Supreme Court of Ireland Decisions

Judgment

Title:	Minister for Justice and Equality -v- J.A.T. No. 2
Neutral Citation:	[2016] IESC 17
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Court:	Supreme Court
Composition of Court:	Denham C.J., O'Donnell Donal J., MacMenamin J., Laffoy J.
Judgment by:	Denham C.J.
Status:	Approved
Result:	Appeal allowed

Judgments by	Link to Judgment	Concurring
Denham C.J.	Link	O'Donnell Donal J.
O'Donnell Donal J.	Link	MacMenamin J., Laffoy J.

THE SUPREME COURT

Appeal No. 294/2014

Denham C.J.
O'Donnell J.
MacMenamin J.
Laffoy J.

Between/

Minister for Justice and Equality

Applicant/Respondent

and

J.A.T. No. 2

Respondent/Appellant

Judgment delivered on the 28th day of April, 2016 by Denham C.J.

1. This is an appeal by J.A.T., the respondent/appellant, who is referred to as "the appellant", from the order of the High Court (Edwards J.) made on the 5th June, 2014 and perfected on the 6th June, 2014 and the written judgment delivered in relation thereto on the 9th June, 2014, which ordered the surrender of the appellant to the United Kingdom, pursuant to s. 16 of the European Arrest Warrant Act, 2003. The Minister for Justice and Equality, the applicant/respondent, is referred to as "the Minister".

2. The High Court held that the appellant had suffered unjust harassment in that the proceedings against him "were *de facto* abusive of the Court's process".

3. However, the learned High Court judge held that this was not a case in which he

> "would be justified in denying the [Minister] relief by refusing surrender, notwithstanding that the manner in which the [appellant's] rendition has been pursued has been abusive of the process".

4. The High Court held that the abuse of process would be addressed appropriately by an admonishment of the parties responsible.

5. The following question was certified by the High Court for an appeal to this Court:-

> "Where such an abuse of process has been found to have occurred is it sufficient or appropriate for the Court to admonish the parties responsible whilst also surrendering the [appellant]?"

Cross appeal

6. The Minister has brought a cross appeal contending that:-

(i) The High Court erred in law and in fact in holding that the appellant had suffered unjust harassment on account of the manner in which his rendition has been pursued;

(ii) The High Court erred in law and in fact in holding that cumulatively the proceedings reported at [2008] IEHC 118, referred to as "*T. No. 1*", and the Supreme Court appeal in *Minister for Justice v T.* [2010] IESC 61, and the present proceedings, were oppressive to the appellant and/or to his family, and

(iii) The High Court erred in law and in fact in holding that the proceedings constituted an abuse of the Court's process.

European Arrest Warrant for the appellant

7. The appellant is sought by the United Kingdom on foot of a European arrest warrant (referred to as "the EAW") relating to four offences:-

(a) Conspiracy to cheat the public revenue, contrary to s. 1(1) of the Criminal Law Act, 1977;

(b) A second offence of conspiracy to cheat the public revenue, contrary to s. 1(1) of the Criminal Law Act, 1977;

(c) Cheating the public revenue, contrary to common law; and

(d) Conspiracy to commit money laundering, contrary to s. 1(1) of the Criminal Law Act, 1977.

8. The section of the European arrest warrant where details of the offences are given is headed "Tax Fraud".

9. The particulars of the first offence given in the EAW was as follows:-

> Between the 1st day of January 1997 and the 31st December, 2005, with intent to defraud and to the prejudice of the Commissioners of Inland Revenue and Customs and Excise, conspired with others to cheat the public revenue by dishonestly submitting false 715 CIS 24 and CIS 25 vouchers issued pursuant to Inland Revenue construction industry taxation schemes.

The description of the said offence was given as:-

> Between 1997 and 2005, the appellant was at the centre of a large scale fraud on the UK Public Revenue. He managed and controlled a large number of companies and individuals in the UK associated with the construction industry, which were used to systematically defraud the Revenue by dishonestly pretending that payment had been properly made to third parties which held tax exemption vouchers under the Inland Revenue Construction Industry Scheme ("CIS Scheme"), thereby resulting in the dishonest submission of such vouchers to the Revenue. Such pretence allowed payments to be made by a contractor gross of tax and VAT to be passed down the chain accordingly. False invoices were raised to justify such payments. Tax and VAT were not accounted for to the Revenue. Instead, the funds passed down the chain were ultimately withdrawn in cash, to pay an off record workforce cash in hand without deduction of tax, and also to benefit the appellant and others involved in the fraud. The loss to the Revenue is in excess of £10 million.

10. The second offence described that between 1997 and 2005, the fraud operated on the UK Revenue by the appellant and others extended to companies and businesses independently of the Revenue Construction Scheme (CIS Scheme). It was stated that in pursuance of the fraud, false invoices were created to give the impression that work had been legitimately carried out by parties, so as to disguise the dishonest extraction of funds from those companies and businesses, which sums were ultimately converted to cash and falsely accounted for, thereby necessarily reducing the taxable profits of the companies and businesses. The fraud, it was stated, was perpetrated against the UK public revenue. And, it was also stated that, the appellant was based in London, in the UK, throughout the period of the offending.

11. The third offence alleged is that of cheating the Public Revenue, contrary to Common Law. The particulars given are that between the 1st January, 1997, and the 31st December, 2005, he cheated the public revenue by failing to disclose his income to the Inland Revenue. In that time, it was stated, in excess of £2 million was received into personal bank accounts held by the appellant, which income he concealed, and failed to make any or any proper return to the Revenue, or to make any payment of income tax.

12. The fourth offence alleged is described as money laundering, of which particulars and a description are given.

Statement of Opposition on behalf of appellant in the High Court

13. The appellant did not consent to being surrendered on the EAW. It was opposed on the basis that in the particular circumstances the issue of the warrant and the

application to the High Court amounted to an abuse of process on the part of the domestic prosecuting authority of the issuing State and/or the Minister.

14. It was submitted that the appellant had suffered an abuse of process in light of all the circumstances of the case such that his surrender is prohibited.

15. The circumstances and the factors referred to, in relation to the abuse alleged, which was stated to be, but not limited to, included:-

> (i) The failure, refusal and/or neglect of the issuing judicial authority to apply Article 2.2 "ticked box" provision for the four offences in the first proceedings on the first EAW, the subject of the decision of this Court in *T. No. 1*.
>
> (ii) The contents of the EAW, where it is conceded that the EAW is a "reissued Part 3 warrant", alongside the statement that it addresses the observations of this Court in *T. No. 1*, which statements concede that the issuing judicial authority and/or the Minister failed or neglected or misused the Article 2.2 provision available to them in the first EAW.
>
> (iii) The detrimental effect and prejudice to the appellant and his family by reason of the proceedings in *T. No. 1*, including the effect on his health and well being, the stress and anxiety caused, the impact of the proceedings upon family members and the appellant's family life in general, and the impact of the overall length of time concerned in these proceedings on the appellant and members of his family.
>
> (iv) The detrimental impact upon the appellant's health, well being and family life and the impact upon the appellant's family members arising from the institution and prosecution of these proceedings against him after the refusal of surrender in *T. No. 1*.
>
> (v) The impact of stated time periods and delays in the proceedings, being: (a) the time from the alleged offences, being between 1997 and 2005; (b) the time between the appellant's alleged failure to attend at a police station on the 26th January, 2006 (which was denied), and the issuance of the domestic warrant and the EAW in *T. No. 1*, which EAW was issued on the 7th March, 2008; (c) the time period involved in *T. No. 1* proceedings which period was from the date of endorsement of the warrant on the 12th March, 2008, and the appellant's arrest on the 3rd April, 2008, and the conclusion of the proceedings in the Supreme Court on the 21st December, 2010; (d) the time period between the conclusion of the proceedings in *T. No. 1* in December 2010 and the issuance of the EAW in these proceedings on the 13th June,2011; (e) the time period between the issuance of the EAW in these proceedings and the transmission to the Minister and the endorsement before the High Court on the 16th September, 2011; (f) the time period between the endorsement of the EAW on the 16th September, 2011, and the arrest of the appellant in July, 2012; (g) the cumulative effect of the elapse of time on the appellant, and his health and well being and that of his family.
>
> (vi) The individual and/or cumulative effect and prejudice to the

appellant's constitutional rights and ECHR rights, the appellant's health and well being and the detrimental impact upon his family members arising from all of the above factors.

(vii) The surrender of the appellant would be prohibited by s. 37 of the European Arrest Warrant Act, 2003, referred to as "the Act of 2003", in that to surrender the appellant from such offences would be to breach or violate his constitutional and ECHR rights in the following aspects: (a) it would breach or violate his constitutional rights to fair procedures where he is subject to repeated applications for his surrender; (b) the application is oppressive and unjust whereby the issuing judicial authority had open to it the provisions of Article 2.2 in *T. No. 1* but failed, neglected or refused to apply them to the offences the subject matter of those proceedings where the same offences are the subject matter of this application; (c) the surrender of the appellant would be lacking in proportionality in light of the circumstances of the case both as regards his constitutional and ECHR rights, including failing to vindicate his right to bodily integrity, his right to fair procedures, his right to liberty, and/or would be unfair in light of his current state of health and well being and/or present a risk to his life such that his surrender should be prohibited.

(viii) The surrender of the appellant is prohibited by s. 37 of the Act of 2003, in that to surrender the appellant for such offences would be to breach his constitutional rights to fair procedures and the enjoyment of his family life (under Article 41 of the Constitution and/or Article 8 of the European Convention on Human Rights). In the circumstances the surrender of the appellant would be an unjust and disproportionate interference in his family life and is contrary to fair procedures in all the circumstances of the case.

(ix) The proceedings herein constitute an abuse of process whereby the appellant is prejudiced in respect of appeal to the Supreme Court arising from a determination that he should be surrendered to the issuing State. The restriction on the right of appeal provided by s. 16(12) of the European Arrest Warrant Act, 2003, with effect from the 24th August, 2009, thereby has prejudiced the appellant's position in respect of this matter where no such restriction could have applied in *T. No. 1*.

The High Court

16. When this application came before the High Court the relevant points of objection were summarised by the learned High Court judge as comprising:-

> "an objection based upon an alleged abuse of this Court's process by the domestic prosecuting authority of the issuing state and/or the [Minister] in seeking to 'come again' in circumstances where they failed or neglected or misused the ticked box procedure available to them pursuant to article 2.2 of the Framework Decision in T. (No. 1)."

Also

> "Moreover, delay has been specifically pleaded and is relied upon as an aspect of the case based upon abuse of process; as an aspect of the case based upon prejudice to the health and wellbeing of the [appellant] and his family; and as an aspect of the case based upon the right to respect for family life guaranteed by article 8 ECHR and the contention that it

> would be a disproportionate measure to surrender the [appellant] in the circumstances of this case."

17. The High Court set out in great detail the facts of the case, which may be seen at *Minister for Justice and Equality v. J.A.T* [2014] IEHC 320.

18. An earlier warrant had been issued for the appellant from the United Kingdom, in relation to the same offences. That warrant was issued on the 7th March, 2008, by a District Justice at a Magistrates' Court in London. The appellant was arrested in Ireland pursuant to that warrant, which he contested. On the 21st December, 2010, this Court discharged the appellant from that warrant.

19. In *Minister for Justice v T.* [2010] IESC 61, Hardiman J., *inter alia*, pointed out difficulties in that EAW and the lack of scrutiny, stating:-

> "It appears to me that this very grave difficulty has arisen because the drafters of the warrant, presumably the prosecuting solicitors to the Inland Revenue, failed to distinguish between the completed offence of cheating the Revenue, which might or might not be capable of description as 'fraud', on the one hand, and the offence of conspiracy to cheat the Revenue which, as the warrant itself proclaims, is not within the framework list. Notwithstanding this, the warrant earlier contains a certificate that all of the offences were on the list."

20. However, the authorities in the United Kingdom have maintained their request for the surrender of the appellant. It was stated by them that this second EAW takes into account the judgment of this Court: see *Minister for Justice v T.* [2010] IESC 61, Hardiman J., *nem diss*.

21. On this second EAW the High Court concluded:-

> "The Court is satisfied, on balance, that the [appellant] has suffered unjust harassment on account of the manner in which his rendition has been pursued to date, and that cumulatively the proceedings in *T. (No. 1),* and the present proceedings, have subjected the [appellant] in particular, but also his family, to oppression. In those circumstances the present proceedings must be regarded as being *de facto* abusive of the Court's process and I so find.
>
> However, having carefully weighed the various considerations that I identified as relevant, I do not consider that this is a case in which I would be justified in denying the [Minister] relief by refusing surrender, notwithstanding that the manner in which the [appellant's] rendition has been pursued has been abusive of the process.
>
> It is a matter of significance that nobody has set out to deliberately abuse the Court's process or by underhand and despicable means to secure an unfair advantage. That said, a duty of care was owed both to the court and to the [appellant], which has ostensibly been breached. This is not a case, however, where irremediable ongoing prejudice has been caused to the [appellant] by the unjustifiable prolongation of the rendition efforts. The [appellant's] medical conditions were pre-existing and were not caused by the additional oppressive stress to which he has been subjected. Moreover, his medical conditions, though they remain ongoing, have fortunately not significantly worsened with the effluxion of time. Indeed, there has been some improvement. The many risk factors for self harm and suicide identified by Dr. M. in his report existed at the time of the first proceedings. Though Dr. M. has stated that the stress of being surrendered to the United Kingdom authorities may potentially have a

> negative impact on both the [appellant's] mental health and that of his son, I am satisfied on the evidence that that was always going to be the case given the vulnerabilities of those parties. Accordingly, while oppression has occurred, and it is very regrettable, it may be regarded as an historical prejudice at this time in the sense that the case is now at the point that it ought to have been at in January 2009, when the High Court gave judgment in *T. (No 1)*, had the initial rendition request been addressed with due diligence. However, any surrender that may happen hereafter, with all its direct and indirect consequences, is something that the [appellant] and his family would have to have faced in any event even if the first case had been properly conducted. Moreover, the court is entitled to take account of the fact that the [appellant], and others affected, may possibly have legal remedies open to them to pursue in respect of any suffering which they have been caused to experience unnecessarily.
>
> In this Court's view the abuse of process that has occurred in this case can be appropriately addressed by admonishment of the parties responsible for it, and particularly of the [Minister] who had carriage of the proceedings in this jurisdiction at all stages. The Court wishes to deprecate in strong terms the fact that the [appellant] has been unjustly harassed and oppressed and unnecessarily twice vexed with litigation. That having been recorded, I consider that the abuse that has occurred has not been so egregious that the mere fact of going forward in the light of it would be offensive. On balance, taking into account all of the circumstances of the case, I believe that it should still be allowed to proceed in the overall interests of justice."

Cross appeal
22. The Minister has brought a cross appeal against the finding by the High Court that there was an abuse of process.

23. The Minister has cross-appealed contending that the High Court erred in finding that the appellant has suffered unjust harassment, oppression, and abuse of process.

24. I have considered carefully the lengthy and detailed judgment of the learned High Court judge; the affidavit of the appellant sworn on the 11th January, 2013 (which is detailed in the judgment of the High Court also) and the exhibits thereto; the appellant's second affidavit, sworn on the 15th March, 2013, with updated medical information; and the two additional medical reports accepted by the learned trial judge, being the report of Dr. H., dated the 25th May, 2013, on the appellant's son and the report of Dr. S.M. based on his assessment of the appellant on the 27th May, 2013.

25. I am satisfied that there was an evidential basis upon which the learned trial judge could, and did, find that in the circumstances there was an abuse of process. I would not interfere with the findings by the learned trial judge that the appellant has suffered unjust harassment, oppression, and that the proceedings may be regarded as being *de facto* abusive of the Court's process, an abuse of process.

26. Consequently, I would dismiss the cross-appeal of the Minister.

The Issue
27. Thus, the issue on this appeal is the question as certified -

> "Where such an abuse of process has been found to have occurred is it

> sufficient or appropriate for the Court to admonish the parties responsible whilst also surrendering [the appellant]?”

In other words, where the learned trial judge has found such an abuse of process, is it sufficient or appropriate for the Court to admonish the parties, while surrendering the appellant?

Decision

28. Historically, the issue of extradition has been a matter of treaties between States. Treaties negotiated by the executive branch of the governments of the States. In Ireland the procedure has been that the individual applications have been processed through the courts, under a scheme established by legislation, whether it be pursuant to the Petty Sessions (Ireland) Act, 1851, the Extradition Act, 1965, or the European Arrest Warrant Act, 2003 There have been many bilateral treaties between Ireland and other States. A corpus of jurisprudence has grown up around applications for extradition and the decisions of the judiciary.

29. In developing the Irish jurisprudence courts have been referred to, and have referred to, international conventions and the domestic laws of other states, in analysing the issues raised. For example, in *Bourke v. A.G.* [1972] I.R. 36, the issue which arose before the court was as to a “political” offence, and the application of the Extradition Act, 1965, referred to as “the Act of 1965”. The Court referred to the European Convention on Extradition, to s. 50 of the Act of 1965, and to it being derived from the said Convention, and to the principle of the non-extradition of political offenders. Reference was made to the Belgian law of 1833, which marked the historic turning point in the evolution of this principle. There were wide ranging references to the laws on extradition in many other European states, before the Court concluded, by a majority, in the judgment of O’Dálaigh C.J.:-

> “Therefore, my conclusion is that Blake’s offence in escaping was a political offence and that the plaintiff’s offence in assisting that escape was connected with Blake’s offence in escaping, as has already been shown. Therefore, the plaintiff may not be extradited”.

30. The underpinning of the relevant legislation is an extradition agreement between states, as referred to in *Wyatt v. McLoughlin* [1974] I.R. 378. In the High Court Finlay J. stated:-

> “… I am satisfied that I am entitled to have regard to the fact that an extradition Act is necessarily the consequence, as Mr. Liston contends, of an agreement between two sovereign States reposing confidence in each other, and that I should not in the first instance, suppose that the court and the other authorities of the country by which extradition is sought are using a deceit so as to secure the apprehension of the plaintiff.”

31. In the Supreme Court in *Wyatt v. McLoughlin* Walsh J. held:-

> “Extradition is the formal surrender, based upon reciprocating arrangements by one nation with another, of an individual accused or convicted of an offence who is within the jurisdiction of the requested country when the requesting country, being competent to try and punish him, demands his surrender. The formal arrangements by which this may be secured and the principle of reciprocity enshrined are either by way of treaties or by reciprocal legislation.”

32. However, the courts do not simply rubber stamp a warrant from another state with which Ireland has an extradition agreement. For example, in *Gillespie v. Attorney General* [1976] I.R. 233, the point in the High Court, and in this Court, was whether the plaintiff should be allowed to adduce evidence of an expert in English law to show that the English warrant on which he was to be extradited was invalid because it was issued without jurisdiction. Henchy J. giving the decision of the Court held:-

> “Section 55, sub-s.1, allows a court to attribute an authenticity and a lawful origin to a warrant with a duly verified signature, but the court is debarred from ascribing that, or any other, probative value to the

> document if and when good reason to the contrary emerges. This means that when it is sought, in the District Court or in the High Court, to adduce evidence showing that the authenticity or evidential value of the document put forward as the warrant is not what it would otherwise be, the court is bound to receive that evidence if it is otherwise admissible."

The appeal was allowed on this point.

33. The issue of injustice, oppression and invidiousness are part of the Act of 1965, which has been interpreted by the Courts. Thus, in *Fusco v. O'Dea* (No. 2) [1998] 3 I.R. 470, this Court considered the issue of injustice, oppression and invidiousness in the context of that appeal. In that case the plaintiff had been tried for offences before the Crown Court in Northern Ireland. While awaiting judgment he escaped from prison in Belfast, on the 10th June, 1981. A few days later he was found guilty and sentenced in Belfast. On the 18th January, 1982, the plaintiff was arrested in the State, tried pursuant to the Criminal Law (Jurisdiction) Act, 1976, before the Special Criminal Court, and convicted of offences relating to the said escape. The plaintiff was due to be released from prison on the 16th December, 1991. On the 11th December, 1991, he was arrested on five warrants pursuant to the Act of 1965 in respect of the convictions and sentences which had been imposed on him by the Crown Court in Northern Ireland. The plaintiff sought his release on a number of grounds, including that the Court should infer that following the plaintiff's arrest in the State, the Northern Ireland authorities had made a decision not to seek his extradition and that this decision was communicated to the plaintiff by implication. Accordingly, it was submitted that the Northern Ireland authorities were then estopped from seeking his extradition. The High Court ordered the release of the plaintiff. This Court allowed the State's appeal. The plaintiff had been convicted by the Crown Court in Northern Ireland of offences of murder, attempted murder, possession of firearms and ammunition, namely a M60 machine gun and a quantity of ammunition. He had been sentenced to imprisonment for life, with a recommendation of a minimum of 30 years, on the first offence, and to life and 20 years each on the other offences, all ordered to run concurrently. Hamilton C.J. held at p. 499:-

> "As I have already stated, the interests of justice require that persons accused of serious offences should be brought to trial and if convicted, should be obliged to serve sentences lawfully imposed.
>
> Having regard to all the circumstances of this case, I am of the opinion that there is no basis for holding that it would be unjust, or oppressive, or invidious to deliver up the plaintiff herein for the purpose of serving the sentences lawfully imposed on him in respect of the serious offences of which he had been found guilty, other than one.
>
> I am of the opinion that it would be both unjust and oppressive to deliver up the plaintiff to serve the said sentences if credit were not given for the period of imprisonment which he served in respect of offences committed in Northern Ireland and which were the subject of the trial before the Special Criminal Court."

In that case I stated, at p. 523, that:-

> "However, the specific terms of s. 50(2)(bbb) - lapse of time, exceptional circumstances, unjust, oppressive, invidious - require the Court to look at all the circumstances. In determining the circumstances the warrants are relevant. Thus, the fact that the warrants are for convictions is relevant, it reflects specifically on the issue of prejudice and a trial. The length of sentence remaining to be served may be important, if it did not exceed the 'concurrent' sentence served in Portlaoise he would be entitled to an order for release. Thus, the Court weights the convictions in determining

the exceptional circumstances."

In that case I analysed the factors raised and held that individually none of the factors was an "exceptional" circumstance, nor taken together did they create a pattern of exceptional circumstances, such that he should not be surrendered.

34. Prior to the Act of 1965 the method of processing extradition requests to Ireland from the United Kingdom was a procedure under s. 29 of the Petty Sessions (Ireland) Act, 1851, "the Act of 1851", a "backing" of warrants process. This continued to be used until in *State (Quinn) v. Ryan* [1965] I.R. 70, this Court held the section to be unconstitutional. The applicant had sought *habeas corpus* in relation to a warrant backed under s. 29 of the Act of 1851. There was a clear flaw and it was obvious that the applicant would be released. A second warrant was prepared by the English police, sent to Dublin, and endorsed. Members of An Garda Síochána sat in court with the new warrant as the applicant's release was ordered. They then arrested him immediately in the vicinity of the Court, and drove him over the border into Northern Ireland, where they handed him over to the English police officers. All this was technically legal within s. 29 of the Act of 1851. The Act of 1851 had been previously held not to be inconsistent with the Constitution. However, the Supreme Court refused to uphold this extradition procedure, stating that it deprived the plaintiff of access to the Court. O'Dalaigh C.J. held, at p. 117.

> "From the survey of the evidence it becomes clear that a plan was laid by the police, Irish and British, to remove the prosecutor after his arrest on the new warrant from the area of the jurisdiction of our Courts, with such dispatch that he would have no opportunity whatever of questioning the validity of the warrant."

And at p. 118:-

> "In plain language the purpose of the police plan was to eliminate the courts and to defeat the rule of law as a factor in Government."

And at p. 122:-

> "It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of these rights. As a necessary corollary it follows that no one can with impunity set these rights at nought or circumvent them, and that the Courts' powers in this regard are as ample as the defence of the Constitution requires. Anyone who sets himself such a course is guilty of contempt of the Courts and is punishable accordingly.
>
> The proper order to be made in respect of Detective In¬spector Matthew G. Ryan is that he be served with notice to show cause why he should not be held to be guilty of contempt of the Courts and dealt with accordingly."

Subsequently, there were affidavits before the Court and apologies on behalf of the Irish gardaí . Counsel on behalf of the British police indicating that they would not tender an apology unless and until they had been found in contempt. Four persons were before the Court to show cause why they should not be held guilty of contempt of the Court and punished accordingly. O'Dalaigh C.J. stated at p. 133:-

> "The Court accepts that the Petty Sessions (Ireland) Act purported to authorise instant deportation, but it cannot accept the view that in a State whose Constitution guarantees personal rights it is enough to look to statute only as the warrant for one's actions."

The Court referred to the regret expressed by the Irish officers, to their knowledge that there cannot be a recurrence of the conduct in question, and considering this, the Court stated that it would forego the imposition of penalty in their case. The English police officers tendered apologies after the Court found that they had been in contempt. The

Court held that in the absence of an unqualified apology the Court would have found it necessary to impose an exemplary penalty upon them. However, such apology having been made to the Court they were discharged without penalty.

Thus, this Court has expressed the view that the courts cannot be eliminated from the equation to defeat the rule of law in the context of an extradition exercised so as to deprive a person of access to the courts, or to deprive a citizen of his constitutional rights. While that view was expressed in relation to actions under s. 29 of the Act of 1851, they are general principles appropriate to any actions taken to eliminate the courts from an extradition process so as to set a citizen's rights at nought.

New Procedure
35. A new statutory procedure was introduced under the European Arrest Warrant Act, 2003, referred to as "the Act of 2003". It is under this procedure that the appellant is sought to be surrendered to the United Kingdom.

The Framework Decision
36. On the 13th June, 2002, the Council Framework Decision, referred to as "the Framework Decision", addressed the issue of the EAW and the surrender procedures between member states. Reference was made to the conclusions of the Tampere European Council of the 15th and 16th October, 1999, according to which formal extradition procedures should be abolished among member states.

37. It was recited that the EAW provided for in this Framework Decision was the first concrete measure in the field of criminal law implementing the principle of mutual recognition, which the European Council referred to as the "cornerstone" of judicial co-operation.

38. The Framework Decision envisaged the new system to be based on decisions of a judicial authority. This Recital (8) stated:-

> "Decisions on the execution of the European arrest warrant must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender."

39. It was recited that the role of central authorities in the execution of a EAW must be limited to practical and administrative assistance.

40. Recital (12) stated:-

> "This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that the person's position may be prejudiced for any of these reasons.
>
> This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media."

41. The General Principles of the Framework Decision commence in Article 1 with:-

> "Definition of the European arrest warrant and obligation to execute it.
>
> 1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.
>
> 2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.
>
> 3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union."

42. Article 6 specifies that the issuing judicial authority shall be the judicial authority of the issuing member state which is competent to issue a EAW by virtue of the law of that state. And the executing judicial authority shall be the judicial authority of the executing member state which is competent to execute the EAW by virtue of the law of that state.

43. In Ireland the decision making judicial authority is the High Court *i.e*. a superior court.

44. The time limits and procedures for the decision to execute the EAW are addressed in Article 17 which states:-

> "Time limits and procedures for the decision to execute the European arrest warrant
>
> 1. A European arrest warrant shall be dealt with and executed as a matter of urgency.
>
> 2. In cases where the requested person consents to his surrender, the final decision on the execution of the European arrest warrant should be taken within a period of 10 days after consent has been given.
>
> 3. In other cases, the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person.
>
> 4. Where in specific cases the European arrest warrant cannot be executed within the time limits laid down in paragraphs 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days.
>
> 5. As long as the executing judicial authority has not taken a final decision on the European arrest warrant, it shall ensure that the material conditions necessary for effective surrender of the person remain fulfilled.
>
> 6. Reasons must be given for any refusal to execute a European arrest warrant.

> 7. Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it shall inform Eurojust, giving the reasons for the delay. In addition, a Member State which has experienced repeated delays on the part of another Member State in the execution of European arrest warrants shall inform the Council with a view to evaluating the implementation of this Framework Decision at Member State level."

The Act of 2003

45. The Act of 2003 is described in its long title as an Act to give effect to the Framework Decision on the European arrest warrant and the surrender procedures between member states, to amend the Act of 1965 and certain other enactments, and to provide for matters connected therewith.

46. In defining the term "judicial authority" the Statute reflects the Framework Decision, stating that the term means "the judge, magistrate or other person authorised under the law of the Member State concerned to perform functions the same as or similar to those performed under section 33 by a court in the State." Thus, the decision of who is a judicial authority is taken by each member state.

47. In Ireland, under s. 33 of the Act of 2003, a court may, upon an application made by or on behalf of the Director of Public Prosecutions, issue a EAW, where it is satisfied in accordance with the terms set out in the Act.

48. At the foundation of the EAW Scheme is the concept of mutual trust and co-operation. This is reflected in s. 4A of the Act of 2003, which provides that it shall be presumed that an issuing state shall comply with the requirements of the Framework Decision, unless the contrary is shown.

49. Section 11 of the Act of 2003, as amended, provides that a EAW shall, insofar as practicable, be in the form set out in the Framework Decision as amended by the Council Framework Decision 2009/299/JHA.

50. The Act of 2003, as amended, sets out the requirements for a EAW.

51. Section 16 provides that where a person does not consent to his or her surrender to the issuing state, the High Court may make an order directing that the person be surrendered to such other person as is duly authorised by the issuing state to receive him, provided that *inter alia*:-

> (a) the High Court is satisfied that the person before it is the person in respect of whom the EAW was issued,
>
> (b) the EAW has been endorsed in accordance with s. 13 for execution of the warrant,
>
> (c) the EAW states, where appropriate, the matters required by section 45.
>
> (d) the High Court is not required, under s. 21A, 22, 23 or 24 (as inserted by the Criminal Justice (Terrorist Offences) Act 2005) to refuse to surrender the person under the Act,

(e) the surrender of the person is not prohibited by Part 3.

52. Part 3 covers provisions on the prohibition on surrender. It includes section 37, which provides that:-

"(1) A person shall not be surrendered under this Act if -

(a) his or her surrender would be incompatible with the State's obligations under

(i) the Convention, or

(ii) the Protocols to the Convention,

(b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which s. 38(1)(b) applies)

(c) there are reasonable grounds for believing that -

(i) the European arrest warrant was issued in respect of the person for the purposes of facilitating his or her prosecution or punishment in the issuing state for reasons connected with his or her sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation, or

[…]

53. Section 45C provides that:-

"For the avoidance of doubt, an application for surrender under section 16 shall not be refused if the Court is satisfied that no injustice would be caused to the person even if -

(a) there was a defect in, or an omission of, a non-substantial detail in the European arrest warrant or any accompanying document grounding the application,

(b) there is a variance between any such document and the evidence adduced on the part of the applicant at the hearing of the application, so long as the Court is satisfied that the variance is explained by the evidence, or

(c) there has been a technical failure to comply with the provisions of this Act, so long as the Court is satisfied that the failure does not impinge on the merits of the application."

54. Thus, this scheme in relation to EAWs between the member states, is based on the decisions of judicial authorities, mutual respect and co-operation. As is clear from the Framework Decision and the Act of 2003, as amended, the decision made in a member state is not administrative. The decision is made by a person designated in the member state as a judicial authority. The scheme of EAWs is grounded on principles of co-operation and mutual respect between judicial authorities in the member states. However, each judicial authority has responsibilities and duties. The process is not a rubber stamp. If a surrender is refused that may well be a reflection on the particular circumstances which have developed in a case, rather than on the system itself.

55. In developing the jurisprudence on extradition the courts have been cognisant, as has been illustrated earlier in this judgment, of their duty to protect constitutional rights and the rule of law. This has continued while implementing the Act of 2003.

56. At one extreme there may be issues of torture and inhumane or degrading treatment. In *Minister for Justice v. Rettinger* [2010] 3 IR 783, the Minister sought the surrender of the respondent to Poland to serve the balance of a two year sentence imposed for the offence of burglary. The respondent opposed the application on the grounds that if he was returned to Poland he would be exposed to a real risk of torture or inhumane or degrading treatment, in breach of art 3. of the ECHR and s. 37 (1)(a) and (i) of the Act of 2003. The respondent filed affidavits as to the prison conditions. On behalf of the Minister there were letters from Poland stating that the prisons had improved in recent years. The High Court held that the respondent had failed to establish a real risk of torture or inhumane treatment, as required, and ordered his surrender. However, questions were certified for this Court. This Court allowed the appeal of the respondent and remitted the matter to the High Court, holding that the burden rested on the respondent to adduce evidence proving that there were reasonable grounds for believing if he was returned to Poland he would be exposed to a real risk of torture etc. The burden did not shift to the Minister. Reference was made to s. 37 (1)(i) which required that there be reasonable grounds for believing that the real risk existed, not proof on balance of probabilities. As to art. 3 of the Convention, the test was whether there was a real risk of prohibited treatment. Reference was made to a series of cases before the European Court of Human Rights as to prison conditions in Poland. I addressed relevant principles and the test to be applied, and remitted the matter to the High Court for the test to be applied.

Fennelly J. pointed out that this Court was being requested to consider for the first time the standard of proof which it must apply in an EAW case where a person facing surrender complains of the danger of being subjected to inhumane or degrading treatment in the requesting state. Fennelly J. pointed out also that the Court was invited to prohibit the surrender pursuant to s. 37 of the Act of 2003.

In relation to art. 3 of the Convention, Fennelly J. referred to the absolute protection against treatment prohibited by art. 3. He said in paras. 71 and 72:-

> "[71] The inevitable consequence of the principle of absoluteness is that the objectives of the system of surrender pursuant to the Council Frame¬work Decision on the European Arrest Warrant and the Surrender Proce¬dures Between Member States (2002/584/JHA) cannot be invoked to defeat an established real risk of ill-treatment contrary to article 3. This does not mean that there is any underlying conflict between the Convention and the Framework Decision. As is stated in recital 10, '[t]he mechanism of the European arrest warrant is based on a high level of confidence between member states'. The normal presumption is, as I said in my judgment in Minister for Justice v. Stapleton [2007] IESC 30, [2008] 1 IR 669, at p. 689, the courts, 'when deciding whether to make an order for surrender must proceed on the assumption that the courts of the issuing member state will, as is required by Article 6.1 of the Treaty on European Union "respect human rights and fundamental rights and fundamental freedoms"'. The amended version of Article 6 now in force does not affect this principle. Recital 13, however, declares that:¬
>
> > 'No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or pun¬ishment.'

> [72] Furthermore, article 1.3 provides:¬
>
> > 'This Framework Decision shall not have the, effect of modifying the obligation to respect fundamental rights and legal principles as enshrined in Article 6 of the Treaty on European Union.'"

In considering the issues of the onus of proof and the burden of proof, Fennelly J. held at para. 74:-

> "[74] A partial answer to these questions can be found in the very word¬ing of s. 37(1)(c) of the Act of 2003. According to the section, it is sufficient to establish that 'there are reasonable grounds for believing that' the person would be 'subjected to ... inhuman or degrading treatment'. The European Court in *Soering v. United Kingdom* (App No. 14038/88) (1989) 11 EHRR 439 spoke of 'substantial grounds for believing that the person concerned, if extradited, would face a real risk of being subjected to torture or to inhuman or degrading treatment'. Each test focuses, firstly, on the quality of the evidence or 'grounds' and, secondly, on the level of risk. In practice, the two elements are closely connected and will, in many cases, merge into a single test. The subject matter of the enquiry is the level of danger to which the person is exposed. There is no discernible difference between 'reasonable grounds' and 'substantial grounds'. It is equally clear that it is not necessary to prove that the person will *probably* suffer inhuman or degrading treatment. It is enough to establish that there is a 'real risk'. Recital 13 of the Framework Decision speaks of 'serious risk'; the term 'real risk' is consistently used by the European Court in its case law, including *Soering v. United Kingdom (App No.* 14038/88) and *Saadi v. Italy (App No*. 37201/06) (2009) 49 EHRR 30. It is appropriate to the seriousness of the subject matter. It would be absurd to require a person threatened with expulsion to a state where he may be exposed to inhuman or degrading treatment, not to mention torture, to prove that he would *probably* suffer such treatment. It must be sufficient to establish 'real risk'."

Fennelly J. also remitted the matter to the High Court to apply the test identified.

57. The issue of an abuse of process has arisen before. For example, in *Minister for Justice v. Tobin* [2012] IESC 37. In that case there had been amending legislation after the first EAW was sought and before the second EAW was sought. Fennelly J. held:-

> "10. The consequence of the amending legislation was that the appellant has faced a second process of arrest, objection, High Court hearing and appeal. All this is the result of what appears to have been a legislative error followed by its correction. None of this was the responsibility of the appellant. For the reasons given by Hardiman J, this is quite different from cases where an earlier proceeding has failed by reason of defects in a warrant. In those cases it will be apparent that the surrender (or extradition as the case may be) is the result of a particular defect in the warrant and that, on established principles, the error can be remedied and a new warrant can be issued without the defects.
>
> 11. These are in essence the reasons why I agree with Hardiman J that the appeal should succeed on the ground of abuse of process. The principle of national procedural autonomy permits the courts of the Member States to apply national procedural rules so long as they do not infringe either the principle of non-discrimination or of effectiveness.

> 12. I am not sure that it is relevant to introduce the element of inequality of arms between the appellant and the State authorities. Inequality in that sense will be present in every case under the Framework Decision or in extradition generally. I cannot see that it adds anything to the appellant's case. Nor do I believe that delay would constitute a ground for refusing surrender on the facts of this case. This Court in its decision in Minister for Justice, Equality and Law Reform v. Stapleton [2008] 1 IR 669 considered how an issue of delay should be treated in the context of the European Arrest Warrant in the case of surrender for prosecution. The possibilities must be more limited where a conviction has already recorded.
>
> 13. I would confine the decision on abuse of process to the special and unique circumstances of this case. There was an Arrest Warrant; the appellant was arrested and taken before the Court; he opposed his surrender through the judicial process in accordance with the law. He succeeded. It was not then suggested that the law was erroneous. The appellant had no reason to expect that it would be changed, if he successfully invoked its provisions. The law was changed. His surrender was sought a second time. I would allow the appeal and decline to order the surrender of the appellant."

A majority of the Court allowed the appeal and refused to surrender the appellant.

58. The Court considers carefully the rights of persons sought to be surrendered. Thus, in *The Minister for Justice v. Marek*, Supreme Court, Unreported, 5th February, 2009, it was stated by Murray C.J., that before making an order for surrender, the Court must, having regard to s. 45 of the Act of 2003, be satisfied that the Judicial Authority has given the appropriate undertaking concerning a re-trial. He held:-

> "The Court is not satisfied that there is, in relation to the request for surrender founded on the European Arrest Warrant, sufficient documentation or information regarding the nature and form of the re-trial that will take place if the appellant is returned to it and therefore it does not consider that the Order for surrender made by the High Court was correctly made in the circumstances outlined. That however is not the end of the matter. The European Arrest Warrant and the scheme and system of surrender envisaged by it anticipated that there may be circumstances in which there is a lack of clarity or a gap in the information before a Court dealing with such a request. That this should be anticipated is not surprising considering the number of countries covered by the system of surrender and the different languages which requires the translation of relevant documentation which may give rise to ambiguities.
>
> Having come to the conclusion that because of, at the very least, an ambiguity in respect of the undertakings given having regard to what is contained in page 2 of the European Arrest Warrant the Court, as I have indicated, feels it should set aside the Order of the High Court, it having been incorrectly made, and considers that the matter should be remitted to the High Court in order that the High Court can, pursuant to s. 20 of the Act, require the issuing Judicial Authority to provide it with such additional documentation or information as will enable it to determine the nature and form of the re-trial which the requesting Judicial Authority says may take place, and will if the appellant so requests, on his return to the Czech Republic, should that Order eventually be made."

59. In *Bolger v. O'Toole* [2008] 4 IR 780, the Act of 1965 was applicable to issues of delay, medical negligence, and exceptional circumstances, which were analysed:-

> "[70] 68. In the final analysis, it is necessary to stand back and consider the entire history in accordance with the correct application of para. (bbb). I accept that the lapse of time of ten years qualifies as sufficiently exceptional to satisfy the first requirement. I have also indicated that the delays between 1995 and 1998 constitute another exceptional circumstance, but I have come to the conclusion that it is to be considered against the contribu¬tion of the plaintiff himself to the total period. The ultimate question is whether, in all the circumstances, it would be unjust, oppressive or invidious to deliver the plaintiff to the authorities in the United Kingdom. For that purpose, both his illness and the length of the sentence to be served have to be put in the balance. The decisions of this court in M.B. v. Conroy [2001] 2 ILRM 311 and Carne v. O'Toole [2005] IESC 22, (Unreported, Supreme Court, 21st April, 2005) strongly suggest that his illness would not justify making an order for release. In the former case, the decisive element was that the illness appeared to have supervened after the plain¬tiffs return to Ireland. Keane C.J. there accepted that it would not be logical to refuse delivery to another country to stand trial on the ground of an illness which would not prevent a trial here. Similar considerations apply where his delivery is required in order to serve a sentence.
>
> [71] 69. The length of the sentence (which must now be limited to two years) is not an exceptional circumstance. It could be considered, if it tended to show that delivery would be unjust, invidious or oppressive, but I cannot see how that is so in this case. However, when appraising all the circumstances, the plaintiffs own behaviour is material. It cannot be ignored that the plaintiff failed to attend the balance of his trial and that the only evidence he produced for the English court took the form of two medical certificates. Like Peart J., I cannot escape the impression that he refused cooperation with an independent medical examination. He has greatly added to the length of the proceedings as a whole by the pursuit of utterly unmeritorious legal proceedings.
>
> [72] 70. I am satisfied that it would not be unjust, oppressive or invidious to deliver the plaintiff pursuant to the orders of the District Court. I would allow the appeal from the order of the High Court directing his release."

Second Warrant

60. This is the second EAW issued by the requesting state for the surrender of the appellant. The appellant has raised this as specific ground for the refusal of his surrender. However, it has long been settled jurisprudence in relation to applications for extradition or surrender that the fact that there was an earlier warrant is not a basis of itself upon which to refuse to surrender.

61. It is clear, and remains the law, that simply because a second EAW is issued for the same offences does not, of itself, indicate an abuse of process, or is a reason of itself to refuse to surrender the person requested.

62. In *Bolger v. O'Toole*, Unreported, *ex tempore*, Supreme Court, 2nd December, 2002, Mr. Bolger, the applicant/appellant, appealed against an order of the High Court (O'Neill J.), delivered on the 8th June, 2000, which dismissed his claim. The proceedings were brought because it was a second set of warrants seeking the rendition of the applicant to England. I stated:-

"The fact that a previous set of warrants existed and on which the applicant was discharged does not *prima facie* exclude the production and endorsement of a second set of warrants. It may well be that for good reason, in the circumstances of a case, a court may determine that an application for rendition should be refused. Thus, if it were an abuse of process the application may fail. In this case the applicant has been refused leave to make a specific application grounded on specific issues of abuse of process. However, that would not be a bar to any subsequent application for habeas corpus on different issues. Similarly, issues such as delay, which may arise in accordance with the legislation as well as the Constitution, are separate issues which may be raised. However, these matters are not before this court.

For the reasons stated in this judgment, I am satisfied that the order and judgment of the High Court should be affirmed and the appeal dismissed."

63. In *Gibson v. Gibson*, *ex tempore*, Supreme Court, 10th June, 2004, an earlier warrant had been issued arising out of the same facts and had been refused. The question on the appeal was whether a new warrant could proceed. Keane C.J. held:-

"It is necessary to say at the outset that, in my view, it is clear beyond argument that in extradition cases, the mere fact that a warrant has been issued and an application made arising out of the warrant to the court for an order or extradition, that a warrant has been issued on an earlier occasion arising out of precisely the same alleged offence, and has been adjudicated upon by the District Court or any court of competent jurisdiction, that fact does not, of itself and by itself, preclude a subsequent application to a court of competent jurisdiction. If there were any doubts that that is the state of the law, they were, in my view, laid to rest by the decision of this court in *Bolger -v- O'Toole* (unreported decision of the court, delivered on 2nd December, 2002)."

64. Consequently, the fact that the Court has before it a second EAW seeking surrender of the appellant is not of itself an indication of an abuse of process. It is a fact to be considered in light of all the circumstances of the case.

Time Passing

65. A great deal of time has passed: it is alleged that the appellant committed the offences between 1997 and 2005; the first warrant issued on the 7th March, 2008, the judgment of this Court in *Minister for Justice v. J.A.T*. [2014] IEHC 320, was delivered on the 21st December, 2010; the arrest on the second EAW on the 24th day of July 2012; and the hearing of this appeal. The scheme under the Framework Decision, and the Act of 2003, aspires to be a speeded up procedure. This has not been achieved in this case. The time which has passed since the alleged offences, the first arrest on the first EAW, the second EAW, and the hearing of this appeal, is not of itself a factor upon which a request for surrender would be refused. However, this time period has to be considered in light of all the circumstances of the case.

Medical factors

66. Medical factors were put before the courts on the first EAW, and on this EAW, in relation to the appellant and to his son.

Medical factors relating to the appellant

67. An updated medical report in relation to the appellant was before the High Court from the appellant's General Practitioner's practice. It stated:-

"To Whom It May Concern:

The above man is a patient in this practice and has been for the past number of years. He primarily is a patient of Dr. Moore but attends me also, I know [J.] well. He has had a chequered history with depression, chronic anxiety and also has an addiction to alcohol which was waxed and waned over the years.

To give a synopsis of his psychiatric history, he attempted suicide in 2008 by way of an overdose and was admitted to [a hospital] in Mullingar. At that time he was taking anti-depressants in the form of Cymbalta and Lexotan which is an anti anxiety and sleeping tablets. Further to that he was maintained on other anti-depressants in the form of Mitrazepam and Zyprexa at night and occasional Xanax. He suffered a great deal of stress and anxiety with recent proceedings between 2007 and 2010 with regards to extradition proceedings.

He is very anxious and stressed again because of the renewal of the extradition proceedings. He is not sleeping, a lot of anxiety and depression. In particular he is worried about the care of his son who is a young man with chronic schizophrenia who is attending this practice and also is attending the local psychiatric services and CAD for an alcohol addition

Over the past 8 months, [J.] has been in to see Dr. Moore on about 7 occasions, generally speaking with abdominal pain and pain in his right upper quadrant. We have referred him on to the surgical clinic in Mullingar for assessment for this.

Certainly today [J.] presented to me in quite a distressed state and I would fear for his mental health with regards to going through the full process of hearings and court appearances and extradition proceedings again against him. He feels very unfortunate and does feel to a degree that he is being unfairly treated. We had a good in-depth discussion about this and he feels his family has fallen apart since this whole episode has begun.

He also has a daughter in England who has mental health issues which does seem to have started from around the time of the initial proceedings. She worries quite a lot about her parents and feels strongly that he is being unfairly treated. She has become stressed and unwell because of this and is under the care of physiatrists here and in England. I have seen her myself on numerous occasions.

[J.] feels again that his whole family is falling apart. He thought he had put this behind him but now it has reared its head again and he feels that he will be unable to cope as well as his family. He has asked me to write to you as I do feel that this is genuine and as I said we know [J.] and both his son and daughter well in the practice, and it is putting quite a lot of pressure on the family as a whole as you can well imagine."

Medical factors relating to the appellant's son

68. An updated medical report dated the 30th November, 2012, in relation to the appellant's son, D. was also before the High Court on this second EAW application. It stated:-

"**To Whom It May Concern**:

> The above man is a patient in this practice and has been for the past number of years. He has a diagnosis of chronic schizophrenia who is attending this practice for seven years. He is also attending the local psychiatric services under the care of Dr. Corcoran. His medications are Zispin 50mg nocte, Zyprexa 20mg nocte and Xanax on a prn basis. He has a lot of negative problems associate with the schizophrenia and also has an alcohol addition.
>
> [D.] is very dependant on his Dad [the appellant] at present in all aspects of his care. [D.] doesn't drive, socialise or mix well and [the appellant] tends to take him everywhere he needs to go and in general keeps him on an even keel and keeps a good watch on his 24 hours a day. [D.] is very withdrawn, introverted and really his only life it (*sic*) that of his family. He has a chronic psychiatric illness which will not get better and in fact will most probably deteriorate as he gets older, especially if he continues to abuse alcohol.
>
> His Dad [the appellant] looks after him very well and I feel [D.] is very dependant on him at present."

Conclusion
69. The High Court made a finding of an abuse of process. This is a serious finding which may not be diminished by this Court.

70. However, it is clear that no deliberate actions were taken to intentionally create this abuse of process. Thus, it is not a situation similar to *State (Quinn) v. Ryan* [1965] I.R. 70, and no issue of *mala fides* or contempt of court arises.

71. The High Court indicated that it would order an admonishment. An admonishment of "the parties involved" would appear to relate to the Minister, the Central Authority, and the prosecuting authorities in the United Kingdom. "To admonish" such parties in the circumstances would have no effect on the appellant, if he is surrendered to the United Kingdom, despite the finding that the proceedings against him "were *de facto* abusive of the Court's process". In fact, it would mean that the "parties responsible" achieve a benefit, despite their abusive behaviour. And the appellant, who has suffered from the abuse of process, is surrendered despite that abuse of process. This outcome is tainted, as it could be considered to be the fruit of abusive procedures.

72. In general, if there is an abuse of process by authorities they should not benefit. The rule of law, and the right to fair procedures, requires that such a general principle be applied.

73. Of course, there may be circumstances where a court considers that there has been an abuse of process, but to a limited degree, and applying the principle of proportionality, a surrender procedure could proceed. However, such a finding would arise only in a situation where a process was found to be an abuse, but in a limited manner, and with limited effect.

74. In this case there is an accumulation of factors.

75. It is clear, and remains the law, that simply because a second European arrest warrant is issued that does not of itself indicate any abuse of process. See *Bolger v. O'Toole*, unreported, Supreme Court, 2nd December, 2002, and *Gibson v. Gibson, ex*

tempore, Supreme Court, 10th June, 2004, Keane C.J..

76. In analysing a case where there has been a finding of an abuse of process, the circumstances of each case are relevant and critical to the ultimate decision.

Factors
77. I have reviewed the circumstances of this appeal, which include the following factors:-

(a) this is the second EAW issued in relation to the offences alleged;

(b) failings in the first EAW could have been addressed in the first application;

(c) a considerable time has passed since the alleged offences and a considerable time has passed since the arrest of the appellant on the first EAW;

(d) the medical condition of the appellant, who is a vulnerable person;

(e) the medical condition of the appellant's son, for whom the appellant is a significant carer;

(f) the family circumstances;

(g) the oppressive effect which the two sets of EAWs have had on the appellant; on his son; and on his family;

(h) no explanation has been given for delays;

(i) there has been no engagement by the authorities with the issues as to the first EAW or the delays;

(j) the Central Authority has a duty to bring to the attention of the issuing State authorities defects or internal contradictions in a warrant, and to consider whether all the documentation is complete and clear, before being relied upon for the purpose of seeking to endorse an EAW;

(k) the duty of the Court to protect fair procedures; and

(l) the principle that a party in litigation should not benefit from proceedings which were *de facto* abusive of the Court's process.

The family factor
79. While there is an obligation to surrender, it is not absolute. Recital 12 of the Framework Decision specifically states that it respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union. Further, it is stated that the Framework Decision does not prevent a member state from applying its constitutional rules relating to due process, amongst others.

80. Reflecting the Framework Decision, s. 37 of the Act of 2003, provides that a person shall not be surrendered under this Act if his or her surrender would be incompatible with the State's obligations under the Convention, or the Protocols to the Convention, or would be a contravention of any provision of the Constitution, with an exception which is not relevant to this case.

81. Article 8 of the Convention provides:-

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

82. I have regard to *H(H) v. Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor intervening*), *H(P) v Same (Same Intervening), F - K v Polish Judicial Authority [2013] 1 AC 338*, a decision of the Supreme Court of the United Kingdom, as a relevant authority. In the second of these appeals, the appeal was allowed, the Court referring to factors including that the loss of the wife to her younger children would be exceptionally severe, that her husband's ill health would render him incapable of becoming the effective priority carer, as well as the overall delay.

83. In this case the appellant has health issues; his son suffers from schizophrenia; the appellant is his son's primary carer; the appellant's wife is not in a position to be their son's primary carer; in the running of the family the appellant plays a primary role, which includes the fact that they live in the country and he is the only driver in the family, and drives his son to medical appointments etc.

84. Bearing in mind s. 37 of the Act of 2003, and Article 8 of the Convention, the family factors in this case are relevant.

Conclusion

85. While no single factor, as set out above, governs this appeal, in circumstances where the High Court has found, correctly in my view, that there has been an abuse of process, I am satisfied that the factors, referred to in this judgment, taken cumulatively, are such that there should not be an order for the surrender of the appellant.

86. To answer the question certified, where such an abuse of process has been found to have occurred, it is not appropriate for the Court to admonish the parties responsible while also surrendering the appellant.

87. Thus, I would allow the appeal, and refuse to make an order for the surrender of the appellant.

Judgment of O'Donnell J delivered on the 28th day of April 2016

1 I gratefully adopt the facts set out in the judgment delivered by the Chief Justice today and will not repeat them here. I recognise that all of the factors identified by the Chief Justice are matters which must evoke concern, dissatisfaction and some degree of sympathy. These are, unfortunately, emotions which are not infrequently encountered in these courts. Persons accused of crime may often themselves come from circumstances, or have suffered experiences, which can excite sympathy. The criminal process, particularly involving cooperation between jurisdictions, can be frustratingly inefficient, slow, and opaque. I was myself doubtful, however, that even cumulatively, the matters relied on by the appellant were sufficient to justify a refusal of surrender in this case. But in the light of the views of my colleagues, and the judgment of the Chief Justice, I do not dissent from the Order proposed. I would, however, emphasise that this is a rare, and indeed exceptional case. While exceptionality is not in itself a test, it can be a useful description, and it is, in my view, only cases which can truly be so described that will be those rare cases in which it may be said that surrender would offend due process and interfere with the rights of the appellant to such an extent that it must be refused. It is, however, necessary to explain both the factors that apply and the weight to be given to them which lead to that conclusion. I do not think that we should take refuge in the observation that all cases depend on their own facts; that would mean that, in theory, all cases raising any arguable issues would have to be the subject of appeal, with all the delay, inconsistency and unpredictability that entails. While little assistance is to be obtained from the submissions in this case, I do think that this Court can, and should, identify the principles involved, even if at the margin, courts and judges may on occasion differ as to the outcome of the application of those principles.

2 While this case is multi-factorial, it is likely that in the future, some or more of the components identified in the case will be present and relied on, perhaps together with other factors, as justifying a refusal to surrender. It is necessary to keep in mind that the Framework Decision is meant to facilitate a speedy process, and unless grounds for refusal are specified with clarity, and the weight accorded to them is identified, the process can become frustrated by a proliferation of claims to resist or delay surrender on amorphous allegations requiring close analysis of the facts. It would be foolish not to recognise that there may be circumstances where the fact that an argument can be raised, even if the prospects of success are remote, may be enough for an applicant with his or her own reason to seek delay. By the same token, it is important to recognise that delay is contrary to the underlying objective of the Framework Decision, which is to seek speedy surrender between Member States. It is noteworthy that in the immediate aftermath of the decision of the United Kingdom in *HH v. Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2013] 1 AC 338 referred to by the Chief Justice, there was an immediate and significant increase in claims seeking to resist surrender on the grounds that such surrender would breach the rights guaranteed to an individual and his or her family members by Article 8 of the European Convention on Human Rights and Fundamental Freedoms. It was estimated in a recent case that in the United Kingdom, Article 8 was relied on in more than 120 cases per month. As a result, the Divisional Court of England and Wales sought to establish a more structured and rigorous approach to such claims (see *Polish Judicial Authority v. Celinski* [2015] EWHC 1274). It is not, perhaps, appropriate to address such matters in any further detail here, since they were not the subject of argument, but I do consider it desirable to explain with some precision the view I take of the components relied on in this case.

3 In the interests of clarity in future cases, I respectfully suggest that phrases such as "*de facto* abuse" or "harassment and oppression", if they are to be invoked in argument, require greater refinement and precision. Something is either an abuse of process, or it is not. Harassment and oppression are concepts drawn from the case law derived from *Henderson v. Henderson* (1843) 3 Hare 100, 67 E.R. 313, and their use risks blurring two strands of case law that deserve to be distinguished. I also, respectfully, doubt that it is appropriate or useful to introduce a concept of "duty of care" on the part of requesting authorities or the Irish authorities. If a warrant is defective, that is enough,

and it is superfluous at best, and possibly misleading at worst, to address the question of the care used or the reason for the defect. But the idea that a duty of care is owed to subjects of a warrant might give rise to a deflection of attention from the warrant to the efficiency of the requesting or executing authorities. It is important that courts should be astute to detect and prevent improper or *mala fide* conduct, but it is equally important that a valuable jurisdiction is not diluted by allowing the legal test to spread into negligence and to become the familiar search for something that can be described as careless. Furthermore, caution should be exercised in addressing the law of European Arrest Warrants in the light of law surrounding previous bilateral or even multilateral extradition treaties. The Framework Decision, with all of its many difficulties, is a matter of the law of the European Union, and was intended to provide a new and streamlined process for surrender between member states of the Union, and to that extent represented a significant departure from the earlier approach. While the legal background to a provision is important, it is also necessary to recognise that the purpose of any new provision is to effect a change, sometimes radical, from the existing law, and it is necessary to give full effect to that change once identified.

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

5 Here, three factors are asserted as cumulatively leading to an order refusing surrender.

6 The first factor is the undoubted fact that the first warrant was found to be defective by order of this Court, and this is a repeat application. It is important, in my view, to maintain, however, the clear distinction between the principles of *res judicata* and the

closely associated principles established in *Henderson v. Henderson* and *A.A. v. The Medical Council* [2003] 4 IR 302, on the one hand, and the law relating to warrants on the other. *Henderson v Henderson* deals with the question of a full inter partes hearing of civil proceedings under a process designed to ensure that the true issues between the parties are identified (if necessary by amendment of pleadings) and determined. The position in relation to warrants is fundamentally different. Importantly, there is no process of amendment. The issue is the validity of the warrant as issued. Strictly speaking, when a fresh warrant is issued, its validity becomes a separate issue. It is not *res judicata* because the issue under the new warrant has not been decided. Technically (and this is a technical issue) the issue now is the validity of the new warrant. Nor is it appropriate to try to apply the concepts of bringing all claims at the same time. In the case of warrants, that would amount to saying that only one warrant could ever be issued. For these reasons and more, it has always been held that the fact that an initial warrant has been found to be defective does not preclude the issuance of a further warrant. (See *ex tempore* judgment of Denham J. in *Bolger v. O'Toole* (Unreported, Supreme Court, 2nd December, 2002) and *ex tempore* judgment of Keane C.J. in *Attorney General v.Gibson*, (Unreported, Supreme Court, 10th of June, 2004). Indeed, it could be said that this is part and parcel of the law which also requires that warrants should be scrutinised with rigour. For my part, therefore, I do not think that concepts such as oppression and harassment by repeated application, which employs part of the language used in *Henderson v. Henderson*, should be used in dealing with warrant issues. There may be circumstances in which the repeated issuance of warrants may be prohibited, either because of bad faith, the seeking of tactical advantage, or otherwise. It may also be appropriate to consider the impact on an individual of repeated applications. But those situations require to be analysed in the context of the law relating to warrants, and not of some hybrid version incorporating the principle in *Henderson v. Henderson*.

7 Counsel in this case argued strongly that an important feature of this case was that there was a duty on the part of the authorities of both the requesting and executing states to explain how it was that the error had occurred in relation to the first warrant. It was, he contended, insufficient merely to issue a further warrant which was said to have addressed the defects identified in this case in *Minister for Justice, Equality and Law Reform v. J.A.T.(No. 1)* [2010] IESC 61. I am wholly unconvinced by this contention. If explanation was ever required, it was more naturally required in the context of the proceedings in which the error was identified. It would, I think, border on the perverse to refuse surrender now on foot of what is *ex hypothesi* a perfectly valid warrant because the authorities had not given a more elaborate explanation of an error made in an earlier warrant, which itself had been found to be defective by a final decision of this Court (at least when there is no suggestion of bad faith or concealment calling for explanation) particularly when, until now, it had never been suggested that such an explanation was a necessary condition of the execution of a second warrant. In any event, there is little mystery about the events here. An error was made in dealing with a relatively complex area of law, both in itself and in relation to the operation of the European Arrest Warrant system, and both the substantive and procedural law of Ireland. That misunderstanding was corrected, albeit at some cost in terms of expense and time. But if this Court was to hold that surrender should not be made on foot of the second warrant because the error in the first warrant had not been sufficiently explained to the Court's satisfaction, it would be coming close to the proposition that a second warrant could not be issued, or could only be issued and executed at the discretion of the second court.

8 I am prepared to accept, for the purposes of this argument, that there are circumstances where a second or subsequent warrant may be issued for tactical reasons which may accordingly amount to an abuse of process. Certainly, *obiter dicta* in *Turin v Barone* [2010] EWHC 3004 might support this approach. I also accept that while abuse of process normally involves an improper motive (and certainly can be more readily

identified when that is present) it is not necessarily confined to such circumstances. It may be that a situation can be arrived at in an individual case, perhaps without culpability and certainly without improper motive, but where it can nevertheless be said that to permit proceedings to continue would be an abuse of the Court's process in the sense that it would no longer be the administration of justice. I also do not rule out the possibility that there may be a case where the facts are so extraordinary that they call for explanation. However, in the present context, it must be kept in mind that the issue for an Irish court, in respect of which it is required to administer justice, relates principally to the surrender, and it is the process in relation to that which must be the primary focus of any such inquiry. I would not, therefore, have considered that the issuance of a second warrant in this case amounts to, or even comes close to being an abuse of the process. I do not think that if the second warrant had been issued reasonably promptly, and in relation to a person of full health, and with less forceful claims under Article 8, that it would be considered that the issuance of a second warrant after refusal of surrender on an earlier warrant would, by itself, be a ground for refusal of surrender.

Delay and Lapse of Time
9 The fact that the crimes alleged here date back to 1997 is more properly to be considered in the context of lapse of time rather than delay. There is, as I understand it, no suggestion that the United Kingdom authorities ought to have detected the alleged crime any earlier. In any event, such an allegation is one which a court should be extremely slow to entertain. The relative antiquity of the offences, however, is relevant in considering those elements of delay in the issuance of the first warrant, and more importantly, the second warrant, and its execution in this jurisdiction. I do think that these delays are factors in the Court's assessment, but, regrettable and worthy of criticism as they are, in my view they fall far short, by themselves, of establishing any abuse of process or grounds for refusal of surrender. Nor do they do so when taken in conjunction with the fact that a second warrant was issued.

Article 8
10 It seems clear that the respondent is in a very difficult health situation, although the Court might expect a more detailed expert report. Again, however, this matter must not be tested against some generalised consideration of personal sympathy, but rather as to whether the circumstances are such which render it unjust to surrender the respondent. It will almost always be the case that considerations such as these, which undoubtedly evoke some sympathy, would never, in themselves, be remotely a ground for refusing surrender any more than they would be a ground for prohibiting a trial in this jurisdiction. The respondent, however, is also the primary, and effectively the sole caregiver for his son, who in turn is in a situation where that care is particularly important. For the reasons set out in the judgment of the Chief Justice, it seems clear that he will undoubtedly suffer very severely if the appellant is surrendered for trial. He is not a person against whom there is any accusation of wrongdoing. The impact on the appellant's son is, for me, an important consideration. While the appellant's son is not a child, he is, in my view, a member of the appellant's family for the purposes both of Article 8 of the ECHR and the Constitution. Nevertheless, I agree with the learned trial judge in this case that these considerations would, themselves, not be enough to establish a ground for refusing surrender if the first warrant had been in a proper form and these matters, which were present at that time, had been the sole ground for resisting surrender. I do not, however, agree that the fact that neither the respondent's health issues nor his son's condition has deteriorated in the intervening time means that this consideration is now irrelevant. It seems to me to be relevant that this is a second application, and moreover, that there has been avoidable delay on the part of the authorities in both jurisdictions in the preparation, submission, and execution of the second warrant, even though the evidence of the respondent's circumstances, and those of his son, had been adduced in the first European Arrest Warrant proceedings. These factors - repeat application, lapse of time, delay, impact on the appellant's son, and

knowledge on the part of the requesting and executing authorities of those factors - when weighed cumulatively, are powerful. Even then, and without undervaluing the offences alleged here, it is open to doubt that these matters would be sufficient to prevent surrender for very serious crimes of violence. This illustrates that the decision in this case is exceptional, and even then close to the margin.

11 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.

12 Finally, I also agree that the real issue in this case is whether an abuse of process has been established. Where a true abuse of process is established, I think it would normally follow as a matter of logic that the proceedings should not be further entertained and should normally be struck out. There may be cases where the abuse itself is one capable of remedy, and where a *locus poenitentiae* might be permitted to allow the defect to be cured. But the normal and logical remedy for an abuse of process is the striking out or staying of the proceedings constituting abuse. Insomuch, however, as there is expansion of the concept of abuse of the process, and less reprehensible conduct is included under that heading, it may be understandable that there would be inevitable tendency to broaden the corresponding remedies to accommodate and respond to the different levels of conduct constituting abuse of process. That is, perhaps, a reason to ensure that the concept of abuse of process is not extended unduly, and its essential strength diluted. If it is considered that matters can properly be addressed by admonishment, then it is open to doubt that the conduct amounts to an abuse, *de facto* or otherwise, at all.

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