High Court of Ireland Decisions

Judgment

Title:	Minister for Justice and Equality -v- R.O
Neutral Citation:	[2017] IEHC 663
High Court Record Number:	2016 20 EXt & 2016 72 EXT
Date of Delivery:	02/11/2017
Court:	High Court
Judgment by:	Donnelly J.
Status:	Approved

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THE HIGH COURT

Record No. 2016/20 EXT

2016/72 EXT

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

-AND-

R.O

RESPONDENT

JUDGMENT of Ms. Justice Donnelly dated this 2nd day of November, 2017.

1. The surrender of the respondent is sought by the United Kingdom of Great Britain and Northern Ireland ("the U.K.") on foot of two European Arrest Warrants. The first European Arrest Warrant ("EAW"), dated 27th January, 2016, was endorsed by the High Court on 1st February, 2016. The respondent was arrested thereunder on 3rd February, 2016 and was remanded in custody. The second EAW, dated 4th May, 2016, was endorsed by the High Court on 10th May, 2016 and the respondent was arrested

thereunder on the same date and remanded in custody.

2. In respect of both of the EAWs, the respondent has raised three identical objections:

> a) That his surrender is prohibited in circumstances where the U.K. is shortly to determine whether it will remain a part of the European Union ("E.U.") and where a withdrawal from the E.U. would have the effect of voiding any obligations of the regime established pursuant to the Council (EC) Framework Decision of 13th June, 2002 (2002/584/JHA) on the European Arrest Warrant and the surrender procedures between member states ("the 2002 Framework Decision") and the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"). He claims that the safeguards and protections afforded to persons surrendered pursuant to the Act of 2003 would be set at naught.
>
> b) That his surrender is prohibited by virtue of Section 11(1A)(f) of the Act of 2003, and Article 8(e) of the 2002 Framework Decision in that neither EAW specifies sufficiently the matters thereby required.
>
> c) That his surrender would be contrary to s. 37 of the Act of 2003, his constitutional rights and rights pursuant to the European Convention on Human Rights ("ECHR") in that he will face inhuman and degrading treatment in Maghaberry Prison.

3. The respondent made an additional objection to his surrender on the second European Arrest Warrant. This objection centred on the delay in respect of the prosecution of the alleged offence set out in that warrant.

A Member State that has given effect to the 2002 Framework Decision

4. The surrender provisions of the Act of 2003 apply to member states of the E.U. that the Minister for Foreign Affairs has designated as having, under their national law, given effect to the 2002 Framework Decision. By the European Arrest Warrant Act, 2003 (Designated Member States) Order 2004 (S.I. 4 of 2004), the Minister for Foreign Affairs designated the United Kingdom of Great Britain and Northern Ireland as a member state for the purposes of the Act of 2003.

Section 16 (1) of the Act of 2003

5. Under the provisions of s. 16(1) of the Act of 2003, the High Court may make an order directing that a requested person be surrendered to the issuing state provided that;

> (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 s. 45 of the Act of 2003;
>
> (d) The High Court is not required under sections 21A, 22, 23 or 24 of the Act of 2003 to refuse surrender;
>
> (e) The surrender is not prohibited by Part 3 of the Act of 2003.

Identity
6. The Court is satisfied on the basis of the information contained in both EAWs, in the additional documentation and in the affidavit of Sergeant James A. Kirwan, member of An Garda Síochána, that R.O, the person before the Court, is the person in respect of whom each EAW has issued.

Endorsement
7. The Court is satisfied that each EAW has been endorsed in accordance with s. 13 of the Act of 2003 for execution in this jurisdiction.

Section 45 of the Act of 2003
8. Each EAW seeks the respondent's surrender for prosecution. In those circumstances, the Court is satisfied that no issue arises pursuant to s. 45 of the Act of 2003 which deals with trials *in absentia*.

Sections 21A, 22, 23 and 24 of the Act of 2003
9. The Court is satisfied that in relation to each EAW, it is not required to refuse to surrender the respondent on the basis of any of the above sections.

Part 3 of the Act of 2003
10. Subject to further consideration of s. 37 and s. 38 of the Act of 2003, the Court is satisfied that it is not required to refuse the surrender of the respondent in respect of any other section contained in Part 3 of the Act of 2003 in respect to one or both European arrest warrants.

Section 38 of the Act of 2003
11. In the first EAW at point (e), it is indicated that the respondent is sought for the purposes of prosecution for two offences. The issuing judicial authority has ticked the boxes entitled "murder, grievous bodily injury" and "arson" at point (e) I for the purpose of relying upon Article 2, para. 2 of the 2002 Framework Decision in respect of the two offences in that warrant. It is therefore not necessary to establish double criminality (correspondence) with offences in this jurisdiction.

12. In the second EAW at point (e), it is indicated that the respondent is sought for prosecution for one offence of rape and the issuing judicial authority has ticked the box "rape" to indicate reliance on Article 2, para. 2 of the 2002 Framework Decision. Therefore double criminality is not required to be established.

13. The details of the offences outlined on each of the EAWs are such that there is no manifestly incorrect designation by the issuing judicial authority of the offences as coming under the list of offences covered under Article 2 para. 2 of the 2002 Framework Decision. Furthermore, in light of the significant penalties that would apply to a person convicted of these offences, which are in excess of the three year minimum sentence that must be applicable before an offence can properly be designated as coming within the said Article 2 para. 2, the provisions of s. 38 of the Act of 2003 have clearly been met.

14. In light of the foregoing, the surrender of the respondent is not prohibited pursuant to the provisions of s. 38 of the Act of 2003.

The "Brexit" point
15. The respondent has argued that his surrender is prohibited in circumstances where the U.K.'s notification of withdrawal from the E.U. has, *inter alia*, the effect of voiding the U.K's obligations pursuant to the 2002 Framework Decision and this State's obligations pursuant to s. 16 of the Act of 2003 to make orders for surrender. The central point in this argument has been rejected by this Court in its decision in *Minister for Justice v.*

O'Connor [2017] IEHC 518. That decision is the subject matter of an application for leave to appeal directly to the Supreme Court. In light of the decision of this Court in the instant case, as set out further below, to seek further information from the U.K. authorities, the Court is not in a position to finalise its overall decision as to surrender in this case. In all the circumstances, the Court will not finalise the determination on the Brexit point at this juncture.

Section 11 of the Act of 2003

16. In respect of the first EAW, the respondent raises an issue in relation to s. 11(1A)(f) of the Act of 2003. He claims there is insufficient particularisation of the degree of involvement/participation of the respondent in the commission of the offences outlined on that EAW and insufficient linkage of the respondent to the offences.

17. The first EAW seeks his surrender for prosecution on alleged offences of murder and arson. The EAW states that an extensively burnt body of a woman was found in an upstairs bedroom of her home. She had been stabbed to death. The respondent first met the deceased on the evening before she was found dead when she was present with others in his company. She left that company to return home.

18. The first EAW recites that the respondent wore a cream waist-length jacket on the evening of the 1st - 2nd August, 2015 when he left an address outlined in the warrant, but was not wearing the jacket when he was seen by a friend at 4.45am on 2nd August, 2015 with his top half soaking and blood on his hand. There is also reference to the respondent having a bald patch on the crown of his head; CCTV is said to record a male with a light coloured waist length jacket pulled over his head climbing over the fence at the home of the deceased. The same individual is seen later walking away. A man with a distinctive bald patch and carrying a light coloured jacket is seen later at another location. A knife is found in a garden near that location which matches knives in the kitchen of the deceased and there is DNA from the blood on the knife matching that of the respondent.

19. Counsel for the respondent submitted that it is not expressly stated in the first EAW that the respondent killed the deceased or set fire to her house. Counsel questioned whether the EAW sets out a sufficient link or connection between the respondent and whoever it was that killed the injured party in this case. Counsel submitted to the Court that it was noteworthy that there were no details of any fire being set, any accelerants being used, or any details of how it was alleged that there was in fact the crime of arson. Counsel submitted that there is no statement that the respondent killed the deceased or assisted in her killing or that he is the individual on the CCTV footage or even that this individual is alleged to have unlawfully killed the deceased.

20. Counsel also submitted that there was no statement that the respondent was in the deceased's house on the night in question and there was no statement as to how a fire was started, who started it or what level of participation the respondent had in this. Counsel stated that there is no assertion that there is any DNA link with the respondent to the deceased or to any fire. It was submitted that the circumstances outlined do not specify the degree of involvement or alleged degree of involvement of the respondent in the commission of the offence as required by s. 11(1A)(f) of the Act of 2003.

21. In relation to the second EAW, a similar submission based on s. 11(1A)(f) of the Act of 2003 was made. In point (e) of that EAW, it is outlined that the alleged injured party had sexual intercourse with two males on separate occasions on 30th December, 2003. The details record that the first act was consensual while the second act was non-consensual. The second EAW alleges that the respondent's DNA was found on the high vaginal swabs taken from the injured party. The respondent submitted that it was not stated on the warrant that he was the male who raped or assaulted her on the night in

question; it does not assert that it was the respondent who had non-consensual sexual intercourse with the injured party. In this regard, it is submitted that there is no link between the respondent and non-consensual sex in relation to the allegations outlined in this second European arrest warrant.

22. It was submitted on behalf of the minister that this Court is not required to try the issue of whether there is a *prima facie* case; all that is required is that there be clarity in the matters set out on the warrant upon which the domestic court is seeking the return of the respondent and which shows what the case against him/her is to be. Counsel for the minister referred to the case of *Minister for Justice and Equality v. Baron* [2012] IEHC 180 regarding circumstantial evidence, a case in which the court was brought through each individual element of what was a totally circumstantial case in which allegations were being made in the context of a drug trafficking case in which there were certain elements regarding extraterritoriality. The High Court (Edwards J.) dealt with the underlying situation with regard specifically to where there are circumstantial facts or where matters would have to be inferred by this Court in relation to how the matter would proceed. The complaint being made in that case was that there was no specific link between the individual account and that particular respondent.

23. At p. 33 of *Baron*, Edwards J. stated that:

> "[…][i]t is sufficient if the information both specifically asserts a link and gives a general outline of the basis for that assertion, or alternatively sets forth sufficient alleged circumstantial facts that would, if proven, allow a court to infer the necessary link. It is not necessary, however, to provide every detail of the proposed evidence by means of which the circumstances in question might be established in Court. […]".

At p. 36 of *Barron*, Edwards J. stated that:

> "[t]he Court would reiterate its view that it is not necessary to provide every detail of the proposed evidence to be relied upon once the circumstance on which the link is based is itself identified."

In that case, there was no clear or direct link between specific allegations, and at p. 38, Edwards J. stated that:

> "[i]n the Court's view this is again to misunderstand this Court's function in respect of considering whether the warrant contains a sufficient description of the degree of involvement or participation of the respondent in the offence alleged. The Court is not concerned with whether what is alleged in regard to the degree of involvement or participation of the respondent in the offence will stand up when the evidence in support of it is tested. It is solely concerned with whether there is clarity as to what is in fact being alleged in that regard. In this Court's view the allegation here is quite clear. […]".

At p. 39, Edwards J. stated that:

> "[t]he Court […] is not concerned with whether what is alleged in regard to the degree of involvement or participation of the respondent in the offence will stand up when the evidence in support of it is tested. However, in so far as the Court is concerned the allegation itself is quite clear and the information provided in relation to this charge makes clear what linkage is alleged and the basis for it."

Edwards J. later on the same page, states that "[t]he Court would simply remark that whether or not there is sufficient, or indeed any evidence, to support that assertion is a matter for the court of trial."

24. It was submitted on behalf of the minister that even though it may be necessary to draw inferences from the details set out in the warrant, it is very clear that what is set out in the warrant is circumstantial evidence relating to this respondent. Counsel

submitted that all the matters required by s. 11(1A)(f) of the Act of 2003 are present in each EAW, including the date and time and location of the alleged offences. It was submitted that the Court is not required to see all the evidence, which is made clear in the *Baron* decision and in *Minister for Justice, Equality and Law Reform v. Stafford* [2009] IESC 83, there simply has to be a link for the respondent to know what offences he is wanted for in the issuing state. It was submitted that this Court is not required to go into any form of investigation or take on an evidential role in relating to the offending behaviour.

25. In written submissions, counsel for the minister made reference to the purpose of the warrant as described in the *Minister for Justice, Equality and Law Reform v. Dimitrovas* (Unreported, Peart J., High Court, 13th February, 2007) at p. 4:

> "[…] The warrant is in compliance with the section. The Framework Decision itself and the Act provide a specimen of the form of warrant to be used for a European arrest warrant. Its purpose is to ensure that a person arrested has the necessary basic information upon arrest as to the offences for which his surrender is sought. It is not a document designed or intended to provide him with every piece of information which he might wish to have for the purpose of his trial, but he is entitled to know in a general way what offence is alleged and the provision of the criminal law of the issuing state he is said to have infringed, and of course the potential penalty he might face if convicted. This Court also requires a certain minimum of detail if it is required to determine the question of correspondence and minimum gravity. That is another purpose fulfilled by a correct completion of the warrant."

26. It was submitted by counsel for the minister that these essential elements as noted by Peart J., have been included on the warrant dated the 27th January, 2016. The alleged offences have been set on in plain language in each EAW at point (b). Point (c) of each EAW indicates the provision of the criminal law allegedly infringed by the respondent and the potential penalty upon conviction. Counsel also submitted that point (e) of each EAW complies with Peart J.'s request in *Dimitrovas* to include a "*certain minimum level of detail*". Point (e) of each EAW clearly outlines the time and place of the incidents in question, a description of the alleged offences for which surrender of the respondent is sought and in addition sets out the potential nexus between the respondent and the alleged offences.

27. It was accepted by the minister that the link between the respondent and the offences is based on circumstantial evidence, however, it is submitted that this alone is not a sufficient reason on which to refuse an order pursuant to s. 16 of the Act of 2003. In the case, *Minister for Justice and Equality v. Shannon* [2012] IEHC 91, the High Court gave permission to execute a warrant for Gerard Shannon, regardless of the fact that the evidence linking Gerard Shannon to the theft committed by his brother, was primarily circumstantial. In *Minister for Justice, Equality and Law Reform v. Hamilton* [2008] 1 IR 60 at para.15 Peart J. notes that, when examining a warrant:

> "There is no question of this court, in carrying out that exercise, being concerned as to the strength of the case against the person named. That is not involved in the exercise of being satisfied that the warrant is in the proper form. Clearly, there must be some detail, however, from which the court can be satisfied that the person named has some involvement in the alleged offence. There must be some connection made between the alleged offence and the person named in the warrant. But the fact that the paragraph is headed in such a way as to require the time and place, as well as the degree of involvement of the person, does not mean that anything akin to a *prima facie* case must be set forth. That type of matter

> will be a matter for the prosecution authority in the requesting country to deal with by whatever procedure applies in that jurisdiction, such as would occur here by the service of the book of evidence."

28. Counsel for the minister submitted that the case of *Shannon* suggests that a description of the circumstantial evidence is sufficient to overcome "degree of involvement" requirement necessary for populating a warrant. She also pointed out that it is noted in *Hamilton*, that the strength of the 'involvement evidence', is not a relevant matter for the court in this jurisdiction, but instead that there must be some degree of alleged involvement.

29. It was submitted that the narrative of the events included from pages 4 to 6 of the warrant dated 27th January, 2016, clearly sets out the basis, or put differently, sets out the circumstantial evidence, upon which the PSNI have formed the opinion, that the accused was connected to the death of the named individual and also the arson attack on that individual's named address. While this evidence appears to be of a circumstantial nature, it is submitted that there is no issue in relation to the prosecution of a case based on circumstantial evidence and there is clearly sufficient information contained in the warrant to allow the respondent to know the case he would have to meet if surrendered to the issuing state and which is made clear in the judgment of Edwards J. in the *Baron* case. It is accepted by counsel that point (e) does not directly assert that the participant in the non-consensual intercourse was the respondent, however, it is the minister's submission that it is clearly implied from the description of the facts outlined in point (e) of the warrant. It is further submitted that any issue arising therefrom relates to potential defences, which the respondent might claim are available to him at the trial of the action in the issuing authority.

30. In conclusion, it was the minister's submission that both EAWs contain a sufficient level of detail, which allow the respondent to identify the charges against him, the time and place of the alleged offences, and also identify the basis on which the conclusion was formed that the respondent was in some way connected with the offences. It was therefore submitted that the EAWs fully comply with the requirements of s. 11(1A)(f) of the Act of 2003 and Article 8(e) of the 2002 Framework Decision.

31. In reply to the minister's submissions, counsel for the respondent confirmed that she was not making a strength of evidence point; what is required is that the matters set out in s. 11(1A)(f) of the Act of 2003 be outlined in the warrant, including the degree of involvement or alleged degree of the involvement of the person in the commission of the offence. Counsel contended that if the Court analyses the facts outlined in point (e) of the EAW, there is no allegation that the respondent engaged in the offences alleged. Counsel submitted that the extent of what is set out is that a person in a light-coloured jacket was seen in the environs of the deceased's house. There are gaps in what allows the Court to make the inference that there is sufficient detail.

The Court's analysis and determination

32. In assessing whether there is sufficient detail in the EAWs to satisfy s. 11(1A)(f) of the Act of 2003, this Court must have regard to the *dictum* of Denham J. (as she then was) in *Minister for Justice, Equality and Law Reform v. Dolny* [2009] IESC 48 regarding the Court's requirement to read the warrant as a whole. In the present case, if the EAWs are read as a whole, it is abundantly clear that the respondent is being sought for the offences of murder and arson. The *dicta* in *Dimitrovas* and *Hamilton* referred to above, clarify the High Court's approach to assessing whether the detail in an EAW is sufficient to comply with the legislative requirements.

33. Each of the present EAWs contains assertions that the respondent's surrender is sought for the purpose of conducting a criminal prosecution. The EAWs outline that there are arrest warrants in existence for him in the U.K. (Northern Ireland) in respect

of the offences for which surrender is sought. The EAWs states the maximum length of the sentences that may be imposed for the offences. In particular each EAW sets out at point (e) the usual heading in the form of the EAW set out in the annex to the Framework Decision. This heading states that the EAW relates in total to a particular number (indicated in each EAW) of offences. Each EAW includes the subheading: "Description of the circumstances in which the offence(s) was (were) committed, including the time, place and degree of participation in the offence(s) by the requested person:" After that heading a description of the alleged offences follows.

34. The first EAW places the death of the victim in a context, namely how her body was found and her meeting with the respondent in the hours before her death. The EAW then gives considerable information about the evidence with certain specific references to what the respondent was doing, what he was wearing and his personal appearance. A reasonably similar situation pertained in Stafford where no body was found in that case and the details of her death could not be set out with specificity. There was a recitation of circumstances, which pointed to the fact that a particular person had carried out the murder in that particular case.

35. In the present case, the EAW refers to the respondent wearing a cream jacket and having a bald patch and having met the deceased the evening before her body was found. Those are relevant matters given what is seen on CCTV as regards the movement of a man, his description and the finding of a knife with the deceased's DNA present upon it at a location where a man with a similar appearance to the respondent was seen.

36. The evidence as set out in the warrant is one of circumstance, where the only proper inference one can draw from the context of the details outlined in the warrant is that he is the person seen on the CCTV, and this is implicit in the description provided by the issuing judicial authority. The respondent matches the description. There is also no requirement to give precise details of how the murder or the arson took place in a situation in particular where the precise mechanism of both is for obvious reasons unclear. It is the circumstances in which these offences took place, and the time, place and degree of participation that is required. The cases of *Baron* and *Stafford* above are particularly relevant to the determination of this case.

37. When the first EAW is read as a whole, it is abundantly clear the respondent is the person being sought for prosecution for the offences of murder and arson. It is the Court's view that there is no substance in the submission that there is insufficient detail for the purposes of s. 11(1A)(f) of the Act of 2003. It is, at a minimum, a necessary inference from the totality of the EAW, that he is wanted for the murder and arson described in the EAW and that he is linked to it by way of circumstantial evidence. Indeed, it appears to the Court that it could more truly be described that the first EAW when viewed as a whole, states directly that he is wanted for the murder and arson set out in point (e) and that his prosecution will be based upon the circumstantial evidence set out in the first European Arrest Warrant. In the context of the EAW as a whole, I do not see any failure to comply with the provisions of s.11(1A)(f) of the Act of 2003.

38. In relation to the second EAW, the Court similarly concludes that the respondent is the man whose surrender is sought for the purpose of prosecution for the offence of rape. The circumstances of the rape are set out in considerable detail. There is no doubt from the totality of the EAW, that the respondent, whose DNA was allegedly a match for the DNA from the semen taken on a high vaginal swab from the alleged injured party, is being sought for an offence of rape. There is no substance in the submission that he could be the man who had consensual sexual intercourse with the alleged injured party before the offence was committed. That act was stated explicitly to be consensual, whereas this respondent is sought for the purpose of prosecution for the rape which is

explicitly detailed in the second EAW. It is again a necessary inference from the totality of the second EAW that he is the man who is sought in respect of the rape and he is not the man who had consensual sexual intercourse with the complainant. Similarly, like the first EAW, the second EAW as a whole is making the statement directly that he is the person sought for the rape offence which is detailed at point (e) thereof. The submission that there is no sufficient detail in the second EAW is, in the circumstances, somewhat contrived. This point of objection is rejected.

39. The Court is therefore satisfied that both EAWs contain sufficient detail for the purposes of s. 11(1A)(f) of the Act of 2003 and that the respondent's surrender is not prohibited thereunder.

Section 37 of the Act of 2003

Article 3 of the European Convention on Human Rights

40. The respondent claims that his surrender on foot of these EAWs would be in breach of s. 37 of the Act of 2003 as he claims there is a real risk that he would be subjected to inhuman and degrading treatment in Maghaberry Prison on surrender. In particular, the respondent claims that the fact that he is wanted for trial, that a significant custodial sentence is involved if convicted at trial, that he is vulnerable due to his medical situation, and that there is an extant threat to his life, all combine in his particular case to make him especially vulnerable to a breach of his Article 3 ECHR rights. Counsel relied upon the evidence of the respondent, his solicitor, and the U.K. reports on conditions in Maghaberry exhibited in their affidavits.

41. The respondent himself swore two affidavits in these proceedings. In his first affidavit dated 27th April, 2016, he outlines how he was previously incarcerated in Maghaberry Prison on a number of occasions, from 16th August, 2008 to 21st August, 2008; 31st January, 2011 to 28th April, 2011; and, 19th July, 2013 to 2nd September, 2014. In relation to these dates, he stated that while there was a pervasive atmosphere of violence, he luckily managed to avoid any serious assaults. He also states that he was aware of other serious assaults such as scalding and knife attacks that occurred in Maghaberry while he was previously incarcerated there. He says that the prospect of returning to Maghaberry causes him extreme concern as conditions have further deteriorated since he was there and that it seems from recent reports that the current dangerous conditions fall below the standards required in a civilised society.

42. The respondent avers that the situation is exacerbated by his own personal circumstances in that he has been informed that there is an existing threat against his life emanating from a dissident organisation. As a result of the conditions in Maghaberry, the respondent states that it is likely that this threat will give rise to a violent and life threatening assault on his person if he is incarcerated there. The respondent exhibited a *Report on an unannounced inspection of Maghaberry Prison, 11-22 May 2015*, published in November 2015 ("the 2015 Report"). This was a visit by a number of U.K. regulatory bodies including HM Inspectorate of Prisons (these bodies form part of the U.K. national preventive mechanism under the Optional Protocol to the U.N. Convention Against Torture).

43. In his affidavit dated 21st July, 2017 Mr. Farrell, the respondent's solicitor, outlines that due to the extremely serious offences for which the respondent's prosecution is sought, it is inevitable that should the respondent be surrendered, he will be remanded in Maghaberry prison. This is a high security facility and which is the only prison in Northern Ireland that holds Category A prisoners. He also avers that the chance of the respondent being transferred to a medium security facility such as Magilligan prison in Limavady is virtually nil.

44. Mr. Farrell gives his belief that Maghaberry prison holds 1,000 inmates ranging from those on remand, those serving short sentences, those serving life sentences and separated paramilitary prisoners. He avers that there have been damning reports concerning the lack of safety for prisoners in Maghaberry. He stated that the most recent report entitled *Overview of Initial Findings of a Report on an announced inspection of Maghaberry Prison* published in February 2016 ("the 2016 Report") reveals that levels of violence remained too high. He avers to his professional experience of inmates who have been both perpetrators and victims of violence there to and from other prisoners.

45. While in custody pending the hearing of this application, the respondent suffered a left frontal lobe infarct. He spent 10 weeks in hospital after this stroke and he has been left with some residual right-sided weakness. His cognitive functioning was the subject matter of extensive investigation prior to the hearing of the application. No application for the Court to carry out a hearing into his capacity was ultimately made and the Court is satisfied on the reports that it was not necessary for the Court of its own motion to embark on such a hearing.

46. Counsel for the minister submitted that there is nothing evidentially which would lead the Court to the conclusion that this respondent has needs and vulnerabilities that would require him not to be surrendered. While the 2015 Report does express concerns in relation to certain aspects regarding the prison, it is clear that this is one part of a very precise, self-monitoring and ongoing regime where the country's own reports identify issues and seek to have issues dealt with in a very timely manner. It was submitted that the updated Inspectorate report published February 2016 establishes a number of matters: that a second inspection took place in a very timely fashion because there had been concerns and that much has improved.

47. Counsel referred to p. 6 of the 2016 Report which states that "a start had been made in tackling the challenges around safety, and there were credible plans to do more". It was submitted that this shows that there is serious attention being given to the issue of prison conditions in Maghaberry, a prison with a diverse population, and that there is a strict regime in place to assess and carry out further and ongoing assessments of that regime. At the end of the conclusion at p. 8 of the report, the urgent action taken to date with regards to safety is commended and it is recommended that the momentum be maintained.

48. Counsel submitted that whilst there are some concerns which are still very much noted in the 2016 Report, there is active improvement and control and a real incentive and drive to make the prison a safe place for all persons. However, counsel submitted that according to the affidavit of the respondent, he has already spent a significant period of time in the prison without incident and he does not describe any incident of any nature that affected him personally. It is accepted by the minister that there are references in the documentation received from the PSNI that there were two threats that had been reported to them and to An Garda Síochána. The respondent says he fears he may be placed in 24-hour lockup and is concerned that this would have a severe effect on his physical and mental health. Counsel submitted that his concern at its height would be that he fears he would be segregated or placed in 24-hour lockup because of fears to his own safety. In this jurisdiction, prisoners can be placed in 23-hour lock up because they are on protection or on watch because of threats from other persons. It was submitted that the respondent may find himself in a position where the prison will have to take such steps as are necessary to provide for his wellbeing.

49. Counsel submitted that the report is positive in terms of vulnerable persons and that there is nothing before the Court that would suggest that any prison in Northern Ireland or the U.K. services would not provide for his welfare and in the absence of evidence

that there is a real threat to his particular safety because of his physical needs. It was submitted that the Court must rely on the capacity of the state to which he is being returned to meet those particular needs. Counsel also commented upon the fact that no expert evidence or affidavit of law was put forward by the respondent to say that these needs will not be met. In the absence of these, counsel for the minister submitted that the Court must rely on the mutual trust and confidence that exists between the states.

50. In reply to the minister's submissions, counsel for the respondent accepted that there is an evidential burden on the respondent. It was submitted, however, that the internal goings-on in the prison are within the peculiar knowledge of the issuing state and the degree to which the respondent can carry the evidential burden forward is therefore limited. Concerns as regards safety expressed in the second Inspectorate report of 2016 were before the Court. The respondent in his affidavit outlined the history of his own experience of Maghaberry prison and his apprehended fear is that he will be subjected to a life-threatening assault. Counsel submitted that the respondent's complaint is not about being put in 24-hour lock up; the complaint is that the prison structures in Maghaberry prison are wholly inadequate to prevent the threat to his life being carried out.

51. Counsel submitted that the respondent may be put in lock-up, but that it is only a possibility. Counsel stated the report evidences that there are very high levels of violence in Maghaberry prison. From the report, there are different segregation units in Maghaberry prison, staff not always present in areas where prisoners congregate. Therefore, it was submitted that the respondent does not know precisely what he is facing if he goes back to Maghaberry prison, all he knows is that he is a vulnerable prisoner going into a chaotic prison.

52. Counsel submitted that the apprehension evidence in the affidavit of the respondent coupled with what is contained in the report on Maghaberry prison, coupled with what is known about the respondent's personal circumstances that he is a vulnerable person, that this Court is put on an enquiry into the matter on the basis of cogent evidence demanding some sort of guarantee or assurance be given to this Court that his rights under s. 37 of the Act of 2003 will be safeguarded.

The Court's Analysis and Determination

53. This Court must operate on a presumption that a state requesting extradition will comply with basic fundamental human rights. This applies in the case of states with whom Ireland has entered into extradition treaties or agreements as held by Edwards J. in *Attorney General v. O'Gara* [2012] IEHC 179. The presumption is expressly stated as regards other states in the E.U. under the provisions of s. 4A of the Act of 2003 which refers to a presumption that an issuing state will comply with its obligations under the Framework Decision. This draws upon the principles of mutual trust and confidence that this Court must place in another member state of the European Union. If surrender/extradition is to be refused, there must be evidence overcoming that presumption.

54. The substantive law in this area is not in any real dispute. Section 37 (1) (c) (iii) (II) of the 2003 Act, states that a person shall not be surrendered if there are reasonable grounds for believing that "he or she would be tortured or subjected to other inhuman or degrading treatment." The phrase "tortured or subjected to other inhuman or degrading treatment" derives from Article 3 of the ECHR and such treatment is prohibited in absolute terms. It is a phrase found in Article 4 of the E.U. Charter of Fundamental Rights and Freedoms ("the Charter"), and is also an unenumerated right in the Constitution.

55. The Supreme Court in *Minister for Justice, Equality and Law Reform v Rettinger*

[2010] IESC 45 held, in accord with the case law of the European Court of Human Rights ("ECtHR") that, it is not necessary to establish that there is a probability of ill-treatment, rather a real risk of such ill-treatment is sufficient. The mere possibility of ill-treatment is however not sufficient to prevent surrender.

56. In *Rettinger* the Supreme Court also set out the procedural basis for establishing whether such a real risk exists. There is a burden on the respondent to adduce cogent evidence capable of proving that there are substantial grounds for believing that he or she would be exposed to a real risk of being subjected to treatment prohibited by Article 3 of the European Convention on Human Rights. The Court is entitled to attach importance to reports of independent human rights organisations and to governmental sources. It is also open to an issuing state to dispel doubts raised by the respondent's evidence but in doing so, the burden is not to be taken as having shifted. The Court is required to be forward looking in its approach and it also must engage in a rigorous examination of the information placed before it. The Court must be mindful of the presumption that an issuing state will comply with its obligations regarding fundamental human rights.

57. Subsequent to the decision in *Rettinger*, the Court of Justice of the European Union ("the CJEU") decided the joint cases of *Aranyosi v. Generalstaatsanwaltschaft Bremen* (Case C-404/15, Grand Chamber, 5th April, 2016) and *Caldararu v. Generalstaatsanwaltschaft Bremen* (Case C-659/15 (PPU), Grand Chamber, 5th April, 2016). The test identified by the CJEU that must be met before surrender is prohibited, is the same as that identified in *Rettinger* (and indeed other cases from the ECtHR identified in *Rettinger*); there must be substantial grounds for believing that following surrender a person will run a real risk of being subject, in the issuing member state, to inhuman or degrading treatment. The CJEU based its decision on Article 4 of the Charter, but there is nothing to suggest that the meaning of inhuman and degrading treatment differs between Article 3 of the ECHR and Article 4 of the Charter.

58. Furthermore, in the view of this Court, the CJEU judgment highlighting that the executing judicial authority must rely upon information that is objective, reliable, specific and properly updated is entirely consistent with the requirements for evidence as set out in *Rettinger*. The references in both the decision of the Supreme Court and of the CJEU to information from reputable sources are consistent with each other. The decision of the CJEU focuses more on judgments or reports of transnational bodies of the Council of Europe or the UN, while the Supreme Court referred to independent human rights organisations or governmental sources. Both decisions clarify that these are not exclusive sources of information; they are simply examples of the type of sources of information that may be possible. It is also noteworthy that the CJEU makes specific reference at paragraph 96 to national or international procedures and mechanism for monitoring detention conditions. This would include European Committee for the Prevention of Torture (CPT) reports as well as national preventive mechanisms which have been established in compliance with the Optional Protocol to the U.N. Convention Against Torture. The 2015 and 2016 Reports referred to above are reports from the U.K. national preventive mechanism.

59. In the case of *Minister for Justice and Equality v. McLaughlin*, (20th October 2017), I make certain further observations about the compatibility of the *Rettinger* judgment of the Supreme Court with the judgment of the CJEU in the joined cases of *Aranyosi and Caldararu*. These refer in particular to the issue of a burden of producing evidence, the sequencing of the decision making process and the role of the minister (as central authority) in seeking further information. It is unnecessary to repeat those paragraphs save to emphasise that this Court is of the view that the minister (as central authority) has a duty under s.20(2) of the Act of 2003 to seek further information from the issuing judicial authority or issuing state where the relevant conditions have been met for

triggering that duty. Section 20(2) of the Act of 2003 is a provision of Irish law which the minister is bound to apply.

60. The 2016 Report of the U.K. national preventive mechanism is the most relevant report as it reflects the latest updated position. This report shows an improving position but states that the levels of violence "remained too high". The Court is well aware of the threat against this respondent's life. The respondent has put forward the view that he will be in 24-hour lock-up. A 24-hour lock-up would not, in general, be consistent with the requirements under Article 3 ECHR not to subject the respondent to inhuman and degrading treatment. The respondent's main complaint was not about 24-hour lock up however (and indeed there is no substantive evidence from an independent source that he is at real risk of being held in such 24-hour lock up), as he did not pursue that issue through any independent objective reports identifying concerns over that type of behaviour. His complaint is about his overall safety in the prison given the significant concerns about safety that have been expressed in the reports.

61. This Court is aware that Humphreys J. in *Lanigan v. The Governor of Cloverhill* [2017] IEHC 23 has ruled that the Maghaberry Prison Report of 2015 falls significantly short of the level of real risk to the life or human rights of the applicant that would render unlawful his detention for the purposes of surrender to the United Kingdom. The evidence before Humphreys J. and the submissions made to him are not apparent from the judgment. In the instant case, the Court has the benefit of the later 2016 Report, but also the specific concerns relating to this individual i.e. that he is a prisoner subject to threats to his life and he has certain health issues. Furthermore, it is unclear if *Aranyosi* was opened to the High Court in the course of the *Lanigan* case and if the importance of a report from a national preventive mechanism was highlighted.

62. The 2016 Report establishes that there has been a significant response to the criticism of Maghaberry prison made in the 2015 Report. Of considerable concern to this Court however, is that the 2016 Report states that levels of violence are still too high and "there remained a need to develop a comprehensive safer custody strategy to better manage the significant challenges presented by an increasingly vulnerable population." The 2016 Report says "that a significant amount of work was still outstanding to make Maghaberry safer and for this to reflect more positively in prisoners' experiences."

63. The Court is satisfied on the basis of the evidence that Maghaberry is the more likely prison in which this respondent will be detained. The evidence also establishes that the respondent is a vulnerable prisoner because of the offence with which he will be charged and, more particularly, because there are specific threats to his life. He has some issues arising from the stroke which may not of themselves be such as to demonstrate that he is at risk of being subjected to inhuman and degrading treatment. Those needs however must be considered in conjunction with the fact that he is a vulnerable prisoner on other grounds. In all these circumstances, the Court is satisfied that the national preventive mechanism's 2016 report (together with the 2015 Report) establishes that there are specific deficiencies in Maghaberry concerning the safety of vulnerable prisoners there.

64. In this case the minister did not seek any information from the U.K. authorities about the conditions in which the respondent is likely to be held. The Court has given its view above, based on the *McLaughlin* decision, about the responsibilities of the minister under s. 20 of the Act of 2003. In the circumstances, this Court is required to exercise its own powers under s. 20 to seek further information from the U.K. about the conditions in which this respondent will be held should he be surrendered to face trial in Northern Ireland. This is because there is specific and updated (January 2016) information concerning the conditions of detention in *Maghaberry* prison that give rise to concern that there is a real risk that this respondent, by virtue of his vulnerabilities, will

be subjected to inhuman and degrading treatment.

Delay

65. The respondent claims in relation to the second EAW, that there has been delay which would amount to a violation of his rights under s. 37 of the Act of 2003. Counsel indicated that a "no prosecution decision" was taken following the submission of a file to the "PPS" on 25th January, 2005 and no additional information appears to have come to light since then. Counsel referred to the reference to a review being conducted which was mentioned in point (f) of the second EAW but counsel submitted that it is not known when this review took place, what information prompted it and how long thereafter the decision to prosecute was taken.

66. As the delay amassed is over ten years, counsel submitted that the respondent has been deprived a right to trial within a reasonable time. She submitted that the respondent is not responsible for the delay and no reasons have been forthcoming for the delay by the issuing state authorities. Counsel also submitted that a lack of files and contemporaneous notes will hamper any trial the respondent might face in the issuing state and these files and notes had been destroyed due to the delay. This point is particularly argued in the context of the Brexit point which has been dealt with above.

67. Counsel for the minister submitted that the EAW sets out clearly that there was a decision to review the file and to open the case and that it is not for this Court to go behind that. If there is delay in this case, that is a matter for the issuing state where proceedings could be brought if there are concerns in relation to a trial process not being a fair process. To engage with or prejudge these matters would be outside the scope of this Court's requirements under the Act of 2003.

The Court's Analysis and Determination

68. As regards the delay, it is undoubtedly true that there has been a significant lapse of time in relation to the second European arrest warrant. However, it has long been recognised that lapse of time, or 'delay', does not of itself prohibit surrender. Delay or lapse of time may have relevance to issues of fair trial (including trial within a reasonable time), of abuse of process or personal or family rights. Insofar as the issue of fair trial or speedy trial is concerned, the respondent has not put forward any specific grounds to show prejudice other than the concept of general prejudice that may exist after such a delay. Moreover, the respondent has not put forward any deficiency in the system of justice in the U.K. that would demonstrate that his right to a fair trial would not be protected in that jurisdiction.

69. Put simply, the respondent does not meet the tests laid down in *Minister for Justice, Equality and Law Reform v. Stapleton* [2006] IEHC 43 and *Minister for Justice, Equality and Law Reform v. Brennan* [2006] IEHC 94 to prohibit his surrender on the grounds of flagrant denial of justice. *Stapleton* in particular establishes that the question of fair trial is more appropriately dealt with in the issuing state where all the relevant information will be before the national court. In short, the executing judicial authority deals with issue that concern the lawfulness of the surrender, whereas the national courts are best placed to deal with issues of delay involving right to a fair trial within a reasonable period. Although it is unnecessary to adjudicate on the matter, the Court is not satisfied on the evidence that the respondent would succeed in this jurisdiction in preventing his trial on the basis of the lapse of time.

70. Finally, the Court is satisfied that Brexit does not affect or will not affect those tests. The test, namely that of egregious circumstances that create a real risk of a flagrant denial of justice, have been applied in the context of extraditions under the Extradition Act, 1965 (see for example *AG v Marques* [2016] IECA 374). There is no evidence of an egregious defect in the U.K. justice system such that there is a real risk that he will be

subjected to an unfair trial as a result of the delay. The submissions of the respondent are highly speculative and are not grounded in either the legal principles covering issues of delay and fair trial rights in extradition matter or any consideration of the relevant provisions of criminal justice law prevailing in the United Kingdom. The respondent's point of objection concerning delay is therefore rejected.

Conclusion
71. The Court has decided, on the basis of the most recent report available to it from the U.K. national preventive mechanism, that there is specific and updated information concerning the conditions of detention in Maghaberry prison that give rise to concern that there is a real risk that this respondent, by virtue of his vulnerabilities, will be subjected to inhuman and degrading treatment. In the circumstances, the Court will exercise its power under s. 20(1) of the Act of 2003 to seek further information from the U.K. authorities as to the conditions in which this respondent will be held should he be surrendered to the United Kingdom.

Addendum
72. On the day of the proposed delivery of this judgment, 20th October, 2017, counsel for the respondent sought an adjournment as the respondent had been admitted to Accident & Emergency. Another date for the delivery of the judgment was thereby fixed.

73. In her customary and appropriate compliance with her duty to the Court, counsel for the respondent presented to the Court an updated report (*Report on an unannounced visit to Maghaberry Prison, 3-4 April 2017, published August 2017*) of the U.K. national preventive mechanism ("the 2017 Report"). This was a review of the progress made against the nine inspection recommendations made in the 2015 Report. This report is noted to be supplementary to that of the 2016 Report.

74. This was a "light touch review of progress" and it did not deal with all issues in the prison. This 2017 Report establishes that the situation in the prison is much calmer than in May 2015. Levels of violence and disorder were generally low (although there were a few serious incidents). Dynamic security had improved.

75. Of specific interest to the Court was a section of the 2017 Report that focuses on an assessment of vulnerable prisoners in Maghaberry prison. The particular vulnerable prisoners identified were those entering the prison for the first time, or those who displayed signs of a mental illness, "particularly those who self-harm." According to his own affidavit, the respondent is not a newcomer to Maghaberry prison, nor has he made any submissions as to the current state of his mental health, though he has stated that he fears he may be placed in 24-hour lockup which would have a severe effect on his physical and mental health. There is a risk that he may be kept isolated by reason of his vulnerabilities, including the threat to his life. The report however does not completely alleviate fears as to conditions for prisoners who are kept in segregation or isolation, as p. 12 of the report states as follows:

> "[t]he segregation unit environment was much improved and better than we often see and staff appeared to adopt a humane approach to the men held. However, some men stayed in the observation cells for too long, and others had been living on the unit for prolonged periods with a poor regime that did not effectively address issues of wellbeing and psychological deterioration."

76. The report does not specifically address the position of vulnerable prisoners who fall outside the categories mentioned in the report as indicated above. It does not address the position of those with similar vulnerabilities as the respondent, i.e. those faced with serious threats to their lives and those who suffer from a serious physical illness. However, the report notes on p. 13 that a review group had been set up to review "the

service model at the prison to ensure the needs of prisoners with complex health issues were met". This review group was later superseded by a Joint Review of Vulnerable Prisoners by the Department of Health and Department of Justice. The assessment of the Joint Review is not detailed in the report, which would indicate that it is yet to be completed. The report does not indicate a timeframe for the completion and publishing of the review. Furthermore, even upon completion of the review, the report has not indicated what steps Maghaberry Prison will take to reduce the real risk of the respondent being subjected to inhuman and degrading treatment in Maghaberry Prison if surrendered. The report merely suggests "consideration will be given".

77. Overall therefore, the Court is not satisfied that the 2017 Report sufficiently addresses the concern of this Court about the risk of this respondent being subjected to inhuman and degrading treatment because of his aforementioned vulnerabilities. The Court will therefore exercise its power under s. 20(1) of the Act of 2003 to seek further information from the U.K. authorities as to the conditions in which this respondent will be held should he be surrendered to the United Kingdom.

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