High Court of Ireland Decisions

Judgment

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[2017] IEHC 62

THE HIGH COURT

2006 No. 9 EXT

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

SAFET BUKOSHI OTHERWISE KNOWN AS ASTRIT PICARI (No. 2)

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered the 23rd day of January, 2017.

1. The High Court has been requested by the United Kingdom ("the U.K."), to give its consent to the extradition of the respondent to Albania from the United Kingdom. The consent of the High Court is necessary because the respondent is present in the U.K. (specifically Scotland) having been surrendered there on foot of a European arrest warrant ("EAW") issued by a court in Scotland. He is serving a sentence imposed on him in respect of the offence for which he was surrendered. The Court is satisfied that the person requested by the Albanian authorities is the same person in respect of whom the surrender has been ordered to the United Kingdom.

2. The respondent was surrendered to the U.K. in respect of a number of serious offences. After conviction, due to his mental health issues, the Scottish court made a compulsion order and a restriction order; this means that the respondent is subject to conditions of detention in hospital and to treatment without limit as to time. While serving that sentence in Scotland, a request for his extradition to Albania was received by the Scottish government. The request relates to a conviction in his absence on charges which, in the words of the Scottish government, "essentially amount to murder by means of an automatic firearm."

3. The solicitors who represented the respondent in the original EAW proceedings were notified of this request for onward extradition. They contacted the respondent, received instructions to act, and have represented him in this Court at all material times. The respondent filed a lengthy notice of objection but his points of objection to the giving of consent for onward extradition can be synopsised as follows:

> (a) His right to bodily integrity would be violated if extradited to Albania because of his particular mental health issues and the prison conditions in Albania;
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> (b) That he had a trial *in absentia* and the retrial guarantees are insufficient;
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> (c) There would be a violation of his right to fair trial in general; and
>
> (d) His respect for his private and family rights would be violated on surrender.

The nature of the Court's enquiry

4. At the beginning of the hearing of this application, counsel for the minister observed that this was the first case of its type, certainly the first contested case, under which the court was required to consider the provisions of s. 24(4) of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003") and that issues of interpretation arose. Section 24(4) of the said Act is the subsection which governs the giving of consent to the onward extradition to a third country from a State to which this country had surrendered a person on a European arrest warrant.

5. Section 24(4) of the Act of 2003, as amended, provides that:-

> "The High Court shall give its consent to a request under subsection (3) if it is satisfied that -
>
> (a) were the person concerned in the State, and
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> (b) were a request for his or her extradition received in the State from the third country concerned,
>
> his or her extradition pursuant to such a request would not be prohibited under the Extradition Acts 1965 - 2001."

6. Section 24(4) of the Act of 2003 is the implementing section of Art. 28, para. 4 of the Council (EC) Framework Decision of 13th June, 2002 (2002/584/JHA) on the European arrest warrant and the surrender procedure between Member States ("the 2002 Framework Decision"). Article 28, para. 4 states:-

> "[…] a person who has been surrendered pursuant to a European arrest

> warrant shall not be extradited to a third State without the consent of the competent authority of the Member State which surrendered the person. Such consent shall be given in accordance with the Conventions by which that Member State is bound, as well as with its domestic law."

7. Counsel for the minister submitted that there are a number of possible interpretations of s. 24(4) of the Act of 2003. Counsel requested that the Court consider these interpretations and make a determination as to the appropriate basis upon which this Court should adjudicate on this request for consent to onward extradition.

8. The first possible interpretation is that the sole issue that concerns the court is whether extradition to the particular country, namely Albania, is prohibited by virtue of the Extradition Act, 1965, as amended ("the Act of 1965"). This narrow view limits the issue to whether Albania is a state with which this State has entered into any international agreement or convention for the purpose of surrender by each country to the other of persons wanted for prosecution or punishment, and that the Minister for Foreign Affairs has made an order applying Part Two of the Act of 1965 to that country.

9. Counsel for the minister has established to the Court's satisfaction that Albania is a country with which this State has entered into such an international convention by production to the Court of the latest statutory instrument which confirms that such an order was made by the Minister for Foreign Affairs. In the schedule to S.I. No. 9 of 2009, Albania is listed as a country which is a party to *inter alia* the Paris Convention on extradition. The Court is therefore satisfied that the Minister for Foreign Affairs has made an order applying Part Two of the Act of 1965 to Albania.

10. The Court is satisfied, however, that these proofs are not sufficient to comply with the provisions of s. 24(4) of the Act of 2003. According to that subsection, the court must be satisfied, were the person concerned in the State and were a request for his or her extradition received, that his or her extradition would not be prohibited by the Extradition Acts 1965 - 2001 (i.e. the Act of 1965 as amended). If the person were in the State and if a request were received in relation to a person, the High Court would be obliged to consider all of the matters contained in the Act of 1965 as amended before extradition could be ordered. In the view of the Court, the focus in s. 24(4) of the Act of 2003 is on the person requested and not merely on the country seeking the extradition. The Court has no hesitation in holding that the High Court must consider the application from a wider perspective than merely confirming that the third country making the request is a party to an extradition agreement with this State and that Part Two applies to that country.

11. The second interpretation of s. 24(4) of the Act of 2003, as posited by counsel for the minister, is that the reference to prohibition relates solely to those prohibitions that are expressly set out in the Act of 1965 as amended. In that regard, counsel points to prohibitions, such as the requirement for correspondence and minimum gravity, the prohibition on surrender for political offences and certain military offences and with regard to Irish citizens in certain circumstances. Counsel referred to the Act of 1965 and to the lack therein of a similar provision to s. 37 of the Act of 2003; section 37 prohibits surrender in circumstances where the surrender would be incompatible with the State's obligations under the European Convention on Human Rights ("ECHR") and its protocols or would contravene a provision of the Constitution.

12. Counsel for the minister submitted that, while the State has duties under the Constitution and under the ECHR (see, for example, the case of *Soering v. United Kingdom* (App. No. 14038/88 [1989] ECHR 14, 7th July 1989)) to a person in the State whose extradition is sought, similar requirements may not necessarily apply in the situation of a person surrendered to another member state. Counsel submitted that the member state to which the person has been surrendered has certain duties to comply with the ECHR and the Charter on Fundamental Rights and Freedoms. In that sense, it

was submitted that the person's rights will be protected by the courts of another jurisdiction and it would be unnecessary duplication for this court to consider those issues as well.

13. The Court considers it relevant to consider the terms of s. 29 of the Act of 1965, as amended. Under that section, the High Court must commit a person to prison to await extradition, if the court is satisfied that the conditions therein have been met. Section 24(4) of the Act of 2003 most closely resembles s. 29(1)(c) of the Act of 1965; that subsection requires the court to be satisfied that "extradition of the person claimed is not prohibited by this Part or the relevant extradition provisions […]". It has long been accepted by the Superior Courts in this jurisdiction that where extradition would violate fundamental constitutional norms, or would fail to respect the ECHR rights of the requested person, the extradition must be refused. An example of where the former was considered is *Finucane v. McMahon* [1990] 1 I.R. 165 and of where the ECHR was considered is *Attorney General v. Davis* [2016] IEHC 497. Therefore, although there is no express reference in Part Two of the Act of 1965, or in the extradition agreement to which this State is party to a prohibition on extradition if fundamental rights will be breached, it has long been accepted that extradition under those provisions is prohibited if extradition will result in a violation of fundamental rights.

14. If this respondent had not been surrendered to Scotland, but instead a request for his extradition had been made directly to Ireland, the High Court would be obliged to protect his ECHR and constitutional rights in considering whether his extradition is permitted. The reason the respondent is present in Scotland is because this Court has made an order directing his surrender thereto. In the ordinary course, no further prosecution or surrender or extradition can take place in respect of this respondent unless the High Court gives permission. The High Court, should it interpret s. 24(4) of the Act of 2003 in the manner contended for by the minister, would be reducing the constitutional protection provided to a person whose removal from the State has been ordered for a particular purpose and for that purpose only. While the Scottish courts and Scottish government may well be in a position to protect this respondent's ECHR rights, the Scottish courts and Scottish government cannot protect his rights under the Irish Constitution. It is not unknown that the rights set out in the Constitution may vary from those set out in the European Convention on Human Rights. Furthermore, it would also be removing from the Irish courts the power to protect the fundamental rights, which are guaranteed under the ECHR and by the Charter on Fundamental Rights and Freedoms, of a person who has been forcibly surrendered from this jurisdiction.

15. As this Court has pointed out, the provisions of s. 24(4) of the Act of 2003 and s. 29(1)(c) of the Act of 1965 are very similar. The courts of Ireland have operated the Act of 1965 on the basis that the Act and the extradition agreements prohibit extradition, where extradition would amount to a violation of fundamental rights under the Constitution or the European Convention on Human Rights. In the absence of a clear indication to the contrary in the Act of 2003, I am quite satisfied that the Oireachtas could not have intended that the similar provision in s. 24(4) of the Act of 2003 would be interpreted differently. In particular, there is nothing to indicate that the Oireachtas intended that a person already forcibly surrendered to another member state, would have lesser protection as regards fundamental rights than a person whose extradition was requested directly from this State. In those circumstances, this Court must proceed to consider whether his rights under the Constitution and the ECHR will be protected if he is to be extradited to Albania from the United Kingdom.

The specific prohibitions contained in the Extradition Act 1965, as amended

16. As stated above, the main objections put forward by the respondent to the granting of consent to his onward extradition to Albania concern the right to fair trial, freedom from inhuman and degrading treatment and the right to respect for his private and

family rights. This Court is also required to consider whether other provisions of the Act of 1965 would prohibit his surrender. The court has carefully considered the documentation before it and is quite satisfied that the offence for which he has been convicted *in absentia* in Albania corresponds with the offence of murder in this State and is an offence which meets the requirements of minimum gravity.

17. The Court is also satisfied that sufficient details of the offence have been set out, as well as the relevant statutory provisions of Albanian law, in the request to the Scottish authorities which has been transmitted to this jurisdiction as part of the application for consent. Even though the respondent was convicted in Albania under a different name than that which he used in Ireland and Scotland, the Court is satisfied that his identity has been established.

18. Having considered the documentation, the Court is satisfied that none of the express prohibitions on extradition contained in the Act of 1965 require consent to his onward extradition to be refused.

The respondent's mental health, Albanian prison conditions and inhuman and degrading treatment
The factual situation as provided by Scotland

19. The relevant facts are that the respondent, who then called himself Safet Bukoshi, was surrendered to Scotland from Ireland in February, 2008 pursuant to a European arrest warrant. On 20th May, 2009, he was convicted of the offences in respect of which his surrender has been ordered, namely offences connected with setting fire to an aeroplane at Glasgow Airport. He was made subject to a (hospital) compulsion and restriction order due to concerns about his mental health without limit as to time. He was detained in the State Hospital, Carstairs in Scotland, was apparently transferred to another clinic in Scotland, but was later returned to the State Hospital.

20. Subsequent checks revealed that the respondent's correct identity is, in fact, Astrit Picari. He had been convicted in Albania on charges essentially amounting to murder by means of an automatic firearm and sentenced to seventeen years imprisonment in November, 1997. That trial was held *in absentia*. It appears that at the point of sentence, he fled Albania.

21. The information from the Scottish Government establishes that the respondent initially consented to his extradition to Albania before a court in Scotland. The matter then came before the Scottish government for the purpose of making the final decision on extradition. The Scottish government have indicated that, despite his consent, they are investigating how his human rights will be upheld should he be extradited. It was at that point in the Scottish procedure that the consent of Ireland to his onward extradition to Albania was sought.

22. The Scottish Government sent to the High Court the annual report on this respondent, dated 1st June, 2015, which was required by the relevant section of the Mental Health (Care and Treatment) (Scotland) Act, 2003 to be provided to the Scottish Ministers. That report also addressed a query from the Central Authority in this jurisdiction as to the capacity of the respondent to give informed consent to his extradition. The author of the report is Dr. Gordon Skilling, consultant forensic psychiatrist at the State Hospital, Carstairs, Scotland, where the respondent is detained.

23. Dr. Skilling reports that the respondent continues to be diagnosed with paranoid schizophrenia. He does not suffer from any other mental disorders. He continues to receive treatment with Olanzapine 10mg daily, which he has been on for many years. His mental state has remained stable and he has been in remission from symptoms of

psychosis for some considerable period of time. The respondent accepts that he has benefitted from treatment with anti-psychotic medication and there has been no concern about his compliance. In Dr. Skilling's view, as a result of the respondent's mental disorder, it is necessary, in order to protect any other person from serious harm, for him to be detained, whether or not for medical treatment; there is concern about his ability to comply with medication if living in the community and to cope with other stressors.

24. Dr. Skilling is of the opinion that, without appropriate treatment including medication, the respondent's future mental health would be at significant risk. He is also of the view that, although the respondent is generally well settled and compliant with his care plan, he continues to require assessment and treatment in a secure setting and he would be unlikely to comply with that on a voluntary basis. The secure setting requires the condition of special security that can only be provided in the State Hospital.

25. Dr. Skilling makes it clear in his report that the relevant authorities have obtained very little information from the Albanian authorities about the nature of any psychiatric follow up that would be available to the respondent were he to be extradited. It appears that this was despite Dr. Skilling's reasonable effort to contact various Albanian authorities. In particular, he sent an e-mail to Durres prison but his subsequent e-mail to the prison went unanswered.

26. Dr. Skilling was also asked about the ability of the respondent to give informed consent to his extradition and, in his view, the respondent was quite capable of giving the appropriate consent. It is noted that the respondent has instructed his lawyers in this jurisdiction to oppose this application for consent to onward extradition and also that he intends to challenge any extradition that may occur in Scotland. No issue has been raised by the lawyers acting on behalf of the respondent as to his capacity to deal with the Scottish proceedings or the present proceedings. The Court is satisfied that the respondent's capacity to give instructions is not in doubt.

The respondent's affidavit

27. The respondent swore an affidavit grounding his points of objection. He accepts that he has a history of mental illness and accepts that when not on medication, he committed offences in Ireland when resident there in 2005. In May, 2007, he was convicted in the Dublin Circuit Criminal Court in relation to three counts of arson and one count of attempted arson all related to the same location and date and upon conviction he received a sentence of five years. He says he was surrendered to Scotland on completion of that sentence by order of the Irish High Court.

28. The respondent says that he is fully aware of the fact that he suffers from paranoid schizophrenia and that he needs medication to stay mentally well. He says that he will keep taking medication into the future as advised by his doctors. He expresses his concerns about being exposed to conditions in Albanian prison where he says he has been advised by his family members that inmates have their heads shaved and no ready access to clean clothes and showering / washing facilities. He says and believes that access to medicine is also very limited and has real concerns that his access to medication will be limited.

The respondent's evidence with respect to Albanian conditions

29. The principal evidence on behalf of the respondent was contained in a number of affidavits of Professor Brad K. Blitz who is a Professor of International Politics at Middlesex University in London. He specialises in, and has conducted several studies of, judicial reform in post-Communist states. He has been a frequent visitor to Albania since 2001 and in 2006 he acted as a consultant to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") with

respect to penal conditions in Albania.

30. Professor Blitz compiled an initial report dealing with the position in Albania regarding:

(a) The provision of facilities for mentally ill prisoners;

(b) Retrial;

(c) Data on reversal of verdicts;

(d) Legal representation and representation for those convicted in their absence; and,

(e) Levels of corruption in Albania as they relate to the matter.

The evidence of Professor Blitz regarding prison conditions

31. Professor Blitz confirmed that Albania is a signatory to several international and domestic instruments which guarantee protection of human rights and in particular protect against torture and ill-treatment as stipulated under Article 3 of the European Convention on Human Rights. Albania operates under a Constitution which guarantees basic human rights and specifically prohibits torture. The prison system operates within a legislative framework; the most important instruments being the Penal Code and Penal Procedural Code, the Penal Executive Code or the execution of penal decisions and the law on the rights and treatment of prisoners and the law on penitentiary police who are prison security staff. Mental health is covered by the 1996 Mental Health Act, but Professor Blitz says the legislation has been subject to much criticism regarding the practice of involuntary admissions, overcrowding and the shortage of trained professionals.

32. In addition to the ECHR, Albania has also signed and ratified a number of other human rights conventions and protocols relevant to the respondent's case: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural rights, and the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.

33. Professor Blitz also indicates that over the past ten years Albania has been invited into a closer partnership with the European Union (E.U.), becoming a candidate country in 2012. During the course of Albania's discussions with the European Council, the state has been urged to adopt further European norms regarding human rights, the development of effective and good governance and the eradication of corruption. As part of the revised European partnership for Albania of December, 2005, short and medium term priorities which Albania should address were identified. This specified a number of action points that related to penal sector reform, including:

(a) Ensuring that the relevant international conventions are observed in establishing and running new penitentiary facilities;

(b) Ensuring compliance of the Albanian Criminal Code with U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(c) Implementation of the 2004 master plan to improve conditions for

detainees and prisoners on remand; and

(d) Ensuring that the code of ethics for the prisons system is rigorously observed.

34. Professor Blitz gave an overview of the prison system. From reputable data sources, it appears that the historical problem of overcrowding was now in decline with the opening of a new prison in October, 2012. International monitoring organisations note that conditions in prisons vary widely, with older facilities falling short of international standards. United States of America ("U.S.") State Department Human Rights reports, state that older facilities had unhygienic conditions and often lacked many basic amenities, including access to potable water, sanitation, ventilation, lighting and health care. The European Commission's Progress reports have highlighted some positive developments with respect to Albania's prison system, but they still call attention to cases of ill-treatment and partially implemented recommendations.

35. As a result of reports from the Office of the Ombudsman and non-governmental organisations concerning inadequate access to medical examinations, including wholly inadequate access to mental health care, in April 2014, the Albanian Parliament adopted a law that sets out the rights of detainees and standards for their treatment, including appropriate medical treatment in prisons.

36. Professor Blitz says that, in general, provision of care for the mentally ill is wholly underdeveloped in Albania. He says that in 2007, Albania maintained just 24 beds for the treatment of mental illness per 100,000 population. In his initial report, he referred extensively to the 2006 report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

37. In the conclusions to his initial report, Professor Blitz had concerns about the physical facilities of older prisons, that psychiatric and other mental health provisions are not provided in all prisons and that there are questions as to how the respondent would be able to receive the quality of care of a European standard. In particular, he said "one would seek assurances that if the defendant were returned, he would be able to avail himself of the necessary treatment in a designated prison." His final concern was that it was unlikely that wherever the defendant was housed, that he would be able to receive sufficient prescription medication, especially in the required dosage, since all reports suggest that individuals and their families must subsidise their own treatment.

38. After Professor Blitz had sworn his initial affidavit on 13th January, 2016, the Council of Europe issued a report to Albania authored by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the 2016 CPT report"). This dealt with visits to the Albanian penal system between 4th and 14th February, 2014. Professor Blitz swore a supplemental affidavit on 1st April, 2016, referring to particular aspects of that report.

39. The 2016 CPT report acknowledged cooperation from the Albanian authorities throughout, but noted that the principle of cooperation required that the CPT's recommendations be effectively implemented in practice. The CPT said it was very concerned by the lack of progress in a number of areas, such as the regime of activities provided to prisoners, prison health care services (in particular, the supply of medication to prisoners), the situation of forensic psychiatric patients (namely, the persistent failure to accommodate them in an adequate psychiatric establishment) and the implementation of legal safeguards surrounding involuntary hospitalisation of a civil nature. Professor Blitz highlighted a number of establishments that were visited by the CPT, but none of these was the prison Durres.

40. Professor Blitz had a particular concern about those who had been declared not criminally responsible, but subject to a judicial compulsory treatment order. At the time of the visit of the CPT, the great majority of such patients continued to be held in prison establishments in breach of national legislation. Some two thirds of them were being held at Kruja special facility in conditions which, in the CPT's view, "*were likely to amount to therapeutic abandonment. In fact, this establishment did not have a single psychiatrist for over a year, the supply of psychotropic medication was seriously affected by prolonged shortages and no rehabilitative activities worthy of the name were on offer*." The CPT called on the Albanian authorities to take urgent steps to remedy these shortcomings and speed up the creation of a specialised forensic psychiatry facility.

41. Professor Blitz referred to the specific complaints of the CPT regarding particular facilities that were visited. He also referred to the shortage of medical drugs, etc. at specific facilities. In its response to the 2016 CPT Report regarding the facilities at Korca in the 2016 CPT report, the Albanian government stated that it was committed to strengthening inter-agency cooperation to ensure modern standards in the treatment of prisoners in the penitentiary system. In that context, a cooperation agreement was signed in July (presumably 2014) between the Ministry of Justice and the Ministry of Health on healthcare in the penitentiary system. The response of the Albanian Government to the CPT report went on to state that "the implementation of this agreement has solved the problem of supplying medication, medical consultations in all regional hospitals, as well as enabling medical and psychiatric consultations, laboratory examinations, endoscopy, imaging and any other necessary examination, in District Hospitals, Hospital University Centres, according to the legislation". Guidelines drafted pursuant to that agreement, on the cooperation of prisons with the health structures and institution at the local level, had improved the psychiatric service for patients with mental health disorders especially.

42. In his supplemental affidavit, Professor Blitz repeated the above response of the Albanian Government but he did not address the specific issues raised in that response. In answer to the Albanian response to the CPT report, he says "that it is my view that the provision of care for a person in the Respondent's position with his level of psychiatric illness remains wholly underdeveloped and of low quality in Albania". In his view, there is "substantial risk that he will not receive the required treatment if returned to Albania". He said that the construction of a forensic psychiatric hospital in Albania is still some time hence and the level of psychiatric care provided in those few prisons that do so is sporadic. He said that in other such prisons, regular consultations with psychiatrists and other experts and continuity of medical care is not readily available. Professor Blitz is quite correct in identifying that the response of the Albanian authorities indicated that the intended provision of a forensic psychiatric facility was at a very early stage.

43. A large number of reports from various bodies including non-governmental organisations was also placed before the court. These provided general background information in relation to Albania, its prisons and its health regimes. Many of these reports were not opened to the Court, nor were they referred to in written or oral submissions. Some of these were of some antiquity. The Court will only refer to the contents of those reports where relevant.

Information provided by the Albanian authorities with regard to this respondent

44. Subsequent to that supplemental affidavit of Professor Blitz, further information was received from the Albanian Ministry of Justice via the Scottish authorities. The Court accepts that it was entitled to receive this information.

45. The Albanian Ministry of Justice, relied upon a letter from the Director General of Prisons dated 27th May, 2016. This letter states that "citizens with mental health problems at the Albanian Penitentiary System are treated at [sic] the same standards of public health institutions, are diagnosed by psychiatrists of the Penitentiary System and of community health institutions, and are treated in accordance with the recommendation of psychiatrists. The hospitalization of these persons is realized at the Special Health Penitentiary Institution (Prison Hospital) until the improvement of their health situation".

46. It was clarified that the respondent "will be accommodated at the Institute for Enforcement of Criminal Judgments (IECJ) of Durres because this institution has a specialized psychiatrist". The letter went on to say that in relation to access to medical personnel that, not only at the IECJ of Durres, but also at all penitentiary institutions, the health service is available on a 24 hour basis. It was stated that the respondent will be under the continuous surveillance of the medical staff of this institution; that medical treatment will take place in accordance with the recommendations of psychiatrists and that he will be provided therapy with Olanzapine. There is a structure of psycho-social workers (psychologists) in the penitentiary system, where all convicts/pre-trial detainees are provided such a service. Finally, it was stated that at the IECJ of Durres, the respondent will be provided with continuous psychological and counselling therapy by the psycho-social staff and will be treated by "ITP (individual treatment program) for persons with mental health problems".

Further Reply of Professor Blitz

47. Professor Blitz replied by way of a further report to the above response by the Albanian government. He said that, as he had previously outlined, the provisions of psychiatric care in the penal system was wholly underdeveloped and that it was most unrealistic to suggest that 18 months on from the 2016 CPT report, there was comprehensive reform.

48. Professor Blitz had identified in his earlier report that Durres was a standard security prison with a section for minors and a total capacity of 250. He did not add any specific reference to Durres in his further report, but stated with respect to the assurances given about place and type of care that "[w]hile there has been significant improvement in the prison infrastructure, the above assurance have not been subject to external scrutiny." He referred to the absence of reports from other monitoring bodies.

49. Professor Blitz questioned whether the response of the Albanian authorities meant that facilities were prepared for those persons with chronic conditions. He also said that there were concerns regarding continuity of care should the named psychiatrist leave, and the availability of medication, because families of inmates are often required to purchase medication.

50. In Professor Blitz's view, the assurances provided were not sufficient to dissuade the concerns raised on a close reading of the 2016 CPT report and review of available secondary sources. He also said that, given the history of sub-standard conditions for prisoners and neglect of mental health provisions, he remained unconvinced by the statements provided and "believe[d] the defendant needs more specific guarantees for long term, sustainable psychiatric care and continuous provision of medication."

Other Evidence

51. Counsel for the respondent also relied upon the 2013 Report on Conditions in Albanian Prisons and Recommendations for Reform prepared by the Rule of Law and Human Rights Department of the Organization for Security and Cooperation in Europe ("OSCE"). This report referred to the issue of those persons who do not bear criminal responsibility for their crimes due to mental health problems. These are kept in prison

hospitals or in a particular prison, namely Zaharia in Kruja. In that prison, most of the medication is provided by the prison but supplemented by families. There are medical personnel including psychologists available. Recommendations were made in respect of those persons who it said were "not prisoners, but patients."

The law regarding mental health, prisons and inhuman and degrading treatment

52. Subject to the issue, dealt with above, as to whether the Court had jurisdiction under s. 24(4) of the Act of 2003 to engage with issues of constitutional and ECHR rights, there was agreement that the High Court may not order the extradition of a person to a country where his rights to bodily and mental integrity, human dignity and right not to be subjected to inhuman and degrading treatment, would be violated. These are protected by Article 40.3 of the Constitution, Article 3 of the ECHR and indeed, where issues of European law are involved, by Article 19 of the European Union Charter on Fundamental Rights.

53. The decision in *Minister for Justice v. Rettinger* [2010] 3 IR 783 set out the principles under which the court must operate when assessing if there has been a breach of these particular rights. Although that case concerned surrender to an E.U. member state, it has been accepted in a number of subsequent cases that similar principles apply when considering extradition to a non-member state.

54. In *Rettinger*, the applicable test was set out by Denham C.J., as follows:

> "(i) a court should consider all the material before it, and if necessary material obtained of its own motion;
>
> (ii) a court should examine whether there is a real risk, in a rigorous examination;
>
> (iii) the burden rests upon a respondent, such as the respondent in this case, to adduce evidence capable of proving that there are substantial grounds for believing that if he (or she) were returned to the requesting country he, or she, would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention;.
>
> (iv) it is open to a requesting state to dispel any doubts by evidence. This does not mean that the burden has shifted. Thus, if there is information from a respondent as to conditions in the prisons of a requesting state with no replying information, a court may have sufficient evidence to find that there are substantial grounds for believing that if the respondent were returned to the requesting state he would be exposed to a real risk of being subjected to treatment contrary to article 3 of the Convention. On the other hand, the requesting state may present evidence which would, or would not, dispel the view of the court.
>
> (v) the court should examine the foreseeable consequences of sending a person to the requesting state;
>
> (vi) the court may attach importance to reports of independent international human rights organisations, such as Amnesty International, and to governmental sources, such as the State Department of the United States of America;
>
> (vii) the mere possibility of ill-treatment is not sufficient to establish a

respondent's case;

(viii) the relevant time to consider the conditions in the requesting state is at the time of the hearing in the High Court. Although, of course, on an appeal to this court an application could be made, under the rules of court, seeking to admit additional evidence, if necessary;"

55. Based upon the judgment of Fennelly J. in the same case, it appears that the phrase "substantial grounds" must be read as meaning "reasonable grounds". As this Court has held in *Attorney General v. Damache* [2015] IEHC 339, the test in *Rettinger* applies to the prohibition on inhuman and degrading treatment under the Constitution or under the European Convention on Human Rights.

56. As the High Court (Edwards J.) held in *Attorney General v. O'Gara* [2012] IEHC 179, there is a presumption arising in extradition cases that the requesting country will act in good faith and that it will respect the fundamental rights of the requested person. This is a weaker presumption, and more easily rebutted, than the presumption to be found in respect of the presumed compliance with the provisions of the 2002 Framework Decision in respect of European arrest warrants by other member states of the European Union.

57. This Court, in the decision of *Attorney General v, Marques* [2015] IEHC 798, cited with approval the decision of the High Court in England and Wales in *R (McKinnon) v. Secretary of State for Home Affairs* [2009] EWHC 2021 where Lord Justice Stanley Burnton stated at para. 67 thereof:

> *"It is well recognised that Article 3 applies to conduct of the most serious and severe kind. It is particularly difficult for a person to establish a breach of his Article 3 rights where the conduct that is envisaged is, as in the present case, not the deliberate infliction of harm by agents of a foreign state but neglect or a lack of resources on the part of that state."*

58. In the case of *Attorney General v. N.S.S.* [2015] IEHC 349, the High Court (Edwards J.) accepted that important assurances had been given in respect of the custodial conditions in which that respondent would be kept should he be extradited to Russia. On that basis, the High Court held that its concerns were allayed in light of those assurances and there were no substantial grounds for believing that a real risk exists that the respondent if extradited would be detained in conditions which would breach the prohibition on inhuman and degrading treatment.

59. There is also no dispute that the particular conditions in which those suffering from mental ill health are treated may amount to inhuman and degrading treatment. In *G. v. France* (App. No. 27244/09, 23rd February, 2012), the European Court of Human Rights ("ECtHR") again reiterated that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The ECtHR went on to say at para. 38:

> *"The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in the case, such as the durations of the treatment, its physical or mental effects and, in some instances, the sex, age and state of health of the victim[…]. Although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3[…]. The Court also refers to the general principles concerning the States' responsibility in respect of health care dispensed to people in detention, as set out in the Slawomir Musial v. Poland judgment, for example (no. 28300/06, 85-86, 20 January 2009). In that judgment it*

> *found, in respect of a detainee suffering from serious, chronic mental disorders, including schizophrenia, that while maintaining the detention measure was not, in itself, incompatible with the applicant's state of health, detaining him in establishments not suitable for incarceration of the mentally-ill, raised a serious issue under the Convention. It also noted that the detained had not been given specialised treatment, particularly constant psychiatric supervision, and the cumulative effects of the inadequate medical care and inappropriate conditions in which the applicant was held clearly had a detrimental effect on his health and well-being and amounted to inhuman and degrading treatment."*

60. Both parties referred to the case of *Dybeku v. Albania* (App. No. 41153/06, 18th December 2007) albeit with a different emphasis, in which the ECtHR held that treating a mentally ill prisoner in the same manner as other prisoners was not a strong justifying argument on behalf of the respondent state. The nature of a prisoner's psychological condition may make him or her more vulnerable and exacerbate his or her feelings of distress, anguish and fear. In the *Dybeku* case, it was also held that a lack of resources cannot in principle justify detention conditions which are so poor as to reach the threshold conditions for Article 3 to apply. The *Dybeku* case related to events which occurred in or about the years 2002 to about 2007.

61. In *Aswat v. United Kingdom* (App. No. 17299/12, 16th April 2013), the extradition to the United States of a mentally ill man who was at risk of being detained in the ADX Prison (Supermax) in Florence, Colorado was prohibited. In particular, the ECtHR held that in light of the current medical evidence, there was a real risk that the applicant's extradition to a different country and to a different and potentially more hostile prison environment would result in a significant deterioration in his mental and physical health and that such a deterioration would be capable of reaching the Article 3 threshold.

The Court's analysis and determination on the prison conditions issue

62. In assessing whether a particular individual is at real risk of being subjected to inhuman and degrading treatment, the court's task is not simply to assess whether human rights violations take place in the requesting country. The issue is to decide if there are substantial or reasonable grounds for believing that the particular respondent would be at real risk of a violation of his or her human rights. Nonetheless, the extent to which violations are systemic, their frequency and the particular vulnerability of the individual, are all factors which must be assessed in identifying whether there is a real risk of such abuse in the particular case.

63. In the present case, the evidence establishes that Albania has not had a good record in terms of its prisons conditions. In an annex to his report, Professor Blitz has included a short summary of Albanian political history since the Second World War in order to explain the present political and legal situation. Of note is that after political unrest in the 1990s, a large number of prisons were destroyed and this led to subsequent overcrowding. By 2006, however, the country began construction of a large number of prisons, in particular pre-trial detention centres. A new probation system was also put in place. On the evidence of Professor Blitz, it seems that historical issues of overcrowding have been abated.

64. Professor Blitz complained of poor physical facilities in certain custodial facilities. Based upon the information provided by Albania, we know that this respondent will be housed in Durres. This was a prison which was criticised by the CPT in its report in 2006. That report was relied upon by the ECtHR in *Dybeku*. Since then, it is clear that there has been much construction and refurbishment of prisons in Albania. In Professor Blitz's own report, he reported that the Minister of Justice prioritised rebuilding in the largest cities, naming Durres first in the order of priority. He referred to a pre-trial detention facility being started there. However, it is significant that Professor Blitz did not provide any specific criticism of Durres in his final response. In all the

circumstances, the respondent has not produced any cogent evidence that there is any real risk that, by reason of the physical facilities in the custodial institutions in Albania, he will be subject to inhuman and degrading treatment.

65. Professor Blitz raised specific concerns about the nature of the psychiatric treatment that the respondent may receive. In particular, he queried whether it would be to "a European standard". The Court observes that in so far as this conveys an absolute standard for extradition to be permitted, it is not the standard that the Court has to consider; the issue is whether there is a real risk that the treatment (or lack thereof) would make the detention inhuman and degrading. As mentioned earlier at para. 37 of this judgment, Professor Blitz noted in his first report that "one would seek assurances that if the defendant were returned, he would be able to avail himself of the necessary treatment in a designated prison." He also raised the specific issue about access to medication.

66. In relation to both those matters, the Albanian government has given specific assurances that the respondent will be given the appropriate medical treatment including medication. The response to that by Professor Blitz has been to query the giving of those assurances. In particular, Professor Blitz said that while there has been significant improvement in the prison infrastructure, the prisons have not been subject to external scrutiny.

67. This Court is bound to apply the presumption that a country seeking extradition will act in good faith and respect fundamental rights. That presumption is weaker than in the case of surrender involving an E.U. member state and the EAW procedure. Nonetheless, it is not insignificant that Albania is a candidate country for membership of the E.U., that it is a party to the ECHR, that it is a party to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, that it is a party to the U.N. Convention Against Torture Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and that it is a party to the Optional Protocol to the Convention Against Torture. The specific assurances that have been given with respect to his treatment must be viewed in that light. Furthermore, there is no evidence that Albania has a track record of not abiding by specific assurances in extradition cases.

68. The Court is satisfied that Professor Blitz's concerns over whether matters can have improved within 18 months since the visit of the CPT in February 2014 (in fact this is a period of over 2 years and 3 months up to the date of the assurances) do not amount to cogent evidence that the respondent's right to freedom from inhuman and degrading treatment will be violated. Moreover, Professor Blitz does not consider that specific information was given in the response of the Albanian authorities to the 2016 CPT report in relation to a new agreement with relevant stakeholders regarding health care in prisons. That is a matter which appears to address structural problems in the provision of health care in the prisons.

69. More importantly, with regard to this specific respondent, it has been stated by the Albanian authorities that he will be accommodated at a named institution because it has a specialised psychiatrist. It is also been stated that at this institution, he will be provided with continuous psychological and counselling therapy by the psycho-social staff and that he will have an individual treatment programme. It is also stated by the Albanian authorities that he will be provided therapy with the medication he is on at present, namely Olanzapine. The Albanian authorities have also named the particular psychiatrist.

70. The Court has had regard to what both the CPT and Professor Blitz have said about the nature of the co-operation by the Albanian authorities during the CPT visit. However,

the Court views the issue of co-operation with the CPT as different from the giving of direct assurances to another state with regard to the treatment of a particular individual. What is stated by the CPT is that the principle of co-operation required the recommendations to be effectively implemented in practice. Specific assurances in respect of an individual are qualitatively different to the overall lack of progress in implementing recommendations. There is no suggestion in the CPT report that there has been mala fides on the part of the authorities, the issue is lack of progress.

71. The Court specifically rejects the concern of Professor Blitz regarding the possibility that the named psychiatrist will leave. While there is always a possibility that a psychiatrist will leave his or her position, this does not establish a real risk that this respondent will be left without a replacement psychiatrist to treat him while in prison.

72. What causes the Court the most concern is the fact that there is no designated psychiatric institution to house forensic psychiatric patients. A great deal of the adverse commentary by the CPT, and indeed by the OSCE presence in Albania, is that persons who have been "declared not to be criminally responsible" (as per the 2016 CPT report at para. 41) are housed in prisons rather than in psychiatric hospitals. Those that are not found criminally responsible are by definition not prisoners and should not be treated as prisoners. No evidence has been placed before the Court and no argument made to the effect, that there was a real risk that this respondent would be found not to be criminally responsible or in Irish terms "not guilty by reason of insanity". To that extent, no real risk has been established that he will be at risk of inhuman and degrading treatment by virtue of being kept in prison when he is not a prisoner.

73. On the other hand, he is a man who, on the evidence, suffers from a serious psychiatric condition and will require treatment for that indefinitely. In Scotland, he was committed to a hospital rather than a prison. At present, confinement in a secure forensic psychiatric hospital is not available to him in Albania. The fact that he has been found criminally responsible is not decisive as to whether the authorities will have fulfilled their obligations to him as a man who is manifestly vulnerable by virtue of his chronic and serious psychiatric condition. The Court is alert to the fact that his illness requires long term treatment and supervision.

74. Counsel for the minister distinguished the *Dybeku* case on a number of grounds, one in particular being that the ECtHR was assessing treatment that had already occurred. Furthermore, in that case, Albania defended the case partly on the basis that this was a resource issue. Counsel submitted that no such response is made by the Albania authorities here, but on the contrary, they have given assurances that the respondent will receive appropriate treatment.

75. In *Dybeku*, it was partially the Government's response that this inmate had been treated the same as other inmates despite his mental health issues, that led the Court to conclude that there was a failure in their commitment to improving the conditions of detention in compliance with the recommendations of the Council of Europe. The particular conditions of detention to which the ECtHR referred, were the European Prison Rules on Health Care and in particular the requirement that sick prisoners who require specialist treatment shall be transferred to specialised institutions or to civil hospitals where such treatment is not available in prison. The Rules also provide with regard to mental health, that specialised prisoners or sections under medical control shall be available for the observation or treatment of prisoners suffering from mental disorder or abnormality who do not necessarily fall under the provisions of Rule 12. Rule 12 provides that persons who are suffering from mental illness and whose state of mental health is incompatible with detention in a prison should be detained in an establishment designed for that purpose. If they are to be exceptionally held in prison there should be

special regulations designed for that purpose.

76. In the *Dybeku* case, the ECtHR did not go so far as to say that to detain a person who has a serious and chronic mental health condition in a prison is, of itself, inhuman and degrading treatment. Indeed, it is implicit in its observation that the government had failed to show that notwithstanding his stay in a high security prison, those conditions were appropriate for a person with his history of mental disorder. The Court did consider that his regular visits to prison hospital could not be viewed as a solution since he was serving a sentence of life imprisonment.

77. In the present case, this Court has not been presented with medical evidence to the effect that to hold this respondent in a prison, as distinct from a forensic psychiatric unit or clinic, would be incompatible with his mental health. Dr. Skilling's evidence does not go so far. Moreover, it is instructive that he enquired about the psychiatric follow-up that would be available should the respondent be extradited and that he specifically tried to contact Durres prison. It may well be that detailed evidence would more easily be available to the respondent in Scotland for presentation to the Scottish government and, if necessary, to the Scottish courts on any appeal therefrom. It is evidence that is singularly lacking in these proceedings.

78. Furthermore, the Court is satisfied that the Albanian authorities have specific regulations regarding prisons that in the words of Professor Blitz are "in line with international and specifically European standards". Therefore, the regulatory framework with respect to his detention is also established as being in line with European standards.

79. The assurances that have been given in this case as to his psychiatric treatment and the individual care plan available to him, the regulatory framework in Albania for the treatment of prisoners and the absence of specific medical evidence contraindicating prison due to his ill-health are sufficient to satisfy the Court that the absence of a forensic psychiatric unit does not, of itself, create a real risk that this respondent will be subjected to inhuman and degrading treatment on his any extradition to Albania.

80. While there are legitimate ongoing concerns about the provision of psychiatric care in Albania for those within the criminal justice system, specific assurances with regard to the treatment of this respondent have been given by Albania. Although concern has been expressed about those assurances in the light of the ongoing concerns about psychiatric care that have been expressed in successive CPT and other reports, no evidence has been put forward that specific individual assurances with regard to treatment of persons extradited have been violated in the past by Albania. The Court is entitled to accept those assurances. It is neither necessary nor appropriate to await external scrutiny of the assurances that have been given. Indeed, the assurances relate mainly to treatment that will occur in the future to this respondent.

81. The Court notes that Professor Blitz speaks of the possibility of further reports becoming available which may either affirm or refute the Albanian government's claims of reform. The Court cannot refuse to make its decision based on reports that may become available in the future. However, if these reports do come to hand in the near future, this respondent would be able to present them to the Scottish authorities if they are supportive of his arguments.

82. In the present case, the Court is also satisfied that specific agreements between the stakeholders in the healthcare field have been entered into and implemented since the last CPT visit as per the Albanian response to the CPT report. No evidence has been put forward by the respondent to undermine this assertion. That is evidence which could have been obtained even in the absence of inter-governmental reports or a report from

the National Preventive Mechanism (under the Optional Protocol to the Convention against Torture) in Albania, the People's Advocate as posited by Professor Blitz.

83. On the evidence before the Court, the Court is satisfied that there is no basis for rejecting the specific assurances that have been given in this case with respect to the treatment of this respondent. In all the circumstances, the Court is satisfied that it has not been established that there are substantial or reasonable grounds for believing that there is a real risk that this respondent will be subjected to inhuman and degrading treatment if extradited to Albania on account of his mental ill health and the conditions in which he will be detained.

Fair Procedures and Fair Hearing

84. The respondent claimed that, because of the practices within the criminal justice system that operate in Albania, he will not receive a fair trial, in particular as there are significant levels of corruption in Albania. He relied upon the evidence from Professor Blitz and from a wide variety of reports on Albania. Professor Blitz says that international monitors highlight significant corruption across many sectors of government and the judiciary. He referred to the most recent U.S. State Department Human Rights Report of 2015 in which it is said that impunity remained a problem. Government officials, including judges, were able to avoid prosecution. He stated that there had been a consistent pattern of complaints submitted to the Office of the Ombudsman.

85. The 2014 U.S. State Department Human Rights Report on Albania stated that although the Constitution provided for an independent judiciary, political pressure, intimidation, widespread corruption and limited resources sometimes prevented the judiciary from functioning independently and efficiently. There are sometimes closed hearings because security officers do not admit observers. Disciplinary proceedings had been lodged by the High Council of Justice against 19 judges and they were considering charges against 14 more.

86. The respondent conceded in his submissions that Albanian law sets out many trial procedures "that we are accustomed to" and that the 2014 U.S. State Department Human Rights Report stated that these rights "are generally respected". However, the respondent referred to that part of the report in which the U.S. State Department noted that in a number of decisions the ECtHR was critical of certain trial procedures, in particular that the authorities failed to secure or properly record witness evidence, used evidence obtained by torture and failed to provide detainees access to a lawyer.

87. The organisation Civil Rights Defenders (previously known as the Swedish Helsinki Committee for Human Rights) states in its Country Report entitled "*Human Rights in Albania*" dated 13th August 2015, that the Albania justice system is systematically corrupt with high levels of impunity. This Report states that there are some positive steps to tackle corruption with the arrest of several public officials on charges of corruption. With respect to penal cases, it is stated that there are problems with the pro bono lawyers in such penal cases, as they are poorly paid and suffer from a low level of professionalism.

88. The level of corruption has been a cause of concern in the European Union. Various reforms are required to bring the standards in line with the judicial systems in the European Union. The Interim Opinion of the European Commission for Democracy (the Venice Commission) of the Council of Europe has stated that the Albanian Constitution of 1998, prepared in close cooperation with the Venice Commission, had resulted in the paradox that the guarantee of an independent and accountable judiciary had been bestowed on judges who were not yet independent and impartial in practice and this lead to the development of corporatist attitudes which led to wide-spread corruption and

lack of professionalism. That is why there are draft reforms to "reboot" the system.

The law

89. Issues of systemic corruption or systemic injustice in the criminal justice system of a requesting state (for extradition or surrender) are matters a requested person is entitled to raise. However, the respondent must discharge a heavy onus to show that there are substantial grounds for believing that there is a real risk that he will not receive a fair trial to the extent of a flagrant denial of that right to a fair trial (see the Supreme Court in *Minister for Justice, Equality and Law Reform v. Puta and Sulej* [2008] IESC 29; [2008] IESC 30, and the High Court in Attorney General v. N.S.S. cited earlier). Flagrant in that sense is intended to convey a breach of the principles of a fair trial guaranteed by Article 6 ECHR which are so fundamental as to amount to a nullification, or destruction of the very essence of the rights guaranteed by that Article. There is a presumption in favour of a State that it will respect human rights, however, it is a rebuttable one.

90. In the case of *N.S.S.*, concerning the real risk of a breach of Article 6 rights if the respondent were to be extradited to Russia, the High Court (Edwards J.) stated:

> *"15.4.3 The respondent in this case has adduced a substantial body of evidence that is consistent in painting a picture of long standing structural weaknesses and deficiencies in the Russian judicial and criminal justice systems. The evidence in question consists of country of origin information coming from numerous independent and reputable sources such as the US State Dept, The Council of Europe's CPT, The United Nations, The UK Home Office, Human Rights Watch amongst other, and of course the evidence of Professor Bowring*
>
> *15.4.4 Amongst the weaknesses and deficiencies identified are concerns about the independence of the judiciary; biases and unfairness' in the system; a disproportionately high rate of convictions (in excess of 99%) save where public officials are being tried for abuses where the rate of convictions is much less; difficulties in defendants obtaining effective legal representation; an unhealthy relationship between prosecutors and the judiciary where excessive deference is shown to the prosecution service and judges appear biased in favour of prosecutors; an unhealthy relationship between the prosecution service and law enforcement agencies with the latter frequently coercing confessions by means of violence, sometimes amounting to torture, excessive force and ill-treatment of persons in custody, and scant respect for the presumption of innocence.*
>
> *15.4.5 The evidence is really all one way in that regard, despite a number of initiatives mentioned in the additional information furnished on behalf of the requesting state aimed at strengthening the independence of the judiciary and the prosecution service. However there has been no engagement whatever with the matter which this Court views with greatest concern, i.e., that there is strong evidence to suggest that in many Russian trials no more than lip service is paid to the presumption of innocence. In this context the Court again recalls the comments at para. 45 of the Report of the UN Special Rapporteur on the Independence of Judges and Lawyers in the Russian Federation dated 30th April, 2014, quoted earlier."*

91. The question of how to address allegations of systemic corruption in extradition cases generally, and in Albania in particular, arose in the U.K. in a series of decisions.

The U.K. Supreme Court in *Kapri v. Lord Advocate* [2013] UKSC 48 dealt with a request to extradite a man to Albania to serve a sentence imposed in his absence for murder. The U.K. Supreme Court stated at para. 28:

> *"It is a sad fact that, despite all the many provisions in international human rights instruments which emphasise that everyone has the right to a fair trial before an independent and impartial judge, there are still states where the judiciary as a whole is infected by corruption. It is, of course, hard to get at the true facts. But there is no smoke without fire, and where allegations of corruption are widespread they must be taken seriously. So too must an appreciation of what corruption may lead to when it affects the whole system. It may involve simple bribery of judges and court officials, or it may involve interference with the judicial system for political reasons of a much more insidious kind. Unjust convictions may result, just to keep the system going and keep prices up. Everyone whose case comes before the courts of that country where practices of that kind are widespread is at risk of suffering an injustice. Those who are familiar with the system may know how much they need to pay, or what they have to do, to obtain a favourable decision but be quite unable to come up with what is needed to achieve that. Those who are not familiar with it will be at an even greater disadvantage."*

92. The U.K. Supreme Court observed at para. 32 that "*[t]he stark fact is that systemic corruption in a judicial system affects everyone who is subjected to it*." It was important, therefore, that a court have a close look at material in order to determine how systemic or widespread the problem is at the time of the particular hearing. That case was returned to the Scottish High Court where two expert witnesses gave evidence and there were a large number of reports from governmental, inter-governmental and non-governmental organisations.

93. In the case of *Kapri v. Lord Advocate* [2014] HCJAC 33, the Scottish High Court held at para. 132:

> *"It is abundantly clear that there is a high level of perception in Albania, including that of some judges, that corruption exists in the judicial system and elsewhere in the Albanian public sector. The court has no difficulty in concluding that corruption occurs in the Albanian judicial system, if by that is meant that it has occurred, and may again occur, in certain situations. The broad impression, upon a consideration of all the material presented, is that, so far as the criminal justice system is concerned, it may occasionally affect decisions involving high ranking politicians or organised criminals, especially on incidental or procedural matters such as bail (eg the Puka case). It may affect civil cases where there is a political dimension or very large sums of money involved. The extent of this is entirely uncertain. At best for the appellant, there may have been undue influence of one sort or another in criminal cases involving a single judge on matters of procedure. It may be more frequent than this, but there is simply no adequate material upon which it could be held that there are substantial grounds for believing that it exists at such a level as will necessarily involve a flagrant denial of justice in all, or even most, cases. Quite the contrary, most of the material in the reports spoken to is of a very general nature and often simply repetitive of earlier reports by the same or a similar organisation. The court is entirely satisfied therefore that there has been no evidence presented to it, and certainly no cogent or compelling evidence, that there are substantial grounds for believing that the level of corruption in the Albanian judicial system is at the "systemic" level such that it falls into that "extreme" category whereby the removal of anyone to that country would necessarily result in a violation of a Convention right. As will be seen, it is equally satisfied that there are no substantial grounds for believing that there is a risk of the*

appellant, in particular, being the subject of an unfair trial should he be extradited to Albania."

The Court's determination and analysis on fair trial

94. The respondent submitted that the Scottish court in *Kadri* took a deferential approach to the Albanian judicial system but that the Irish court should be more prepared to put the Albanian judicial system through, in the words of the Supreme Court in *Rettinger*, a "rigorous examination." The Court does not agree with this categorisation of the Scottish approach. Indeed, the Scottish Court, in para. 111 of its judgment, specifically referred to the requirement to carry out the examination rigorously. The references to the nature of the task at hand by the Scottish court as "*faintly invidious, if not disrespectful*" were acknowledgements of the difficulty that a court faces in giving judgment on the legal system in another state - in particular one that is a party to the European Convention on Human Rights. Moreover, the Scottish Court correctly noted that no legal system is without flaws and indeed the Scottish reference to delays in civil and criminal matters might perhaps find some resonance in this jurisdiction.

95. The respondent made the argument that the finding in *Kadri* was more nuanced in that it was a finding at para. 141 that there was "*cogent and compelling evidence, which the court accepts, that this particular appellant will obtain a fair trial upon his return to Albania*." That, it seems, was only one part of the conclusion of the Scottish Court. In fact, as stated above, "[…] *the fundamental conclusion of the court remains that, although there may well be elements of corruption in the Albanian judicial system (as there may be in those of other signatories to the Convention), there is no proper evidential basis for the conclusion that it is at a systematic or systemic level such that there are substantial grounds for believing that any person being extradited to Albania would risk suffering a flagrant denial of his right to a fair trial.* […]" (para. 141).

96. The respondent submitted that, apart from the guarantee of a retrial, there is no guarantee given about corruption. The respondent submitted that until the much needed constitutional reforms are cemented and bedded down, there is a risk of a flagrant denial of justice if the respondent were to be extradited to Albania.

97. The issue for the Court is whether there is evidence to establish substantial grounds for believing that the respondent will be at real risk of a flagrant denial of his fair trial rights if he is extradited. The Court has carefully considered all of the reports before it. Albania is a state which has had a difficult and sometimes calamitous history since the Second World War. The Vienna Commission identified issues with regard to the new Albanian Constitution which provided for the independence of the judiciary. There has been a paradoxical resultant corruption within the judiciary. The U.S. State Department notes that pervasive corruption is the most significant human rights issues and particularly within the judiciary. The U.S. State Department also notes that anti-corruption laws are not implemented effectively and officials frequently engaged in corrupt practices with impunity.

98. Corruption is, however, being tackled: Civil Rights Defenders note that some positive steps have been taken, including the arrest of several public officials on corruption charges. The 2014 U.S. State Department Human Rights Report observes that the European Commission had noted that various disciplinary proceedings had been taken against a significant number of members of the judiciary. It is also noted that there was a prosecution of the head judge of one district court, the head of the district prosecution office, the chief clerk, the chief secretary, two private citizens and a defence counsel on various charges related to active corruption, abuse of offence and similar offences. Convictions against all except the judge and prosecutor were recorded, while those trials remain outstanding. In an earlier report, it is noted that a prosecutor was sentenced to one year in prison for unlawful influence on his wife, who was a judge in

the same district court. She was acquitted.

99. In the view of the court, the examples of prosecutions for corruption do not establish that this particular respondent is at real risk of being exposed to a flagrant denial of his fair trial rights. On the contrary, they establish that real and specific steps are taken to prosecute this behaviour where it can be established. Furthermore, the U.S. State Department reports that it was "sometimes" that political pressure, intimidation, widespread corruption and limited resources prevented the judiciary from functioning independently and efficiently.

100. Of considerable importance is that the U.S. State Department Country Report states that the trial procedural rights are generally respected by the government. This is significant as it is a general statement that specific rights are protected within the system.

101. The Court contrasts the evidence presented by the respondent in this case with the evidence presented in N.S.S. concerning the judicial system in Russia. In that case, "[*t]he evidence [was] all one way*." (para. 15.4.5). Of the greatest concern to the court was that in Russian trials, there was no more than lip service paid to the presumption of innocence. That is not the position here, what has been put forward is that the trial guarantees are generally respected. Furthermore, it is not being submitted that all Albanian judges are corrupt but that sometimes corruption can be a problem.

102. The Court is satisfied that, on the evidence, it has not been established that there are substantial grounds for believing that there is a real risk that the respondent will be subject to a flagrant denial of his fair trial rights under Article 6 of the European Convention on Human Rights.

The right to a retrial after trial *in absentia*

103. The respondent was tried in his absence in Albania. The Scottish Government, in seeking consent to the onward extradition of the respondent to Albania, has informed this Court that "[i]n accordance with the Second Additional Protocol [to the European Convention on Extradition, 1957], the Albanian authorities have assured us that Albania law permits re-examination of the case where an individual who has been tried *in absentia* is extradited."

104. The Albanian request sets out in some considerable detail the nature of their system of trial *in absentia* and also the relevant section of the Albanian Criminal Procedure Code, namely Article 147. The Albanian authorities also set out in considerable detail the manner in which the courts have interpreted the legal provisions regarding trial *in absentia* and how the decision to appeal may be exercised. They also rely upon the decision of the Supreme Court of Albania which supported the giving of an advance guarantee of a retrial in the case of an extradition from another country. The Constitutional Court rejected a request by the Supreme Court to address the constitutionality of provisions regarding the trial *in absentia*. According to the Albanian authorities, this means that it is only in clearly defined circumstances of voluntary waiver of the right to participate in trial after notification of the trial, that a trial in absentia is legitimate.

105. In his written submissions, the respondent quoted extensively from the U.K. High Court decision setting out the relevant Albanian law in the cases of *Mucelli, Hoxhaj and Gjoka v. Albania* [2012] EWHC 95 (Admin). The applicant accepts that statement:

> ***"The Albanian Law***

Constitution and legislation

12 Albania is a contracting state to the European Convention on Human Rights. Article 17.2 of the Albanian Constitution provides specifically that the limitations of rights and freedoms under the constitution cannot infringe Convention rights. Article 33 of the constitution confers a right to be heard before judgment, although a person who evades justice does not benefit from this right. Article 43 of the constitution confers a right to appeal a judicial decision to a higher court, except when the constitution provides otherwise. Article 116.1 sets out a hierarchy of norms: a. the Constitution; b. ratified international agreements; c. the laws; and d. normative acts of the Council of Ministers. Under Article 122 ratified international agreements constitute part of the internal juridical system, are directly applicable in Albania if self-executing, and have superiority over incompatible domestic laws.

13 Albania is a signatory to the European Convention on Extradition, including the Second Additional Protocol , which contains a guarantee of retrial in Article 3 .

"Article 3 — The Convention shall be supplemented by the following provisions:

'Judgments in absentia

When a Contracting Party requests from another Contracting Party the extradition of a person for the purpose of carrying out a sentence or detention order imposed by a decision rendered against him in absentia, the requested Party may refuse to extradite for this purpose if, in its opinion, the proceedings leading to the judgment did not satisfy the minimum rights of defence recognised as due to everyone charged with criminal offence. However, extradition shall be granted if the requesting Party gives an assurance considered sufficient to guarantee to the person claimed the right to a retrial which safeguards the rights of defence. This decision will authorise the requesting Party either to enforce the judgment in question if the convicted person does not make an opposition or, if he does, to take proceedings against the person extradited.""

Albania ratified the Convention and Additional Protocols by Law 8322 of 2 April 1998.

14 On 3 December 2009, the Albanian Assembly enacted Law No 10 193 "On Jurisdictional Relations with Foreign Authorities in Criminal Matters". It came into force the following year. Article 51 is entitled "guarantees in connection with the extradited person". Article 51.4 provides for the review of a conviction in absentia against an extradited person where the Ministry of Justice has given a guarantee to that effect to the requested state:

51.4: "A final decision rendered against the extradited person by the local judicial authorities in his absence may be reviewed at the request of the extradited person, if the Minister of Justice has given such a guarantee to the requested State. The request for review is submitted within 30 days from the arrival of the extradited person in Albanian territory and its examination follows the rules of the Code of Criminal Procedure ".

15 The Albanian ("the CCP") contains various fair trial rights. Thus Article 48 gives a defendant the right to choose a lawyer, although in the absence of such a choice it may be made by a relative: Article 48.3. More important for present purposes is that Article 147.2 CCP confers the right on persons where decisions have been rendered in their absence to request the renewal of the time limit to appeal.

147.2 "If the decision was rendered in his absence, the defendant may request the reinstatement of the time-limit to appeal when he proves that he has not been notified of the decision."

Article 147.3 continues that that request must be within 10 days from the date when the person has been actually notified of the act which makes the retrial of the case possible. Article 148 then provides for the effects of a reinstatement of a time-limit.

148.1 "The court which he has dicided the reinstatement of the time-limit, upon request of the party and so far as it is possible, orders the repetition of the operations in which the party was entitled to participate."

16 Under Article 410 CCP a defendant may appeal a conviction personally or through his defence lawyer. Article 410.2 provides that, if a defendant has been sentenced in absentia, a defence lawyer may only appeal under the defendant's power of attorney. Articles 449-461 of the CCP govern the application for a review of a final judgment. Article 450 sets out four instances when a person may request the review of a decision:

"(a) when the facts of the grounds of the decision do not comply with those of another final decision; (b) when the decision has relied upon a civil court decision which has subsequently been revoked; (c) when following the decision new evidence has emerged or has been found which independently or along with previous evidence proves that the decision is wrong; and (d) when it is proved that the decision was rendered as a result of the falsification of judicial acts or evidence considered by law as a criminal offence."

Appeals are dealt with in Articles 422-430 CCP . Under Article 451 the accused or the prosecutor may file a request for a review in accordance with the grounds of review in Article 450 ."

106. In *Mucelli, Hoxhaj* and *Gjoka*, the respondent quoted extensively from the conclusions of the England and Wales High Court in those cases. The applicant also relies upon the dicta contained therein. The High Court stated:

"48 The issue for us in each of these cases is whether there is a practical and effective right of retrial, consonant with Article 6 ECHR, if these three applicants are extradited to Albania. In each case the Albanian authorities have asserted that there is that right. The so-called supplemental "guarantees" (tracking the language of Article 51 of Law 10 193 of 3 December 2009) by the Albanian Ministry of Justice assert that the right exists. Given the independence of the judiciary the Ministry of Justice could not go further. The language of expectation which Mr Hardy QC underlined is explicable as the expectation that the applicants will apply for a retrial under Article 450.

49 However, mere assertions by the Albanian authorities that there is the right to retrial is inadequate in the light of the history. What is necessary

is that these assertions be made good as a matter of Albanian law and practice. In that regard I accept the submissions of Ms Barnes, who appeared for Fair Trials Abroad and who invoked MSS v Belgium [2011] 53 EHRR 2 , [353], [359].

50 At the outset I underline the point my Lord, Toulson LJ, made in the course of argument: the court's assessment of Albanian law and practice must turn on an evaluation of the expert evidence. Toulson LJ drew on his experience in the Commercial Court, where English lawyers were sometimes tempted to offer their own interpretation of foreign law. There, as here, that temptation must be resisted. The obvious reason is that neither the English lawyer nor the English court can have a full understanding of the context of foreign constitutional and statutory instruments or judicial decisions. The experts have that understanding. Their views may be in conflict and the court may have to reconcile them but not primarily through its own interpretation of the foreign law materials.

51 In my view the building blocks for evaluating Albanian law and practice are firstly, that Albania is a contracting state of the European Convention on Human Rights and therefore subject to the jurisdiction of the European Court of Human Rights. The Convention has been explicitly adopted by article 17 of the Albanian Constitution and under Article 122 takes precedence over domestic law. Albania is also a signatory to the Second Additional Protocol to the European Convention on Extradition which provides, as we have seen, for a guarantee of a re-trial in Article 3. There is also the enactment of Article 51.4 of Law No 10 193 of 3 December 2009. All these are a necessary, but not a sufficient, condition for a conclusion as to whether there is a practical and effective right of retrial in Albania.

52 Next, there is the jurisprudence. The ES case is the first of the trilogy of Albanian decisions pertinent to the issue before us. It is clear that that case turned in the Constitutional Court on Article 147 CCP; there is no mention of Article 450 CCP . It established that a person tried in absentia had a right to have his case re-opened, even if he had been represented at trial by a family appointed lawyer. The case then went to the Supreme Court. Professor Kokona makes the point that there is a lack of clarity in the Supreme Court in ES because of the combination of considerations of procedural principle and the factual merits of the case. In other words, as I understand it, the Supreme Court considered the merits of ES's case and that was at least an element in the court's decision to refuse his claim. Professor Kokona also explains that there was no evidence in ES of a Ministerial guarantee of a retrial. So despite that distinctly off beam answer the Albanian Ministry of Justice gave in its 22 December 2011 reply to the Secretary of State's questions about ES , it seems to me that whatever happened in ES is of no relevance to the issues before the court.

53 Mece is a crucial decision. There was a Ministerial guarantee there given to the Spanish court that Mece would have a retrial. On his return to Albania Mece applied to the Supreme Court for a retrial under Article 450 CCP. The Supreme Court in its 17 September 2010 decision held that Mece should obtain a retrial. The Ministry of Justice has explained that Mece changed Albanian law, that it is binding on lower courts and that Mr Mucelli falls exactly within the ruling. Professor Kokona accepts Mece as a

positive step, although she points to the conflicting use of Article 147 CCP in ES and Article 450 CCP in Mece. She accepts, however, that Bogdani followed Mece . Mr Blaxland QC contends that there is no evidence about whether Mece has been retried. Even if it is not too late in the day to be advancing that point, the fact is that we do know what happened in Bogdani. To my mind that is determinative.

54 Bogdani followed his extradition from this country consequent on the decision of this court: [2008] EWHC 2065. Applying Mece , the case was sent to the Court of Appeal in Gjirokastër, and we have Judge Qirjazi's report about how the case is proceeding. Professor Kokona majors on the procedural hurdles and delays in the case, but these are explained by the Ministry of Justice. The crucial point is that the Supreme Court has on at least two occasions held that there is a right of retrial and we have chapter and verse on what happened in Bogdani's case. There were delays but they have been explained. Mr Mucelli will need to act quickly on return, and he will need a lawyer to make his Supreme Court application. Despite the absence of legal aid in Albania for the purpose, there is no evidence before us that Mr Mucelli will not be able to make a timely application or obtain legal assistance.

55 In my view, the law and practice in Albania is now such that there is no real risk that Mr Mucelli will suffer a flagrant denial of justice on his return to Albania. He is entitled to a retrial of the merits of the case against him. As for Messrs Hoxhaj and Gjoka, I cannot see that the District Judge erred in her conclusion that she was sure that they would be entitled to a retrial or (on appeal) a review amounting to a retrial on their return to Albania. I am fortified in these conclusions because of the history of Albanian extradition attempts. The Albanian authorities must be acutely conscious of the fact that these present cases will be observed carefully when these three persons are extradited. There is also the scrutiny of Albanian extraditions in the European Court of Human Rights, an ongoing scrutiny because, as Professor Kokona explains, the Sulejmanni case is still before that court."

107. In the present case, the evidence from Professor Blitz was short and perhaps not to the point. He conflated this issue of retrial with the question of judicial corruption and the lack of independence. He referred to the Mucelli cases but draws the Court's attention to the fact "that while the above cases were decided on the grounds that the presiding judge was not persuaded that the applicants would suffer 'a flagrant denial of justice' on their return, there is little evidence of the return of prisoners suffering from severe mental illness." He then refers to the issue of the detention of convicted persons suffering mental health problems in ordinary prisons. His final conclusion is that "[…] while there is a possibility that the defendant would be able to secure a retrial, this right does not appear to be automatic and assurance would need to be given that the defendant is entitled to a retrial and may be represented."

108. In the present case, the Albanian authorities have given a very clear guarantee of "the exercise and respect of the right to retrial of [the respondent]". In so far as the respondent seeks to undermine the undertaking as to his right to retrial, there must be reasonable or substantial grounds to show that there is a real risk that he will be subjected to a flagrant denial of justice on his return home. The Court notes that Albania is a member of the Council of Europe and a party to the ECHR and that there is a presumption, albeit a weaker one than that for an E.U. member state, that Albania will comply with its fundamental rights obligations. Those fundamental rights include the right to a fair trial at which one is present. Furthermore, and in particular, the Albanian

authorities have given an express guarantee as to a retrial.

109. The Court has no evidential basis for the claim that there is a real risk of a flagrant denial of rights. In so far as the respondent has presented evidence through Professor Blitz that this raises particular issues because of this respondent's mental health condition, the Court rejects that contention. There is no evidence whatsoever that his mental health would not permit him from exercising this right and indeed, in Dr. Skilling's report, it is reported that this respondent had weighed in the balance his right to a retrial in considering whether to consent to his surrender. In so far as the respondent refers to corruption as a concern in this regard, the Court refers to its rejection of this claim as set out above.

110. In so far as the respondent has raised the issue that there is no automatic guarantee of a retrial under the law, it is clear in the present case that there is such a guarantee. The Court also observes that this particular respondent has not placed any specific evidence before the Court to show that he would not be able to avail of the retrial because of any particular conditions which apply to him. In light of the guarantee, which the Court has no basis for rejecting, the Court is satisfied that it has not been established that there are substantial grounds for believing that there is a real risk that, on the respondent's return, there will be a flagrant denial of justice by virtue of his previous trial *in absentia*.

Delay

111. The respondent submitted that the delay in the present case was a bar to onward extradition as it amounted to a breach of the Article 38 constitutional guarantee to expeditious trial and to the right to a trial within a reasonable time under Article 6 of the ECHR. The respondent accepted that the Supreme Court case of *Minister for Justice v. Stapleton* [2008] 1 IR 669 applied as regards to general propriety of the trial courts dealing with delay. The respondent submitted, however, that the decision was not absolute in its terms and relied upon the decision in *Minister for Justice v. Hall* [2009] IESC 40 in which it was stated by the Supreme Court that there may be occasions when it is more appropriate to litigate delay in the requesting state. The respondent relied upon the particular circumstances here, the length of time since the alleged offences, the time taken since the enactment of the Act of 2003 and the taking of the proceedings, the fact that the respondent has in the interim begot a family, his mental health issues and his current treatment for same in Scotland.

112. The Supreme Court has been clear that, in general, issues such as prosecutorial delay and its consequences are more appropriately litigated in the requesting state which is the state of trial. Without having to consider what if any exceptions may apply to this matter (although it is clear that delay in the context of Article 8 ECHR and the public interest in the extradition may arise for consideration), in the present case, the case being made by the respondent falls at the first hurdle. He has made a claim of what is, in effect, prosecutorial delay without providing any evidential basis for same.

113. This case involves a man who apparently changed his name when he left Albania and lived in Ireland and in Scotland for about 20 years. He has given misinformation to the authorities in this jurisdiction and in Scotland and, in large part, the delay is due to his own behaviour. There is nothing to suggest that there was any delay on the part of the Albanian government in pursuing him. There is also no fault on the part of the Scottish authorities, as it was only in June 2014 that it came to light that he was in fact Astrit Picari and that he had been convicted in his absence of murder in Albania. It appears that both the Albanian authorities and the Scottish government acted without delay once his identity became known. Moreover, the respondent has not made a case that the delay will prejudice him in respect of any particular matter. Finally, the respondent has not put forward any medical evidence to show that his mental illness is

a ground that would impact upon a fair trial, either by reason of delay or otherwise.

114. Therefore, the Court is satisfied that even if "delay" were to be a ground for refusing to give onward consent, there is no evidential basis for refusing consent in the circumstances of this case.

Family Life
115. There was no disagreement between the parties on the law to be applied in this area. The Irish High Court has set out in *Minister for Justice and Equality v. T.E.* [2013] IEHC 323 twenty-two legal principles that the Irish courts must consider. It is unnecessary to repeat those here. The respondent also referred to the case of *Minister for Justice Equality and Law Reform v. Machaczka* [2012] IEHC 434 in which the Court prohibited the surrender of a respondent on Article 8 grounds in circumstances where he suffered from mental illness and was at risk of committing suicide if returned to Poland.

116. In the view of the Court, is it unnecessary to carry out any elaborate factual analysis as this is not a case which can be said to be truly exceptional in it features. This was the approach approved by the Supreme Court more recently in *Minister for Justice and Equality v. J.A.T.* (No. 2) [2016] IESC 17 where it was stated by O'Donnell J. at para. 11 as follows:

> *"In any future case, where all or any of the above factors may be relied on, it would not, in my view, be necessary to carry out any elaborate factual analysis or weighing of matters unless it is clear that the facts come at least close to a case which can be said to be truly exceptional in its features. Even in such cases, which must be rare, it is important that the considerations raised are scrutinised rigorously."*

117. In the present case, the respondent is sought for the offence of murder. Any delay, or more specifically any lapse of time in seeking him is explained by his departure from Albania and assumption of a different name. Although he is in a Scottish forensic hospital suffering from a serious mental illness, he is not suicidal and indeed his illness is well controlled by medication. His claim that this will affect his family life is completely unsustainable in circumstances where he has no contact with his children in Ireland. Furthermore, he has a son in Albania with a former partner and his return there on foot of any extradition would put him closer to those members and indeed he has specifically expressed the view that he would be closer to his family in Albania when explaining to Dr. Skilling why he consented to his extradition. That short synopsis demonstrates that this Court is not required to give further detail as to why there is no basis for his claim that consent to onward extradition would amount to a disproportionate interference with his family life.

Cumulative Grounds
118. The respondent has also claimed that the entire set of circumstances in this unusual case are such that the surrender of the respondent would amount to a violation of his constitutional rights and his rights under the European Convention on Human Rights. In essence, the respondent repeats what has been said above, in particular with reference to his family.

119. The Court has considered carefully each of the respondent's individual claims as above. The Court has rejected each one. The Court is not satisfied that there is an entitlement to claim an "omnibus" breach of rights over and above the consideration of each particular claim. A cumulative set of circumstances may affect a court's decision under one particular heading, for example, under a claim with regard to family and personal rights the court may consider the totality of the circumstances including the effect of delay on the public interest in surrender. That is entirely different to the argument that, despite rejecting each individual ground, the Court should refuse

consent on the basis of the cumulative evidence and submissions made before it.

120. The Court is bound to act in accordance with law and to give its consent to onward extradition unless that extradition would be prohibited under the Extradition Act 1965, as amended. There may be aspects of a case that "*evoke concern, dissatisfaction and some degree of sympathy*" in the words of O'Donnell J. in *Minister for Justice and Equality v. J.A.T.* (No. 2). The role of the court is not to test this matter "*against some generalised consideration of personal sympathy*" but to apply the law. Unless the cumulative grounds point to a breach of a particular right or to a prohibition on surrender, the Court must set aside any personal sympathy it might have and act upon the law. In this case, there is simply no basis for holding that the cumulative points offered on behalf of this respondent amount to a legal or constitutional ground for prohibiting the giving of consent to his onward surrender to Albania.

Conclusion
121. For the reasons set out above, the Court is satisfied that it can give its consent to the United Kingdom (Scotland) to extradite this respondent to Albania.

JUDGMENT of Ms Justice Ní Raifeartaigh delivered on 25th January, 2017

1. This case comes before the Court by way of an application pursuant to section 39(3) of the Nurses Act, 1985. The two plaintiffs, who are nurses, seek cancellation of a decision of An Bord Altranais (hereinafter 'the Board') made in March, 2015, that their names be erased from the register of nurses. The decision of the Board under challenge in these proceedings followed upon a Fitness to Practice Committee inquiry into certain allegations of professional misconduct on the part of the two nurses which arose in connection with the death of an elderly patient in a hospital in which they were working at the time. The Committee made certain findings of misconduct, and recommended that the two nurses be censured. However, the Board subsequently decided to impose the more severe sanction of erasure. In these proceedings, the plaintiff nurses do not challenge the findings of the Committee that they were guilty of professional misconduct, and confine their challenge to the sanction of erasure imposed by the Board. They do so on the ground that the Board failed sufficiently to take into account a number of distinct mitigating factors when considering what sanction to impose. The plaintiffs also contend that the decision of the Board imposing the sanction of erasure was invalid and unlawful because the Board lacked the necessary statutory quorum at the time of its decision. The latter point raises an issue with regard to the construction of certain provisions of the Nurses Act, 1985, and the Nurses and Midwives Act, 2011, as well an issue as to whether the Plaintiffs are estopped in the present proceedings from raising the issue of the Board's quorum in circumstances where the issue was not raised on their behalf at the time of the Board hearing in question.

Chronology of Events
2. As one of the complaints in this case is that the Board failed to take into account the lapse of time or delay in the case as a mitigating factor when considering the appropriate sanction, it is necessary to consider the chronology of events in some detail. There is no doubt but that a significant period of time has elapsed since the events which led to the inquiry, being the 22nd June 2006. This was the date of death of Ms. Hannah Comber, the elderly patient in the hospital in which the plaintiff nurses were working and in connection with whom the allegations of professional misconduct against the plaintiffs were investigated by the Fitness to Practice Committee. Accordingly, there was a period of almost 9 years between this event and the decision of the Board to impose the sanction of erasure.

3. On the 22nd June 2006, Ms. Hannah Comber, a long-term and highly dependent

patient in the hospital in which the plaintiffs were on duty, died in the early hours of the morning. It subsequently transpired, on foot of the pathologist's examination and the other facts established, that the cause of her death was asphyxiation. It seems, from all the facts established, that this occurred because she slipped down in the chair in which she was sitting which had a restraint belt, which belt caused the asphyxiation . Some hours prior to her death, she had become agitated while in her bed, which was a frequent occurrence. The plaintiff nurses had arranged to take her from her bed and place her in the day room under the supervision of a care assistant, who remained with her at all times. Ms. Comber was placed in a chair which had a restraint belt. It seems likely that the care assistant fell asleep while supervising Ms. Comber and that the accident happened while she was asleep. In or about 5am, the care assistant raised the alarm that something had happened to Ms. Comber. The plaintiff Nurse Dowling arrived and made some efforts to resuscitate Ms. Comber using CPR, but discontinued these efforts shortly afterwards in the belief that Ms. Comber was already dead. The plaintiff nurse Carroll arrived on the scene shortly after nurse Dowling. The two nurses then transferred Ms. Comber to her bedroom, laid her out on her bed and changed her clothes. No doctor, ambulance or other person was summoned by them, and they went off duty at approximately 8am.

4. Before going off duty, Nurse Carroll completed two documents. Nurse Dowling was fully aware of the entries made by Nurse Carroll. The 'Heatherside Hospital night report' and the 'Communication Sheet' contained the following entries regarding Ms. Comber: *"remained restless, out to commode at 1.30am", "requested to get dressed and get up. Dressed and sat on chair in dayhall. Continued to talk loud until 4am. Dozed in chair until 5am. Slipped off chair. Unresponsive. Put back to bed. Vital signs absent RIP"*. A nurse Crowley, who came on duty at 8am, was told that Ms. Comber had slipped down or slumped in her chair. She passed this information on to Dr. Kennedy, the doctor who subsequently attended the hospital at the request of Matron Moore, the Matron who came on duty the morning after the death of Ms. Comber. What is significantly absent from these entries and communications is any suggestion or hint that the death might have been caused by the restraining belt or that it might have been from anything other than natural causes.

5. Nonetheless, Dr. Kennedy was of the view that it was a coroner's matter because the death was unexpected and he contacted the Gardai. Later that afternoon, the pathologist, Dr. Bolster, rang him to inform that the cause of death was consistent with asphyxia. This raised concerns, particularly in light of the absence of any information from the nurses that might have suggested anything unusual about Ms. Comber's death. Members of an Garda Siochana arrived at the hospital during the late afternoon of the 22nd June, 2006, to interview persons in connection with the death.

6. Nurse Dowling made a witness statement to the Gardai which was signed at 6.50pm. Nurse Carroll made a statement to the Gardai, which was signed at 10.35pm. The Gardai cautioned her during the taking of this statement, after she said that the care attendant had fallen asleep while looking after Ms. Comber. The Gardai then interviewed the care attendant who signed a statement at 1.00am on the 23rd June, 2006. The Gardai then decided to re-interview Nurse Dowling pursuant to caution by reason of differences between the other accounts given to them and her own account, and she signed this second statement at 2.15am on the 23rd June, 2006.

7. In addition to the Garda investigation, which, it should be said, did not lead to the preferring of any criminal charges, the events in question led to the holding of an inquest, the conduct of a HSE inquiry, and an inquiry by the Fitness to Practice Committee by the defendant Board. Obviously, the latter is the most relevant to these proceedings. The history of the proceedings before the Board and the Fitness to Practice

Committee can be sub-divided into a number of separate periods.

The first period: from the initial complaint to service of the documents for hearing (8th August, 2006 - 12th May, 2010)

8. The first contact was made with the defendant Board on the 8th August, 2006. The Matron who came on duty the morning of the death of Ms. Comber, Matron Moore, wrote to the Board, making a preliminary inquiry as to who the appropriate persons or authorities were, to whom a complaint should be made. Apart from a holding letter, this letter was not responded to until the 19th December, 2006, over four months later, when the Board replied that, while a matter should be brought to the attention of senior nurse management, it was also open to any person to refer such a complaint to the Fitness to Practise Committee of the Board. The Board further noted a report in the Irish Times which referred to the death of Ms Comber and requested a copy of the report of any investigations carried out by the hospital into Ms. Comber's death. On the 28th December, 2006, Matron Moore again wrote to the Board, explaining that she had reported the death of Ms Comber to Senior HSE-South Management on 23rd June, 2006, and that an investigation process had commenced by the HSE-South in September and had not yet concluded. She indicated that the only report she had was her own written report into the death as submitted to the HSE. This was replied to by letter dated from the Board dated 18th January, 2007, seeking a copy of her report. A further letter from Matron Moore followed on the 22nd January, 2007, enclosing her own report and giving contact details for the person in the HSE dealing with the investigation. A meeting of the Board was held on the 15th February, 2007, at which the Board considered documentation furnished by Matron Moore together with copies of newspaper articles relating to the death of Ms. Comber. A decision was made to make an application for an inquiry into the fitness to practise nursing of the plaintiffs. This was communicated to the plaintiffs by letter dated the 2nd March, 2007. This early period of response to the letter of Matron Moore is not particularly impressive in terms of the speed of response on the part of the Board.

9. On the 4th April, 2007, the coroner's inquest into the death of Ms. Moore took place and evidence was heard from relevant persons, including the plaintiffs, the care assistant, the other nurses who took over duty from the plaintiffs on the morning in question, the Gardai, Dr. Kennedy, and the pathologist, Dr. Bolster. A verdict of death by misadventure was handed down.

10. On the 8th May, 2007, signed statements were furnished to the Board on behalf of the plaintiffs. On the 16th May, 2007, the Fitness to Practice Committee held a meeting and on the 24th May, 2007, the Committee wrote to the plaintiffs advising them that the Committee had decided that there was a *prima facie* case for the holding of an inquiry.

11. What is then notable is that it was not until 11th May, 2010 that a notice of an intention to hold an inquiry was served upon the plaintiffs, followed by service shortly thereafter of a book of documentation to be relied upon at the inquiry. This was three years after the Committee's decision that there was a *prima facie* case for the inquiry, and almost four years after the death of Ms. Comber. It has been argued on behalf of the Board that this lapse of time was due to the following factors: that the case was complex; that it was necessary to await the receipt of documentation from the HSE and the Garda Siochana; that for various reasons the Board is not anxious to deploy its compulsory statutory powers (such as the power to order production of documents) unless it becomes necessary to do so; and that the assembly of relevant documentation for the inquiry hearings must be comprehensive in order that the materials can be served on the parties prior to the hearing. I am not persuaded that the case was particularly complex, and indeed, most of the witnesses heard by the Fitness to Practice Committee were the same witnesses who had given evidence at the inquest. It might

also have been possible to employ the Board's statutory powers of production at an earlier stage than they were, in order to speed up the process of obtaining documentation, for example, from An Garda Siochana. During one particular year, 2008, nothing appears to have taken place other than the sending of one letter to Matron Moore. Overall, the time lapse in this particular period appears to me to be excessive and responsibility for it can be laid almost entirely at the door of the Board.

The second period: between the service of notice of intention to hold an inquiry to the commencement of the inquiry (May, 2010 - June, 2011)

12. The hearings were originally scheduled for June, 2010, but were postponed on a number of occasions for a number of reasons. From my review of the correspondence in this period, it would appear that the adjournments were primarily granted at the request of the plaintiffs. One of the plaintiffs was suffering on an ongoing basis from stress, anxiety, and depression, and her husband also had surgery during the period. The other plaintiff also suffered from stress and anxiety, and underwent surgery herself. In contrast to the first period, this lapse of time cannot be laid at the door of the Board.

The third period: the hearings before the Committee and the Committee's report (29th June, 2011 - 6th March, 2012)

13. The inquiry was conducted by a Fitness to Practice Committee consisting of three members. The inquiry commenced with four members but, due to a family bereavement, the fourth member withdrew from further involvement in the inquiry after a certain point. A Senior Counsel acted as legal assessor on behalf of the Committee. Evidence was presented to the Committee by Senior Counsel acting on behalf of the CEO. The hearings took place between the 29th June, 2011, and the 6th March, 2012. The Committee heard evidence from a number of witnesses, including: the Sergeant and the Garda who had conducted the Garda investigations; the care assistant who was in the room with Ms. Comber when she died; four nurses; Mr. Ciaran Fahy, an engineer who gave evidence in relation to the restraining chair; Matron Mary Moore; Dr. Kennedy; and both of the plaintiffs. The report of Dr. Bolster, the pathologist, was agreed without her being called to give evidence. A large number of documents were also available to the Committee. Matron Moore gave evidence over a number of days and repeatedly expressed her view that the plaintiff's conduct amounted to a serious deficiency in a nurse's duty. Dr. Kennedy gave evidence, *inter alia*, as to why it was extremely important for nurses to keep proper records in relation to their patients, namely, because doctors and others rely heavily upon the information reported by nurses and that a relationship of trust between doctors and nurses is essential.

14. The Committee set out its findings in a report dated the 6th March, 2012. I will return to those findings in detail below. The Committee also made a recommendation that the appropriate sanction to be applied was one of censure.

15. Given the part-time nature of the work of committee members, and the number of hearing days that had to be held (10 in total), the period of time which elapsed during this period does not appear to me to be unreasonable.

The fourth period: The period between the committee report and the first Board meeting (6th March, 2012 - 24th February, 2014)

16. Most of the time lapse in this period is attributable to the fact that the plaintiff, Ms. Dowling, commenced judicial review proceedings in respect of the Committee's inquiry and report. Leave to bring these proceedings was granted on the 26th March, 2012. Ms. Carroll did not bring any such proceedings, but indicated that she would prefer her case to be kept together before the Board with that of Ms. Dowling. While the statement of

opposition was not filed until the 11th June, 2013, it is also true to say that a complication was created by the fact that, in error, an incorrect version of the Statement of Grounds was initially sent to the Board on behalf of the plaintiff. This event led to a heated exchange of correspondence between the Board and the solicitor on behalf of Ms. Dowling. Ultimately, the proceedings were settled in such a manner as to enable the Board to proceed to consider the Committee's report. Having regard to all the circumstances as revealed by the correspondence in this period, I do not think the blame should be laid at anyone's door for this period of time. As indicated, the proceedings were settled and the settlement date was 6th January 2014. By letter dated 7th February, 2014, it was indicated that the Board proposed to hold a meeting on the 25th February to consider the committee report and this meeting duly took place.

The Board meeting of the 25th February, 2014

17. The transcript of this meeting was made available to the Court. There were more than 20 members of the Board present on this occasion. The significant events which took place on this occasion were as follows. The legal representatives on behalf of the plaintiffs accepted the findings of the Committee report and invited the Board not to depart from the recommended sanction of censure. The Board indicated that it was considering increasing the sanction to one of erasure. Following submissions on behalf of the plaintiffs, it was agreed that the Board would write to the plaintiffs setting out its rationale for doing so.

The fifth period: between the first Board meeting and the second Board meeting (25th February 2014 - 24th March 2015)

18. It is again, a striking feature of the history of the case that more than a year elapsed between the first and second Board meetings. A review of the correspondence indicates that this was for a variety of reasons. First, there was disagreement between the Board and the plaintiffs as to whether the Board had adequately set out its rationale for considering the sanction of erasure. Secondly, the plaintiffs raised a new legal issue concerning the validity of the Committee inquiry, namely that ministerial approval had not been obtained in respect of the committee's procedures. Thirdly, one of the plaintiffs became aware of the existence of an Irish Medicines Board report that might be relevant and asked the Board to obtain it and furnish it to them. Fourthly, certain adjournments were requested on behalf of the plaintiffs for a variety of reasons. Having reviewed the correspondence for this period, it does not seem to me that the Board can be faulted for the lapse of time, given the number of issues raised on behalf of the plaintiffs during this period.

The Board meeting of the 24th March, 2015, and the letter communicating the Board's decision dated the 25th March, 2015

19. Again, the transcript of the Board hearing was made available to the Court. Because of the quorum issue that has been raised by the plaintiffs in relation to this meeting, it is important to note that there were 9 Board members present on this occasion, in contrast to the attendance of over 20 members at the meeting the year before. Oral submissions were made on behalf of the plaintiffs relating to mitigation of sanction. Written submissions had previously been lodged on behalf of the plaintiff Ms. Dowling. The Committee did not indicate its decision on that date, the 24th March, 2015, but said that it would communicate its decision by letter.

20. By letter dated the 25th March, 2015, the next day, the Board communicated its decision to each of the nurses, stating, *inter alia*:

"The Board, having confirmed the report of the Fitness to Practise

> Committee at its meeting on 25 February, 2014, and having considered submissions made on your behalf […] to include mitigating factors, decided that your name should be erased from the Register in accordance with Section 39 (1) of the Nurses Act, 1985.
>
> The Board was of the opinion that the sanction of censure as recommended by the Fitness to Practise Committee was not commensurate with the seriousness of the professional misconduct proven in the findings of the Fitness to Practise Committee of Inquiry. The Board was of the opinion that:
>
> - the proven allegations were of such a serious level as to undermine the reputation of the profession and the confidence of the public in the profession,
>
> - the misconduct was at the upper end of the scale of professional misconduct,"

It went on to state in relation to Ms Carroll, that:

> " - the withholding of information from relevant stakeholders i.e. Nurses, Dr. Kennedy and Southdoc and the omission of information from documentation was a very serious offence.
>
> The Board's rationale is based on the findings of allegation 1(b) and allegation 2 of the Fitness to Practise Committee of Inquiry Report"

And in relation to Ms Dowling that,

" - the failure to provide adequate care to the patient and the withholding of information from relevant stakeholders i.e. Nurses, Dr Kennedy and Southdoc and the omission of information from documentation was a very serious offence."

The Findings of the Fitness to Practice Committee

21. It is necessary to set out the precise findings of the Fitness to Practice Committee in relation to each of the plaintiffs. The findings were not identical in respect of each nurse. Further, each nurse was found guilty of some allegations, and not guilty of others.

22. In relation to the plaintiff Nurse Dowling, she was found guilty of professional misconduct on a number of charges as follows:

> • Allegation 1(a): that she failed to provide adequate nursing care to Ms. Comber. This finding was based on evidence that, on finding Ms. Comber in the day hall, she failed to call an ambulance and failed to continue CPR until medical assistance arrived.
>
> • Allegation 1(b): that she failed to make a full and/or adequate record of relevant information, including Ms. Comber's condition, care, the circumstances of her death and/or events thereafter, and/or failing to ensure such records were made and/or kept.
>
> • Allegation 2: that she failed to inform nursing staff coming on duty after her and/or Dr Michael Kennedy and/or Southdoc and/or any other appropriate person of the full and/or true circumstances of Ms Comber's death either in a timely manner or at all. The Committee found that she had failed to notify others of important circumstances relating to Ms.

Comber's death, including the fact that Ms. Comber was found with the lap belt around her neck or chest.

• Allegation 3: that during investigations into the circumstances of the death of Ms. Comber, she furnished information to the Garda and/or hospital authorities which she knew was incomplete, inaccurate and/or untrue. The committee found that Nurse Dowling furnished inaccurate and/or untrue information to the Gardai in her first statement dated the 22nd June, 2006, in stating that she found Ms. Comber sitting on the floor with her back to the chair, having regard to the evidence of Ms. Margaret Bolster, Assistant State Pathologist, Mr. Ciaran Fahy, Consulting Engineer, and the conflicting and inconsistent evidence of Nurse Dowling herself.

23. It may also be noted that Nurse Dowling was found not guilty of a number of other charges. These were: that she had failed to accompany or keep a regular check on Ms. Comber throughout the night and/or ensure that this was done; that she had failed to ensure that Ms. Comber would be safe and/or secure whilst strapped in her chair; and that she failed to take any or any appropriate action to revive Ms. Comber by cardio pulmonary resuscitation (CPR), summoning an ambulance or medical assistance or otherwise. In relation to the latter charge, it was found that the evidence established that Nurse Dowling did take an appropriate action to revive Ms. Comber by initiating CPR, and that this was the precise scope of the allegation, notwithstanding that there were separate issues as to the adequacy of the CPR given and as to whether an ambulance or medical assistance should have been summoned. She was also found not guilty of a charge relating to moving Ms. Comber to her room following her death and/or changing her clothing. With regard to this allegation, the Committee said that it was not established that these actions were inappropriate, having regard to the lack of a stated policy to deal with unexpected deaths and the movement or otherwise of a deceased patient in those circumstances. She was also found not guilty of a charge that at the inquest into Ms. Comber's death, she made allegations that the Gardai and/or Matron Moore, had put inappropriate pressure on her to provide information to the death of Ms. Comber.

24. In relation to the plaintiff Nurse Carroll, she was found guilty of professional misconduct on a number of charges as follows:

• Allegation 1(a): that she failed to provide adequate nursing care to Ms. Comber. The Committee found that there was an overall failure by Nurse Carroll to provide adequate nursing care to Ms. Comber, having regard in particular to the findings of the Committee under Allegations 1(b) and 1(d) as set out below.

• Allegation 1(b): that she failed to make a full and/or adequate record of relevant information, including Ms. Comber's condition, care, the circumstances of her death and/or events thereafter and/or failing to ensure such records were made and/or kept. The Committee found that the night report was not a full and/or adequate record of all such relevant information, and had regard to the question which occurred to Nurse Carroll regarding the possibility that Ms. Comber had choked and the fact that Nurse Carroll had noticed that Ms. Comber's fingers were black.

• Allegation 1(d): that she failed to take appropriate action to ensure Ms. Comber was properly observed and/or accompanied when she saw and/or heard that the care attendant with her was or might be asleep.

This finding was based on the evidence of Nurse Carroll herself, that she saw and/or

heard that the care attendant, Ms. Keating, was or might be asleep.

- Allegation 2: that she failed to inform nursing staff coming on duty after her and/or Dr Michael Kennedy and/or Southdoc and/or any other appropriate person of the full and/or true circumstances of Ms Comber's death either in a timely manner or at all. The Committee found that she had failed to inform these persons of important circumstances relating to Ms. Comber's death, including the question which occurred to Nurse Carroll regarding the possibility that Ms. Comber had choked and her observation of the blackened fingers.

25. Nurse Carroll was also found not guilty on a number of charges. These were: that she failed to accompany and/or keep a regular check on Ms. Comber throughout the night and/or ensure that this was done; that she failed to take any or any appropriate action to revive Ms. Comber by cardio pulmonary resuscitation (CPR), summoning an ambulance or medical assistance or otherwise; and that, following Ms. Comber's death, she had moved Ms. Comber to her room and/or changed her clothing when it was inappropriate to do so. It was not established that these actions were inappropriate, having regard to the lack of a stated policy to deal with unexpected deaths and the movement or otherwise of a deceased patient in those circumstances. She was also found not guilty of a charge that during investigations into the circumstances of the death of Ms. Comber she had furnished information to the Garda and/or hospital authorities which she knew was incomplete, inaccurate and/or untrue, which was referred to as allegation 3.

26. Having set out its findings, the Committee went on to recommend the sanction of censure, saying:

"The Committee felt that while this was a serious failure to deal with the aftermath of a serious incident, the Committee had regard to the fact that this was a once-off incident, the lack of a stated policy in the hospital to deal with unexpected deaths, and the insight displayed [by both nurses] at the Inquiry as regards the inadequacy of the documentation drawn up in the aftermath of Ms. Comber's death."

The Quorum Issue

As to whether the quorum of the Board meeting on the 24th March, 2015, should have been 12 or 9 persons

27. An issue raised in the case on behalf of the plaintiffs was whether the necessary quorum for the Board meeting of the 24th March, 2015, at which the decision was made to impose the sanction of erasure, was 12 Board members (as required by the Second Schedule to the Nurses Act, 1985, ('the 1985 Act')) or 9 members (as required by the Schedule to the Nurses and Midwives Act, 2011 ('the 2011 Act')).

28. Section 6 of the Nurses and Midwives Act, 2011, is also relevant to this issue which provides as follows:

> "6. (1) Notwithstanding the repeal of section 6 of the Act of 1985 by section 4—
>
> (a) the body known as An Bord Altranais, or in the English language as the Nursing Board, established by that section 6 shall continue in being and shall be known as Bord Altranais agus Cnáimhseachais na hÉireann or, in the English language, as the Nursing and Midwifery Board of Ireland, and
>
> (b) subject to subsections (5) to (7), anything commenced but not completed by that body, or the committee established under section 13(2)

> of the Act of 1985, before the repeal of that section by section 4 , may be carried on and completed by the Board (with its membership as constituted under this Act) or that committee (with its membership as constituted under section 13 of the Act of 1985), as the case requires, after such repeal as if sections 6 and 13 of the Act of 1985 had not been repealed."

29. The Board meeting on the 24th March, 2015, commenced with a hearing attended by legal representatives on behalf of the plaintiffs. The Board members introduced themselves and it was therefore plain that there were only 9 Board members present. Nothing was said by either side about this matter at that time. There were then addresses to the Board from their own legal adviser, the legal representatives on behalf of the plaintiffs, and the legal representative on behalf of the CEO of the Board. The Board then withdrew to consider the matter in private, and a decision was reached to impose the sanction of erasure. This decision was communicated to each of the Plaintiffs by letter dated the 25th March, 2015.

30. It was argued on behalf of the plaintiffs that a quorum of 12 applied and that the entire procedure was required to be conducted pursuant to the procedures laid down in the 1985 Act, up to and including the sanctions to be applied and the application to this Court, which was brought pursuant to section 39 of the 1985 Act. It was argued, more particularly, that the effect of s.6 (1) of the 2011 Act was that the entirety of the procedures of the 1985 Act applied to a proceeding commenced before the 2011 Act came into force, with a limited exception concerning membership only, and that the quorum issue was not a 'membership' issue, and therefore, that the quorum of 12 applied, as per the 1985 Act.

31. Counsel on behalf of the defendant Board argued in the first instance that the quorum point had not been pleaded by the plaintiffs with regard to the Board as distinct from the Fitness to Practice Committee. In this regard emphasis was laid on the wording of the relevant paragraph of the plaintiffs' pleadings which read as follows:

> "Without prejudice to any of the foregoing, the Defendant confirmed the findings of the Committee and proceeded to sanction the Plaintiff in circumstances where *the Committee lacked jurisdiction* to convene an inquiry under Section 38 of the Act by virtue of the following; (a) Ministerial approval for the regulations purporting to govern the Committee's procedures was not obtained as required by Section 26 of the Act; (b) the Committee lacked sufficient quorum to fulfill its functions under the Act; (3) The statutory quorum required for erasure from the register was not complied with by the Defendant."

It might indeed be said, strictly speaking, that the three sub-paragraphs are governed by the phrase italicised above, which would limit the issue pleaded to the quorum of the Committee only. On the other hand, subparagraph (c) clearly refers to the quorum required for erasure, and only the Board can impose the sanction of erasure (or indeed any sanction). I am inclined to give the plaintiffs the benefit of the ambiguity and to hold that the quorum issue should be considered by the Court and not excluded simply by reason of the manner in which matters were pleaded.

32. Counsel on behalf of the defendant Board also argued that the 2011 Act quorum of 9 applied, by reason of s6(4) which provides simply that "The Schedule applies to the Board", and that the phrase "with its membership as constituted under this Act" in section 6(1)(b) encompassed the quorum issue. It was also argued that the interpretation contended for by the plaintiffs would lead to an absurd situation, whereby the Board, if dealing with different cases, some commenced before and some after the 2011 Act, would have to employ different quorums. It was contended that this absurdity

could be avoided by the application of s.5(1)(b) of the Interpretation Act 2005.

33. Extracting from section 6 of the 2011 Act the precise words which are applicable to the Board, the following are the relevant provisions; section 6(1) provides that, notwithstanding the repeal of section 6 of the 1985 Act, anything commenced but not completed by the Board (with its membership as constituted under this Act) before the repeal may be carried on and completed by the Board after such repeal as if section 6 had not been repealed. Thus, all of section 6 of the 1985 Act, which includes the Second Schedule with its quorum of 12, continues in force, unless the issue of quorum falls within the term 'membership'. It seems to me that the plaintiffs are correct that the number of persons necessary for a quorum is not a 'membership' issue and that 'membership' refers to the identity and qualifications of the persons who may sit on the Board. The 2011 Act reduces the Board's membership from 29 to 23 persons and alters the composition of the Board in various respects. It seems to me that the purpose of the words in brackets in section 6(1) of the 2011 Act i.e. 'with its membership as constituted under this Act', was to ensure that any changes in personnel on the Board arising from these changes would not render invalid anything being done by the Board which straddled the period before and after the commencement date of the 2011 Act. Other than this specific issue of membership, however, the position is that the Board must proceed 'as if section 6 had not been repealed', which means that the Second Schedule to the 1985 Act applied and therefore the quorum of 12 was required. I am not persuaded that the result is an 'absurdity' for the purpose of applying the Interpretation Act 2005; different quorums apply for different matters during a transitional period, but while perhaps logistically inconvenient, it is not all that difficult to achieve. It does not seem likely that applications involving erasure of a nurse from the register arise very frequently before the Board. In this particular case, it seems that the only issue for the Board meeting on the 25th March was this particular case, and if it had been thought that a quorum of 12 was required, no doubt it would have been arranged that the required number of persons be in attendance.

34. If I am correct that, strictly speaking, the statute required that this Board meeting required a quorum of 12, the next issue is whether the plaintiffs are estopped from raising this ground in the present proceedings by reason of the fact that the point was not raised at the hearing itself on their behalf.

As to whether the defendants acquiesced in a hearing by a non-quorate Board and/or waived their right to object in that regard

35. The defendant Board argued that, even if the plaintiffs were correct that the Board was non-quorate on the 24th March, 2015, they had acquiesced in the hearing and/or waived their right to raise this issue before the High Court, having failed to raise an objection at the Board meeting, in circumstances where it was clear to them that there were only 9 Board members in attendance on the occasion in question. The plaintiffs argued that what the authorities in this area condemned was a litigant keeping in reserve a point of objection of which he was actually aware at the time of the hearing, but they submitted that this was not the case here, as they were not aware of the defective quorum at the time of the Board meeting in question. Counsel for the Board objected that there was no evidence before the Court as to the state of knowledge of the plaintiffs or their legal advisers at the time of the hearing.

36. While the hearing was ongoing before the Court, additional affidavits were sworn on behalf of all parties. These dealt with a discrete issue, namely whether a document entitled 'Procedures of the Board when considering reports of the Fitness to Practice Committee pursuant to Part V of the Nurses Act, 1985' had or had not been sent by the Board to the plaintiffs by letter dated 7th February, 2014. This document made it clear that the Board took the view that the quorum of 9 provided for by the 2011 Act applied.

An affidavit sworn on behalf of the Board averred that a letter of this date, enclosing the Procedures document, had been sent to the plaintiffs and their solicitors. The solicitor on behalf of Nurse Dowling averred that his electronic record of all correspondence received from the Board suggested that he did not receive the letter of 7th February, 2014 at that time, but he accepted that he received a subsequent letter dated 24th February, 2014 which enclosed the letter of 7th February, 2014 although not the attachment to that letter. Neither the solicitor nor his client and her husband had any recollection of ever seeing the Procedures document. A further affidavit sworn on behalf of the Board averred that that the usual practice was for a staff member to lift a Procedures document from a stack of such documents kept in the office for this purpose and to enclose it with what is a standard form letter inviting a nurse to a Board meeting following a Fitness to Practice inquiry. Further, the letters had been sent by registered post and the Board exhibited evidence showing barcodes, suggesting that both the solicitor and Ms. Dowling herself had received the letter. Nurse Carroll averred that she had received the letter of 7th February, 2014 but that she did not believe she had received the Procedures document and that her box of documents did not contain it. The Board produced barcode evidence relating to the receipt of the letter in her case also.

37. At the very least, the plaintiffs and their representatives were on notice that there was in existence a document setting out the procedures of the Board. Further, insofar as it is necessary to do so, I find on the balance of probabilities that both solicitors received the letter of the 7th February, 2014. I also find on the balance of probabilities that the Procedures document was enclosed with the letter, for two reasons. First, it was the usual practice for a staff member sending such a letter to lift a Procedures document from a stack in the main office of the department and to enclose it with the letter; there would have been no reason for this practice not to have been followed in this case. Secondly, there was no complaint from the solicitors for the plaintiffs that the enclosures had not arrived with the letters. Given the rigorous nature of the correspondence from solicitors on behalf of the plaintiffs throughout the process, I accept the Board's argument that it is highly unlikely that such an important matter would have been overlooked i.e. that they would not have followed up, at the time, on a letter which referred to an enclosure consisting of the Board’s procedures, which was not accompanied by the enclosure itself. But perhaps most importantly of all, the relevant provisions concerning the quorum are set out in legislation, and the number of Board members present on the 24th March 2015 was, visibly, 9. Accordingly, it seems to me that the question of whether the plaintiffs and their legal representatives received the Procedures document in advance of the Board hearings is something of a side issue. The argument on the quorum issue is founded upon legislative provisions.

38. From all of the evidence in this part of the case, it seems to me that the most likely situation is that the matter of the necessary quorum for the Board hearing was simply not adverted to by the lawyers on behalf of the plaintiffs at the second Board hearing, through simple oversight. I take this view as a matter of inference from the totality of the evidence regarding the general approach of the plaintiffs and their legal teams, which was one of raising every possible point in relation to procedures throughout the process. For example, they had, interestingly, previously raised the issue of the quorum for the Fitness to Practice Committee in correspondence and they had also raised, both in correspondence and at hearing, an issue regarding ministerial approval for the procedures of the Committee. In general, it seems fair to say that all matters were keenly contested. I think it unlikely that, if they had been actually aware of the non-quorate status of the Board on the 25th March, 2015, they would have simply sat on their hands and raised no objection at that time. I note also that Nurse Carroll in her affidavit of 14th October, 2016, avers that on the date of the Board meeting, she was not aware of any issue relating to the quorum nor did her legal advisers discuss it with her.

39. It seems to me, therefore, that the issue of estoppel falls to be decided on the basis of the following matrix of facts which I find on the balance of probability: (1) that there was knowledge on the part of the plaintiffs of the essential fact which would have grounded an objection i.e. (the fact that there were only 9 members on the Board on the day of the hearing); and (2) that the legal advisers, through simple oversight, had probably not given consideration to the legal significance of the fact that there were only 9 members present. I do not consider it likely that they considered that they had a legal ground of objection and deliberately chose not to raise it at the hearing. The question is whether, in those particular circumstances, they are estopped from raising the jurisdictional issue at this stage. For guidance on this particular configuration of circumstances, I have considered the authorities to which I was referred.

40. In the landmark estoppel case of *Corrigan v. Land Commission* [1977] I.R. 317, it was held that the appellant was estopped by his conduct from questioning the competence of two lay commissioners to adjudicate upon his objection to the provisional list describing land to be acquired compulsorily because he had failed to raise any objection to them at the hearing. Key to this conclusion was that the appellant knew at the time of the Tribunal hearing that the two lay commissioners in question had signed the certificate that the land in question was required for that purpose. Henchy J. said, *inter alia*:-

> "I consider it to be settled law that, whatever may be the effect of the complaining party's conduct after the impugned decision has been given, if, with full knowledge of the facts alleged to constitute disqualification of a member of the tribunal, he expressly or by implication acquiesces at the time in that member taking part in the hearing and in the decision, he will be held to have waived the objection on the ground of disqualification which he might otherwise have had. The rule was bluntly and pithily expressed as follows by Lord Denman in *R. v. Cheltenham Commissioners* 19 :—
>
> > ". . . if all parties know that he [a magistrate] is interested, and make no objection, at any rate if there be any thing like a consent, . . . or if he take a part upon being desired to do so by all parties, in all these cases it would be monstrous to say that the presence of the magistrate vitiated the proceedings.""

41. He also referred to the point being 'knowingly waived by counsel for the appellant when they elected to accept the tribunal as they found it composed on the day of the hearing'. He went on to say, in a celebrated passage:

> "The rule that a litigant will be held estopped from raising a complaint as to bias when, with knowledge of all the relevant circumstances, he expressly or impliedly abandoned it at the hearing, is founded, I believe, on public policy. It would be obviously inconsistent with the due administration of justice if a litigant were to be allowed to conceal a complaint of that nature in the hope that the tribunal will decide in his favour, while reserving to himself the right, if the tribunal gives an adverse decision, to raise the complaint of disqualification. That is something the law will not and should not allow. The complainant cannot blow hot and blow cold; he cannot approbate and then reprobate; he cannot have it both ways."

It may be noted that the above quotations from this leading case refer both to knowledge of the 'facts' and to the issue of 'concealment' of a complaint. It does not seem to me that it addresses the specific difficulty in the present case, namely the disjunction between the plaintiff's knowledge of the relevant fact (that there were 9 Board members) and their oversight of the potential legal significance of this fact (that the Board might not be quorate).

42. The decision in *Kennedy v. DPP* [2012] IESC 34, is to my mind similar to Corrigan insofar as the issue concerned a complaint of objective bias which was based on facts which were known to the person at the hearing but not raised at that time. In that case, the High Court judge hearing the case had viewed certain documents and considered them 'highly prejudicial' to the applicant, but was not asked to recuse himself. The subsequent attempt to suggest that he should not have continued to hear the case failed by reason of the failure to raise objection at the time of the original hearing. Again, there was no issue as to a lack of awareness of the significance of a legal point, as arises in the present case.

43. The case of *Moran v. O'Sullivan* [2003] IEHC 35 involved racehorse owners who sought to complain in judicial review proceedings about the fact that they had not been notified of or entitled to attend a steward's inquiry which led to the suspension of their horse. However, they had appealed from the stewards inquiry to the relevant committee of the Turf Club without making any point about the absence of fair procedures, and it was held that having played a full part in the inquiry by the Committee without raising any question as to its jurisdiction, they were estopped from challenging the result. Again, the case is different from the present case insofar as there was no issue of inadvertence to a potential legal ground of objection based on a statutory provision.

44. In *Delaney v. Central Bank of Ireland* [2011] IEHC 212, a case in which the plaintiff, an employee of the defendant, challenged a decision by the Bank to the effect that he was not fit for work on grounds of his mental health, the plaintiff, with the benefit of legal advice, agreed to attend an interview with a psychiatrist on a direct referral by his employer Bank. It was held that in those circumstances, the direct referral of the plaintiff by the Bank to the psychiatrist was not open to challenge on the grounds of unfair procedures. In *Kelleher v. An Post* [2016] IECA 195, the appellant claimed a lack of fair procedures in relation to a disciplinary process which ultimately led to his dismissal as postmaster. The Court of Appeal held that the appellant, having fully participated at all stages of the procedure without objection, was estopped from complaining about the procedures. In neither of these cases was there any issue as to the person or his legal adviser being unaware of a potential jurisdictional problem by reason of a statutory condition, as arose in the present case.

45. There are, however, a number of cases which appear to me to be more pertinent to the issue arising in the present case. In *State (Byrne) v. Frawley* [1978] I.R. 326, the prosecutor failed to raise a legal issue of significance either at the time of his trial or on appeal. The decision in *de Burca v. Attorney General* [1976] I.R. 38 had been handed down before the prosecutor's trial had come to a conclusion, but no issue as to the composition of the jury was raised on his behalf either at his trial or on his appeal, or in his application for further appeal to the Supreme Court pursuant to s29 of the Courts of Justice Act 1924. For present purposes, it is important to observe that Henchy J, delivering the majority judgment of the Supreme Court in subsequent Article 40.4.2 proceedings brought by the prosecutor, laid considerable emphasis on the fact that the prosecutor had been defended at trial by one of the counsel who had successfully argued the de Burca case and therefore must have had clear knowledge and understanding of the de Burca decision but chose not to raise the issue. That being so, the prosecutor was debarred from raising the issue in subsequent proceedings brought by him pursuant to Article 40.4.2. Henchy J. said:

> "As to the prisoner in this case, his position is uniquely different from that of other persons convicted by a jury selected under the provisions of the Act of 1927. He was the first person entitled to plead successfully in the Circuit Court the unconstitutionality of such a jury. As a result of the decision in the de Burca Case, he was presented with that opportunity in the middle of his trial. An informed and deliberate decision was made to

> turn down that opportunity. His then counsel, instead of applying to have the jury discharged, elected—and I make no criticism of that choice—to allow the trial to proceed without any objection to the jury as constituted. It was obviously thought to be in the best interests of the prisoner that he should take his chances before that jury, notwithstanding its constitutional imperfection. Had he been acquitted by that jury, doubtless we would have heard no complaint that the jury was selected unconstitutionally.
>
> Because the prisoner freely and knowingly elected at his trial to accept the empanelled jury as competent to try him, I consider that he is now precluded by that election from claiming that the jury lacked constitutionality: see the decision of this Court in *Corrigan v. Irish Land Commission*. The prisoner's approbation of the jury was affirmed by his failure to question its validity when he formulated grounds of appeal against his conviction and sentence, and when his application for leave to appeal was argued in the Court of Criminal Appeal. It was not until some five months after his trial that he first put forward the complaint that the jury had been formed unconstitutionally. Such a volte face is impermissible. Having by his conduct led the Courts, the prosecution (who were acting for the public at large) and the prison authorities to proceed on the footing that he accepted without question the validity of the jury, the prisoner is not now entitled to assert the contrary. The constitutional right to a jury drawn from a representative pool existed for his benefit. Having knowingly elected not to claim that right, it would be contrary to the due administration of justice under the Constitution if he were to be allowed to raise that claim in the present proceedings when, by deliberate choice, it was left unasserted at the trial and subsequently in the Court of Criminal Appeal. What has been lost in the process of events is not the right guaranteed by the Constitution but the prisoner's competence to lay claim to it in the circumstances of this case."

The case might be thought to support the view that it is necessary, in order for estoppel to apply, that there be clear evidence that the person, or at least his legal adviser, must be shown to have had actual knowledge of the legal significance of the key fact about which he should have objected.

46. Also relevant are a number of cases which deal with the issue of estoppel in the context of the provisions in the Criminal Justice Act, 1999, ('the 1999 Act') dealing with preliminary examinations and returning an accused for trial. The 1999 Act abolished the requirement that a District Court conduct a preliminary examination before sending an accused forward for trial. In *Burns v. Judge Early* and others [2003] 2 I.L.R.M. 321, the applicant was arrested and charged with an indictable offence before the District Court. After a number of initial dates in the District Court, an issue arose as to whether the provisions of the Criminal Justice Act, 1999, or the Criminal Justice Act, 1967, applied to his case, and whether a preliminary examination should be conducted. A date was fixed for argument on this issue, but on this date, the applicant consented to being sent forward to the Special Criminal Court. He then pleaded guilty and was sentenced by that court. Seven months later, after the decision in *Zambra v. McNulty* [2002] 2 IR 351, he applied to the High Court seeking an order of certiorari quashing the order of the Judge sending him forward to the Special Criminal Court and quashing his sentence and conviction. The High Court (O'Caoimh J), refusing the relief sought, held that he had been in a position at all relevant times to raise the issue of the non-applicability of the 1999 Act to his case but instead consented to being returned for trial without a preliminary examination and accepted the jurisdiction of the Special CC by pleading guilty, and was now precluded from claiming a lack of jurisdiction in the Special Criminal Court.

47. Interestingly, O'Caoimh J expressly distinguished the case of *Glavin v. Governor of Mountjoy Prison* [1991] 2 I.R. 421 on the ground argued by the DPP, namely that neither the infirmity nor potential infirmity were known to the applicant in that case at the time of the making of the order of return for trial or his trial. The Glavin case concerned the validity of a preliminary examination conducted by a District Judge who had reached retirement age and had not been continued in office by warrant, because of a mistaken belief as to his true age. This was not known at the time of applicant's return for trial. The High Court, and Supreme Court on appeal, held that the purported preliminary examination was therefore null and void and the applicant's subsequent trial and conviction were also null and void

48. In *Gorman v. Martin* [2005] IESC 56, there was also clear evidence of actual knowledge on the part of the applicant, at the time of his arraignment, of the legal point concerning whether a preliminary examination should be conducted. The case involved a man who discharged his legal team and then pleaded guilty to an offence, and who subsequently sought to challenge his conviction and sentence in judicial review proceedings on the basis that no preliminary examination had been held prior to his being sent forward. Kearns J referred to *State (Byrne) v. Frawley* and *Burns v. Judge Early*, and noted that at the time of his arraignment, 'the applicant himself was aware of his entitlements under the Criminal Procedure Act 1967. He apparently dismissed his legal advisors because they were not persuaded by the merits of his contentions at the time'. Notwithstanding this knowledge, he had not raised the point and instead chose to plead guilty. The Supreme Court set aside the order of certiorari granted by the High Court in those circumstances. These cases might also be thought to support the view that a person can only be estopped where there is clear evidence that either he or his legal advisers were aware of the significance of the legal point, upon which they subsequently seek to rely, at the time of the original hearing.

> 49. A decision which seems to me to be of considerable relevance in the present context is that in *Brennan & Ors v. Governor of Portlaoise Prison and Anor* [2008] 3 IR 364. In that case, the applicants were arrested and detained pursuant to s.4 of the Criminal Justice Act, 1984, then pursuant to s.30 of the Offences Against the State Act, 1939, and then released and re-arrested pursuant to s.4(3) of the Criminal Law Act, 1997, and brought before the Special Criminal Court to be charged with membership of the IRA. Their first appearance before the Special Criminal Court was on the 13th October, 2002. No objection was raised on their behalf at that stage as to the manner in which they had been brought before the Court. They applied for bail and were refused. They were remanded a number of times, on consent, until December, 2004. At this stage, for the first time, when they were about to be arraigned, they challenged the jurisdiction of the Court to try them. The jurisdictional point in question was two-fold; (a) that their arrests under section 4 of the Criminal Law Act, 1997 were unlawful because the only legitimate form of arrest for the purpose of bringing someone lawfully before the Special Criminal Court was an arrest pursuant to s.30 of the Offences Against the State Act, 1939; and (b) that they had not been brought 'forthwith' before the Special Criminal Court in accordance with s30A(3) of the Offences Against the State Act, 1939, which applied to re-arrests. These two legal points had first been raised by a Mr. O'Brien, who had been arrested much later than the appellants in the Brennan case. Mr. O'Brien had been arrested on the 6th April 2004 and re-arrested on the 8th April 2004, and immediately raised the jurisdictional point on being brought before the Court. In reality, the appellants Brennan and others raised their jurisdictional objection only as a consequence of Mr. O'Brien having raised this objection. The Special Criminal Court fixed the same date for hearing all objections and rejected all the challenges. Mr. O'Brien's case was adjourned pending an

application for judicial review and he was ultimately successful in the Supreme Court on the second point raised, concerning the term 'forthwith' (*O'Brien v. Special Criminal Court & Anor* [2008] 4 IR 514). Meanwhile, the trial of Brennan and others had proceeded and they were convicted and sentenced. Their appeal to the Court of Criminal Appeal, in which the jurisdictional issue was one of the grounds of appeal, was rejected. They did not seek a further appeal to the Supreme Court under s.29 of the Courts of Justice Act, 1924. Two weeks after the Supreme Court decision in O'Brien, the Brennan applicants brought proceedings pursuant to Article 40.4.2 of the Constitution. The High Court (O'Neill J) held that the matter could be dealt with by way of Article 40.4 but, having examined cases such as *State (Byrne) v. Frawley*, and *People (DPP) v. Kehoe* [1985] I.R. 444, held that the right to complain about a constitutional or legal defect could be lost by a failure to exercise the right and by the passage of time. The Supreme Court dismissed the appeal on the basis that it was not open to a convicted person to challenge the legality of their detention pursuant to Article 40.4.2 where their case and appeal had been determined to a point of statutory finality, but also went on to say that the case would have failed on the merits in any event because no objection had been raised in the Special Criminal Court within a reasonable time. Geoghegan J, delivering the judgment of the Court, clarified an apparent inconsistency between *The People (Director of Public Prosecutions) v. Kehoe* [1985] I.R. 444 and *The People (Director of Public Prosecutions) v. Gilligan* (Unreported, Court of Criminal Appeal, 8th August, 2003) on this issue of when jurisdictional points should be raised before the Special Criminal Court, saying:

"In *The People (Director of Public Prosecutions) v. Kehoe* [1985] I.R. 444, if the dicta of McCarthy J. were to be interpreted literally, it could be suggested that his view was that any objection to jurisdiction had to be taken on the very first day that the accused came before the court. There can be all sorts of circumstances where this could not reasonably be expected and I do not think that McCarthy J. ever intended the literal interpretation which has been given to his words. An unrepresented accused, for instance, could not be expected to raise jurisdictional objections until he had legal advice. This view coincides with the view of the Court of Criminal Appeal as expressed in the judgment of that court delivered by McCracken J. in *The People (Director of Public Prosecutions) v. Gilligan* (Unreported, Court of Criminal Appeal, 8th August, 2003). There is no doubt that under long established jurisprudence of the courts a jurisdictional objection must be taken as soon as is reasonably possible. Some judges have spoken of the parties effectively conferring a jurisdiction. I would prefer a slightly different formulation. Jurisdiction is conferred by law rather than by persons and, therefore, I think that it is somewhat more accurate to say that by law a bona fide exercise of jurisdiction is deemed to be a good exercise if objection is not taken at the appropriate time. That would, of course, be very much in line with the judgments in *A. v. Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88 though that case covered a somewhat different factual situation and the principle applicable here long predated it.

22 For all these reasons, I am firmly of the view that even if the appeal was entertainable it would have to be dismissed."

50. Having regard to the above cases, it seems to me that *State (Byrne) v. Frawley*, *Burns v. Early*, and *Gorman v. Martin* can be distinguished from the present case because in those cases it was clear that each of those applicants knew of the precise legal point that they could have taken at the original hearing but chose not to do so. The

significance of Brennan is that this was a case closer to the present case, namely, one where the legal point was overlooked by the legal advisers at the relevant time; the reality of the situation appears to be that the prisoners in the Brennan case and their legal teams simply did not advert to the jurisdictional point that might be made until the point was raised by another accused, Mr. O'Brien, following his arrest a considerable time later. This seems to me to be the closest situation to that arising before the Court now insofar as it seems to me likely, as I concluded above, that the plaintiffs' legal team simply did not advert to the quorum requirement of 12 persons until after the hearing had concluded. The decision of the Supreme Court in Brennan was that the point could not be raised in the Article 40.4.2 proceedings, it not having been raised at the first reasonable opportunity in the Special Criminal Court.

51. It might be argued that Glavin favours the plaintiffs in the present case because he succeeded in his application in circumstances where he made no objection at the relevant time because he was unaware of the key circumstances; but it seems to me that Glavin is more properly characterised as a case where the applicant was unaware of key facts (that the District Judge had turned 65, and that he had not been re-appointed) rather than a situation where a legal point based upon the interpretation of a statute had not been adverted to. It therefore seems to me that the outcome in the present case should be same as that in Brennan. It seems to me implicit in the decision in Brennan that a failure to advert to a possible legal ground of objection is not treated by the courts in the same way as the absence of knowledge as to a fact which may ground an objection. Hence, the different outcomes as between the Glavin and Brennan cases.

52. It might be thought to be harsh that the plaintiffs in the present case, having raised many procedural points during the lengthy process before the Fitness to Practice Committee and the Board, are now precluded from raising this particular point about the Board's quorum in circumstances where they did not advert to the point at the time of this particular hearing, which took place on a single day. The plaintiffs argue that the procedural requirement of 12 members of the board is not purely technical but has a real and practical effect, insofar as 12 rather than 9 persons would have to have been persuaded of the need for the ultimate sanction of erasure. However, it should also be borne in mind that the practical consequence of their having raised the objection at the appropriate time would have been that it would have afforded the Board an opportunity to adjourn and obtain the necessary quorum; even if they disagreed with the plaintiff's interpretation of the law, the Board may have chosen to do so out of an abundance of caution. Indeed, even if the point had been raised after the Board hearing and before the present proceedings were launched, the Board might perhaps have re-convened and conducted a fresh hearing on the issue of sanction. The difficulty for a decision-maker, such as the Board, in a situation where there is a failure to complain about a procedural matter, such as a quorum, contemporaneously is that such a failure to raise the jurisdictional point at the time of the hearing prevents the decision-maker from considering, and possibly remedying, the problem complained of.

53. Accordingly, I am of the view that, even if I am correct that the statutory quorum applicable to the Board meeting on the 25th March, 2008, was 12 persons, the plaintiffs are estopped from raising this point in these proceedings because the objection was not made at the time of the hearing.

54. For completeness, I should perhaps say that I was referred to the case of *G v. An Bord Uchtala* [1980] 1 I.R. 32, which of course deals with the question of waiver of constitutional rights and the necessity for a consent to be a "fully-informed, free and willing surrender or an abandonment" of the rights. However, the factual matrix in that case is far removed from the present case, concerning as it does the validity of the consent of a young and vulnerable mother with regard to the adoption of her new-born baby, and who may have been motivated by fear, stress and anxiety, and I find it of little assistance in determining whether the plaintiffs in the present case, who were

assisted by lawyers at every step of a protracted and hard-fought process, knowingly waived their right to raise an objection to the Board meeting in question. Similarly, I do not consider the decision in *Director of Consumer Affairs v. Governor and Company of the Bank of Ireland* [2003] 2 I.R. 217 to be of any great assistance. That case concerned the exercise of a statutory power to issue directions in relation to the imposition of charges for services to customers. Under a statutory provision, s 149(2) of the Consumer Credit Act, 1994, the power had to be exercised within certain time limits. The High Court (Kelly J., as he then was) held that the exercise of the power outside of the statutory time limit was voidable rather than void, and that the defendant could not be heard to complain of the validity of the directions in circumstances where it had acted upon the direction and neither ignored nor contested them. This was in a context of a close and detailed reading of the Consumer Credit Act, 1995, and the particular parameters of this function by the Director of Consumer Affairs.

The Decision of the Board to impose the sanction of erasure

55. As was set out in the chronology of events above, the Fitness to Practice Committee conducted oral hearings on 10 separate days over a period of 10 months. It set out its conclusions in a Report dated the 6th March, 2012, set out earlier in this judgment, and recommended that a sanction of censure be imposed on the two plaintiffs. It may be noted that the Committee has no formal statutory power or role in relation to the appropriate sanction; apparently the issuing of a recommendation by the Committee has simply developed as a matter of practice.

56. The Board held a meeting to consider the Committee's report on the 25th February, 2014. The reasons for the gap in time between the Committee's report and this Board hearing have been set out earlier in this judgment. The Board meeting consisted in part of a hearing at which the plaintiffs' legal representatives made submissions. The Board itself had a legal adviser, who gave his advice in the presence of the parties; while the CEO, whose role it had been to present the evidence to the Committee, was represented by Senior Counsel. A transcript of the hearing was available to the Court. Two relevant events took place at this meeting; (1) the findings of the Committee Report were accepted on behalf of the plaintiffs and the Board formally adopted its findings; (2) the Board indicated to the plaintiffs that it was considering the more severe sanction of erasure. It was agreed that the Board would write to the plaintiffs indicating the basis on which it was considering this sanction, and that the plaintiffs would have an opportunity both to make written submissions and to address the Board at another hearing.

57. There then followed considerable correspondence between the parties, characterised, *inter alia*, by the plaintiffs, complaining that they were not receiving sufficient particulars of why the more severe sanction was under consideration, and by the defendant Board indicating that it believed that it had made its position clear on the issue in a letter of 3 March, 2014, the details of which are set out below.

58. Written submissions were sent to the Board on behalf of Nurse Dowling by letter dated 19 March, 2015. The matter came on again for hearing more than a year after the first Board hearing, on the 24th March, 2015. Again, there is a transcript of that part of the meeting, at which the plaintiffs' legal representatives made oral submissions. Again, the Board received legal advice, on this occasion by a Senior Counsel, which was given in the presence of the parties; and the Senior Counsel representing the CEO was also heard on particular issues. The Committee then retired to consider its decision. On the next day, the 25th March 2015, the plaintiffs received a letter communicating the Board's decision to impose the sanction of erasure, which was in the following terms (which, for present purposes, may be useful to set out again):

"The Board, having confirmed the report of the Fitness to Practise

Committee at its meeting on 25 February, 2014, and having considered submissions made on your behalf […] to include mitigating factors, decided that your name should be erased from the Register in accordance with Section 39 (1) of the Nurses Act, 1985.

The Board was of the opinion that the sanction of censure as recommended by the Fitness to Practise Committee was not commensurate with the seriousness of the professional misconduct proven in the findings of the Fitness to Practise Committee of Inquiry. The Board was of the opinion that:

- the proven allegations were of such a serious level as to undermine the reputation of the profession and the confidence of the public in the profession,

- the misconduct was at the upper end of the scale of professional misconduct,"

It went on to state in relation to Ms Carroll, that:

" - the withholding of information from relevant stakeholders i.e. Nurses, Dr. Kennedy and Southdoc and the omission of information from documentation was a very serious offence.

The Board's rationale is based on the findings of allegation 1(b) and allegation 2 of the Fitness to Practise Committee of Inquiry Report"

And in relation to Ms Dowling that,

" - the failure to provide adequate care to the patient and the withholding of information from relevant stakeholders i.e. Nurses, Dr Kennedy and Southdoc and the omission of information from documentation was a very serious offence."

The present application was initiated pursuant to section 39 by the plaintiffs on the 13th April, 2015, seeking to have the decision of the Board quashed.

59. The provisions of the Nurses Act, 1985, concerning the powers of the Court on an application such as this are rather peculiar in some respects. Section 39 provides, in relevant part, as follows:-

"(1) Where a nurse—

(a) has been found, by the Fitness to Practise Committee, on the basis of an inquiry and report pursuant to section 38 of this Act, to be guilty of professional misconduct.... or

(b) …

the Board may decide that the name of such person should be erased from the register or that, during a period of specified duration, registration of the person's name in the register should not have effect.

(2) ...

(3) A person to whom a decision under this section relates may, within the period of 21 days, beginning on the date of the decision, apply to the

High Court for cancellation of the decision and if such person so applies—

> (a) the High Court, on the hearing of the application, may—
>
> (i) cancel the decision, or
>
> (ii) declare that it was proper for the Board to make a decision under this section in relation to such person and either (as the Court may consider proper) direct the Board to erase such person's name from the register or direct that during a specified period (beginning not earlier than 7 days after the decision of the Court) registration of the person's name in the register shall not have effect, or
>
> (iii) give such other directions to the Board as the Court thinks proper,
>
> (b) if at any time the Board satisfies the High Court that such person has delayed unduly in proceeding with the application, the High Court shall, unless it sees good reason to the contrary, declare that it was proper for the Board to make a decision under this section in relation to such person and either (as the Court may consider proper) direct the Board to erase the person's name from the register or direct that during a specified period (beginning not earlier than 7 days after the decision of the Court) registration of the person's name in the register shall not have effect,
>
> (c) the High Court may direct how the costs of the application are to be borne.

60. One of the peculiarities within the above provision is that the numbered sub-paragraphs within s39(3)(a) are expressed to be disjunctive. On a literal interpretation, therefore, the High Court cannot cancel a decision and issue directions to the Board. Nor is there any explicit reference to remitting a matter to the Board for further decision. Thus, at least on a literal reading, the Court is not empowered to quash a Board decision and remit it for further decision with directions as to how this should be done. Another noteworthy aspect of the section is the lack of clarity as to the precise nature of the inquiry to be carried out by the High Court upon such an application; is it to review the merits of the decision, be it a finding of fact or a sanction imposed, or merely the process by which the decision was arrived at? In this regard, I note that in the High Court decision in *Perez v. An Bord Altranais* [2005] 4 IR 298, to which I will return in further detail below, O'Donovan J. appears to have taken a broad approach to the role of the Court on such an application, although in that case, the issue was not confined to sanction as it is in the present case. In Perez, the Court heard sworn evidence and considered other evidence that had been adduced before the Fitness to Practice Committee before making its own findings of fact and ruling that the sanction of erasure was appropriate in the circumstances of that case. That the section also envisages that expert evidence may be received by the Court, as occurred in Perez, would also support the broader view of the Court's role. Yet, it is incongruous, if the role of the Court is a broad rather than a narrow procedural one, that the Court does not have the power to substitute its own sanction for that imposed by the Board.

61. It may be noted that the provisions are also different to the provisions pursuant to which the High Court heard an appeal in relation to a sanction imposed by the Medical Council in *Hermann v Medical Council* [2010] IEHC 414. There, it was clear that Court

had ample powers to make various orders, including an order substituting any penalty it considered appropriate. Notwithstanding this difference as between the two regimes, I consider the comments of Charleton J. most useful insofar as he spoke of showing respect for the expertise of the Medical Council, which comments are set out below.

62. In the present context, it is worth noting the range of penalties that were potentially available to the Board pursuant to the Nurses Act, 1985. In addition to the power to erase a nurse from the register, the Board may, pursuant to s. 41 of the Act, "advise, admonish or censure" the person in relation to the professional misconduct. Another option, contained within s. 39 alongside with that of erasure, is that "during a period of specified duration, registration of the person's name in the register should not have effect", in other words suspension for a definite period. It is perhaps an unusual feature of this case that the option of suspension was favoured neither by the Committee or the Board, and yet it was a sanction occupying an intermediate position between censure and erasure.

The proper approach of the Court to the issue of sanction in general

63. In *Hermann v. Medical Council* [2010] IEHC 414, Charleton J. considered the appropriate principles to be applied in a case involving an appeal against sanction imposed by the Medical Council. It may be noted that the sanction imposed in that case was one of suspension for one year with certain requirements, including that the doctor undergo a period of retraining for 3 years. Charleton J. pointed out that the principles governing the imposition of sanction were considered by Finlay P in *Medical Council v. Dr. Michael Murphy* (High Court, Unreported, 29th June, 1994) in which Finlay P identified four principles:

> "First, I have to have regard to the element of making it clear by the order [made by the High Court on appeal] to the medical practitioner concerned, the serious view taken of the extent and nature of his misconduct, so as to declare him from being likely, on resuming practice to be guilty or like or similar misconduct. Secondly, it seems to me be an ingredient though not necessarily the only one that the order should point out to other members of the medical profession the gravity of the offence of professional misconduct and thirdly, and this must be some extent material to all these considerations, there is the a specific element of the protection of the public which arises where there is misconduct and which is, what I might describe as the standard in the practice of medicine. I have as well an obligation to assist the medical practitioner with as much leniency as possible in the circumstances."

It may be noted that while the first three principles emphasise the seriousness of the conduct as well as issues of deterrence and protection of the public, the last principle, in effect, refers to the requirement of considering mitigating factors.

64. Charleton J. went on to describe the spectrum of sanctions contained in the Medical Council legislation and commented:

> "The scheme of the Act therefore involves, in its mildest form, correction as a first gradation. In such cases the Medical Council may admonish or fine a doctor or issue a written censure. Some of these incidents may involve bringing a doctor to his or her senses. It is clear that there is an overlap in the more serious of these milder cases with the necessity to mark in an appropriate way the nature of the misconduct or lack of competence through attaching conditions to registration, and restricting the practice by the doctor of medicine. These restrictions can include a requirement for retraining, perhaps coupled with an undertaking not to

practice during that time. Where a doctor is shown not to be dependably safe in the practice of one form of medicine a transfer to another division is appropriate. This kind of response rarely if ever overlaps with the earlier division and moves into the most serious category of cases where a suspension of registration, cancellation of registration and a prohibition for a substantial time against a practitioner applying for re-registration can be involved. I see no reason why in the most serious cases that this cannot be a lifetime ban on the practice of medicine. Correction, rehabilitation and punishment mark out the potential approaches by the Medical Council within these three major but sometimes overlapping categories of appropriate response to misconduct or lack of competence. To rigidly divide these responses into categories would be to undermine the scheme of the Act whereby the Fitness to Practice Committee, in making a recommendation to the Medical Council, and the Council itself, are entrusted with the important task of ensuring that the practice of medicine delivers its expected service to the public through being highly competent, safe and reliable. In the mildest cases of admonishment little danger may be involved to the public. When that category shades into the instances where it is necessary to issue a censure in writing, or to attach conditions to registration while restricting the practice of medicine that may be engaged by the practitioner, the category of misconduct or lack of competence has become more serious. It is clear from the scheme of the Act of 2007 that the approach by the Medical Council should involve protecting the public and reassuring them as to the standards that medical practitioners will at all times uphold; requiring that medical practice is by those who are properly trained and appropriately qualified to safely engage in the areas of medicine where they hold themselves out to be experts. In that and the other more serious category, the protection of the public is paramount to the approach of the Medical Council. The reputation of the medical profession must, in those instances be upheld. This exceeds in importance, where the misconduct is serious, the regrettable misfortune that must necessarily be visited upon a doctor."

65. Charleton J indicated that, given the greater expertise of the Medical Council in the area, considerable deference should be paid to its views on sanction by the Court:-

"10. The question arises as to what test should the court apply to the issue of sanction where that issue alone is appealed to the court under s. 75 of the Act? It is urged that some form of curial deference should be exercised by the High Court towards decisions of the Medical Council. The Fitness to Practice Committee of the Medical Council is a specialist body dealing with complaints of professional misconduct on a frequent basis. The members of the Committee have ready access to relevant precedents and are therefore in a position to assess both the nature of the conduct complained of, and where it fits as to category, gravity, and the type and severity of penalty that has been established as appropriate by prior decisions. I have no doubt that the Medical Council should take this approach as a general guide to the imposition of penalties. I am also satisfied that it is not the only principle which is applicable. Guidelines derived from previous sanctions establish both an appropriate level of knowledge among members of the Medical Council and also informs medical practitioners and their legal representatives as to what kind of sanction may be faced in an event of a finding being made of misconduct. That, while an appropriate guide, is not completely restrictive. No court exercising a sentencing jurisdiction ever regards itself as boxed in by sentencing precedent. Exceptional circumstances can arise which move one category of case from a particular band of gravity into a higher or lower category. Mitigation of circumstances should be considered to see if some particular factor lessens the gravity of the appropriate response. Consistency of appropriate sanction against medical practitioners is,

however, important for the reasons which I have mentioned and to ensure the continued trust of the public in the medical profession; one of the fundamental purposes inherent in the relevant sections of the Act of 2007.

11. In *Marinovich v. General Medical Council* [2002] UKPC 36, Lord Hope of Craighead, giving the judgment of the Privy Council, was of the opinion that curial deference should be uppermost in the mind of any court or appellate tribunal considering an appeal as to sanction. At paras. 28 and 29 he stated:-

> '28. In the appellant's case the effect of the Committee's order is that his erasure is for life. But it has been said many times that the Professional Conduct Committee is a body which is best equipped to determine questions as to the sanction that should be imposed in the public interest for serious professional misconduct. This is because the assessment of the seriousness of the misconduct is essentially a matter for the Committee in the light of its experience. It is the body which is best qualified to judge what measures are required to maintain the standards and reputation of the profession.
>
> 29. That is not say that [the appeal body] may not intervene if there are good grounds for doing so. But in this case their Lordships are satisfied that there are no such grounds. This was a case of such a grave nature that a finding that the appellant was unfit to practise was inevitable. The Committee was entitled to give greater weight to the public interest and to the need to maintain public confidence in the profession and to the consequences to the appellant of the imposition of the penalty. Their Lordships are quite unable to say that the sanction of erasure which the Committee decided to impose in this case, while undoubtedly severe, was wrong or unjustified.'

12. This decision was made, however, under legislation that differs from that in force in this jurisdiction. Having taken the principles that I have referred to into account, and having considered the role that sanctions against medical practitioners fits within the scheme of complaint enquiry, finding and response inherent in the Act of 2007, I have to come to the view that the High Court, considering an appeal under s. 75 of the Act, is deliberately vested by the Oireachtas with powers of such an amplitude that it is required to exercise its own analysis of whatever evidence as to sanction is put before it. The Medical Council retains the burden of proving that the sanction was correct. The Court, in considering whether to cancel the relevant decision, to replace it with a different decision or to impose no sanction on the practitioner, is obliged to assess what is appropriate in light of the findings of fact which led to the imposition of the sanction by the Medical Council in the first instance. That decision, and the reasoning underpinning it, should not be ignored. Rather, that decision and the justification contained within the document imposing the sanction is the primary material under appeal and on which the hearing is based. In considering the question of the sanction, the Court's focus should be both on the conduct underpinning the sanction and the reasoning of the Medical Council in arriving at its decision. Because of the relatively greater experience of the Medical Council in imposing sanctions, its knowledge as to relevant precedents and the expert nature of the task undertaken, the

> High Court, on an appeal as to sanction, should treat the decisions of the Medical Council with respect. An independent view should be taken as to what ought to be done. Where an error has been made in the context of a sanction which is otherwise appropriate, then it should be corrected. If, however, the level of sanction is one which is justified by the material before the Medical Council, then the Court would need to find a specific reason for altering it on the evidence presented on the appeal."

66. Although the powers of the High Court in an application such as that in *Hermann* are not the same as those available to the Court in the present application, the concept of curial deference, in the sense of affording considerable respect to the decision of an expert professional body, nonetheless appears to me to be a sensible approach to adopt in nursing cases also. However, in the present case, the application of the concept does not necessarily point all in one direction, as there was a difference of view as between the Fitness to Practice Committee and the Board on the issue of sanction; the Committee having recommended censure, and the Board, erasure. The Committee had been present for the giving of oral evidence over 10 hearing days and had an intimate knowledge of the facts. However, the Board's view was that of nine members while that of the Committee's was that of three, and the Board has a statutory function in respect of sanction while the Committee does not. I would consider it important to give considerable weight to the views of the Board and to depart from its views only if those were clearly disproportionate or had been arrived at in a manner which was not legally sound.

The nature and seriousness of the professional misconduct in the present case

67. The first three matters referred to by Charleton J. in the *Hermann* case were matters relating to the seriousness of the conduct, the principle of deterrence and the protection of the public. These inter-related considerations reflect the inherent purpose of the Board. The Nurses Act, 1985, confers on the Board certain duties including the responsibility to promote high standards of professional conduct among nurses, and the scheme whereby the Fitness to Practice Committee conducts inquiries and the Board imposes sanctions sits squarely within that essential function. The Act does not, however, either define 'professional misconduct' nor does it set out any hierarchy of gravity into which different kinds of misconduct might be placed. The expression 'professional misconduct' was considered by Keane J, in the context of medical practitioners, in *O'Laoire v. Medical Council* (Unreported, High Court, Keane J., 17th January, 1995), which was referred to with approval in the context of nurses by O'Donovan J. in *Perez* as follows:

> "In my view, the principles declared by Keane J. in *O'Laoire v. Medical Council* with regard to medical practitioners and by the Privy Council in *Doughty v. General Dental Council* with regard to dentists are equally applicable to the nursing profession so that "professional misconduct", so far as a nurse is concerned, is a serious falling short, whether by omission or commission, of the standards of conduct expected among nurses and it is irrelevant that such misconduct may be attributable to honest mistake. In that regard, I would adopt the statement by Lord Hoffmann in the course of a judgment which he delivered in a case of *McCandless v. General Medical Council* [1996] 1 WLR 167 at p.169 that there was a "duty to protect the public against the genially incompetent as well as the deliberate wrongdoers"."

68. It is unfortunate that there is so little authority for the Court by way of guidance on the circumstances in which the different sanctions envisaged by the Nurses Act, 1985, are appropriate and, in particular, the circumstances in which the most serious sanction of erasure should be imposed. The only nursing decision cited to me, *Perez v. An Bord Altranais*, concerned a case of erasure. In *Perez*, the applicant, who had been employed as a staff nurse at a nursing home, was found guilty of professional misconduct following an inquiry by the Fitness to Practice Committee. The Board subsequently decide to impose the sanction of erasure and the applicant challenged the decision,

including the findings made against her. The general allegation was that, despite long training, she had persistently failed to acquire adequate knowledge of her duties and had consistent difficulty with basic nursing skills. The High Court heard evidence from the applicant as well as five experienced nurses who had worked with her, and was referred to the transcript of the testimony before the Fitness to Practice Committee. O'Donovan J commented that the applicant did not impress him as a witness and that he "did not think that she was a very truthful person" or that "much reliance could be put on her evidence". On certain specific issues of fact, he found her to be "less than candid" to the Committee and "not telling me the truth" and said that there were other aspects of her evidence about which he had "considerable reservations". He found that, in addition to denying the allegations of incompetence, she made accusations against her colleagues that she had been bullied, which he found to be groundless. His conclusions are set out in a passage which gives a graphic indication of the type of professional shortcomings in issue in that case:-

> "Insofar as the specific findings of the Committee with regard to the professional conduct of the applicant was concerned, I was persuaded beyond any doubt by the evidence of Nurses Gallagher, Tallon, Reyes and Ryan that, in the matter of communicating information about patients to her colleagues at the end of a tour of duty, or otherwise, and in the matter of aseptic techniques and hygiene; particularly in the context of dressings, the applicant's conduct fell seriously short of the standard of conduct expected among nurses. In particular, although I am satisfied that her colleagues regularly impressed upon her the importance of giving accurate and complete information about how patients were faring or what instructions doctors had given with regard to their care and the importance of observing aseptic techniques, especially those related to dressing wounds, I was persuaded by the testimony of her colleagues that the applicant frequently communicated imprecise and incomplete information with regard to the welfare of patients and that her aseptic techniques were extremely poor, in that, she regularly failed to wash her hands, or use, or change gloves in the course of dressing a wound in circumstances where it was a universal nursing practice that she should do so and this despite being constantly reminded to do so. Moreover, her dressing techniques were so poor that it frequently occurred that dressings applied by her fell off and had to be replaced at additional expense and, of course, adding to the workload of other staff.
>
> In the light of the testimony of Nurses Ryan, Reyes and Gallagher, I was again persuaded beyond any doubt, that, on the 14th April, 2003, the applicant not only gave medication to the wrong resident, but initially tried to persuade Nurse Reyes not to tell anyone about her mistake and, latterly, denied having made the mistake to both Nurse Ryan and Nurse Gallagher before, ultimately, admitting her default. I am also persuaded beyond any doubt by the testimony of Mrs. Gallagher that the applicant was seen to place dirty swabs on a patient's breakfast tray. Accordingly, I have no doubt that the Committee was quite entitled, as it did, to conclude that, by giving medication to the wrong resident and placing dirty swabs on a patient's breakfast tray the applicant's professional conduct fell seriously short of the standard of conduct expected among nurses.
>
> Apart from the foregoing, the nursing staff at the nursing home gave evidence which I accept and which pointed inexorably to the fact that, during the period when she was employed as a staff nurse at that nursing home, the applicant was anything but a competent nurse; a view which Mrs. Gallagher and Nurse Ryan, in particular, expressed in no uncertain terms. She found it difficult to make herself understood by other members of the staff, a problem which, as I have already indicated, I myself had

> when she was in the witness box and it would appear that she did not readily understand many instructions that were given to her although she rarely admitted as much. In that regard, it is also relevant to note that, during the period when she was a staff nurse at the nursing home, she was incapable of taking telephone calls, apparently, because she could not understand what was being said to her on the telephone and it was her invariable practice, when she had to answer the phone, to hand over the receiver to the person nearest to her. Moreover, in the course of her evidence, she conceded that while she was working in the nursing home, she undertook a test in English at University College Dublin which she failed. At no stage, while she was working at the nursing home did the director of nursing in the home, Mrs. Gallagher, consider that the applicant was sufficiently trustworthy to be permitted to dispense drugs and, although she spent ten months in the nursing home, it would appear that there was many a long-term resident in respect of whom she could not put a name on their face. She did not seem to appreciate the risk involved in giving medication to the wrong patient and, in that regard, appeared to be more concerned about her own reputation than she was about the wellbeing of the patient. Accordingly, it would appear that she could not be trusted. That would seem to have been Mrs. Gallagher's main concern about the applicant's suitability for nursing. Mr. Gallagher accepted that all nurses, being human, could make mistakes but that it was totally unacceptable that they would not acknowledge a mistake, particularly, when a patient's welfare was at stake. Accordingly, as I have indicated, there was much criticism of the applicant's competency as a nurse and, apart altogether from the evidence which I heard, it appeared from the transcript of the evidence which was given to the Committee that they heard sworn testimony from a Dr. Philip Ahearne, a general practitioner, who frequently attended the nursing home, who expressed the view that the applicant's competency as a nurse was below standard and that he felt it unsafe to give instructions to her and testimony from a Nurse Denise Canavan, who, at the material time, was also employed as a staff nurse at the nursing home, that she was of the view that the applicant required supervision at all times."

69. He went to say that her conduct not only fell far short of the standard of conduct expected among nurses, but did not accord with the code of professional conduct for nurses laid down by the Board. He went on to confirm the decision that her name be erased from the register of nurses. There was no discussion of the appropriateness of the sanction, and the judgment is concerned exclusively with the findings leading to that sanction. Noting that the most serious sanction of erasure was imposed in that case, I would observe the following matters in connection with the facts: (1) the applicant was incompetent in terms of her ability to care for patients at the most basic level of hygiene and dressings, and had on one occasion placed dirty swabs on a patient's breakfast tray; (2) she was incompetent in the matter of passing on relevant information concerning the welfare of patients; (3) she did not learn or correct her habits despite the repeated attempts of others to teach her; (4) she not only gave medication to the wrong resident on one occasion, but sought to persuade another nurse not to tell anyone about her mistake and later denied having made the mistake at all, before ultimately admitting the mistake. As already noted, the Judge was also highly critical of her evidence before him. The case is therefore very different in a number of respects from the present case: there was no insight by the Ms. Perez into her shortcomings even by the time the matter had come to the High Court and, indeed, she continued to contest the findings of misconduct; her incompetence was at the most basic level of nursing and impacted directly on the care of the patients; and she was not honest either with her colleagues when working, or when giving evidence to the Committee or the High Court.

70. Insofar as any appropriate comparisons may be made between cases involving allegations of professional misconduct against nurses and doctors, I note also that in the *Hermann* case, there were extremely serious deficiencies in the standard of care on the part of the doctor in question and that at least one of the patients suffered long-term serious injury as a result. In that case, the sanction was one of suspension for one year with conditions as to re-training. The sanction of erasure was never in issue, despite the seriousness of the misconduct. In the present case, the core allegations, and those apparently considered most serious by the Board, were the failure to report relevant information, rather than the deficiencies of care which were found (essentially, a failure to continue CPR on the part of nurse Dowling at a time when she considered the patient to be already dead, and a failure to rouse the sleeping care attendant who was supposed to be supervising Ms. Comber, on the part of nurse Carroll). The core of the misconduct in the present case, to put it bluntly, was a serious failure to record and pass on information which was clearly relevant, giving the impression of a natural and peaceful death when there had in fact been a sudden and unexpected death. It is a misconduct of a rather different kind to that in issue in the *Hermann* case. Nonetheless, it was a most serious failure and a significant breach of the trust reposed in nurses to carry out their nursing duties, a core part of which involves the keeping of proper records and passing on relevant information to others, including doctors. As Dr. Kennedy explained when giving evidence during the Committee's inquiry, it is vital that doctors are given accurate and complete information because the actions they take may be different, depending on the different types of information they get. He said that he had organised a post-mortem in this case because he tended to be 'more forensically aware' than some other doctors, but that other doctors might not have done so. He said that if causes of death are not properly picked up, there can be no learning of lessons to prevent similar deaths from occurring in the future. He said that, as a doctor who was on the nursing home site only for short periods of time, he would be unable to do his job professionally and fully if he were not being given accurate information on an ongoing basis, and this would raise the possibility that patients may not be looked after to the best of the doctor's ability. He pointed out that if there was a concern about some information being inaccurate, this could cause a rift in the relationship between doctor and nurse and call into question information that the doctor might be given in the future. He said that trust was 'absolutely essential' to the relationship. He also said that a patient such as Ms. Comber was one of the 'most vulnerable patients in society'.

71. No matter what professional misconduct is in issue, it is always possible to conceive of even more serious cases. Such cases might involve grossly negligent care of a patient resulting in serious harm or death, or even deliberate harming of a patient, particularly if accompanied by repetition or a pattern of such conduct. But the fact that one can imagine even more serious cases is not a reason for saying that this case does not fall within the upper end of the scale, given the seriousness of the conduct. I would not disagree with the Board's view that the misconduct itself fell at the upper end of misconduct, involving, as it did, certain failures in relation to the care of Ms. Comber, coupled with a serious failure to keep proper records and to pass on information in relation to an elderly, vulnerable patient who had died a sudden and unexpected death. The real issue in this case is whether the various mitigating factors should have adjusted the penalty downwards. As Charleton J. pointed out in *Hermann*, the decision-making body must, in addition to the seriousness of the misconduct, the principle of deterrence, and the protection of the public, also consider mitigating factors. The plaintiffs' complaint in the present case is not that the Board considered the misconduct to be so serious, but that it failed sufficiently to take into account the relevant mitigating factors. I now turn to each of these individually.

The lapse of time or 'delay' issue

72. It is indeed a striking feature of this case that a period of nearly 9 years elapsed

between the death of Ms. Comber and the decision of the Board to impose the sanction of erasure upon the plaintiff nurses. To put it at its most neutral, there has been a significant lapse of time since the event in question. The professional standing of the plaintiffs has been uncertain since that time. It is true, as was submitted on behalf of the Board, that the Board took no formal step to suspend them or prevent them from working in any way. But it is also true that, as a matter of fact, these two particular nurses were suspended from their employment shortly after the events in question and have not worked since. There was also medical evidence that each of the nurses had suffered from stress and anxiety since the death of Ms. Comber and while the process was ongoing. One of the plaintiffs adduced evidence that she was no longer allowed to act as a volunteer on trips to Lourdes, which caused her great personal distress. Thus, the ongoing nature of the proceedings over a period of 9 years has concrete effects in the real world, even if the Board itself is not responsible for taking any formal step against the plaintiffs during that period.

73. For the proposition that delay in a disciplinary process can be relevant to the penalty ultimately imposed, the plaintiffs rely on the decision in *Gallagher v. Revenue Commissioners* [1991] 2 I.R. 370. In that case, an officer of customs and excise was suspended from his duties in January, 1988, on the basis of suspicions that that he had fictionalised reports and grossly understated the value of vehicles seized. The delays in the investigation were criticised by the Court, there having been a delay of four and a half years between the events under investigation and charges being brought against him. The High Court held that the Court could not restrain the holding of an oral inquiry on grounds of inordinate delay where a person was charged not with a criminal offence but with misconduct in the performance of his duty as a civil servant. However, the court went to say that delay would be relevant in assessing his defence and to the imposition of any disciplinary measures should the charges be made out. Blayney J. said:

> "Such a delay will undoubtedly make it more difficult for the plaintiff to deal with the charges, and it is a delay for which the entire responsibility rests with the Revenue Commissioners. And while it is not a ground for the court to restrain the holding of an oral hearing, it clearly will be a relevant consideration for Mr. O'Callaghan to take into account in assessing the plaintiff's answer to the *charges and also a relevant consideration for the plaintiff's superiors if the charges, or any of them, are held to the established, in deciding what disciplinary measures should be imposed*." (emphasis added).

Counsel on behalf of the defendant Board sought to distinguish the Gallagher case on the ground that the present case did not involve an employer/employee relationship and the Board had not taken any direct action which had prevented the plaintiffs from working in the present case. The plaintiffs also rely on a decision of the European Court of Human Rights in *Malek v. Austria* (60553/00, 12th September, 2003), in which the Court granted declaratory relief that there had been a violation of Article 6(1) of the Convention by reason of delay in disciplinary proceedings involving a lawyer. The effect, if any, of the *Malek* decision on Irish law as it was set out in *Gallagher* is not straightforward, bearing in mind not only that the *Gallagher* case concerned an application to restrain a disciplinary proceeding whereas *Malek* concerned declaratory relief only, but also that European Convention principles are applicable in this jurisdiction only through the mechanisms provided for by the European Convention on Human Rights Act, 2003. I rely instead on the dictum in *Gallagher* that if there has been delay in a disciplinary process, it may be taken into account when the question of sanction is under consideration. I am not persuaded that the absence of an employer-employee relationship renders the principle irrelevant, because the principle seems to me to be simply one of fairness to the person whose professional position and other circumstances in the real world are likely to have been affected by the uncertainty hanging over him or her while the disciplinary process is ongoing. Further, I am of the

view that a period of delay may be relevant to the imposition of sanction even where the overall delay or circumstances are not such as to warrant prohibition of the proceedings themselves.

74. That said, it seems to me clear that the only delay which should be taken into account is delay on the part of the disciplinary body, and not any delay caused by the person who is to be the subject of the sanction. Having set out the chronology earlier in this judgment, the only period where the Board's conduct of proceedings could be described as unreasonably long was the first four years of the proceedings; thereafter, a variety of factors caused the lapse of time, not least of which were applications made by the plaintiffs themselves and the bringing of judicial review proceedings by one of them and a request by the other that the Board not proceed with her case until the judicial review proceedings were determined.

75. If I am correct that there was at least some period of delay that should have been taken into account by the Board in considering sanction, the next question is how the Board in fact approached the issue of delay or lapse of time in this case. First, it may be noted that there is no explicit reference to the issue of delay in its letter of 25th March, 2015, communicating the reasons for choosing the sanction of erasure. It might be argued that the issue of delay, having featured so prominently in the submission of the legal representatives at the hearings before the Board, must logically be encompassed by the phrase 'to include mitigating factors' in the Board's letter of 25th March, 2015. However, the matter is not so straightforward, because the Board received different legal opinions and submissions on the relevance of delay at the hearing, and did not indicate which of them it was going to follow. At the hearing on the 25th February, 2014, after the legal representatives for each of the plaintiffs invited the Board to take the overall delay into account, Senior Counsel for the CEO pointed out that there had never been any complaint of delay in the investigation either to the Board or the courts, and offered to prepare a chronology for the Board, if necessary, in order to demonstrate this. He went on to say that while delay might be relevant to the issue of publication he could not identify any issue relevant to sanction which would be affected by delay. Subsequently, at the hearing on the 24th March, 2015, Senior Counsel for the CEO said he was not aware of any authority where delay was found to be a reason to impose a less severe sanction, and he did not see the logic to the proposition. He then went on to deal with aspects of the time-line, effectively saying that the Board had not delayed in any way, and again pointing out that there had been no complaint of delay against the Board prior to this. However, Senior Counsel advising the Board disagreed with that position, and said that he was advising the Board that it could take delay into account in terms of the sanction to be imposed, based on what had been said in the *Gallagher* case. However, he also prefaced that by saying that the only reckonable period of delay in his view was the period between February 2014 and the date of the hearing, the 25th March, 2015. Thus, the Board had before it a considerable range of views on the question of lapse of time/delay; both as to whether it was legally relevant at all, and further, as to what periods might be taken into account, if it was deemed legally relevant. In those circumstances, the silence of the letter of the 25th March, 2015, on this issue is unhelpful. I am conscious of course that the Board's decision was a collective decision on behalf of nine people, and that it is not always necessary or appropriate for a decision-making body to set out its reasoning in detail. Nonetheless, I do think it should have been made clear, even in summary form, whether the Board was taking into account any period of delay and, if so, the extent to which this influenced the ultimate decision on penalty. Having regard to the chronology, as set out above, it seems to me that the first four years of the procedure before the Board were attended by delays which were not entirely justifiable and that this period of delay was something that should have been taken into account as a mitigating factor.

The three mitigating factors referred to by the Committee

76. As has been seen, in its Report, the Committee made it clear that three particular mitigating factors affected its decision to recommend the penalty of censure, referring to them as follows:-

> "this was a once-off incident, the lack of a stated policy in the hospital to deal with unexpected deaths, and the insight displayed [both nurses] at the Inquiry as regards the inadequacy of the documentation drawn up in the aftermath of Ms. Comber's death."

77. Again, the Board's decision, as communicated by the letter dated 25th March, 2015, did not explicitly refer to any of these factors. The plaintiffs say that this demonstrates that they paid no or no adequate attention to these significant mitigating factors. It was argued on behalf of the defendant Board that the phrase in the Board's letter, "*having considered submissions made on your behalf by [your legal representative] to include mitigating factors....*" makes it clear that, on the contrary, they did consider these mitigating factors.

78. While this is not a case in which a failure to give reasons has been pleaded by the plaintiffs in the present proceedings, it seems to me that the generalised manner in which the mitigating factors were dealt with in its letter may be indicative of inadequate weight having been placed on these factors.

79. As regards the first factor identified by the Committee, while the seriousness of the professional misconduct in the present case has been emphasised above, the context in which misconduct took place is also relevant. Both of the nurses had long careers prior to the night in question without their competence or integrity ever having been questioned. The events of the night were 'once-off', as the Committee described it; in other words, the plaintiffs came before the Board with completely clean records in all other respects. In this regard, the case was rather different to the situation in *Perez*, for example, where there had been repeated examples of the nurse engaging in behaviour which made her unfit to be a nurse over a significant period of time and had failed to respond to correction or advice from her colleagues. The present case involved a once-off incident on one particular night; that is not to say, of course, that it was not of itself very serious, or to compare the conduct here with that of Ms. Perez, but merely to point out that it was not part of a continuing course of conduct, as might arise in some cases. It is interesting that in a letter dated the 27th November, 2014, solicitors on behalf of the Board wrote, in emphasising their view that the misconduct was of the highest order: *'The Board have further instructed us to confirm that such gravity and seriousness is not in any way lessened by this being a once-off incident*'. The letter of the 25th March, 2015, communicating the decision of the Board, does not refer to the absence of any prior misconduct of the plaintiffs, but the comments in the letter of 27th November, 2014, would suggest that it was specifically rejected as a mitigating factor. In my view, this was an error and it should have been taken into account as a mitigating factor that: (a) neither nurse had ever been accused of or found guilty of misconduct before; and (b) this was a once-off incident and not a pattern of continuing conduct.

80. The second factor referred to by the Committee was the issue of insight. The question of insight appears to me to be also highly relevant to mitigation; it is relevant to such matters as whether a professional who has been found guilty of professional misconduct might require some form of rehabilitation (as was ordered in the *Hermann* case) as well as the likelihood of their engaging in any such misconduct again in the future (the risk of future offending). These factors must be relevant to whether it was appropriate to impose the ultimate sanction of erasure in the present case. At the hearing before the Court, it was pointed out on behalf of the Board that the Act's provisions allow for the restoration of a nurse to the register after being erased. It does not seem to me that the availability of the remedy of restoration removes from the Board the obligation of considering the question of the nurse's insight at the time of the

imposition of the sanction. It would not be appropriate, in my view, for the Board to take the view that the seriousness of the offence warranted erasure and that the insight (displayed at hearings several years before the imposition of the sanction) could be subsequently dealt with by restoration. All mitigating factors should be considered at the time of the imposition of sanction.

81. The third factor referred to by the Committee was that there was no hospital policy in place to deal with unexpected deaths. It is worth pausing to consider the possible meaning of this somewhat terse statement. The Committee clearly took the view that there was a corporate background to the nurses' individual professional failures and that this was somehow relevant to the issue of sanction. It seems to me that what the Committee must have had in mind, and rightly so, was that the corporate context on the ground was relevant to the culpability of the nurses on the date of their misconduct. This is a completely separate matter to the question of insight subsequently displayed at the hearings because it concerns their state of mind at the time of the misconduct itself. The Board may not have agreed with the Committee on this point, and may not have considered that this factor was relevant to the individual culpability or responsibility of each of the plaintiff nurses or that it carried much weight, but in the absence of any comment by the Board in its letter of the 25th March, 2015, on the subject, it is impossible to know whether it rejected this as a mitigating factor, and, if so, why.

82. Thus, the three mitigating factors identified by the committee were all potentially relevant factors to mitigation, in my view, and it is disappointing that the Board saw fit only to refer to them in the general phrase "*to include mitigating factors*" in its letter of 25th March, 2015. The mere fact that the conduct was at the upper end of the scale did not necessarily dictate that the penalty ultimately arrived had to be the most severe sanction. As with sentencing in the criminal sphere, the fact that the offence is at the upper end of severity is the starting point, but not necessarily the end-point, when considering the appropriate sanction. While I am highly conscious that this is not, as pleaded, a 'reasons' case, the impression from what was said at the two Board meetings and the correspondence on the plaintiffs' behalf between those dates is that the Board did not properly structure its thinking on sanction in order to strike a balance between the various matters referred to by Charleton J. in *Hermann*, and laid a disproportionate emphasis on the seriousness of the conduct, the principle of deterrence, and the protection of the public, without sufficiently considering, discussing or giving weight to potential mitigating factors.

The argument in relation to dishonesty

83. In addition to the arguments relating to the mitigating factors referred to above, counsel on behalf of the plaintiff Ms. Carroll contended that the Board had unfairly extrapolated findings of dishonesty on her part which were not supported by the facts and were inconsistent with her being found not guilty on certain charges. In order to evaluate this argument, it is necessary to consider certain specific findings of the Fitness to Practice Committee and then to consider how the Board subsequently dealt with those findings. Counsel on behalf of the plaintiff also argued that it was not clear on what information the Board had based its decision, and that the Court should not, in the absence of positive evidence to this effect, infer that the Board members had read the entire transcript of evidence. Counsel on behalf of the Board pointed out that, at the hearing on the 25th February, 2014, the Chairperson of the Board said that the Board had had 'lengthy deliberations' before that time and that, while mindful of the fact that they did not hear the witnesses, they were "very informed in the context of the documentation that has been made available to us and we rigorously go through all of the documentation...". Having regard to these comments, it seems to me that it would be wrong of the Court to infer that the Board members had not read the transcript

which was made available to them.

84. I have set out above the totality of the charges on which Nurse Carroll was found guilty of professional misconduct, and those of which she was found not guilty. For present purposes, it is necessary to note that she was found guilty on charges 1(b) and 2, relating to her failure to note in the written records or to tell nursing staff coming on duty, or Dr. Kennedy or Southdoc or any other appropriate person, her view that Ms. Comber had possibly choked and her observation that Ms. Comber's fingers were black. She was found not guilty of a charge, referred to as allegation 3, that she furnished information to the Gardai or hospital authorities which she knew was incomplete, inaccurate or untrue. Counsel on behalf of Nurse Carroll argued that the Board, in reaching the decision that erasure was the appropriate sanction, had lost sight of the fact that she had been found not guilty of allegation 3, and that the Board had essentially elevated a finding of failure to keep a proper record to a finding of dishonest withholding of information involving a more serious form of professional misconduct involving moral turpitude.

85. It may be noted that none of the allegations 1(b), 2 (of which Ms. Carroll was found guilty) or 3 (of which she was found not guilty) used the term 'dishonesty'. However, when the Board wrote to the plaintiffs on the 3rd March, 2015, to explain why it was considering the more severe sanction of erasure, it said:

> "The Board considered that the said professional misconduct was of a sufficiently serious and grave nature to merit such a severe sanction as it demonstrated a level of dishonesty which constituted a fundamental breach of trust and went to the core of the relationship of trust between nurses and the public."

86. By letter dated the 3rd April, 2014, a letter on behalf of Ms. Carroll was sent to the Committee saying:

> "I find it astounding that the Board could extrapolate the findings of the Fitness to Practice Committee in respect of this allegation [i.e. allegation 2] to the extent of constituting dishonesty on the part of our member, Nurse Carroll, when the Fitness to Practice Committee made no such finding. Indeed it would be our contention that none of the evidence submitted by the Executive to the Fitness to Practice Committee or, more particularly, the case made by the Executive to the Fitness to Practice Committee was imputing dishonesty in relation to the allegation."

87. By letter dated the 19th May, 2014, the suggestion that the Board had not adequately set out it reasons to depart from the recommendation of the Committee was rejected by solicitors on its behalf. It was emphasised that the Board's view was not limited to allegation 2 but was instead based upon all of the findings of professional misconduct. In a further letter dated the 19th June, 2014, it again reiterated that it considered "that the said professional misconduct was of a sufficiently serious and grave nature to merit such a severe sanction as it demonstrated a level of dishonesty which constituted a fundamental breach of trust and went to the core of the relationship of trust between nurses and the public".

88. At the Board hearing on the 25th March, 2015, Senior Counsel advising the Board did not comment on the issue of dishonesty other than to note the different positions taken by Nurse Carroll and the Board. Mr. Sugrue, on behalf of Nurse Carroll, again complained that he had to 'extrapolate from some 10 days of hearing before the Fitness to Practice Committee the basis upon which Board has made a finding that certain acts or omissions constituted a level of dishonesty' and that this had not been clarified to a degree which his client was entitled to expect in the face of the severe sanction under contemplation. He drew the Board's attention to the fact that she had been found not guilty of allegation 3, and that there was nothing anywhere else in the evidence showing

'premeditated dishonesty and an intent of Nurse Carroll to mislead anybody'. Senior Counsel on behalf of the CEO said that he was 'not going to try and find instances of dishonesty in the evidence' but invited the Board to 'read the reasons given for the finding of facts under allegation 1(b)'.

89. Interestingly, in the Board's letter dated the 25th March, 2015, communicating its decision to impose the sanction of erasure, the Board did not use the term 'dishonesty' at all, using phrases such as 'very serious' and 'upper end of the scale', in describing the professional misconduct.

90. Having carefully examined the wording of allegations 1(b), 2 and 3; the correspondence between the Board and Ms. Carroll's solicitor; the oral submissions at the hearing on the 24th March 2015; and the final letter from the Board on the 25th March, 2015, it seems to me that a number of distinct questions arise. Was it intended or understood by the Board/CEO that allegations 1(b) and 2 would encompass an allegation of dishonesty? Was the difference in wording as between allegations 1(b) and 2, on the one hand, and allegation 3, on the other, intended or understood to mean that any allegation of dishonesty was confined to allegation 3? Did the Board ultimately base its view about sanction on a finding of dishonesty, or not, having regard to different wording used by it in correspondence on different dates? Was the sanction of erasure chosen by the Board on the basis of an erroneous understanding of the evidence and findings of the Committee? I do not consider it necessary to resolve these questions. It seems that there was, from the beginning, a potential for confusion by reason of the manner in which allegations 1(b), 2 and 3 were worded, although it has to be said that the drafters of allegations are faced with the difficulty caused by the absence of any guiding code as to the different types of misconduct that may be charged. Further, the Board did not assist matters when it used the word 'dishonesty' in correspondence and then resiled from using that word in its final letter. However, the most fundamental question is, whether one characterises the motivation of Ms. Carroll as dishonesty or not, the misconduct found was at the upper level of the scale of seriousness or not. To put it plainly, the Committee found that Nurse Carroll had relevant information which she chose neither to write down nor to pass on orally at the time of her going off-duty. Given the importance of a nurse's duty to furnish all relevant information, this was a very serious matter, whether one describes it as dishonest or not. I would not, therefore, take issue with the Board's decision in placing the conduct at the upper end of the scale of seriousness, although I believe it was unfortunate that the correspondence on behalf of the Board introduced the term 'dishonesty' which was not used in the charges at all and thereby introduced an unnecessary layer of complexity into the situation.

91. By way of final comment on this issue, it might be that consideration should be given in the future to a slightly different format for Fitness to Practice Committee Reports. The form of the Report in the present case was simply to list all the pieces of evidence that had been heard or read, followed by a setting out, in short form, each allegation and the Committee's findings in relation to them. There was no narrative of the facts found, even in a simple form. This led to the arguments which arose in this case as to what precise facts had been found by the Committee as well as what facts had been relied upon by the Board. It would seem to be possible to devise, without making the matter overly complicated, some kind of a report which (1) contains a short narrative summary of the facts, including the identification of any key factual conflicts which arose and what factual findings the Committee has made in relation to those; (2) indicates the decision of the Committee as to which of the allegations are proved and why; and (3) if making a recommendation as to sanction, explains where on the scale of seriousness the Committee considers the conduct to fall together with any mitigating factors considered to be relevant. I appreciate that it is difficult enough to gather together the collective body that is the Committee in order to hear the evidence in a

case such as this, let alone expect any kind of a formal written judgment, but the deprivation of a professional of their means of livelihood is a most serious matter and, in any event, a lack of clarity on key matters may ultimately lead to expensive and time-consuming court proceedings.

Conclusion on the appropriateness of erasure as a penalty

92. I would not disagree with the Board's view that the misconduct itself fell at the upper end of misconduct, involving, as it did, certain failures of care, and a failure to keep proper records and to pass on information in relation to an elderly, vulnerable patient who had died a sudden and unexpected death. The real issue is whether the various mitigating factors should have adjusted the penalty downwards. Having regard to the various matters discussed above, it is my view that the Court cannot be satisfied that the Board properly approached the matter of sanction with adequate regard to the various mitigating factors identified above.

What the Court should do

93. Having regard to the Court's view on how the matter of sanction was approached, the Court is faced with something of a conundrum in terms of how best to proceed. The Court does not have the power to substitute its own sanction for that imposed by the Board. Nor would it be appropriate for the Court merely to quash the sanction, leaving the misconduct entirely unpunished, particularly in circumstances where the findings of serious professional misconduct have been admitted. As noted earlier, on a literal interpretation of s. 39(3) of the Nurses Act, 1985, the Court cannot quash the decision and remit the case back to the Board, yet, it would seem absurd if the Court were simply to have the power to quash the sanction, in a case where the findings of misconduct are not in dispute, without having an ancillary power to send the matter back for reconsideration by the Board as this would leave the conduct, admitted to be professional misconduct, without any penalty. Accordingly, the Court considers that it is necessary to rely upon s. 5(1)(b) of the Interpretation Act, 2005, on the basis that the literal interpretation of s. 39(3) would be absurd. The Court will therefore quash the decision of the Board imposing the sanction of erasure and direct the Board to re-consider the question of sanction in light of the comments made in this judgment as to how the matter of sentencing, and, in particular, issues of mitigation, should be approached. I regret that the Court does not have the power to substitute a penalty for that imposed by the Board in order to bring finality to matters which have already gone on too long, but the Court clearly lacks the power to do so under the 1985 Act and thus, cannot do so.