

THE HIGH COURT

[2025] IEHC 53

BETWEEN

Record No 2024 EXT 106

MINISTER FOR JUSTICE

APPLICANT

v.

JAMES DONEGAN

RESPONDENT

JUDGMENT of Mr. Justice Patrick McGrath delivered on the 31 January 2025

1. In this application, the applicant seeks an order for the surrender of the respondent to Northern Ireland on foot of one Trade and Co-Operation Agreement warrant ('TCAW').
2. This warrant was issued on the 26 April 2024 by District Judge George Connor at Laganside Magistrates Court, Belfast and seeks the surrender of the Respondent for prosecution in relation to the following three offences:
 - i. The Murder, on a date unknown between the 22 June 1979 and the 25 June 1979, of Joseph James Porter contrary to Common Law
 - ii. The possession, within the same dates, of a firearm and ammunition with intent to endanger life or cause serious injury to property contrary to Section 14 of the Firearms Act (Northern Ireland) 1969.
 - iii. The membership, within the same dates, of a Proscribed Organisation, namely the Irish Republican Army, contrary to section 21(1)(a) of the Northern Ireland (Emergency Provisions) Act, 1978.

3. At approximately 9.30am on 24 June 1979, Joseph James Porter's body was found close to the entrance of his farm at 8 Creggan Road, Mountmorris, County Armagh. The postmortem concluded he had died as a result of gunshot wounds to the head and trunk. His home had been ransacked but there was no evidence of forced entry. Four fingerprints were taken from inside Mr Porters home. A right thumb print on a bedroom door has been found to match a fingerprint of the Respondent, which had been taken from him by the RUC in 1977.

4. A Section 20 request was sent to the issuing judicial authority and a reply received thereto on the 15 May 2024. Given the antiquity of the case and the issues raised by the Respondent in objection to surrender, there is set out hereafter a chronology of the most relevant dates following the murder of Mr Porter:-
 - (i) During 2012 the PSNI Historical Enquiries Team reviewed the investigation into this murder. The thumbprint which had been found on the bedroom door was then subjected to the PSNI automatic fingerprint system and found to match the fingerprints taken from the Respondent in 1977. This new evidence linked Mr Donegan to the murder of Mr Porter;
 - (ii) As Mr Donegan was then resident in this jurisdiction, the PSNI asked An Garda Siochana to take over primacy of the investigation;
 - (iii) The Respondent was arrested by Gardai in March 2017 and his fingerprints taken and confirmed to match the print taken from the bedroom door at the late Mr Porter's home. He was interviewed by Gardai and denied involvement in the murder, referring to himself as a 'soldier at war' and describing Mr Porter as a legitimate target. He denied ever being at that address and alleged his print must have been planted by the RUC;
 - (iv) A file was submitted to the DPP and she decided not to prosecute Mr Donegan as there was insufficient evidence;
 - (v) The PSNI then re-opened the investigation in the issuing state
 - (vi) It was then also established that the Ruger Mini rifle used in this murder was used in subsequent attacks on security forces in Northern Ireland, for which the IRA claimed responsibility, as outlined in the TCAW and additional information received in reply to the S20 request. This weapon was recovered in a provisional IRA arms hide in April 1980.

5. Additional information having been received from the issuing judicial authority ('the IJA'), this TCAW was endorsed by the High Court on the 29 May 2024. The Respondent was arrested on the 24 June 2024 and produced to the High Court on that date. He has been remanded in bail on this matter since that date, pending the outcome of these proceedings.

UNCONTROVERSIAL MATTERS

6. The warrant was issued by a 'judicial authority' in the issuing state within the meaning of s. 10 of the European Arrest Warrant Act, 2003 (as amended) ['the 2003 Act'].
7. I am satisfied that the person before the court, the respondent, is the person in respect of whom this TCAW was issued. No issue is taken in relation to identity.
8. The minimum gravity requirement under the European Arrest Warrant Act 2003 (as amended) ['the 2003 Act'] is met.
9. I am satisfied that none of the matters referred to in sections 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the 2003 Act"), arise for consideration in this application and surrender of the respondent is not precluded for any of the reasons set forth therein.

GROUNDS OF OBJECTION

10. In the Statement of Points of Objection, filed on the 15 August 2024, the Respondent objects to surrender on the following grounds:-

- (a) At grounds 3 to 6 it is pleaded that correspondence is not made out between the offences alleged in the Warrant and offences in this State;
- (b) Ground 7,14 and 15 are no longer being pursued;
- (c) At grounds 8 to 13 and 16 to 17 it is claimed that the surrender of the Respondent would, for the reasons specified therein, amount to an abuse of process.

CORRESPONDENCE

RESPONDENT'S SUBMISSIONS – CORRESPONDENCE

11. The Respondent refers to *DPP v MB* [2024] IESC 33 where Charleton J discussed intention in the context of crimes of specific intent where an accused was charged on the basis of joint enterprise.
12. The Respondent submits that the issuing state has failed to provide information sufficient to show that the facts implicating the Respondent, as set out in the TCAW and Additional Information, are sufficient to constitute the offence of murder in this jurisdiction. It is submitted that there is no evidence of the requisite intent on the part of the Respondent in this case, where nothing is outlined setting out his role in the offence or his mental state in participating in the commission of the offence and that such cannot be inferred from the other information.
13. It is submitted that the height of the prosecution's case in the issuing state is that Mr Donegan was present at the scene when the murder occurred and was part of a 'joint enterprise'. No attempt is made to outline his role and his participation.
14. The Respondent further submits that, for similar reasons there is an absence of correspondence in relation to the firearms offence. The Respondent says that there is no evidence to prove he was in possession of these items (the Ruger Mini 14 rifle and some cartridges) except the assertion he was part of a joint enterprise without any expression as to what was the purpose of the joint enterprise or his role in the same.
15. Similar submissions are made in relation to the allegation of Membership of an Unlawful Organisation.

APPLICANT'S SUBMISSIONS- CORRESPONDENCE

16. The Minister submits that, where a man is shot in the head and trunk, causing his death, the offence of murder is committed – see Section 4(1) and (2) of the Criminal Justice Act, 1964. The intention or *mens rea* necessary for an offence of murder can, it is further

submitted, be imputed to others who embark upon a joint enterprise with the shooter and the agreement to take part in such a joint enterprise need not be expressly stated but may be inferred from the surrounding facts and circumstances. When the case is a circumstantial one, it is necessary for the Judge or Jury to consider the cumulative effect of the various strands of evidence, taken together (*People (DPP) v Nevin* [2003] 3 I.R. 321, *DPP v SM*, *DPP v JB* [2004] IECA 116).

17. The Minister sees the complaint made by the Respondent as to a want of correspondence as in reality an argument of want of sufficient detail or particularity as required by section 11A(f) of the Act. The Applicant submits that, in any event, the submission is entirely misconceived whether seen as a correspondence issue or a want of particularity issue.
18. The Applicant submits that the question of whether the evidence presented in the Warrant and Additional Information will be sufficient to sustain a conviction does not fall to be considered by this Court. The Minister refers to two Judgments of Edwards J, *Minister for Justice v Baron* [2012] IEHC 180 and *Minister for Justice v Shannon* [2012] IEHC 91 in support of the submission that, where a joint enterprise is alleged, the bar is low and the IJA is not required to name the other individuals involved, or to specify every act the requested person is alleged to have performed as part of the joint enterprise.
19. The IJA have clarified that the Respondent is allegedly involved in the murder of Mr Porter by way of joint enterprise. The issuing state has highlighted various pieces of evidence upon which the Respondent will rely in support of that contention, including inter alia the Respondents thumbprint being found in the deceased's ransacked home, the deceased's membership of the UDR, the Respondents apparent admission of involvement in IRA activities and his possession of a rifle, found in an IRA 'hide', around the material time and set against the background of the Troubles.
20. It is submitted that in this case the Minister has satisfied the requirements of both S38(1A) and ss 5, 11(1A) and (f) and the warrant asserts a link between the Respondent and the fatal shooting of Mr Porter by paramilitaries and a general outline of the basis for same.

DECISION- CORRESPONDENCE

21. The TCAW is a Warrant issued in accordance with Article LAW.SURR.112 of the Trade and Co-Operation Agreement. It is therefore necessary to demonstrate correspondence in accordance with s. 38 of the 2003 Act. Section 5 of the 2003 Act provides:-

‘For the purposes of this Act, an offence specified in a European Arrest Warrant corresponds to an offence under the law of the state, where the act or omission that constitutes the offence so specified would, if committed in the State on the date on which the European arrest warrant is issued, constitute an offence under the law of the State’.

22. The relevant principles for showing correspondence are now well established. In assessing correspondence, the question is whether the acts or omissions that constitute the offence in the requesting state would, if carried out in this jurisdiction, amount to a criminal offence – *Minister for Justice v Dolny* [2009] IESC 48

23. Section 5 transposes Article 2(4) of the Framework Decision. At paragraph 36 of its judgment in *KL* (C – 168/21) the CJEU similarly stated:-

‘the executing judicial authority is required to verify whether the factual elements underlying the offence which give rise to the issuing of that European arrest warrant would also, per se, constitute an offence under the law of the executing member state if they were present in that State’

24. In his submissions, the Minister refers to the comments of Denham CJ at paragraph 14 of *Dolny* that, in considering the question of correspondence, *‘it is not a helpful analogy to consider whether the words would equate with the terms of an indictment in this jurisdiction’.*

25. Given the Respondents submissions of lack of detail in the TCAW, the Minister also refers to Denham J in *Minister for Justice v Stafford* [2009] IESC 83 where she stated that:-

‘The question which arises for determination is whether the acts alleged on the warrant show a link with the requested person. It is not necessary to show a prima facie case.

It is not necessary to show a 'strong' case. The issue of innocence is for the jury in the requesting state There is no reason why an accusation of a crime based upon circumstantial evidence could not be the basis for a European arrest warrant.'

26. There is no dispute that where a man is shot in the head and trunk, causing his death, the offence of murder is committed – see Section 4(1) and (2) of the Criminal Justice Act, 1964. I agree with the Minister's submission that the intention or *mens rea* necessary for an offence of murder can be imputed to others who embark upon a joint enterprise with the shooter and the agreement to take part in such a joint enterprise need not be expressly stated but may be inferred from the surrounding facts and circumstances. When the case is a circumstantial one, it is necessary for the Judge or Jury to consider the cumulative effect of the various strands of evidence, taken together (*People (DPP) v Nevin* [2003] 3 I.R. 321, *DPP v SM, DPP v JB* [2004] IECA 116).
27. I further agree with the submission of the Applicant that the complaint made by the Respondent as to a want of correspondence as in reality an argument of want of sufficient detail or particularity as required by section 11 A(f) of the Act.
28. The question of whether the evidence presented in the Warrant and Additional Information will be sufficient to sustain a conviction does not fall to be considered by this Court. It is sufficient to provide a broad outline of the alleged events so as to establish a link between the accused person and those events. In considering the issue of correspondence in a case such as the present, where a joint enterprise is alleged founded on circumstantial evidence, the IJA is not required to name the other individuals involved, or to specify every act the requested person is alleged to have performed as part of the joint enterprise. It is sufficient to provide a broad outline of the alleged events so as to establish a link between the accused person and those events. As Edwards J said in *Minister for Justice v Baron*, [2012] IEHC 91 the court must ask itself, when examining correspondence by reference to circumstantial evidence whether '*looking at this information, putting a fair wind at its back, could the inference [of participation] reasonably be drawn*'
29. The Prosecution make the case of the Respondents involvement in the murder of Mr Porter by way of joint enterprise. The murder involved the use of firearms and ammunition, and the Respondent is charged with the firearms offences also on the basis of joint enterprise.

The issuing state has highlighted various pieces of evidence upon which the Respondent will rely in support of that contention, including inter alia the Respondents thumbprint being found in the deceased's ransacked home, the deceased's membership of the UDR, the Respondents apparent admission of involvement in IRA activities and his possession of a rifle, found in an IRA 'hide', around the material time and set against the background of the Troubles.

30. There is sufficient information in the documentation provided to draw a link between the Respondent and the Murder and Firearms Offences alleged. Adopting the phraseology of Edwards J in *Baron*, looking at the information provided and putting a fair wind at its back a Court could reasonably draw the inference of participation by the Respondent in these offences.
31. Insofar as the last offence alleged is concerned, it is alleged that on the date of the Murder of Mr Porter the Respondent belonged to a prescribed organisation, the IRA.
32. Membership of an unlawful organisation in an offence in this jurisdiction contrary to Section 21(2) of the *Offences Against the State Act, 1939* (as amended). Pursuant to Section 9 of the Act and S.I. No. 162 of 1939, the IRA is an unlawful organisation. The Act does not define or specify the criteria for 'membership', but there is no real distinction between the act of 'belonging to' an organisation and being a member thereof. The allegation that he admitted at interview to having been a 'soldier' and was in 1981 involved in a shooting incident close to the border, points to his continuing membership of that organisation at the material period. This attack on the late Mr Porter, a member of the UDR, was clearly a terrorist attack and the Respondent is of course alleged to be one of those who participated in this attack and murder.
33. I am therefore satisfied the requirements of both s.38(1A) and ss 5 of the 2003 Act are met and correspondence established in relation to each of the three offences set out in this TCAW.
34. I am satisfied that the details set out in the Warrant, together with the additional information in reply to the s. 20 request, provide the necessary details required under Section 11A of the 2003 Act.

ABUSE OF PROCESS

RESPONDENT SUBMISSIONS – ABUSE OF PROCESS

35. The Respondent has relied on a number of different strands in support of his submission that this application amounts to an abuse of the process of this Court. These can be summarised as:-

- (i) Delay
- (ii) Previous Decision not to prosecute in this jurisdiction
- (iii) Timing of the decision to prosecute in the Requesting State
- (iv) Article 8 Family Rights

36. The Respondent states that the issuance of the TCAW is ‘clouded with suspicion’ in circumstances where it was done so 4 days before the coming into force of the *Northern Ireland Troubles (Legacy and Reconciliation) Act, 2023* [‘the Legacy Act’].

37. An exceptional time period has lapsed since the date of the alleged offences and it is submitted that there is a distinct lack of information regarding key dates and actions of the authorities in the issuing state from 1979 (date of the alleged offences) through to 2012 (PSNI Historical Enquiry Team review) through to 2017 (Respondent interviewed by An Garda Siochana and DPP directing no prosecution), and on to 26 April 2024 where a warrant was issued by District Judge Connor.

38. The Respondent has filed a report setting out the opinion of Mr Michael Forde BL in which he inter alia deals with the time period which has elapsed in this case and offers a professional opinion as to the effect of the same on any future trial. In Northern Ireland, delay in a prosecution can form the basis for applying to stay proceedings as an abuse of process. The principles grounding such applications were outlined by Kerr LCJ in *B v McNally & McManus* [2009] NICA 3. A stay will be granted where, if the proceedings continue, the accused cannot obtain a fair trial. A stay will also be granted where, even if a fair trial is possible, it would be otherwise unfair to allow a trial to continue.

39. Mr Forde further refers to the Judgment of Carswell LCJ in *RE DPP's Application for Judicial Review* [1999] NI 115 where, in the course of a challenge by the prosecution to the decision of a Magistrate to stay criminal proceedings on the grounds of delay, the following was said:

'Naturally, the longer the delay the more likely it will be that the prosecution is at fault, and that the delay has caused prejudice to the defendant; and the less that the prosecution has to offer by way of explanation, the more easily can fault be inferred. But the establishment of these facts is only one step on the way to a consideration of whether, in all the circumstances, the situation created by the delay is such as to make it an unfair employment of the powers of the court any longer to hold the defendant to account. This is a question to be considered in the round and nothing is gained by the introduction of shifting burdens of proof, which serves to break down into formal steps what is in reality a single appreciation of what is and is not fair'

40. Pointing to the significant lapse of time in this matter, Mr Forde particularly refers to the lack of information regarding key dates and actions following the involvement of the Historical Enquiry Team in 2012. He states that procedurally any such application can be made at any stage of the proceedings and the Court would direct a chronology of key dates so as to consider whether any period of delay can be justified or explained and, Mr Forde says, this may impact on the application for a stay.

41. It is well settled law that delay cannot of itself amount to a bar to surrender. The Respondent however says that the impact of delay in this case must be considered in the following context:-

- i. The time period that has passed since the alleged offence in 1979 up to the present time where the issuing state has made little to no effort to prosecute the Respondent with the offences
- ii. An Garda Siochana appear to have taken carriage of the investigation within the last decade, following which a file was sent to the DPP. She determined that there was insufficient evidence to prosecute Mr Donegan for any offence in this jurisdiction in 2017; and

- iii. The individual and/ or cumulative effect of the delay and/or lapse of time concerning the Respondent, his health and well being
42. The Respondent refers to *Minister for Justice v Palonka* [2022] IESC 6, and the comments of Hogan J at paragraph 3 of his judgment that ‘*a delay of 23 years between conviction and surrender is in itself inordinate and the reasons for any such delay would need to be excused*’. Whilst acknowledging that there are other factors at play here, he submits that the delay here is twice that in *Palonka* and no adequate explanation has been offered for the same.
43. The Respondent has resided in this jurisdiction openly since 1978 and has led an unremarkable family life. He is a now 67-year-old man who has recently undergone heart surgery in the Mater Hospital in Dublin. This surgery was performed in July of 2024, and he spent a number of days in hospital recovering post operation.
44. The Respondent submits that his unremarkable, indeed normal, family life has been built over the last nearly half a century on the basis that he would not face trial for a murder allegation from 1979, a matter of which he was unaware until 2017.
45. The Respondent submits that the factor of certainty in his life in this jurisdiction, developed and strengthened since 1978, is that which elevates the proposed breach of his Article 8 rights to a disproportionate level.
46. He also points to the recent significant medical issues which effect his wellbeing and says that no assurance has been provided as to the care that would be provided to him were he to be surrendered and incarcerated in the issuing state.
47. The Respondent refers to the undoubted jurisdiction of this Court to dismiss extradition proceedings as an abuse of process. The abuse complained of must be of the process of the court dealing with the application for surrender and there must be some exceptional factor to justify a refusal on such a ground – *Minister for Justice v Downey* [2019] IECA 182.
48. The Respondent submits that, though the case does not involve successive attempts at surrender for precisely the same offences, as in *Minister for Justice v Tobin (No. 2)* [2012]

4 I.R. 147 and *Minister for Justice v JAT (No 2)* [2016] IESC 17, the facts and circumstances of this case come under the wider doctrine of abuse of process. In this regard he quotes from the Judgment of Hardiman J in *Tobin (No 2)* who said that abuse of process differed from *res judicata* and was a ‘*separate but conceptually related weapon in the armoury of the courts to protect a litigant from oppression or harassment, to use two words employed in the cases*’

49. The Respondent states that here the Respondent has been the victim of an abuse of process. He so submits on the basis that the issuing state ought to have brought their application to surrender long before now where they were on notice since 2017 of the position of the DPP in this jurisdiction. In support of this submission, he further relies upon the overall delay in the prosecution of these offences, the suspicions surrounding the prosecution of these offences immediately prior to the coming into force of the Legacy Act, the decision of the DPP not to prosecute in this jurisdiction and the interference with his family rights under Article 8 of the ECHR.

APPLICANT SUBMISSIONS – ABUSE OF PROCESS

50. The Minister firstly states that there is no evidence that the Respondent received an assurance from the issuing state that he would not be prosecuted in that State and, absent the same, legitimate expectation in the legal sense cannot arise *Minister for Justice v Gorman* [2010] 3 IR 583. The Applicant in any event doubts whether any such assurance, if ever given, could have operated as giving rise to a legitimate expectation such as to operate as a bar on surrender and refers to *Minister for Justice v GAP* [2017] IEHC 563, where Donnelly J made an order for surrender in circumstances where a requested person had previously been informed he would not be prosecuted in the requesting state owing to insufficiency of evidence.

51. The Minister states that the criticism by the Respondent of the failure to seek an explanation for delay is misplaced as (a) a section 20 request may only issue if the Court is of the opinion that the documentation or information provided is insufficient to enable this court to perform its functions and (b) it is incorrect to say that there is no explanation for the passage of time or a ‘dearth of information’ in this regard. A variety of explanations are provided for the delay. In essence, evidence linking Mr Donegan to the murder of Mr Porter

did not come to light until 2012 when the Historical Enquiries Team reviewed the case and identified a fingerprint match. Thereafter, as Mr Donegan is resident in Ireland, the PSNI requested the Gardai to take over the investigation. Following the interview by Gardai of the Respondent, a file was sent to the DPP in this jurisdiction and decision taken not to prosecute. The investigation was re-opened by the PSNI and a further examination conducted of items at the scene (a cartridge case, a piece of metal and a bullet) which link these items with the Respondent through a chain of circumstances. This ultimately led to the issue of an arrest warrant in April 2024.

52. The Minister submits that contracting states to the European Convention on Human Rights have a procedural obligation pursuant to Article 3 thereof to investigate the killings of individuals, including those allegedly done by non-state actors. In serious cases and in armed conflict, investigations should not be time barred owing to statutory time limits and the granting of an amnesty or pardon is not permitted. The Minister refers to *Brecknell v United Kingdom* [2008] 46 EHRR 46 where the European Court of Human Rights recognised that an investigation could end without concrete results but, sometime later, information casting new light on the circumstances surrounding the death might emerge. The Court there rejected the contention that no new investigative obligation arose at that stage commenting at paragraph 68 that *'there is little ground to be overly prescriptive as regards the possibility of an obligation to investigate unlawful killings many years after the events since the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised'*
53. Far from amounting to an abuse of process, the Minister submits that the request for surrender of the Respondent for the purpose of prosecution is a legitimate attempt by the United Kingdom to discharge its obligations under Article 2 of the ECHR.
54. The Minister submits that it is well established that, save for exceptional circumstances, where issues in relation to the fairness of a prosecution arise owing to the passage of time since the alleged offence, the appropriate forum in which to ventilate such arguments is in the courts of the issuing State: - *Minister for Justice v Stapleton* [2008] 1 IR 609. The Applicant submits that it is clear from the Opinion filed on behalf of the Respondent from Mr Michael Forde that, if surrendered to Northern Ireland, he will have access to an established legal procedure wherein he can ventilate any such concerns. Similarly, any

concerns that Mr Donegan has arising from his exclusion from the so called ‘on the run’ scheme can be considered in proceedings in the issuing state. It is therefore submitted that any objection to surrender on delay grounds is unsustainable.

55. Insofar as the Respondent complains about differential treatment in his prosecution vis a vis others in a similar position who were not prosecuted prior to the coming into force of the Legacy Act, the Minister says that in the absence of any evidence suggesting that the decision to prosecute the Respondent was unlawful or *mala fides* (and no suggestion of unlawfulness is made in the Opinion of Mr Forde), the fact that the Act came into force a number of days after his prosecution, and thereby granted immunity to those not yet prosecuted, is not an abuse of process. Even if it was capable of being an abuse of process, it is an abuse of the process of the Northern Irish Courts and not these courts.

56. Regarding his personal circumstances, the Minister says that the Respondent has not advanced any grounds to support a concern that an adequate level of healthcare and treatment might not be available to him if surrendered and imprisoned in Northern Ireland. He submits that there is nothing in the evidence to sustain this objection and meet the high threshold for surrender to be refused on Article 8 grounds – see *Minister for Justice v Ostrowski* [2012] IESC 57 and *Minister for Justice v Vestartas* [2020] IESC 12.

DISCUSSION- ABUSE OF PROCESS

57. The principles that apply to abuse of process cases in the area of Extradition have been considered in a considerable number of decisions of the Superior Courts.

58. In her Judgment in *Minister for Justice and Equality v. J.A.T. No.2* [2016] IESC 17, a case that involved the issuing of two EAWs, Denham C.J. addressed abuse of process as follows:

’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 should 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 of June 2004, Keane C.J..

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.

76. 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 EAW's 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."*

59. Having set out these factors, Denham C.J. concluded:-

“ 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 surrender of the appellant.”

60. It is furthermore clear that an abuse of process may arise without bad faith as stated by Hunt J. in *Minister for Justice v. Bailey* [2017] IEHC 482:

*“ Abuse of process can arise without any institution acting in bad faith. It may be caused, as it was in this case, by the cumulative effect of the circumstances of the case rendering an abuse of process on the individual concerned. These principles are all expressed in the judgment of Denham C.J. in Tobin (No. 2). ‘Abuse of process’ is described in the same case by Hardiman J. in characteristically vivid and eloquent terms. I can do no better than borrow his words. He described it at para. [313] as:-
“a many headed concept whose manifestations range from the deliberate maintenance of legal proceeding without probable cause... to a ham fisted or unthought out conduct of litigation, particularly by making two or more actions where one would do, which tends to oppress the other party and to cause him expense and/or distress.”*

61. In *Minister for Justice v Downey* [2019] IECA 182 Peart J. emphasised the exceptional nature of the jurisdiction in this regard stating

“[19.] It is clear from J.A.T (No. 2) that there can be circumstances which justify the High Court refusing an application for surrender on the basis of abuse of process. But it is equally clear firstly that such cases require some exceptional circumstance to justify such refusal, but, and critically, that the abuse asserted to exist must be of the processes of the High Court here dealing with the application for surrender, and therefore must relate to the application for surrender itself, and not to the prosecution of the offences which the respondent will face if he/she is surrendered. The different question whether there might be an abuse of process were the respondent put on trial for the offences for which surrender is sought is not a matter for determination in this jurisdiction on an application for surrender. Absent any suggestion that there is no possibility of a fair hearing of any application to have

his trial on these offences stayed, and there has been no such suggestion made by the appellant, it is in my view clear that any such question of abuse of process will be a matter to be pursued by the appellant before the courts in the requesting jurisdiction.

62. In *Minister for Justice and Equality v. Campbell* [2020] IEHC 344, Donnelly J conducted a comprehensive review of the law on abuse of process insofar as it might apply to extradition and surrender cases. In *Minister for Justice v Angel* [2020] IEHC 699 Burns J helpfully summarised the principles as set out by Donnelly J in *Campbell* as follows:-

- (a) there is no bar to bring a fresh application to the Court for surrender*
- (b) there can be circumstances which justify or require the High Court refusing an application for surrender on the basis of abuse of process;*
- (c) a finding of an abuse of process should not be made lightly*
- (d) it is only where the case has exceptional circumstances that an abuse of process will be found (although exceptionality is not the test) and that the abuse of process is that of the High Court in this jurisdiction rather than a concern about an abuse of process to put the requested person on trial;*
- (e) there is broad public interest in bringing things to finality in one set of proceedings;*
- (f) there is a strong public interest in Ireland complying with its international obligations and surrendering individual in accordance with the relevant extradition provisions;*
- (g) a repeat application for surrender is not per se abusive of process. It would only be an abuse of process where to do so is unconscionable in all the circumstances;*
- (h) mala fides or an improper motive is not a necessary precondition for an abuse of process; and*
- (i) the Court should look to the cumulative factors which may make an application for surrender oppressive or unconscionable ‘*

63. The Respondent submits that, looking cumulatively at the circumstances in this case, the surrender of the Respondent would amount to an abuse of the process of this Court. It is therefore firstly necessarily to consider the individual factors referred to by the Respondent in this regard and then consider whether, taken cumulatively, they amount to an abuse of the process of this court.

Decision of DPP not to Prosecute

64. Article 601(c) of the Trade and Co-Operation Agreement provides that the execution of a TCAW may be refused ‘ *if the judicial authorities of the executing state have decided either not to prosecute for the offence on which the arrest is based or to halt proceedings.....* ’. Ireland initially availed of this optional ground for refusal under the Framework Decision by Section 42 (c) of the 2003 Act but this optional ground for refusal was removed by Section 83 of the *Criminal Justice (Terrorist Offences) Act, 2005* (and this removal continued following further amendment by Section 27 of the *EAW (Amendment) Act, 2024*).
65. The fact therefore that the DPP decided in 2017 not to prosecute Mr Donegan for these offences in this jurisdiction is not, of itself, a ground for refusal.
66. Furthermore, for the sake of completeness and even though this did not appear to be pursued at the hearing, there is no evidence that the Respondent was ever given any assurance that he would not be prosecuted in relation to these offences, either in the issuing state or elsewhere.
67. The Respondent further submits that one of the cumulative factors to be considered in considering the abuse of process alleged is the institution of proceedings against the Respondent in the issuing state and a TCAW seeking his surrender just 4 days before the coming into effect of the Legacy Act.
68. The Respondent has adduced no evidence of mala fides or bad faith on the part of the issuing state in the issuance of this TCAW. The question of whether the prosecution of this Respondent at this point in time is unfair or motivated by some unlawful purpose is a matter which is more properly considered in the issuing state – *Minister for Justice v Stapleton*.

Delay

69. In this case, the Respondent submits that due to the passage of time (a) there is a risk that he will not receive a fair trial and (b) there has been a disproportionate interference with his family rights under Article 8 of the ECHR.

Fair Trial & Delay

70. It is not correct to say that there has been no explanation for the passage of time in the prosecution of this Respondent for these offences. From the TCAW and the Additional Information, the following is known:

- (a) The fingerprint evidence linking Mr Donegan to these offences was not discovered until 2012 when this case was reviewed by the Historical Enquiries Team;
- (b) The PSNI thereafter asked An Garda Síochána to take over the investigation as the Respondent resided in this jurisdiction;
- (c) The Gardai arrested and interviewed the Respondent in 2017, a file was sent to the DPP and she decided not to prosecute
- (d) The PSNI thereafter re-opened the investigation. Further examinations of items recovered at the scene were carried out and the results of the same alleged connect the Respondent to these items circumstantially.
- (e) An arrest warrant was issued on 26th April 2024

71. As already noted, delay is in itself not a standalone ground for refusal of surrender. The issue in this regard is whether, owing to the passage of time, there is a real risk that, if surrendered to Northern Ireland, the Respondent might not now obtain a fair trial.

72. Although, as made clear by the CJEU in the *Alchaster* case (Case C-202/24, *Alchaster* [2024]), the principles of mutual trust and confidence do not apply to TCAWs received from the United Kingdom, this Court should consider fundamental rights objections such as this cognisant of the fact that Ireland has entered into extradition arrangements with the United Kingdom pursuant to the Trade and Co-Operation Agreement and that the United

Kingdom is a party to the European Convention on Human Rights. As indicated in the decision of this Court in *Minister for Justice v McAuley* [2025] IEHC 28;

‘ 7.2 There is no dispute between the parties that, following the decision of the CJEU in Alchaster, as a matter of law the presumption of mutual trust and confidence which underlies the operation of the Framework Decision cannot apply where, as here, the Court is considering fundamental rights objections to surrender to the United Kingdom on foot of a TCAW. The Court agrees that the presumption of mutual trust and confidence has no application in this case.

7.3 For reasons elaborated upon below, I am satisfied that the correct position is that a weaker presumption applies where the Court is considering objections to surrender to the United Kingdom on foot of a TCAW. Consistent with the general approach by the Irish Courts to extradition applications from other third countries (countries that are not within the Framework Decision), as modified to take into account comments of the CJEU in Alchaster as to the significance of a history of compliance by the United Kingdom with international human rights treaties including the European Convention on Human Rights, this weaker presumption is one of good faith and compliance on the part of the UK with the fundamental rights of the Respondent if surrendered in particular those set out in the ECHR.

73. The Minister has correctly submitted that, save for exceptional circumstances, where issues in relation to the fairness of a prosecution arise owing to the passage of time since the alleged offence, the appropriate forum in which to ventilate such arguments is the courts of the issuing State: - *Minister for Justice v Stapleton* [2008] 1 IR 609. It is clear from the Opinion filed on behalf of the Respondent from Mr Michael Forde that, if surrendered to Northern Ireland, he will have access to an established legal procedure wherein he can ventilate any such concerns. Similarly, any concerns that Mr Donegan has arising from his exclusion from the so called ‘on the run’ can also be considered in proceedings in the issuing state.
74. The Respondent has not adduced any evidence in support of the contention that, owing to the passage of time, there is a risk that he will not now obtain a fair trial in the issuing state. There is a presumption that the issuing state will act in good faith and in compliance with its obligations under the ECHR, including its obligation to vindicate the right of the

Respondent to a fair trial under Article 8. No evidence has been adduced to suggest that the issuing state will not comply with this obligation. On the contrary the evidence adduced on behalf of the Respondent points to various legal procedures which would be available to the Respondent in the issuing state through which he could litigate any concerns he might have in this regard. I therefore conclude that any objection to surrender on the basis that, owing to the passage of time, he will not obtain a fair trial is unsustainable.

Article 8 Family Rights

75. There is a line of authority from the Irish Courts, including *Minister for Justice v Ostrowski* [2012] IESC 57, *Minister for Justice v Verstaras* [2020] IESC 12 and *Minister for Justice v D.E* [2021] IECA 188, which has established that to be successful in cases such as the present, where a family/ private rights objection is raised in opposition to surrender, the circumstances must be truly exceptional. There must, when considering such objections, be cogent evidence to show the circumstance to be well outside the norm, that is truly exceptional and, in the words of Section 37 of the 2003 Act they must be such as to render surrender incompatible with the States obligations under Article 8 of Convention.
76. Where, as here, a complaint of delay is married to an objection under Article 8 of the Convention, the jurisprudence is clear that delay per se is never sufficient to justify a refusal to surrender. Truly exceptional circumstances must exist before surrender could amount to a breach of Article 8 rights but delay may be of relevance in this regard as, in the words of Charleton J in *Minister for Justice v Palonka* [2022] IESC 6 '*delay may enable the growth of circumstances where a new situation has emerged that engages Article 8 of the European Convention in a genuinely exceptional way as set in the context of the individual procedural circumstances of the case*'.
77. A legitimate aim is being pursued by the issuing judicial authority in seeking the surrender of Mr Donegan to stand trial for these serious offences. There is clear public interest in this state making an order for surrender in compliance with its obligations under the Trade and Co-Operation Agreement. As emphasised by Owens J in *Minister for Justice v T.N* [2019] IEHC 674, delay in itself is not a stand-alone ground on which surrender should be refused and furthermore a respondent can have no legitimate expectation that he can avoid

surrender under extradition or EAW arrangements because of passage of time arising from lack of resources or from the inefficiency of those who should be pursuing the matter.

78. From the case law of the Irish Courts on this question, the following are the principles of particular significance to the objection made pursuant to Article 8 of the Convention in a case such as the present:-

- i. There is a strong public interest in the surrender of persons accused or convicted of criminal offences to countries with which this State has extradition or surrender agreements;
- ii. Delay in itself cannot ever operate as a bar to surrender. A person can have no legitimate expectation that he or she will avoid surrender under extradition or surrender arrangements because of the passage of time arising from a lack of resources or inefficiency on the part of the requesting state;
- iii. Disruption, indeed significant disruption, of family and private life is the norm where surrender is ordered and this cannot ordinarily justify a refusal to surrender on foot of an otherwise lawful request;
- iv. Where the evidence shows a real, exceptional and oppressive disruption to family life in the most extreme and exceptional circumstances, delay may have led or contributed to the growth of circumstances where a new situation has emerged that engages Article 8 of the European Convention.
- v. The ultimate question in a case such as this is whether this is one of those truly exceptional cases (though of course exceptionality is not the test) where, due to the emergence of particular family or personal circumstances in the time since the alleged offences, Article 8 of the Convention is engaged and it would be disproportionate to order surrender in the particular circumstances.

79. The surrender of the Respondent will undoubtedly result in disruption of his family life, namely the life he has enjoyed with his family in Ireland for the last 40 years. He is also a man who has had health difficulties in the recent past which have resulted in heart surgery in the summer of 2024.

80. His surrender is sought to stand trial for the most serious offences. No evidence has been put before the Court to suggest that the United Kingdom will not, consistent with its

obligations under the ECHR, provide sufficient medical care and attention to the Respondent if he is detained pending trial and / or following conviction.

81. The potential disruption to the private and family life of the Respondent, resulting from surrender, is nowhere close to the kind of gross disruption such as to engage Article 8 of the Convention. Given the circumstances of this case and the seriousness of the offences for which surrender is sought, this is not a case where it could be said that his extradition to stand trial would constitute an unwarranted and unlawful interference with family rights such as to warrant a refusal to surrender.

DECISION – ABUSE OF PROCESS

82. Although many of the cases where abuse of process has been successfully invoked in opposition to surrender are ones where there have been previous unsuccessful extradition applications, the abuse of process jurisdiction is not confined to cases involving repeat applications. Refusal of an otherwise lawful request for surrender from a State with which Ireland has extradition / surrender arrangements, on the grounds of abuse of process, should not however be lightly made. It is only in exceptional circumstances that the Court will exercise this jurisdiction and only where the surrender application is an abuse of the process of this Court. The court can look at all factors in considering whether cumulatively they make an application for surrender oppressive or unconscionable.

83. The Respondent is sought to stand trial for the most serious offences on foot of a TCAW lawfully issued by the Requesting State. This is the first surrender request from the issuing state seeking his surrender for prosecution. There has been an explanation for the circumstances in which, many years after these offences, the Respondent came to be nominated as a suspect, the Gardai and DPP in this jurisdiction investigated and considered the matter, the PSNI thereafter conducted further examinations and finally a TCAW was issued. There is no evidence of any *mala fides* or improper motive on the part of the issuing state in seeking the surrender of the Respondent. There is no evidence to suggest that he will not obtain a fair trial if surrendered.

84. Having considered and rejected each of the individual complaints made, which are said to amount alone or cumulatively to an abuse of process, I also conclude that looking at them

collectively, this is not a case where there are grounds for this Court to exercise this exceptional jurisdiction. Looking at all of the circumstances the application for surrender is not unconscionable or oppressive.

CONCLUSION

85. For the above reasons I have rejected the grounds of objection made by the Respondent and I therefore propose to make an order for his surrender pursuant to s16 of the 2003 Act.