THE HIGH COURT

Record No. 2011 No. 297 EXT

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

THOMAS JOSEPH O'CONNOR

RESPONDENT

AND

-BY ORDER-

THE MINISTER FOR FOREIGN AFFAIRS AND TRADE

NOTICE PARTY

JUDGMENT of Ms. Justice Donnelly delivered the 25th day of July, 2017.

1. A European Arrest Warrant ("EAW") was issued on 13th June, 2011 by a judicial authority in the United Kingdom of Great Britain and Northern Ireland ("the U.K.") seeking the surrender of the respondent to serve a sentence imposed upon him in respect of two offences of conspiracy to cheat the public revenue. He is also sought for prosecution for an offence of breaching bail. His surrender was ordered by the High Court (Edwards J.) on 28th January, 2015 pursuant to s. 16 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"). Following the dismissal of the respondent's appeal to the Court of Appeal and then to the Supreme Court, the order of surrender was affirmed by a unanimous Supreme Court on 30th March, 2017 (See *Minister for Justice and Equality v. O'Connor* [2017] IESC 21).

2. Subsequent to that decision of the Supreme Court the respondent launched a succession of legal actions with the objective of preventing his surrender. These actions are grounded upon two main arguments. The first is that, by virtue of the notification by the U.K. under Article 50 of the Treaty on European Union ("TEU") of her intention to leave the European Union ("E.U."), the respondent's surrender is prohibited (hereinafter referred to as "the Brexit point"). The second general ground is that, in light of the manner in which the proceedings had unfolded, the respondent is entitled to reopen all matters which had formed his original points of objection. The second ground encompasses the two original objections to surrender in his points of objection; a point about legal aid and an abuse of process point.

3. The only ground that the respondent argued in the course of the hearing of the application for his surrender before Edwards J. was the legal aid point. In the present hearing, the respondent submitted that, arising from the treatment by these courts of his previous argument concerning the issue of legal aid, he was entitled to re-litigate that matter. The respondent also submitted that, because he did not advance the abuse of process point on the basis that his legal aid point might be held to be moot if he did, he should now be entitled to argue that abuse of process point.

4. In the aftermath of the Supreme Court decision of 30th March, 2017 rejecting his appeal, the respondent issued both habeas corpus proceedings and plenary proceedings challenging his surrender. The earlier history of those proceedings are set out in a Supreme Court ruling of 3rd July, 2017 which dismissed an application by the respondent to re-enter the case in the Supreme Court (see *Minister for Justice and Equality v. O'Connor* [2017] IESC 48). That Supreme Court judgment is considered in more detail later.

5. This present hearing came on before the High Court in circumstances where the minister accepted, having given an similar indication to the Supreme Court in the case of *Minister for Justice, Equality and Law Reform v. Wharrie* [2016] IESC 63, that the Brexit point could be raised before the High Court as it had arisen after the order for the respondent's surrender was made but before his actual surrender. There was an initial disagreement between the parties as to the extent of the minister's concession, but the respondent now accepts that the minister only conceded that the applicant should have the right to raise the Brexit point before the High Court in the context of the s. 16 surrender proceedings.

The Brexit Point

6. The evidence relied upon by the respondent in this case is contained in an opinion of Helen Malcolm QC of the Bar of England and Wales. She is a Queen's Counsel, Recorder of the Crown Court and Deputy High Court Judge practising in Gray's Inns, London. She specialises in extradition law and white collar crime and has a particular interest in European criminal law. Her expertise in the area is not in question.

7. Ms. Malcolm was asked to comment on "the effect of Brexit now, on existing extradition arrangements with the United Kingdom under the EAW provisions; and on the effect of Brexit looking into the future". She was asked in particular to look at the issues as to whether the rights that the respondent enjoyed when his surrender was ordered would still exist and/or will still be enforceable after Brexit. She gave her opinion that giving allowance for the maximum licence period, the respondent "will still be in prison when the UK leaves the EU on 29th March, 2019".

8. Ms. Malcolm said that any person returned within the E.U. on the basis of an EAW request potentially has the benefit of four protections from four different sources. These are as follows:

> (a) The benefit of safeguards enshrined in the domestic law of the executing state (she deferred to experts in Irish law but she suggested that Brexit would have no effect upon the domestic law of Ireland);
>
> (b) The benefit upon return of safeguards to be found in the domestic law of the issuing state. According to Ms. Malcolm, Brexit will not, at least in the first instance, alter domestic legislation (whether under the Extradition Act, 2003 or otherwise) in the United Kingdom;
>
> (c) Insofar as they are different or additional, the benefit of safeguards within the Council (EC) Framework Decision of 13th June, 2002; (2002/584/JHA) on the European Arrest Warrant and the surrender procedures between Member States

("2002 Framework Decision"), and;

(d) The overarching benefit of safeguards under the European Convention on Human Rights ("ECHR").

9. Ms. Malcolm states that any further discussion must be prefaced with various warnings, including that nothing has yet been agreed as regards the U.K. and the European Union. Ms. Malcolm then indicated that the best that could be done, as no transitional provisions had yet been published and nothing had been agreed, was to glean an indication of the U.K. government's intended negotiating position on the EAW from the various pronouncements made to date.

10. Ms. Malcolm referred thereafter to parliamentary research and briefing papers. She also referred to government statements and in particular the U.K. Prime Minister's twelve principles to "guide the Government in fulfilling the democratic will of the people". She stated that one of those was cooperating in the fight against crime and terrorism and that the Prime Minister said that she wanted the future relationship with the E.U. to include practical arrangements on matters of law enforcement and the sharing of intelligence matters with the U.K.'s allies. Ms. Malcolm also referred to the European perspective and the fact that the European Council and European Parliament were insisting that Brexit be negotiated first, followed by negotiations on future relations between the U.K. and the European Union. The Permanent Secretary to the Home Office had indicated that there could be complications for existing EAWs if the U.K. was forced to leave the E.U. before negotiating a surrender agreement as a third country.

11. In respect of the matter at hand, Ms. Malcolm said that it was not easy to give an opinion on the likely effect/outcome of Brexit in relation to extradition in the current state of uncertainty. She said that the U.K. government was acutely aware of the concerns expressed by law enforcement experts. She opined that even if there is a bespoke arrangement for extraditions with the U.K., there is the risk that this will not necessarily allow individuals their right to take (an equivalent of) a preliminary reference to the Court of Justice of the European Union ("CJEU"). She says that the preliminary reference procedure is a new one in the U.K. (presumably she means relating to European arrest warrants) and to date no court has granted a preliminary reference in an extradition matter as far as she is aware. She says that the U.K. would not greatly miss a right it has, to date, not exercised in the field of extradition.

12. Under the heading "Post 'Brexit Day' 29 March 2019", Ms. Malcolm states it has to be assumed that any transitional provisions will terminate at or soon after Brexit day. She goes on to say: "Thus Mr O'Connor may well find himself post 29 March 2019 in a jurisdiction in which the rights he earlier enjoyed under the FD [Framework Decision] are difficult to enforce, if they apply at all. He will be relatively unlikely, in my view, to be able to challenge by way of PR [preliminary reference] at that stage (though his court proceedings will have terminated in any event)."

13. Ms. Malcolm then goes on to say that there are two further considerations, which are protection under the ECHR and prisoner transfer rights. She raises the issue of the U.K.'s Human Rights Act, 1998 and derogation from the European Convention on Human Rights. In essence, what she is saying is that the U.K. could, in theory, seek to derogate and could also repeal the Human Rights Act, 1998. Finally, she talks about prisoner transfer rights and says that the respondent will be able to profit from the E.U. prisoner transfer provisions contained in the Council (EC) Framework Decision of 27th November, 2008 (2008/909/JHA) on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union ("the 2008 Framework Decision on Prisoner Transfers"), another measure which the U.K. chose to opt back into in 2014. She says there exists the Council of Europe Convention on the Transfer of Sentenced Persons but its terms are not identical.

Submissions of the Respondent

14. The respondent submitted that once notification pursuant to Article 50 of the TEU was delivered to the E.U. Council on 29th March 2017, the process of the U.K. leaving the E.U. began. Counsel submitted that as things stand, it is likely the U.K. will exit the E.U. on 29th March, 2019. He submitted therefore it is probable that for at least some of the duration of the envisaged custody of the respondent in the U.K. were he to be surrendered there, the respondent would not enjoy the protection of the 2002 Framework Decision or the 2008 Framework Decision on the Transfer of Prisoners, or under the EU Charter of Fundamental Rights ("the Charter") or access to the CJEU under Article 267 of the Treaty on the Functioning of the European Union ("TFEU").

15. Counsel for the respondent submitted that the respondent's surrender would be unlawful for the following reasons:

(1) Both the Framework Decision and the Act of 2003 as amended are predicated on the requesting state being an E.U. member whilst surrendered individuals are in that state's custody. Counsel points to Chapter 3 which is headed "Effects of the Surrender" and refers to Article 26 on the deduction of the periods of detention served, Article 27 on possible prosecution for other offences (rule of specialty) and Article 28.4 on being extradited to another state;

(2) In the 2002 Framework Decision, third countries have very limited entitlement or obligations. Counsel says that had it been intended that the 2002 Framework Decision should apply to post Brexit U.K., a third country express provision would be required to that end which has not been made;

(3) On 1st January, 2004, S.I. No. 4 of 2004 applied the Act of 2003 to the United Kingdom. At that time the E.U. treaties contained no provision for withdrawing from the European Union. Counsel submitted that the S.I. applies only to the U.K. for such time as it remains in the E.U. and has not notified its intention to leave. Delivering the TEU Article 50 notice was a fundamental change of circumstance (as per the Vienna Convention on the Law of Treaties, Article 62) that invalidates that S.I.'s unqualified reference to the United Kingdom. The respondent raised an issue about the validity of that S.I. and in the circumstances, the Minister for Foreign Affairs and Trade was joined to these proceedings as a notice party on consent;

(4) The present impasse might be redeemable by s. 2 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act, 2012 if its prerequisites were satisfied; however, no such order has been made. This section permits, on certain conditions, the notice party to apply the provisions of the Act of 2003 to third countries;

(5) By analogy with the decision of *R v. Metropolitan Police Commissioner*, *Ex Parte Hammond* [1965] AC 810 where the pre-1922 rendition arrangements between Ireland and England were held not to have survived independence and the disbandment of the Royal Irish Constabulary.

16. Underpinning all his submissions is the respondent's contention that matters of E.U. law have been raised and insofar as there may be any doubt as to the legal position, an Article 267 reference to the CJEU is requested. Counsel for the respondent also submitted that insofar as Irish law alone is concerned, for surrender to be lawful there would have to be evidence that, until approximately

2022, U.K. law will provide that those surrendered on foot of EAWs will be protected *inter alia* under Chapter 7 of the 2002 Framework Decision and will have access to the CJEU under Article 267 of the Treaty on European Union. He submitted that there would have to be an amendment to s. 31 of the Act of 2003 to provide that it applies to states that are leaving the E.U. and that S.I. No. 4 of 2004 would have to be replaced to provide that it applies to the U.K. notwithstanding that she is leaving the European Union. He says that surrender could not be lawful until the constitutionality of the new regime is upheld.

17. In the course of his submissions, counsel cited the TEU and Article 2 thereof, which refers to the E.U. being founded on values which include the rule of law. In the submission of counsel for the respondent, what was at issue was the principle of legality and that surrender, if permitted, would take place in the context of an absence of a legal framework. He also referred to Article 6 of the TEU in which the E.U. recognised the rights, freedoms and principles set out in the Charter of Fundamental Rights. Counsel submitted, in light of the provision in the Charter concerning interpretation of the Charter that, to all intents and purposes, the ECHR was E.U. law for those purposes. Counsel referred to Article 50 of the TEU which he submitted envisaged a deal or agreement being made.

18. Counsel referred to Edward and Lane on *European Union Law* (Edward Elgar Publishing Ltd., 2014) and to the issue of secession from the European Union. This was only an option post the enactment of the Lisbon Treaty, 2007: thus, it has not applied at the date of enactment of the Act of 2003.

19. The respondent wrote a letter to the notice party on 19th June, 2017 "advising" that S.I. No. 4 of 2004 insofar as it designated the U.K. was in contravention of E.U. law. The letter called upon the notice party to revoke the designation entirely or else appropriately amend it. Despite the letter and despite joining the Minister for Foreign Affairs and Trade on consent as a notice party, there was little if any argument specifically directed by the respondent to this issue. The issue was dealt with in a general sense as part of the arguments on Brexit.

20. The respondent referred to the relevant parts of s. 10 of the Act of 2003 as originally enacted as follows:

> "Where a judicial authority in an issuing state duly issues a European arrest warrant in respect of a person—
>
> (a) …
>
> (b) …
>
> (c)…
>
> (d) on whom a sentence of imprisonment has been imposed… in respect of an offence to which the European arrest warrant relates
>
> that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision, be arrested and surrendered to the issuing state."
>
> The underlined words have now been deleted from that section but are relevant to the determination of this issue as this EAW was endorsed by the High Court prior to the amendment of the Act of 2003.

21. Counsel submitted that the 2002 Framework Decision at Recital 11 stated that it was replacing all other extradition arrangements between member states. Recital 12 concerns fundamental rights and counsel submitted that for the minister to succeed in the application to surrender the respondent, the minister had to show that the Charter would remain a part of U.K. law. There was no evidence that that would occur. Counsel also referred to Article 1 para. 3 of the 2002 Framework Decision in which it was stated that the 2002 Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union. He referred to the issues concerning the surrender decision under Article 15 of the 2002 Framework Decision and Article 17 in respect of time limits and submitted that it was almost ten years since the U.K. had first sought the respondent's surrender. He referred in particular, as set out above, to the effects on surrender as set out in Articles 26, 27 and 28 of the 2002 Framework Decision. He submitted that there was no evidence before the court that any such deductions or respect for specialty or guarantees about subsequent extradition would be available post Brexit.

22. Counsel for the respondent referred to various other agreements to which the U.K. might have been a party and to the Extradition (European Union Conventions) Act, 2001. He submitted that the U.K. might have been made a third country to which the EAW procedure could apply. Counsel submitted that as we are at an in-between period at present nothing could be dealt with. He submitted that the respondent's surrender should be refused or perhaps, although he did not agree with this, postponed until the issue of transitional arrangements was clear.

23. Counsel referred to the case of *Attorney General v. Hilton* [2005] 2 I.R. 374, a case coincidentally concerning an offence of cheating the Revenue. Reliance was placed on the decision to show that the concept of desuetude still applied in this country. He also referred to the final paragraph of the judgment to submit that, by analogy, the law here was so vague and uncertain that surrender could not be granted. He referred to the case of *Criminal Proceedings against Petruhhin* (Case C-182/15) [2017] QB 299, a decision of the CJEU, concerning the issue of the extradition of an Estonian national to Russia from Latvia in circumstances where a Latvian national could not be so extradited. His submission in that regard seemed focused on the fact that the CJEU was able to fashion a novel solution to what had been unforeseeable difficulty.

24. Counsel relied on the *Metropolitan Police Commissioner v. Hammond* [1965] AC 810 stating that it was his most important case. The case concerned the operation of the system of extradition which had been in operation since before Ireland's independence from the United Kingdom. He submitted it showed that a system of extradition could not be applied as if secession had not happened.

25. Counsel for the respondent sought to rely upon analogies with Treaty law although he accepted that the 2002 Framework Decision was not a treaty in the commonly understood sense. He referred, however, to *Modern Treaty Law and Practice* (Cambridge University Press, 2013) by Anthony Aust, dealing with the situation where there was a supervening impossibility of performance of a treaty. This was used as an analogy as counsel submitted there was going to be an imminent frustration of the 2002 Framework Decision because of Brexit. Counsel also referred to the concept of fundamental change of circumstances (*rebus sic stantibus*) which render treaties inapplicable. In his submission, there was fundamental change of circumstances here due to the impending cessation of the U.K. from the European Union. He also relied on the principle of desuetude.

26. A second senior counsel (appearing without prearranged indication from the court that a second senior would be included in the legal aid recommendation) addressed the court in relation to the case of *R (Miller & Anor.) v. Secretary of State for Exiting the*

European Union [2017] 2 WLR 583. This is a decision of the U.K. Supreme Court in respect of the entitlement of the U.K. government to trigger Brexit without the prior approval of the U.K. Parliament. That judgment also encompassed cases from Northern Ireland. Counsel submitted that what was clear from the decision was that the U.K. government had stated that the giving of notification under Article 50 was definitive and could not lead to a return to the European Union. He submitted that the issue in this case required a submission to the Court of Justice of the European Union.

The Suggested Questions
27. Counsel on behalf of the respondent submitted to the Court a series of questions that this Court might consider submitting to the CJEU:

1. Whether it was premature to request an Article 267 TFEU reference for a ruling on the respondent's objection to surrender related questions or must any such reference await the conclusions of the cessation procedure or some other event.

2. Is it compatible with the EU treaties, the Charter and the 2002 Framework Decision:

(a) To order the respondent's immediate surrender?

(b) To so order in circumstances where the previous EAW was withdrawn without explanation shortly before the respondent's appeal had been due to be heard against an order that he be surrendered under that European arrest warrant?

(c) To so order where there has not been and, under the requested state's EAW procedural law there cannot be, a determination of the precise merits of an objection to surrender that the respondent raised that was referable to a provision of the 2002 Framework Decision?

(d) To defer ordering the respondent's surrender until such time as the E.U. law rights he presently would enjoy if he had already been surrendered (e.g. Chap. 3 of the 2002 Framework Decision and availability of an Article 267 reference) remain fully effective there until the envisaged duration of his detention or other specified transitional arrangements have been adapted there?

(e) If surrendered, under Article 26 of the 2002 Framework Decision to deduct only periods the respondent was actually detained under the second warrant and to disregard the periods he had been detained under the earlier abandoned warrant?

(f) If surrendered under Article 26 not to deduct the periods during which he was provisionally released from the detention and was under extremely strict bail conditions?

Submissions of the Minister
28. Counsel for the minister submitted that on the Brexit point, there were two ways of looking at what was at stake. The first was (a) whether there was some provision of the Act of 2003 which would be breached by surrender or (b) whether it would be unconstitutional by virtue of s. 37 of the Act of 2003 to surrender him. Counsel submitted that none of the evidence or submissions shows any basis for saying that the respondent's surrender is prohibited.

29. Counsel commented generally on the opinion of Ms. Malcom QC in submitting that it was not so much an opinion as to law but contained factual information as to what had happened to date. Counsel submitted this was generally available information. He submitted that, ultimately, what was being stated by Ms. Malcolm was that the outcome was unknown. He submitted, however, that of considerable importance was her opinion that Brexit would not, at least in the first instance, alter domestic legislation. He submitted that there was later speculation as to what arrangements might be put in place.

30. Counsel rejected the submission that there was an onus on the State to provide evidence. Counsel also submitted that there was no evidence of a vacuum in legal provision, as U.K. law would still be in existence. Counsel submitted that Ms. Malcolm's final opinion that the respondent may well find himself in a jurisdiction where rights he had previously enjoyed are difficult to enforce, was not really based upon any ground supplied previously in the opinion.

31. Counsel submitted that the respondent's assertion that it was "probable" that at least for some of the duration of the respondent's envisaged custody in the U.K. were he to be surrendered, he would not enjoy the protection of the 2002 Framework Decision, the 2008 Framework Decision on the transfer of prisoners, or the E.U. Charter, or access to the CJEU was not supported in any way by the opinion of Ms. Malcolm, except perhaps with regard to the availability of the preliminary references to the Court of Justice of the European Union. He submitted that her opinion was not an opinion on foreign law, but was her opinion on what was the likely outcome of the Brexit negotiations. It was not an opinion as to how that likely outcome will affect the law of the United Kingdom.

32. With respect to the lack of the ability to make a reference to the CJEU, counsel characterised Ms. Malcolm's opinion as highly qualified as she says that the respondent's court proceedings will have terminated in any event. She did not envisage what further matters might be required to be ventilated or whether they would be adequately addressed under U.K. domestic legislation. In any event, counsel submitted it was entirely speculative as to whether in the context of the 2002 Framework Decision, the U.K. would withdraw from the jurisdiction of the Court of Justice of the European Union. A fundamental submission was made that the lack of reference could not possibly amount to a reason to set aside his order for surrender. The availability of the reference had not made the slightest impact upon the validity of the U.K. arrest warrants to date nor was there any basis upon which such suggestion could be made.

33. Counsel further submitted that the respondent's arguments were without evidential foundation and that the judgment of this court in *Minister for Justice and Equality v. A.M.* [2016] IEHC 568 applied without distinction or at least without material difference to the situation that had arisen here. That case had dealt with a Brexit point raised prior to the notification of the intention of the U.K. to withdraw from the E.U. pursuant to Article 50. Counsel submitted it was surprising that it had not been referred to by counsel for the respondent and that no attempt had been made to distinguish it.

34. Without prejudice to that overarching submission, counsel replied to the specific submissions made on behalf of the respondent. In answer to the respondent's contention that the 2002 Framework Decision and the Act of 2003 are predicated on the requesting state

being an E.U. member state whilst surrendered individuals are in that requesting state's custody, counsel submitted that it was far from clear that any such assumption was made in the 2002 Framework Decision. However, even if it was to be so assumed, this did not and could not amount to a ground for non-surrender. As matters stand, counsel submitted the U.K. is a member state and there is nothing in the 2002 Framework Decision, much less the Act of 2003, to suggest that the 2002 Framework Decision will cease to apply if and when a member state exits the European Union.

35. Insofar as the respondent was seeking to rely on s. 10 of the Act of 2003 as originally enacted, counsel submitted that, even if the 2002 Framework Decision can be considered to apply directly in Irish law, its provisions do not preclude surrender to a member state that has served notice under Article 50. Counsel also relied on s. 10 of the Act of 2003 as originally enacted as stating that a person shall be arrested and surrendered to the issuing state in accordance with the provisions of the Act and the 2002 Framework Decision. He submitted that at most it was only the steps to be taken in pursuit of arrest and surrender that might arguably have to be taken in accordance with the 2002 Framework Decision, *i.e.* this did not affect matters after surrender.

36. With regard to the respondent's contention that, if it had been intended that the 2002 Framework Decision would apply to a post Brexit U.K. a third country express provision to that end would be required, counsel submitted this was merely a different way of expressing the first contention of the respondent. Counsel submitted that the U.K. was a member state of the E.U., and therefore the 2002 Framework Decision and more importantly the Act of 2003 applied to the U.K. and will continue to apply unless and until some new arrangement is entered into and/or the U.K. ceases to be a member state. It would be at that point that the Minister for Foreign Affairs and Trade would have the option to extend the provisions of the Act of 2003 to it under the provisions of the Act of 2012.

37. Counsel rejected the submission that because Article 50 TEU did not exist at the time the notice party designated the U.K. on 1st January, 2004, the designation must be deemed to come to an end on the service of the Article 50 notice. The reference to the Vienna Convention was irrelevant in the context of the 2002 Framework Decision not being a treaty. In any event, the provisions of the Vienna Convention did not have any relevance even by analogy. The S.I. No. 4 of 2004 continued to apply and the question of whether its designation would have to be revisited could only arise if and when the U.K. ceases to be a member state of the European Union. With respect to the submission that there was an impasse, counsel submitted this was without substance: the U.K. is not a third country but is a member state.

38. Counsel for the minister rejected any analogy between the current situation and the finding of the House of Lords in *Metropolitan Police Commissioner v. Hammond*. Counsel submitted that the House of Lords in that case had concluded that rendition could not proceed because the changes to the endorsement of warrants that had been made under Irish law had not been effected under English law. Thus, whereas English law provided for the rendition to Ireland of persons on foot of warrants endorsed by the Inspector General of the Royal Irish Constabulary, it did not so provide in the case of warrants endorsed by a Deputy Commissioner of An Garda Síochána. Counsel submitted it was not because of the general change in circumstances that the rendition was refused; it was because it was not lawful under English legislation and perhaps also because there would have been no access to the courts of England to challenge it. This latter aspect had been part of the *ratio decidendi* of *The State (Quinn) v. Ryan* [1965] I.R. 70.

39. With respect to the reference to the CJEU, counsel submitted that no question of E.U. law was at issue. No clarification was required. Insofar as there were a series of questions handed in, counsel submitted that this was a fishing expedition. Some of the points had not even been canvassed before the Court nor indeed was there any evidence regarding this, as an example counsel referred to the issue of the question of liberty and bail.

40. Counsel submitted that this Court's judgment in *A.M.* should be upheld without qualification. The question of what will happen between now and 29th March, 2019 remains speculation. The departure of the U.K. from the E.U. is a matter for negotiation and even assuming it occurs on that date, the terms upon which it may leave are unknown.

41. Counsel submitted that this issue of surrender was a matter of national law. He submitted that contrary to the assertion by the respondent that it was for the State to show that the Charter will remain, he submitted that it was for the respondent to show that his fundamental rights will not be protected. There was an obligation to respect fundamental rights. This was part of the 2002 Framework Decision itself and that was being relied upon by the respondent. Furthermore, under s. 4A of the Act of 2003, this Court had an obligation to presume that the U.K. would respect fundamental rights. It must be presumed that the U.K. will respect the guarantees. This was as a matter of law and not merely a hypothetical question.

The Respondent's Reply

42. In reply, counsel for the respondent submitted that the fundamental issue was one of legal certainty. After the respondent has spent time in custody, there will be a situation where the U.K. will not be in the E.U. and will not be a party to the 2002 Framework Decision. The question is what will be the position. He accepted that Ms. Malcolm was quite clearly speculating and said there was no certainty and indeed that the present state of affairs would continue. He submitted that the U.K., which was indirectly the client of counsel for the minister, could shed light on what will happen but they had put no evidence before the court. He said that he could not prove what would be a catastrophe but he said it was unfair to expect his client, the respondent, on legal aid, to say what the view of the government of the U.K. will be. He submitted that it was simply wrong to leave the respondent in a state of legal limbo. He said he had rebutted the presumption as best he could.

43. Counsel submitted that he had not addressed the *A.M.* decision for the simple reason that it had been decided before the Article 50 notice had been sent. He submitted that the *Miller* case showed that Brexit was now inevitable and that that was the relevance of the *Miller* case. He submitted that this was no longer a matter of uncertainty as to whether Brexit would take place but that Brexit was going to take place.

44. He submitted that the issue regarding Chapter 3 of the 2002 Framework Decision meant that these provisions would no longer apply. These were not trivial matters and that there could be no guarantee. He submitted that the issue of the Vienna Convention was important as it had shown how courts could use the Vienna Convention to aid in interpretation. He submitted that the U.K. court had done so in the cases of *Assange v. The Swedish Prosecution Authority* [2012] UKSC 22 and *Ministry of Justice, Lithuania v. Bucnys and Ors* [2013] 3 WLR 1485. He submitted that if the 2002 Framework Decision was a treaty, there was now a fundamental change of circumstances which terminated it. As regards *Hammond*, counsel submitted that the issue had been that after the secession of Ireland, the arrangements made in a unity state could not survive.

The Court's Analysis and Determination on the Brexit Issue

45. This Court has already given judgment in a Brexit related challenge to surrender to the U.K. under a European arrest warrant. In *Minister for Justice and Equality v. A.M.*, the challenge to surrender arose in circumstances where the U.K. population had voted in a referendum to leave the E.U., but the U.K. had not yet given notice under Article 50. The case is distinguishable from the present case on that basis. In *A.M.*, it was still in the realm of speculation as to whether the U.K. would give the required notice. Furthermore,

unlike the present case, there was no evidence as to the legal position in the United Kingdom.

46. This Court had been prepared, however, in *A.M.*, to take judicial notice that there was at least a significant risk that the U.K. would invoke Article 50 of the TEU for the purpose of leaving the European Union. In those circumstances, the Court considered the position in light of the significant risk of the U.K. leaving the European Union. Although the findings therein are not binding on this Court, this Court is satisfied that the rationale behind the findings of the High Court in A.M., as set out from para. 53 onwards, is applicable to the circumstances of the present case.

47. In particular, this Court adopts paras. 53-56 of A.M. insofar as they apply to the present case:

> *"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.*
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> *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 reciprocity 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.'
> >
> > *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.'"

48. In the present case, counsel for the respondent submitted that there is more than a risk of the U.K. leaving the E.U. and that there now is certainty. This Court has doubts as to whether it was an appropriate means of proof to rely upon the apparent concession of the U.K. government in the *Miller* proceedings to the effect that once Article 50 notification had been given, exit was inevitable; however, the Court does not have to determine that issue. This Court does not view the fact that there may be certainty as to the U.K. leaving the E.U. (at some point in the future) as having any effect upon the decision that the High Court has to make (or more specifically has already made) in connection with this otherwise valid European arrest warrant. This Court's duty is to surrender a requested person to the relevant person in the issuing state entitled to receive him or her, provided that all the conditions under s. 16 of the Act of 2003 have been met.

49. The Court is satisfied that the principles enunciated in *A.M.* apply even though the U.K. has triggered Article 50. The Court is satisfied that in so far as the respondent made arguments that differ from those in *A.M.*, they do not affect the findings set out therein. The order of surrender speaks to the situation that obtains at the time it is made. The U.K. is a member state of the E. U. and the Court must surrender a person to the U.K. who has been requested on an otherwise valid European arrest warrant.

50. The arguments of the respondent relating to the Brexit point did not address that central core of the decision in *A.M.*; that the Court must deal with the issues of surrender on the basis of the law as it currently stands and that there was no evidence that there was a real risk that any specific right set out in the Act of 2003 (or the 2002 Framework Decision) would be violated. The same position applies in the present case. The individual arguments that were made by the respondent are not necessary to address in light of the above finding, but in any event the Court is satisfied that they are without merit. For the sake of completeness the Court will outline why those arguments must be rejected.

51. Section 10 of the Act of 2003 at the time of enactment referred to the 2002 Framework Decision. As was stated in the case of *Rimsa v. Governor of Cloverhill Prison and Anor* [2010] IESC 47 this manner of drafting complicated matters insofar as two legal norms were applicable. The former Chief Justice, Murray CJ, pointed out in *Rimsa* that:-

> *"Framework Decisions, as their name suggests, are legislative measures drafted in terms which range from the general to the specific intended to be effectively implemented in each Member State through its own national legislative measures as Article 34(2((b) of the Treaty makes clear. In principle therefore it is national legislation which must give effect to the Framework Decision and achieve its objectives. That will usually mean that the provisions of the Acts of the Oireachtas themselves contain all the elements necessary to give effect to a Framework Decision. That would not preclude, however, an Act expressly requiring something to be done in accordance with a specific provision of a Framework Decision particularly, where such a provision is sufficiently clear and defined so as to be capable of being enforced or applied by a Court.*

That might be done provided a section of the Act itself does not at the same time, and in parallel with the particular provision of the Framework Decision, purport to give effect to the latter provision so as to ensure that there is only one legal norm or provision applying to a particular matter.

What is unsatisfactory and which has given rise to litigation, and likely to do so in the future, is to have a provision of a Framework Decision made applicable to a particular matter at the same time or in parallel with a specific section or part of an Act governing the same matter.

Even where that is done so as to ensure that the provision in an Act is, at least on its face, in harmony with the applicable provision of the Framework Decision it means nonetheless that the Court has to interpret and apply two legal norms as happened in the Altaravicius case.

Such a situation is then exacerbated of course when there is a manifest divergence between the express terms of an Act and the express terms of a Framework Decision, as has happened in this case.".

52. The Court is not satisfied that the dicta of Murray CJ assists the respondent in the argument he seeks to make that Brexit renders surrender inoperable. Contrary to the position in *Rimsa*, counsel for the respondent has not referred to any provision of the 2002 Framework Decision which demonstrates a manifest divergence, or even an implied diversion, with the provisions of the Act of 2003. Instead, in the view of the Court, counsel for the respondent has sought to extrapolate incorrectly from s. 10, an argument that in accordance with E.U. law the 2002 Framework Decision is no longer applicable where a country has given notice of its intention to leave the European Union.

53. Taking each of the provisions of the 2002 Framework Decision referred to by counsel for the respondent in turn, the Court observes as follows:-

> (a) Recital 11 which refers to the 2002 Framework Decision replacing previous instruments concerning extradition is irrelevant to the issue of the role of executing judicial authority in circumstances where the issuing state has given notification of its intention to leave the European Union. The 2002 Framework Decision simply set up a new system of extradition to replace earlier agreements.
>
> (b) As regards Recital 12 in which it is stated that the 2002 Framework Decision respects fundamental rights and observes the principles recognised by Article 6 TEU and reflected in the Charter, there is nothing to suggest that merely because a country will be leaving the E.U. that those commitments are, have been or will be reneged upon.
>
> (c) Insofar as the general principles are set out at Article 1(3) that the 2002 Framework Decision shall not have the effect of modifying the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 TEU, that is again irrelevant in the context of the matters which are being dealt with. There is no suggestion that the 2002 Framework Decision has had that effect or will have that effect in the context of this particular case.
>
> (d) Particular emphasis was placed by the respondent on the contents of Chapter 3 of the 2002 Framework Decision which is headed "Effects of the surrender". Articles 26, 27 and 28, which respectively refer to deduction of the period of detention served in the executing member state, the possible prosecution for other offences and surrender or subsequent extradition respectively, were relied on by the respondent. The latter two are provided for in the Act of 2003 for the purpose of requests for surrender whereas the first is dealt with for those surrendered to Ireland. There is no submission or argument by the respondent that there is any manifest or implicit divergence between the articles in the 2002 Framework Decision and the sections of the Act of 2003 which implement those articles.

54. On the issue of fundamental rights (or rights that may be considered to accrue from the provisions of the 2002 Framework Decision, including rule of speciality and Article 26 rights of deduction of time), this Court rejects the contention that there is a real risk of an apprehended violation of these rights in the United Kingdom. As was stated in A.M., this Court is bound to act on the presumption set out in s. 4A of the Act of 2003, and required by the principle of mutual trust, that the U.K. will comply with its obligations under the 2002 Framework Decision insofar as the surrender of this respondent is concerned. Section 4A gives explicit confirmation of the principles of mutual trust and confidence which are the principles upon which the 2002 Framework Decision is based. Section 4A provides:-

> "It shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown."

55. In the context therefore of both the Act of 2003 and the Framework Decision, the duties of the High Court as executing authority are set out. Those duties are to apply the national implementing provisions in accordance with the presumption of compliance with the 2002 Framework Decision and to surrender a requested person to the issuing state unless such surrender is prohibited by national law. National law is to be interpreted in accordance with the 2002 Framework Decision, but if national law is contrary to the 2002 Framework Decision to such an extent that a conforming interpretation cannot be given, then this Court is bound to apply national law rather than the 2002 Framework Decision. Nothing to which the respondent has referred points to any divergence between national law and the 2002 Framework Decision in respect of this matter. There is no issue before the Court which requires a reference to the CJEU on any point of interpretation of the Treaties or of the 2002 Framework Decision.

56. As regards the specific concerns on the effects of surrender raised by the respondent because of Brexit, the Court reiterates the

position that the U.K. is at present a member of the E.U. and there is a presumption that she will comply with the requirements of the 2002 Framework Decision which include a commitment to respect for fundamental rights. The opinion of Ms. Malcolm does not lend any support to the case that the respondent's fundamental rights will not be protected. On the contrary, the opinion of Ms. Malcolm is to the effect that Brexit will not, at least in the first instance, alter U.K. domestic legislation. Therefore, on the evidence of his own expert, the rights he will have when surrendered to the U.K. will continue even in the aftermath of Brexit.

57. Ms. Malcolm goes on to raise highly speculative arguments about the possibility of the U.K. derogating from the ECHR and/or repealing their Human Rights Act, 1998; she says the U.K. "could in theory" seek to derogate from the ECHR and repeal the Human Rights Act, 1998. Such speculation does not amount to evidence that there is a real risk of a violation of fundamental human rights. Even more tellingly, she does not give any support to the theory that the U.K., post-Brexit, is likely to renege on commitments it has given under the 2002 Framework Decision to respect fundamental rights of those persons (or the rule of speciality which may arguably be a reflection of state interest and not an individual right) who have been surrendered to it pursuant to the EAW procedure.

58. The Court also repeats what has been said in A.M. with respect to the issue of the guarantees provided by one country to another in all surrender/extradition cases. At para. 60 in A.M, having quoted from the Supreme Court decision in *Minister for Justice and Equality v Balmer* [2016] IESC 25 it was stated:

> *"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."*

59. This Court is satisfied that, even accepting that the U.K. may have ceased to be a member of the E.U. at some point during the currency of the serving of the sentence by this respondent, there is no evidence, not to mind any substantive or reasonable evidence, that there is a real risk that this respondent will be deprived of any fundamental right to which he is entitled by virtue of being surrendered to the U.K. pursuant to a European arrest warrant. There is no evidence, still less substantial or reasonable evidence, that there is a real risk that the U.K. will renege on any of commitments to abide by the provisions of the 2002 Framework Decision in respect of this respondent after she has ceased to be a member of the European Union.

60. Ms. Malcolm highlighted two particular areas where rights (although not necessarily fundamental rights) might be at issue after the U.K. leaves the European Union. The first concerned the transfer of prisoners. There is no guarantee under the Act of 2003 or the 2002 Framework Decision as to subsequent prison transfer and therefore this has no relevance to the issue this Court has to determine in these proceedings. Indeed, the respondent did not expand in oral argument on the issue of prisoner transfer. This may also have been because Ireland has apparently not yet implemented the 2008 Framework Decision on Prison Transfers.

61. The final issue that Ms. Malcolm raised was in respect of a preliminary reference to the CJEU under Article 267 of the Treaty on the Functioning of the European Union. Ms. Malcolm acknowledged that as this was a conviction and sentence case, the respondent's court proceedings will have terminated in any event. On that basis alone, it can be seen that the matter is entirely speculative as no court proceedings will be in being at the relevant period. There is no reason to believe from the evidence that his trial on the bail matter is at risk of extending beyond that period. Moreover, it is also speculative as there is no evidence, not to mind evidence based on substantive or reasonable grounds, that there is a real risk that any such issue might arise. It is striking that since 2014, no issue with respect to the EAW procedure in the U.K. has been sent to the CJEU which by definition includes all of the cases where surrender has been sought as well as those where surrender has been achieved. There is simply no basis for suggesting that a matter of interpretation of E.U. law might arise in his case in respect of any matter post-surrender.

62. Furthermore, even in respect of the specific articles of the 2002 Framework Decision under the heading "effects of surrender", there is no evidence to suggest that there is a real risk that those requirements will not be respected after surrender, including in the period of detention (if any) post Brexit. There is nothing to suggest that his days of detention in this jurisdiction will not be deducted or that his extradition or re-extradition to any other jurisdiction is sought or that there is a risk of a breach of the rule against speciality. Indeed, all of the arguments made by the respondent are not grounded on any real concern as to violation of these rights but are advanced on an entirely theoretical basis.

63. In the context of the observations made above with regard to the provisions of the Act of 2003 and the 2002 Framework Decision, the arguments of the respondent related to the subsequent adoption of the provisions of the Lisbon Treaty (including Article 50 TEU), and the provisions of the Vienna Convention are also rejected. Although the argument was made by analogy, as the 2002 Framework Decision is not a treaty, no real analogy actually exists. There is no fundamental change of circumstances, no supervening impossibility of performance and no discontinuance of the use of the 2002 Framework Decision to come within the doctrine of desuetude. This Court is bound to apply the provisions of the Act of 2003 and to surrender the respondent in accordance with the provisions of the Act of 2003 and the 2002 Framework Decision. Those provisions do not give rise to any ground for refusing to surrender the respondent in the present circumstances.

64. The U.K. is a member state at present and it is not a third country so there is no question of a requirement to qualify the designation pursuant to s. 3 of the Act of 2003. There is no basis to revoke the designation made by the notice party and no requirement or basis for the notice party giving any other designation pursuant to s. 2 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act, 2012.

65. In the Court's view, the analogy with the case of *Hammond* is misplaced as that case decided that, in the absence of a provision in English law for endorsement of a warrant in Ireland by a Deputy Commissioner of An Garda Síochána, the arrest of the person named in the warrant could not take place in England. It was simply an invalid warrant in accordance with domestic law. On the contrary, in the present case there is a valid EAW before the High Court in respect of which all legal conditions for surrender have been met.

66. In conclusion, therefore, the Court rejects the respondent's submissions that the notification by the U.K. of its intention to leave the E.U. means that his surrender cannot take place. This Court is bound to apply the law as it exists and s. 16 of the Act of 2003 requires that the respondent be surrendered in accordance with the Act of 2003. There is no basis for any argument that his surrender is prohibited by the Act of 2003 or the 2002 Framework Decision. There is also no manifest or implied difference between the Act of 2003 and the 2002 Framework Decision on any point at issue. There is no issue concerning the interpretation of the

Treaties, the Charter, the Act of 2003 or the 2002 Framework Decision that requires a preliminary reference to the Court of Justice of the European Union. As a matter of comment, the Court notes that many of the questions posed go far beyond any point that was ever raised in the long procedural history of this case and that no evidence or argument as to their relevance was addressed in these proceedings. Finally, there is no evidence that the departure of the U.K. as a member state of the E.U. will place this respondent at real risk of a violation of any identifiable right in either the Act of 2003 or the 2002 Framework Decision.

Other issues

67. As well as the Brexit issue, the respondent sought to argue what he termed "re-entered grounds of objection". These re-entered terms of objections were themselves subsequently amended. Those amended terms of objection included two substantive points of objection. In synopsis, they are (a) the legal aid point and (b) the abuse of process point. A further constitutional point was not pursued.

68. The legal aid point concerns the question of whether the Attorney General scheme complies with Article 11.2 of the 2002 Framework Decision on the basis that it is an administrative scheme rather than a scheme enshrined in national law. The legal aid point was argued before the High Court, the Court of Appeal and the Supreme Court (twice) previously and rejected on each occasion. Despite this, the respondent maintains that the courts have not dealt with his actual objection.

69. The abuse of process point arose in circumstances where this is the second EAW issued for this respondent in respect of this sentence. Under the first EAW, his surrender had been ordered by the High Court but while the appeal was pending before the Supreme Court, it was indicated to the Supreme Court that the U.K. had withdrawn the European arrest warrant. The respondent maintains that the Supreme Court (according to his points of objection) or a judge thereof (according to oral submissions) had indicated that the minister should not attempt to revive that surrender request by issuing a fresh European arrest warrant.

70. The abuse of process objection had formed part of the original points of objection in these proceedings but had not been argued by the respondent before the court. The respondent submitted that it was because he had wished to pursue his legal aid point but was concerned that, according to his interpretation of the decision of the Supreme Court in *Minister for Justice and Equality v. Olsson* [2011] 1 I.R. 384, his legal aid point would be rendered moot if he argued any other substantive point. Counsel for the respondent accepted that he had not sought a stay or an adjournment of the s. 16 proceedings while his plenary proceedings in respect of the legal aid matter were dealt with.

71. In the affidavit of the solicitor for the respondent grounding these re-entered points of objection, there is an averment to the effect that counsel for the minister accepted that this re-entry would not be confined to the Brexit point. In the course of the oral submission, the transcripts of those earlier hearings having been handed over to counsel for the respondent by the Chief State Solicitor, it was accepted that no such concession had been made. Having heard all of the relevant applications to this Court, I am surprised that such an averment could have been made on affidavit. The only concession that had been made was that the "Brexit point" could be raised and it was clarified in the course of the application to the court that such a point was not confined to the issue of s. 37 of the Act of 2003. The raising of other issues such as the rule of specialty under s. 22 of the Act of 2003 were not covered by the initial concession made by the minister which indicated that the concession merely extended to s.37 of the Act of 2003. As can be seen from the portion of this judgment dealing with the Brexit issue, all matters potentially arising from it have been argued before this Court.

72. Despite the date of 4th July, 2017 being fixed by the High Court for the hearing of this matter insofar as it concerned the Brexit point, the respondent issued a motion before the Supreme Court. That motion sought the following orders and reliefs:

> (1) Set aside the order of 30th March, 2017 and remit the case to the High Court, where it has been reinstated with the agreement of the respondent principally but not exclusively on account of Brexit.
>
> (2) Set aside the cost orders made herein in the High Court and in the Court of Appeal and award this appellant his costs of these proceedings to date.
>
> (3) Further and other relief.
>
> (4) Costs.

In his grounds to that motion, the respondent again claimed that the re-entry of his case was not confined to the Brexit point. His grounds seeking re-entry focused primarily on the aspect of legal aid.

73. The Supreme Court gave judgment in *Minister for Justice and Equality v. Thomas O'Connor* [2017] IESC 48 on 3rd July, 2017. It is perhaps more than of passing interest that counsel for the respondent mentioned this decision in his submissions to this Court but did not address what was said by the Supreme Court in any detailed manner. In his reply to the submissions of counsel for the minister, counsel for the respondent submitted that he had been waiting to see what the minister would say about the Supreme Court decision. For reasons which will become clear, that was a surprising approach to counsel's duty to the court.

74. In his judgment of 3rd July, 2017, O'Donnell J. (*nem diss*) set out in considerable detail the history of these proceedings. The Supreme Court had commenced its judgment by making reference to Article 34.4.6 of the Constitution which provides that the decision of the Supreme Court shall in all cases be final and conclusive. The Supreme Court stated at para. 1:

> *"This is a provision which litigants and their lawyers should respect and abide by whatever their views of the decision: it is in any event a provision which this Court, which is established under the Constitution, is obliged to uphold."*

75. There is evidence before me by way of an affidavit of Ciara Walsh solicitor in the Chief State Solicitor's office, that the minister had brought to the attention of the Supreme Court that the application to set aside its judgment appeared to be brought with the aim of securing an opportunity to reopen the entire s. 16 application in the High Court. In that regard, the Supreme Court's attention was drawn to paras. 11 and 12 of its own judgment of 30th March, 2017 in which it had rejected the attempt by the respondent to characterise his objection to the s. 16 application as a preliminary one only. The Supreme Court, in the judgment of 30th March, 2017, rejected the respondent's contention that he can make his objections piecemeal in saying "*there is no substance to the argument that the appellant was entitled to make objection in a piecemeal fashion*". The Supreme Court dismissed his appeal.

76. This Court is in the same position as the Supreme Court was in respect of the respondent's motion which was dismissed on 3rd July, 2017. This Court is bound to uphold Article 34.4.6 of the Constitution and it cannot permit the respondent to go behind the decision of the Supreme Court. That was subject to the entitlement of the respondent to argue the Brexit issue as that only arose

subsequent to the finalising of those proceedings. That point had at least, in a theoretical sense, the possibility of affecting the respondent's surrender, so it was appropriate that he should be permitted to argue it.

77. The Supreme Court in its decision of 3rd July 2017 noted that part of the object of the application before it was to release the respondent from the consequences of a decision which appeared to have been deliberately, if surprisingly, taken at the time of the original objection to the European arrest warrant. The Supreme Court went on to say at para. 15 that:

> *"It must be obvious that quite apart from this troubling feature of the case, this application faces fundamental problems. Even if this court were to consider that there was an argument which should be entertained for setting aside its judgment (and recognising the height of the hurdle in that regard), the only proper consequence of such an extraordinary order would be that the matter would be re-entered and argued before this court. There could be no basis for or no power to set aside the previous decisions of the High Court and the Court of Appeal. Furthermore, it could not be permissible that if the order of this court was set aside, that the issue before this court would be argued in the High Court."*

78. The Supreme Court stated at para. 22, having summarised the four issues that the respondent wished to raise in the re-entered application, that:

> *"It is I hope sufficient to observe that this application was not necessary to allow the applicant to address the point in relation to Brexit, even though it appears to be formulated in the most general and unsatisfactory of terms. The question described as "Article 11(2)" appears to be the matter considered in these proceedings. The third issue of delay and the alleged "Supreme Court's indication" are clearly the substantive issues which were not prosecuted. Finally, the question of constitutionality and Charter compatibility of that part of s.16 of the EAW Act did not appear to have been raised before or mentioned in these proceedings. It is disquieting that the applicant seems to contend further that he is both entitled to raise this issue, and that it may require a separate plenary hearing."*

The Supreme Court then refused the application to set aside its judgment.

79. As against that very clear indication from the Supreme Court as to the conclusiveness of its decision of 30th March, 2017, counsel for the respondent did not address the issue of Article 34.4.6 of the Constitution or the judgment of 3rd July, 2017. Counsel simply submitted that he was entitled to raise any point and that Article 14 of the 2002 Framework Decision said that he had an entitlement to be heard. Counsel sought to construe this as a European point of law by reference to Article 14 and suggested a reference to the Court of Justice of the European Union. Counsel sought to distinguish the decision of the Supreme Court insofar as it only referred to anything that was 100% *res judicata* against him. Even after enquiry by the court, it was still unclear as to what was accepted as being 100% *res judicata* in the context of these proceedings. Counsel did not accept that a point that had not been argued was *res judicata* and did not accept that even the legal aid point was *res judicata* because, in his submission, there was still doubt as to what the Supreme Court had decided. Counsel did not address the issue of whether the central point was *res judicata*, namely that his surrender to the U.K. could be ordered.

80. This Court is satisfied that there has been a final ruling in this case that the respondent should be surrendered to the U.K. pursuant to this European arrest warrant. This Court is not entitled to permit this matter to be relitigated, save to the extent that an entirely new matter arises subsequent to the decision to surrender the respondent. That is what has occurred in this case because of the Brexit point and that is what has been heard by this Court. To permit any other matter to be raised would be contrary to Article 34.4.6 of the Constitution and to the decisions already made in this case. The principle of legality would be violated by permitting this to occur.

81. For the avoidance of any doubt, the Court completely rejects a final submission made by counsel for the respondent that the s. 16 proceedings were reinstated and that nothing in the order of the court confined this issue to the Brexit point. That must be rejected as a matter of fact, in that it was perfectly clear that the matter was only being re-entered for the purpose of arguing the Brexit point and, as a matter of law, based upon Article 34.4.6 of the Constitution.

82. Although it is not necessary to deal with individual issues raised by the respondent, the Court also observes that there has been no question of the respondent not being heard in relation to this matter. The respondent has been heard repeatedly in the High Court, in the Court of Appeal and in the Supreme Court in respect of these matters. An entitlement to be heard does not confer an entitlement to be heard at any point, at any time, in any manner, in any set of proceedings as chosen by one party. A right to be heard is a right to be heard in accordance with the rules and procedures set out for the hearing of applications.

Comments on the Substantive Issues

83. Although this Court is not required to deal with the issues that have been heard, the Court deems it appropriate to make the following comments. Insofar as the legal aid issue is concerned, there is no doubt that this matter has been repeatedly heard and rejected by three courts in this jurisdiction. Furthermore, it is an entirely academic point in the context of this respondent's surrender and more particularly on the argument that he wished to raise, *i.e.* the Brexit point. This is because this respondent has had the benefit of an indication that there will be no objection to a recommendation being made by this Court for the payment of his legal fees under the Legal Aid Custody Issue Scheme in respect of the Brexit issue. He has had the benefit of two senior counsel, junior counsel and solicitor in this case. He was also able to obtain the services of a QC in London for the purpose of preparing for these proceedings, having notified the Court of his intention to do so and in due course, appropriate fees for this opinion will be covered by the legal aid recommendation. It is an entirely spurious argument to suggest that there is any ground as to why his surrender should be refused on the basis of an absence of a statutory scheme for legal aid.

84. Insofar as his abuse of process point is concerned, the Court observes that there is no order of the Supreme Court or judgment of the Supreme Court stating that the minister should not revive the proceedings by issuing a fresh warrant. Indeed, the phraseology of that point in the amended grounds is surprising as it is not the minister who issues a European arrest warrant. Most importantly, there is a wealth of authority from the superior courts accepting that repeat applications for surrender are permitted and that repeat applications are not in themselves an abuse of process. Furthermore, this EAW sets out in detail the reason why the previous EAW was withdrawn. The reason had been because of a decision the Supreme Court gave in a similar case, that of *Minister for Justice, Equality and Law Reform v. Tighe* 2010] IESC 61. The first EAW was withdrawn and this EAW was drawn up so as to take into account and address the observations of the Supreme Court made in the *Tighe* case.

85. In the circumstances, it cannot be the case that the observations, not even the order, of the Supreme Court (and even more so the observations of a single member of the Court) could result in any further application by an issuing member state being treated as an abuse of process. The respondent in his submissions has never made clear what process is actually being abused. There was a

suggestion that it was an abuse because there was no evidence that the magistrate in London had been told of the observations of the Irish Supreme Court. Even if that was the correct factual situation, that would not be an abuse of the process of this court because the U.K. court could not be bound by any of those observations insofar as its own law applies to the issuing of European arrest warrants. Similarly, the role of the High Court under s. 16 of the Act of 2003 is to surrender a person provided that the conditions set out thereunder have been met.

86. It is acknowledged that the court must protect its own processes but, as the Supreme Court observed in *Minister for Justice and Equality v. J.A.T (No. 2)* [2016] IESC 17, "*something is either an abuse of process or it is not*." (para. 3 of the judgment of O'Donnell J.) The Supreme Court in that case went on to say:

> *"It is important that courts should be astute to detect and prevent improper or mala fide conduct, but it is equally important that a valuable jurisdiction is not diluted by allowing the legal test to spread into negligence and to become the familiar search for something that can be described as careless."*

Even more pertinently, the Supreme Court stated:

> *"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."*

87. In this case, the respondent was convicted and sentenced in the U.K. for a serious fraud offence. He is claiming that his surrender should be stopped on the basis of what the Supreme Court (or perhaps a judge thereof) stated when the previous warrant was withdrawn. There was no order made prohibiting a further application for surrender. It is noteworthy in that regard that at the time of the original s. 16 points of objection, the respondent was not even clear as to what had been asserted in the Supreme Court. Indeed, it is surprising in those circumstances that the respondent is maintaining this objection to surrender on the grounds of abuse of process. In any event, observations by a court as to whether or not a matter should be brought again are not binding on a party to those proceedings and more especially they are not binding on another state lawfully exercising its right to issue a European arrest warrant.

88. There is a significant public interest in having this man serve his sentence. Furthermore, in this case, apart from a general reference to delay in seeking his surrender, the respondent has put nothing before the court as to his family circumstances save for a reference to his terminally ill brother. That affidavit had only been submitted pursuant to his request for a postponement of his order of surrender. There is in fact no compelling feature and no combination of features that render it appropriate to refuse his surrender on grounds of an abuse of process or interference with rights. Therefore, even if he was permitted to argue his abuse of process ground, his surrender would not be prohibited as a result.

Conclusion

89. This Court rejects the respondent's submission that his surrender is now prohibited by virtue of the notification of the U.K. of her intention to leave the E.U. pursuant to Article 50 of the Treaty on European Union. The Court also rejects that the notification by the U.K. under Article 50 gives rise to any issue of European law relevant to this consideration. The Court also rejects the respondent's application to have this Court re-hear his legal aid point and his point about abuse of process. For the sake of completeness, the Court has commented on each of those issues and has indicated that they are points without merit.

90. In the circumstances, the Court is satisfied that the s. 16 order for surrender made by Edwards J. in this case and subsequently affirmed by the Supreme Court on 30th March, 2017, stands.