paragraph 173 set out a litany of failures as regards the assurance that was given in the letter. The letter of assurance should never have been given as regards the position in Britain (as distinct from Northern Ireland). It was however on the basis of that letter of assurance that he travelled through Britain. It is also the case that he was travelling in Northern Ireland in an open fashion since 1998 and in those circumstances it may be appropriate to draw the inference that he was not arrested for the 1972 bombings because of the letter of assurance. It appears that the arrest in Gatwick, Great Britain, enabled the Northern Irish authorities to obtain sufficient evidence to prosecute.

91. The finding of Sweeney J., which was expressly relied upon by the respondent, was that the failure to pass on the information to the DPP of Northern Ireland that the London Metropolitan Police sought him for the Hyde Park bombing amounted to a "catastrophic failure". Sweeney J. held that the giving of the assurance was "wholly wrong." It seems that there were opportunities to correct the impression given. They were serious failures undoubtedly. This Court has not been pointed to any finding in the judgment of Sweeney J., nor could the Court find any determination in that judgment, that these failures were deliberate. Sweeney J. said that "*to date there has been no sensible explanation for the various Operation Rapid failures".* Operation Rapid was the process set up to review those persons "*wanted by the PSNI in connection with terrorist related offences up to the date of the Good Friday Agreement*". Sweeney J. said that there were gaps in the documentation and that the prosecution was not entitled to benefit from those gaps and the lack of a sensible explanation. He did not however stay the application on that basis alone.

92. I am satisfied on the evidence before me that the respondent was misled by the letter of assurance that he would not be arrested for a pre-1998 offence if he travelled through Britain unless new evidence came to light. That the assurance was contingent is apparent from the respondent's submissions which rely upon that interpretation of the letter of assurance in the judgment of Sweeney J. I am not satisfied however that the evidence before me establishes that there was an *intentional* misleading of him with respect to the letter of assurance. The catastrophic failures and lack of explanation do not equate to a finding of *mala fides* or bad faith on the part of the UK authorities. While *mala fides* is not necessary to establish an abuse of process, it would be more readily inferred if *mala fides* was found. Moreover, the principle of mutual trust must apply to the consideration of this matter and, in the absence of evidence of deliberate intention, I must place confidence in the bona fides of the issuing state. The principle of mutual trust means that I must have confidence too that the respondent will be able to explore any further issues of lack of good faith at the trial of these offences if he is surrendered.

93. What was gathered during the Gatwick arrest was real evidence from the respondent; his fingerprints. On the evidence, there is nothing to enable me to find that this was collected from him by a deliberately or consciously unlawful act on the part of the Metropolitan police. Similarly, there is no evidence of a deliberate or conscious unlawful act on the part of the Northern Ireland or UK authorities in the bringing about the situation where he became liable to be arrested. If the evidence established bad faith on the part of state actors in the issuing state in terms of deliberately bringing about the situation where he was available for arrest and consequential evidence gathering, then, in all the circumstances of the particular case including delay and his personal circumstances, the Court would be satisfied that to surrender him would be an abuse of process.

94. In the absence of the element of *mala fides*, this Court must decide if it so oppressive and unjust as not to amount to the administration of justice i.e. to be an abuse of process, to surrender this respondent to face trial in Northern Ireland on evidence gathered in circumstances where he was misled, but not deliberately so, by the letter of assurance into travelling through Britain. That determination must also take into account other factors such as delay and his personal circumstances. The Court must consider whether this is an abuse of the process of this court where there were catastrophic failures on the part of the UK authorities in bringing about a situation where he was relying on that letter of assurance in making any travel plans.

95. This is a case therefore, where the dividing line between improper motive and negligent, even grossly negligent, conduct in the consideration of whether there has been an abuse of process comes into stark focus. It is important to restate that this is not a determination of whether a trial based on similar circumstances would be prohibited in this jurisdiction. The application by a court of trial in this jurisdiction of its constitutional duty to ensure fair procedures may result in the prohibition of a trial in these circumstances. A court in Northern Ireland may also take a view that this would be an abuse of the process of their courts by permitting this trial to proceed if he does face the trial. This is a decision that can only be taken at the trial. The decision for this Court in these proceedings is whether in the circumstances it would be so oppressive or unjust so as to be an abuse of the process of the Court to return him to face that trial even on the presumption that the Northern Ireland courts have a power to deal with the abuse of process issue.

96. These are alleged offences of the utmost gravity. There is a weighty public interest in ensuring that persons charged with offences face trial. There is also a weighty public interest that persons who are sought for surrender/extradition are surrendered in accordance with the relevant multi-lateral or bi-lateral international agreements. The following dicta of O'Donnell J. in *J.A.T. (No. 2)* is particularly relevant:-

> *"An important starting point, in my view, is that considerable weight is to be given to the public interest in ensuring that persons charged with offences face trial. There is a constant and weighty interest in surrender under an EAW and extradition under a bilateral or multilateral treaty. People accused of crimes should be brought to trial. That is a fundamental component of the administration of justice in a domestic setting, and the conclusion of an extradition agreement or the binding provisions of the law of the European Union means that there is a corresponding public interest in ensuring that persons accused of crimes, in other member states or in states with whom Ireland has entered into an extradition agreement, are brought to trial also. There is an important and weighty interest in ensuring that Ireland honours its treaty obligations, and if anything, a greater interest and value in ensuring performance of those obligations entailed by membership of the European Union. All agreements are based on broad reciprocity and there is, therefore, a further interest and benefit in securing the return to Ireland for trial of persons accused of crimes, or the return of sentenced offenders. There is also a corresponding public interest in avoiding one country becoming, even involuntarily, a haven for persons seeking to evade trial in other countries. There is no option in this jurisdiction for a court, in most cases, to direct a trial of the offence here (whatever the practical difficulties involved). This means that the decision to refuse to surrender in individual cases will provide a form of limited immunity to a person so long as they remain in this jurisdiction. The question is, therefore, not where a person should be tried, but whether they should be tried at all so long as they remain in Ireland. There is, therefore, a closer analogy in this regard to be drawn between the analysis of claims involved in domestic criminal proceedings and surrender/extradition than there is between surrender and deportation, for example. Trial and, if appropriate, sentence in this jurisdiction may always involve an interference with family and other relationships, and it is necessary, therefore, to assess the additional interference occasioned by trial abroad in circumstances where it may also be appropriate to take account of the fact that arrangements exist to facilitate prisoners who wish to serve their sentences in their home state. I think it is fair to say that it is only if some quite compelling feature, or combination of features, is present that it would be appropriate to refuse surrender on*

grounds of due process or interference with rights. It is important that courts should also rigorously scrutinise the factual basis for any such claims against that background."

97. It is clear that the public interest in his surrender is extremely high in light of the offences. That remains so even when one takes account of the delay, including when this may be considered as culpable delay. I have weighed in the balance all the other matters urged by the respondent. These include his engagement in the Peace Process and his travels back and forth to Northern Ireland. With respect to the Peace Process, it has not been established that as a general rule it was part of the Good Friday Agreement that no further prosecutions regarding older offences would take place. I have also considered his averment that he could not receive a sentence of more than two years if he were convicted. In light of the EAW, which was not challenged by expert evidence as to the applicable law, is incorrect. The respondent would be subject to a maximum sentence of life imprisonment if convicted. It is stated in the EAW that he would be eligible for accelerated release under s. 10 of the Northern Ireland (Sentences) Act, 1998. Under those provisions it is stated that he would serve two years of the life sentence in prison before being released on licence. While this is significant as to how long he would serve in custody, it does not take away from the fact that he is liable to be sentenced to life imprisonment for these very serious crimes of violence. I have also taken into account his personal circumstances, including his medical conditions and the disruption to his family life.

98. Weighing all of the factors in this case, the most significant of which is the culpable "catastrophic failure" of the UK authorities in respect of the letter of assurance, I am not satisfied that it would amount to an abuse of the process of the court to surrender him to face trial in Northern Ireland. The matters when weighed cumulatively do not prevent his surrender for prosecution in respect of these offences of the utmost gravity. It is also in circumstances where not only is there a presumption, but the respondent has never contested, that issues arising out of the letter of assurance may be fully ventilated in the courts of Northern Ireland and his trial stayed if an abuse of process is found. This Court is satisfied that it is not an abuse of process to surrender him to Northern Ireland to face such a trial. I therefore reject the respondent's points of objection in so far as they relate to a claim of abuse of process.

Conclusion

99. For the reasons set out above, this Court rejects all the points of objection raised by the respondent to his surrender. The Court will therefore make an Order for his surrender to the person duly authorised by the issuing state to receive him.