

THE HIGH COURT

[2020] IEHC 528

RECORD NUMBER 2019/377 EXT

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

IAN BAILEY

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 12th day of October, 2020

1. By this application the applicant seeks an order for the surrender of the respondent to the French Republic ("France") pursuant to a European arrest warrant dated 21st June, 2019 ("the EAW"). The EAW was issued by Vincent Feron, deputy prosecutor of the Office of the Attorney General before the Appeal Court of Paris, as the issuing authority. The EAW seeks the surrender of the respondent to serve a sentence of 25 years' detention imposed by the High Court of Paris on 31st May, 2019, for the murder of Sophie Toscan du Plantier (née Bouniol) at Schull, County Cork, Ireland, in 1996. The EAW is based on a French domestic arrest warrant issued by the High Court of Paris on 31st May, 2019.
2. The EAW was endorsed by the High Court on 16th December, 2019, was executed by An Garda Síochána and the respondent was admitted to bail on the same day.
3. I am satisfied that the person before the Court is the person in respect of whom the EAW was issued. No issue was raised in this respect.
4. I am satisfied that the minimum gravity requirements of the European Arrest Warrant Act 2003, as amended ("the Act of 2003"), have been met. The respondent is sought to serve a sentence of 25 years' detention, all of which remains to be served.
5. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the Act of 2003 arise and that the surrender of the respondent is not prohibited for the reasons set forth therein.
6. At part (e) of the EAW, the issuing authority has certified that the offence in question carries a maximum penalty of at least 3 years' detention in France and has ticked the relevant box for "murder, grievous bodily injury" to indicate that the offence is one to which article 2(2) of the Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, as amended ("the Framework Decision"), applies so that, by virtue of s. 38 of the Act of 2003, it is not necessary for the applicant to establish correspondence between the offence referred to in the EAW and an offence under the law of Ireland. No issue was taken in respect of this certification and in any event, I am satisfied that, if necessary, correspondence could be established with the Irish offence of murder.
7. The respondent was tried, convicted and sentenced in his absence. Section 45 of the Act of 2003 provides:-

"A person shall not be surrendered under this Act if he or she did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the European arrest warrant was issued, unless the European arrest warrant indicates the matters required by points 2, 3 and 4 of point (d) of the form of warrant in the Annex to the Framework Decision as amended by Council Framework Decision 2009/299/JHA, as set out in the table to this section."

The relevant table has been replicated at part (d) of the EAW and has been completed by the issuing authority by ticking box 2 thereof:-

"2: No, the person did not appear in person at the trial resulting in the decision."

The issuing authority went on to tick box 3.4:-

"3.4 The person was not personally served with the decision, but

the person will be personally served with this decision without delay after the surrender, and

when served with the decision, the person will be expressly informed of his or her right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined and which may lead to the original decision being reversed, and

the person will be informed of the timeframe within which he or she has to request a retrial or appeal which will be 10 days

within one month since the date of his arrest or of his constitution as a prisoner, the convicted accused may, however, can consent to the judgement of the High Court and we, in the presence of his lawyer, the new review of his case. The waiver shall be confirmed by the president of the High Court, where appropriate in accordance with the procedure provided by article 706 – 71. The appeals time limitation or last appeal run from the notification to the public prosecutor or the notification to the parties of the recognition of this waiver."

8. I am satisfied that the requirements of s. 45 of the Act of 2003 have been met and that the surrender of the respondent is not prohibited thereunder. No issue was taken in this regard.
9. The respondent delivered points of objection dated 20th January, 2020 which may be summarised as follows:-
 - (a) *surrender is precluded by virtue of the provisions of s. 44 of the Act of 2003;*
 - (b) *surrender is precluded as the issue of the respondent's surrender to France has already been determined in favour of the respondent by the Irish courts in such a way as to amount to an estoppel or accrued right on the part of the respondent;*

- (c) *surrender is precluded as the application herein amounts to an abuse of process;*
 - (d) *surrender is precluded by virtue of the provisions of s. 37 of the Act of 2003 as it would be in breach of the State's obligations under the European Convention on Human Rights ("the ECHR") and/or the Constitution, in particular the respondent's fair trial rights and right to a private/family life; and*
 - (e) *surrender would be contrary to the provisions of the Act of 2003 because the EAW was not validly issued, as the "Attorney General before the High Court in Paris" was not a proper or lawful issuing judicial authority. At hearing, the Court was informed that this objection was not being pursued.*
10. At hearing, there was considerable overlap between the points of objection as argued.
 11. The respondent swore an affidavit dated 10th February, 2020 and his solicitor, Mr. Frank Buttimer, swore three affidavits dated 18th February, 2020, 14th July, 2020 and 16th July, 2020, respectively. The respondent relied upon a "statement of French law" furnished by Ms. Marie d'Harcourt.
 12. The background history to this application is long and complex. On the night of 22nd–23rd December, 1996, Mme. Sophie Toscan du Plantier, a French citizen, was brutally killed at her home in Schull, Co. Cork, Ireland. The killing was investigated by An Garda Síochána and the respondent, a United Kingdom ("the UK") national, who was a neighbour of Mme. Toscan du Plantier, became a suspect. A file was sent by An Garda Síochána to the Director of Public Prosecutions ("the DPP") who decided that there should be no prosecution against the respondent for any charge in relation to the killing and accordingly, no prosecution was brought in Ireland against the respondent. The file was reviewed on a number of occasions and the decision not to prosecute was confirmed. The respondent's solicitor was informed of this by letter dated 5th July, 2010. The investigation carried out by An Garda Síochána and the behaviour of some members of An Garda Síochána associated with the investigation has been the subject of criticism and adverse comment in a number of quarters, but it should be noted that there has never been any official finding of wrongdoing on the part of any member of An Garda Síochána in respect of this matter.
 13. This is the third European arrest warrant issued by France seeking the surrender of the respondent. The first European arrest warrant was issued by France on 19th February, 2010 and sought the surrender of the respondent in respect of the murder of Mme. Toscan du Plantier. On foot of that warrant, the High Court ordered the surrender of the respondent but this was overturned on appeal on 1st March, 2012 by the Supreme Court in *Minister for Justice and Equality v. Bailey* [2012] IESC 16; [2012] 4 IR 1 ("*Bailey No. 1*") which refused to order surrender on the grounds that there had been no decision at that stage to try the respondent, and also that s. 44 of the Act of 2003 precluded his surrender.

14. The second European arrest warrant was issued by France on 3rd August, 2016 and sought the surrender of the respondent for the purpose of prosecuting him for the murder of Mme. Toscan du Plantier. On 24th July, 2017, the High Court refused to order the surrender of the respondent in *Minister for Justice and Equality v. Bailey* [2017] IEHC 482 ("*Bailey No. 2*") on foot of the said warrant on a number of grounds, including that the application was an abuse of process.
15. Subsequent to the refusal of surrender on foot of the second warrant, the French authorities initiated a prosecution of the respondent in France for the murder of Mme. Toscan du Plantier. The respondent was not present or represented at the trial in France which resulted in his conviction for murder and the imposition of a sentence of 25 years' detention on 31st May, 2019. The extraterritorial jurisdiction for murder under Irish law was extended by the Criminal Law (Extraterritorial Jurisdiction) Act, 2019 ("the Act of 2019") which came into operation on 29th April, 2019. The third and current EAW before this Court was issued on 21st June, 2019 and seeks the surrender of the respondent in order that he should serve the said sentence, subject to a right of appeal or retrial as indicated at part (d) of the EAW.
16. It must be emphasised that the guilt or innocence of the respondent in respect of the murder of Mme. Toscan du Plantier is not an issue in these proceedings, which are concerned solely with the issue of whether the applicant is entitled to an order for the surrender of the respondent to France on foot of the EAW before the Court. I turn now to consider the points of objection to surrender raised by the respondent.
17. In both *Bailey No. 1* and *Bailey No. 2*, the courts proceeded on the basis that the extraterritorial jurisdiction relied upon by France was based on the fact that the victim, Mme. Toscan du Plantier, was a French citizen. Similarly, the description of the offence in the current EAW, at p. 5 thereof, expressly refers to the fact that Mme. Toscan du Plantier was a French citizen. It was not suggested to this Court that there could be any other basis for the exercise of extraterritorial jurisdiction by France.

I. Section 44 of the Act of 2003

18. It is submitted on behalf of the respondent that surrender is prohibited by virtue of s. 44 of the Act of 2003 which provides as follows:-

"A person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State."

19. The applicant submitted that in *Bailey No. 1*, the Supreme Court held that the surrender of the respondent to France in respect of the offence in question was prohibited under s. 44 of the Act of 2003 by virtue of the limited extraterritorial jurisdiction exercised by Ireland at that time in respect of murder, and in particular that such jurisdiction was

limited to circumstances where the alleged perpetrator was an Irish citizen. It was submitted that such prohibition no longer applies as the basis upon which Ireland exercises extraterritorial jurisdiction in respect of the offence of murder has been amended by s. 3(5) of the Act of 2019, so that Ireland will seek to prosecute an offence of murder committed outside of Ireland where the alleged perpetrator is an Irish citizen or is ordinarily resident in Ireland. The applicant submitted that as the respondent is ordinarily resident in Ireland, the State could prosecute him for the offence of murder committed outside of Ireland, and in such circumstances, s. 44 of the Act 2003 no longer prohibits his surrender.

20. The respondent submitted that on a proper interpretation of s. 44 of the Act of 2003 and applying the principle of reciprocity of jurisdictional bases required therein, the fact that Ireland will now prosecute persons ordinarily resident in Ireland in respect of murders committed outside of Ireland makes no difference, as the requisite reciprocity has still not been established. France bases its extraterritorial jurisdiction on the nationality of the victim, while Ireland bases its extraterritorial jurisdiction on the nationality or ordinary residence of the alleged perpetrator. Thus, even if at the time of the hearing in *Bailey No. 1*, Ireland had asserted jurisdiction to prosecute persons ordinarily resident in Ireland in respect of a murder committed abroad, the decision in *Bailey No. 1* would not be any different, as the requisite reciprocity did not exist.
21. This aspect of matters was not dealt with in the respondent's written submissions and at hearing, counsel for the respondent stated that he struggled to find the precise *ratio decidendi* of the Supreme Court decision in *Bailey No. 1*, as per day 1, p. 76, line 22 of the transcript. Equally, counsel for the applicant stated frankly that he was not 100% sure of the ratio and that he could not discern a clear test from *Bailey No. 1*, as per day 2, p. 143, line 23 *et seq.* of the transcript. It is because of this apparent uncertainty that it is necessary to closely scrutinise each of the judgments in *Bailey No. 1*, particularly as regards the requirement of reciprocity. In *Bailey No. 1*, the Supreme Court was unanimous in refusing surrender on the ground of a failure to establish that surrender was sought for trial as opposed to investigation, however O'Donnell J. dissented from the majority view that the reciprocity requirement in s. 44 of the Act of 2003 also precluded surrender.
22. The wording of s. 44 was the subject of adverse judicial comment in *Bailey No. 1* where Hardiman J. stated:-

"[318] The wording of the Irish statute (I say nothing about the Framework Decision) is a little difficult to understand because of the use of too many words and their deployment in a peculiar and rather unnatural order."

O'Donnell J. stated:-

"[503] The task of interpretation, whether general or specific, is however particularly difficult in this case. The language of s. 44 of the Act of 2003 is somewhat opaque,

and there is little by way of preparatory documents, or authoritative commentary, which can illuminate these provisions."

23. Despite such commentary, the wording of s. 44 of the Act of 2003 has not been amended and remains in its initial, unsatisfactory form.

24. Section 44 of the Act of 2003 is intended to give statutory effect to article 4.7(b) of the Framework Decision which states:-

"The executing authority may refuse to execute the European arrest warrant:

where the European arrest warrant relates to offences which:

have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory."

25. Under article 4.7(a), an option was given for the executing authority to refuse execution of the warrant where the offences in the warrant related to offences committed in the territory of the executing member state. Ireland did not incorporate that option into the Act of 2003 and so the fact that the offence referred to in the EAW was committed in Ireland is not, in itself, a bar to surrender.

26. It is clear that s. 44 of the Act of 2003 incorporates a two-part test, or requires two conditions to be met before surrender is precluded under the section. As Denham C.J. outlined in *Bailey No. 1*:-

"[23] The first of these conditions is that the offence was committed or alleged to have been committed in a place other than the issuing state. In this case the offence of murder of Mme. Toscan du Plantier took place in Ireland and thus outside the issuing state, which is France. Therefore, the first condition is met."

27. That is a relatively straightforward condition and it did not give rise to any difficulty in its interpretation. However, difficulties appear to have arisen in *Bailey No. 1* as to the second condition, and in particular what precisely is meant by the phrase in s. 44 of the Act of 2003:-

"... the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State".

28. Denham C.J. considered that the meaning of that phrase was better understood if the wording thereof was re-ordered, stating:-

"[24] ... It is helpful to read the third phrase before the second, in construing the meaning of the section. This would thus be:-

'and the act or omission of which the offence consists does not constitute an offence under the law of the State, by virtue of having been committed in a place other than the State'.

These are clear words and so may be considered and applied literally. The section prohibits the surrender of a person where the act of which the offence consists does not constitute an offence in Ireland by virtue of having been committed, i.e. because it was committed, in a place other than Ireland."

29. Further on in her judgment, Denham C.J. turned to the question of reciprocity and explained:-

"[38] Whether one classifies it as an option as to extraterritoriality or reciprocity, art. 4.7(b) of Council Framework Decision of the 13th June, 2002, makes provision for an exception to the requirement of surrender which is a fundamental principle of the Framework Decision.

[39] Article 4.7 has been described as an example of the principle of reciprocity in the Framework Decision. As stated in 'Handbook on the European Arrest Warrant', Blextoon and Van Ballegooij (T.M.C. Aser Press, 2005) in chapter 6, 'The Principle of Reciprocity', by Harman Van Der Wilt at p.74:-

'Only one provision in the Framework decision alludes to the principle of reciprocity. According to Article 4, section 7 sub. (2), the executing judicial authority is allowed to refuse the execution of a European Arrest Warrant, whenever such a warrant envisages offences which have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside the territory of the executing Member State. In the corresponding situation the executing state would simply not be able to issue an arrest warrant due to lack of jurisdiction. The provision restores the equilibrium by offering this state the possibility to restrict the scope of its performances to its own expectations in similar circumstances. This section mirrors Article 7, section 2 of the European Convention on Extradition."

30. Denham C.J. proceeded to consider the law in Ireland on extraterritoriality and the offence of murder as set out in s. 9 of the Offences against the Person Act 1861, as adapted by the Offences Against the Person Act, 1861 (section 9) Adaptation Order 1973, and concluded that there was no jurisdiction in Ireland to prosecute for an offence of murder committed outside the area of the application of the laws of the State unless, as outlined at para. 42 of her judgment, an ingredient in that crime is that the alleged offender was an Irish citizen. She noted that s. 44 of the Act of 2003 represented the adaptation into Irish law of article 4.7(b) of the Framework Decision, which itself had roots in article 7 of the European Convention on Extradition, 1957. She went on to outline:-

"[44] Today in Europe, pursuant to the Framework Decision, there is a new system, a system of surrender of persons between judicial authorities, based on mutual trust and confidence. However, s. 44 of the Act of 2003 and art. 4.7(b) of the Framework Decision, have roots in the system of reciprocity that existed under the earlier regime and this informs the construction of s. 44 of the Act of 2003."

31. Having noted the historical context, Denham C.J. went on to state:-

"[45] I construe s. 44 of the Act of 2003 as enabling Ireland to surrender a person in respect of an offence alleged to have been committed outside the territory of the issuing state in circumstances where the Irish State would exercise extraterritorial jurisdiction in reciprocal circumstances. Ireland would not have jurisdiction to surrender to France a citizen of the United Kingdom for a murder committed in France. Applying s. 44, and the principles upon which it was founded, the appellant has established grounds to succeed on the first legal issue. The reciprocity that is required in construing s. 44 is a factual reciprocity concerning the circumstances of the offences. Offences that take place outside of the territory of a state require specification of the circumstances when that state will exercise jurisdiction. The reciprocity in this case requires Ireland to examine its law as if the circumstances of the offence were reversed. Here the circumstances are that a non-citizen of either the issuing or executing state is sought by the issuing state in respect of a murder of one of its citizens which took place outside the issuing state. The court then must determine under Irish law if Ireland could request the surrender of a non-citizen of either Ireland or the executing state in respect of a murder of one of its citizens which took place outside Ireland. Ireland does not have jurisdiction to seek the surrender of a British citizen from France in respect of a murder of a person of any citizenship and which took place outside of Ireland. Thus, I would allow the appeal on this first issue."

32. Denham C.J. thus applied a test of reciprocity, requiring that "the Irish State would exercise extraterritorial jurisdiction in reciprocal circumstances".

33. Murray J., as he then was, stated that he agreed with the conclusions of Fennelly J. in relation to the meaning and import of s. 44 of the Act of 2003, and that he also agreed with Denham C.J. in relation to her decision that s. 44 constituted a bar to the surrender of the respondent.

34. Hardiman J. cited with approval an extract from Farrell and Hanrahan, *The European arrest warrant in Ireland*, 2nd Ed., (Dublin, 2000) ("Farrell and Hanrahan"), outlining:-

"[348] ... I wish to express my entire agreement with what is said at para. 12–21, p. 184 about s. 44 in its application to a case like this:-

'Where it is clear that the offence in the warrant is an extraterritorial offence, the court must consider whether the offence would be amenable to prosecution on an extraterritorial basis in this jurisdiction. This, clearly,

amounts to the court engaging in a hypothetical test whereby it essentially substitutes the State for the position of the requesting State in relation to the offence described in the warrant (emphasis added).'

[349] *I do not easily yield to the proposition that the section enjoins a hypothetical test on the court. But having considered the section at considerable length, I believe it is open to no other interpretation. The authors continue at paras. 12–21, p. 184:-*

'Presumably where the place of commission of the offence is Ireland the court must essentially ignore this fact and assume for the sake of the exercise that the place of the offence is another State. It is less clear what the position is where the requesting State has asserted extraterritorial jurisdiction on a particular basis ... Is the court restricted to considering whether the State would exercise extraterritorial jurisdiction on the same basis or can it consider whether extraterritorial jurisdiction might be exercised on an alternative basis? The Act provides little assistance in this regard. However, the underlying principle of reciprocity would seem to predicate in favour of the court being restricted to considering whether extraterritorial jurisdiction could be exercised in theory on a similar basis as opposed to on some other ground.'

35. While agreeing with Fennelly J.'s treatment of the historical origins of the principle of reciprocity, Hardiman J. stated:-

"[350] ... I would indeed go further than Fennelly J. felt able to go at an earlier point in his judgment: I do consider it clear that the principle of reciprocity underlines the extradition of suspects accused of committing extraterritorial offences. It is unnecessary to consider the need for reciprocity in other circumstances.

[351] *In considering s.44 of the Act of 2003 it is necessary to bear in mind the contents of the provision of the Framework Decision which it was endeavouring to implement. This permitted a judicial authority to refuse to execute a warrant if (art. 4.7(b)) the warrant related to offences which:-*

'have been committed outside the territory of the issuing Member State [France] and the law of the executing Member State [Ireland] does not allow prosecution for the same offences when committed outside its territory' (emphasis added).

[352] *This plainly raises the legal status in Irish law of offences committed outside Irish territory. But the offence here was in fact committed within Irish territory, so the exercise required by the Framework Decision, and by s. 44 of the Act of 2003, is necessarily a hypothetical one. To those who consider this over elaborate and unduly removed from the facts of the present case, I can only say that I do not disagree, but that the exercise required to be carried out is that enjoined by the*

statute and the Framework Decision, and there is nothing the court can do about that."

36. Hardiman J. indicated that he was fortified in those conclusions by an extract from Blextoon and Van Ballegooij, *Handbook on the European Arrest Warrant*, 1st Ed., (2005), the same extract cited by Denham C.J., and went on to hold:-

"[354] Having regard to the total difference between the manner in which Ireland and France exercise extraterritorial jurisdiction over a non-national in relation to a murder committed outside their respective territories, I agree with the Chief Justice that there is no reciprocity between Ireland and France on the facts of this case.

[355] I wish to emphasise my agreement with the contents of the judgment of Fennelly J., commencing with the assertion that 'a sensible and fair interpretation of art. 4.7(b) demands the recognition of a principle of reciprocity'. Viewed in that light, I agree that the second phrase of s. 44 of the Act of 2003 can only refer to a corresponding but (for that very reason) hypothetical offence of murder committed outside Ireland. I also agree that the issue is whether the crime of murder generally, when committed outside Ireland would 'constitute an offence under the law of the State' (s. 44 of the Act of 2003).

[356] Viewed in that light, I agree with the conclusion of Fennelly J. that it is quite possible to interpret s. 44 of the Act of 2003 in conformity with art. 4.7(b) of the Framework Decision.

[357] The crime here was committed not only outside France, but in Ireland.

[358] If the positions were reversed, a murder outside Ireland is not a crime in Irish law, unless committed by an Irish citizen.

[359] The appellant is not an Irish citizen (and, in any event, the Director of Public Prosecutions has determined there is no case against him).

[360] Section 44 of the Act of 2003 operates to preclude his forcible delivery to France because Irish law does not confer a power to prosecute on the same basis as France: there is an absence of reciprocity."

37. It is clear from the above, particularly at para. 360 of his judgment, that Hardiman J. considered s. 44 as incorporating reciprocity as a precondition to surrender and that the necessary reciprocity is the exercise of extraterritorial jurisdiction on the same basis rather than an extraterritorial jurisdiction exercised on an alternative basis. Moreover, he cited with approval an extract from Farrell and Hanrahan's textbook, quoted above, which stated that:-

"[349] ... the underlying principle of reciprocity would seem to predicate in favour of the court being restricted to considering whether extraterritorial jurisdiction could be exercised in theory on a similar basis as opposed to on some other ground."

If that is the case, then the lack of reciprocity would stem from the fact that, unlike France, Ireland did not exercise an extraterritorial jurisdiction in respect of murder based on the nationality of the deceased. While Hardiman J., at paras. 358-359, appears to lay emphasis on the fact that if the positions were reversed, a murder committed outside Ireland is not a crime in Irish law unless committed by an Irish citizen and here, the respondent was not an Irish citizen, he concluded:-

"[360] Section 44 of the Act of 2003 operates to preclude his forcible delivery to France because Irish law does not confer a power to prosecute on the same basis as France: there is an absence of reciprocity".

This seems to be referring back to a requisite reciprocity of extraterritorial jurisdiction on a similar basis rather than an extraterritorial jurisdiction exercised on some ground other than that relied upon by the issuing member state.

38. Fennelly J. was satisfied that s. 44 of the Act of 2003 must be interpreted in conformity with article 4.7(b) of the Framework Decision and not merely with the general objectives of same. He went on to state:-

"[426] Once it is established, as I believe it is, that the principle of conforming interpretation applies, it follows that the first thing to do is to seek out the correct meaning of art. 4.7(b) of the Framework Decision."

39. He held:-

"[441] ... However, it is still possible to interpret the provision as implying a reciprocal application of the respective laws of the issuing and executing states. By that I mean that art. 4.7(b) of the Framework Decision envisages that prosecution of the extraterritorial offences at issue should be subject to similar conditions in each State."

40. He also considered the views of Farrell and Hanrahan as worthy of citation *in extenso* at para. 442. He noted that the authors considered article 4.7(b) of the Framework Decision to reflect the principle of reciprocity at para. 443. He also noted the authors considered that s. 44 of the Act of 2003 is concerned with a hypothetical comparison of the legal provisions of the two states regarding extraterritorial offences. He found the passage at paras. 12-21 to 12-22, p. 184 of their work particularly persuasive, which was similarly cited with approval by Hardiman J., including the following:-

"[444] ... 'Is the court restricted to considering whether the State would exercise extraterritorial jurisdiction on the same basis, or can it consider whether extraterritorial jurisdiction might be exercised on an alternative bases? The act provides little assistance in this regard. However, the underlying principle of reciprocity would seem to predicate in favour of the court being restricted to considering whether extraterritorial jurisdiction can be exercised in theory on a similar case as opposed to on some other ground'."

41. Fennelly J. further stated:-

"[447] ... It is common case that France exercises extraterritorial jurisdiction on condition that the victim is or was a French citizen It must be a fundamental pre condition to the issue of a European arrest warrant that the law of the issuing state permits it to exercise jurisdiction over any person whose surrender it seeks. To assume otherwise would be to undermine the fundamental requirement of mutual confidence and respect for the judicial decisions of the participating states. Hence, art. 4.7(b) of the Framework Decision must mean that the issuing state has jurisdiction to prosecute the person sought even though the offence was committed outside its territory."

42. As regards the question as to whether Ireland prosecuted for an offence of murder committed outside its territory, he considered this was not susceptible to a "yes" or "no" answer. He went on to hold:-

"[449] The extraterritorial laws of Ireland and France are the converse of each other. A too literal interpretation of art. 4.7(b) of the Framework Decision leads, in my view, to an uneven, capricious and arbitrary result, well illustrated by the present case. The English law concept of corresponding circumstances tends to a more consistent result. It obviously envisages more than the mere search for correspondence, which is, after all, provided for elsewhere in the Framework Decision.

[450] I believe that a sensible and fair interpretation of art. 4.7(b) demands the recognition of the principle of reciprocity. Thus, where a state exercises the option, surrender will be prohibited where the executing state does not exercise extraterritorial jurisdiction in respect of offences of the type specified in the warrant in the same circumstances. In the present case, the relevant circumstance is that the person whose surrender is sought is not an Irish citizen. Under Irish law, a person cannot be prosecuted outside the territory of the State unless he or she is an Irish citizen."

43. There is no doubt that Fennelly J. held that s. 44 of the Act of 2003 incorporated the principle of reciprocity as regards the exercise of extraterritorial jurisdiction. It would appear that he regarded this as not merely exercising extraterritorial jurisdiction in respect of the same type of offence, but also in the same circumstances. At para. 455, he held that article 4.7(b) of the Framework Decision referred to a hypothetical offence, so it follows that s. 44 is concerned with a hypothetical offence rather than the actual offence and, in my opinion, the reference to "in the same circumstances" should be read as a reference to "on the same basis". In other words, that there must be reciprocity between the respective states as regards the basis upon which the extraterritorial jurisdiction is exercised. This is in line with the extract from Farrell and Hanrahan which Fennelly J. found particularly persuasive, citing the authors:-

"[444] ... 'However, the underlying principle of reciprocity would seem to predicate in favour of the court being restricted to considering whether extraterritorial

jurisdiction can be exercised in theory on a similar case as opposed to on some other ground'."

44. O'Donnell J. agreed with the rest of the court that surrender should be refused pursuant to s. 21A of the Act of 2003 as surrender was not sought for the purpose of trying the respondent. However, he found himself in a minority of one as regards whether surrender was precluded by the provisions of s. 44 of the Act of 2003, and dismissed the respondent's objection in that regard. To that extent, the judgment of O'Donnell J. is of limited benefit in seeking the parameters of reciprocity as determined by the majority, but I believe that it is nevertheless worthwhile examining, in detail, the alternative view he put forward, not only for its lucidity but also because it affords us some insight into what he saw as the majority view.
45. At para. 510 of his judgment, O'Donnell J. emphasised that neither the words of s. 44 of the Act of 2003 nor those of article 4.7(b) of the Framework Decision contained any explicit reference to reciprocity, the basis for the exercise of extraterritorial jurisdiction, rather than the fact of its exercise, nor indeed to the concept of considering a hypothetical case by reversing the fact situation in the particular case. He noted the use of the words "does not" in both provisions rather than a conditional phrase such as "would not" which would be more consistent with the requirement of reciprocal bases of jurisdiction. He noted that s. 44 of the Act of 2003 refers to an act or omission not constituting the offence "by virtue of having been committed in a place other than the State", and that even in the hypothetical situation posited by counsel of the murder of an Irish citizen in France, Ireland would not exercise jurisdiction, and accordingly the acts or omissions would not constitute an offence under Irish law. However, that would not be by virtue of the acts having been committed in a place other than the State, it would be because the acts are not alleged to have been committed by an Irish citizen. In his opinion, the proposed requirement of reciprocal bases of extraterritorial jurisdiction required a reversal of the factual situation at a high level of abstraction and such an approach simply did not appear on the surface of either s. 44 of the Act of 2003 or article 4.7(b) of the Framework Decision.
46. O'Donnell J. had this to say regarding reciprocity:-
- "[515] In my view reference to the concepts of reciprocity in this context, and particularly as the starting point of the analysis, is not helpful, and indeed may be positively confusing."*
47. He noted that neither s. 44 of the Act of 2003 nor article 4.7(b) of the Framework Decision make any enquiry as to the circumstances in which the issuing state itself would surrender, but on the contrary asks something about the substantive law of the executing state, and accordingly, he believed that the concept of reciprocity, as traditionally understood within the law of extradition, is not involved here. He did not believe it was possible to read the concept of "same offences" as meaning both the substantive offence and the jurisdictional basis upon which it is tried in the issuing state. In his opinion, the

term "same offences" referred back to the introductory words of article 4.7(b) of the Framework Decision.

48. After considering the matter further, he held:-

"[520] This leads me to the conclusion that the natural understanding of the word 'offence' or 'same offences' is the correct one and in this case relates simply to murder. Approached in this way art. 4.7(b) of the Framework Decision is perfectly capable of being read both intelligibly and consistently with the language of the article, and its presumed intent. Thus, where adopted, it permits or requires an executing state to refuse surrender where the European arrest warrant relates to an offence of murder, committed outside the territory of the issuing member state (in this case France) where the law of the executing member state (in this case Ireland) does not allow prosecution for that offence when committed outside its territory. If the offence here was assault, then the art. 4.7(b) of the Framework Decision exception would apply. Here, however, Ireland does exercise extraterritorial jurisdiction for murder. That, in my view, is all the article requires. In particular, it does not require analysis of the precise basis upon which Ireland or any other executing state may exercise extraterritorial jurisdiction for that offence. It is more consistent with the Framework Decision to ask simply whether in the case of murder (whatever its definition) Ireland exercises extraterritorial jurisdiction. We no longer ask how Ireland or the requesting state define the offence of murder; it is enough that they have such an offence. By the same token, it should not be necessary to ask the precise basis upon which Ireland exercises extraterritorial jurisdiction in cases of murder; it should be enough that it does."

49. O'Donnell J. considered that the simple question posed by both s. 44 of the Act of 2003 and article 4.7 of the Framework Decision is: does Ireland allow prosecution for the offence of murder when committed outside its territory? He emphasised that proceedings seeking surrender were essentially a paper analysis:-

"[522] ... It is the execution of a warrant. If the warrant is in proper form, then unless one of the specific exceptions to surrender is established, the warrant is enforced. The purpose of the Framework Decision was to simplify and harmonise that process. This is the context in which s. 44 is to be analysed. In a sense the entirety of the Act of 2003 and the Framework Decision take effect within four corners of the text of a European arrest warrant presented to the executing judicial authority. Therefore, the 'same offences' referred to in art. 4.7(b) of the Framework Decision and 'the offence' referred to in s. 44 of the Act of 2003, refer back to the offence to which the European arrest warrant relates. That offence is by definition one that has already passed through arts. 2.2 or 2.4 of the Framework Decision, since if it did not, the warrant could not be enforced at all. That offence is selected from art. 2.2 of the Framework Decision, or is the offence in the law of the executing state found to correspond by art. 4.4 of the Framework Decision to the offence specified in the warrant issued by the issuing state. It is that offence, i.e. the offence either

selected from article 2.2 or found to correspond by reference to art. 2.4, which is the offence to which the warrant relates and is the subject of the inquiry posed by art. 4.7(b) of the Framework Decision and s. 44 of the Act of 2003, rather than the specific facts alleged in any particular case to constitute that offence. Indeed, those facts may often only be set out in summary form in the warrant."

50. He found this interpretation more compatible with the text of s. 44 of the Act of 2003, whereas by contrast, the interpretation advanced on behalf of Mr. Bailey was more difficult to reconcile with that section.

51. Importantly, in conclusion O'Donnell J. set out the competing alternative interpretations in the case:-

"[533] In this case, the issue lies between an interpretation which requires an identical jurisdiction in respect of extraterritorial offences (which would make surrender more difficult) and an interpretation which considers only whether in respect of the class of offence with which the person is charged, the executing state itself exercises extraterritorial jurisdiction. In resolving this question the context and structure of the Framework Decision is helpful. In cases such as murder, it does not ask for perfect identity of legal definition or even that the acts concerned themselves would constitute the offence of murder in the law of the executing state. The same approach would suggest that the Framework Decision is not concerned with the precise identity of jurisdiction, so long as the executing state itself exercises jurisdiction in respect of the offence in its law. For these reasons, I would dismiss the appellant's appeal on this point."

52. It appears clear from the above that, as far as O'Donnell J. was concerned, the court was faced with a choice between an interpretation which required a reciprocal basis of jurisdiction in respect of extraterritorial offences and an interpretation which considered only whether the executing state exercised extraterritorial jurisdiction in respect of that class of offence. He opted for the latter interpretation. It is not unreasonable to infer that he regarded the other members of the court as opting for the former interpretation as he did not deal with any other possible interpretation. Indeed, counsel for the applicant herein suggested that the discussion of the issue by the majority of the court in *Bailey No. 1* might best be discerned from O'Donnell J.'s dissenting judgment, as per day 2, p. 144, lines 1-5 of the transcript.

53. I have considered at length, and quoted extensively from, the judgments in *Bailey No. 1* to highlight the difficulty in discerning the relevant test mandated by the proper interpretation of the latter part of s. 44 of the Act of 2003, and in an attempt to find the common ground between the majority. I note that both Hardiman and Fennelly JJ. quoted with approval the view expressed by Farrell and Hanrahan that:-

"... the underlying principle of reciprocity would seem to predicate in favour of the court being restricted to considering whether extraterritorial jurisdiction can be exercised in theory on a similar case as opposed to on some other ground."

I also note that Murray J., as he then was, stated that he agreed with the conclusions of Fennelly J. in relation to the meaning and import of s. 44 of the Act of 2003, and that he also agreed with Denham C.J. in relation to her decision that s. 44 constituted a bar to the surrender of the respondent. I further note that O'Donnell J. was of the view that there was a clear choice between two alternatives as referred to earlier herein.

54. The foregoing analysis of the respective judgments in *Bailey No. 1* leads me to conclude that the majority of the court interpreted and applied article 4.7(b) of the Framework Decision and s. 44 of the Act of 2003 as follows:-

- (i) *article 4.7(b) of the Framework Decision and s. 44 of the Act of 2003 incorporate a principle of reciprocity;*
- (ii) *article 4.7(b) of the Framework Decision and the latter part of s. 44 of the Act of 2003 are concerned with a hypothetical exercise whereby the State is substituted for the requesting state in relation to the offence in the warrant;*
- (iii) *the concept or principle of reciprocity goes further than a mere requirement that the executing state also exercise some form of extraterritorial jurisdiction in respect of the particular category of offence;*
- (iv) *the concept or principle of reciprocity requires reciprocity as between the respective bases on which both the issuing member state and executing member state exercise such extraterritorial jurisdiction;*
- (v) *the extraterritorial laws of Ireland and France were the converse of each other, as the basis for the Irish exercise of extraterritoriality was, at the time, the nationality of the alleged offender, whereas the basis for the French exercise of extraterritoriality was the nationality of the victim; and*
- (vi) *as the requisite reciprocity was not present, surrender was prohibited by s. 44 of the Act of 2003.*

55. In *Minister for Justice and Equality v. Pal* [2020] IEHC 143, McDermott J. considered the application of s. 44 of the Act of 2003 in the context of a request by Romania for the surrender of a Romanian citizen in respect of a murder committed in Ireland. He noted that Ireland exercised extraterritorial jurisdiction over a murder committed by an Irish citizen abroad. He stated:-

"[40] ... I am satisfied that the well established basis upon which Ireland exercises extraterritorial jurisdiction over a murder committed by an Irish citizen abroad does not lead to a situation in which the Romanian authorities who exercise a similar jurisdiction over their citizens would be precluded from seeking the surrender of one of their own citizens from Ireland who had allegedly murdered a person here or indeed in some third country."

He had no difficulty in finding that the requisite reciprocity was established so that surrender was not precluded by s. 44 of the Act of 2003. He referred to the judgments of Denham C.J. and Fennelly J. in *Bailey No. 1*. He noted that the conclusion of Fennelly J. followed an extensive review of the concept of reciprocity in the case law and textbooks, which used expressions such as "corresponding circumstances" and "equivalent circumstances". He also noted that Fennelly J. referred to the commentary in Farrell and Hanrahan as quoted by Fennelly J. at paras. 437-447 of his judgment. Referring to the judgment of Fennelly J., he stated:-

"[43] The learned judge also noted that art. 4.7(b) must mean that the issuing state has jurisdiction to prosecute the person sought even though the offence was committed outside its territory. However, that would not end the matter. The court's search must be for reciprocity in the exercise of that jurisdiction and in the case of France and Ireland that did exist – their extraterritorial laws were 'the converse of each other'. Thus, if the executing state exercises extra-territorial jurisdiction in respect of offences of the same type for which surrender is sought in the same circumstances as those exercised by the issuing state, surrender will not be prohibited."

56. Applying the interpretation of s. 44 of the Act of 2003 as set out in *Bailey No. 1*, and in *Pal*, to the current application, I note that Irish law has now been amended so that Ireland now exercises extraterritorial jurisdiction in respect of murder, not only where the alleged offender is an Irish citizen, but also where the alleged offender is ordinarily resident within the State. Mr. Bailey is, and was at all material times, ordinarily resident within the State, and therefore Ireland could exercise an extraterritorial jurisdiction over him as regards an offence of murder committed outside of Ireland. However, that amendment has not brought about a reciprocal basis as between France and Ireland in respect of the exercise of extraterritorial jurisdiction for the offence of murder in this case. The French basis for extraterritoriality in this case remains the nationality of the victim, whereas the Irish basis for any such extraterritoriality is the nationality or ordinary residence of the alleged perpetrator. That being the case, the surrender of the respondent remains precluded by virtue of s. 44 of the Act of 2003.
57. One may look at it another way by reversing the circumstances. If an Irish citizen was murdered in France by a UK national, who was ordinarily resident in France, Ireland would not exercise extraterritorial jurisdiction or seek extradition of the offender. Thus, the requisite reciprocity does not exist.
58. I should say that, if free to do so, I would prefer the reasoning in the judgment of O'Donnell J. in *Bailey No. 1*, which appears to me to acknowledge that the Framework Decision was a new system specifically intended to make surrender simpler as between member states. Furthermore, his approach appears most consistent with the language and context of both article 4.7(b) of the Framework Decision and the express wording of s. 44 of the Act of 2003.

59. Be that as it may, on my analysis of the majority judgments in *Bailey No. 1*, I must find that s. 44 of the Act of 2003 precludes the making of an order for surrender.

II. Estoppel/Accrued Right

60. The respondent submitted that as a result of the decision of the Supreme Court in *Bailey No. 1* and/or the decision of the High Court in *Bailey No. 2*, the applicant is precluded or estopped from seeking to have the respondent surrendered to France in respect of the same offence which was the subject matter of the earlier European arrest warrants. In each of those decisions, the court refused an order for surrender.

61. The respondent accepted that an order refusing surrender on foot of a request does not automatically prevent a subsequent application being brought by or on behalf of the same requesting state for the surrender of the same person in respect of the same offence. This is particularly so where the reason for refusal of surrender was due to some technicality in respect of the previous warrant or request. However, the respondent submitted that a final judicial determination between the parties on a specific substantive issue could create an estoppel and preclude a re-opening of that issue between the parties in subsequent proceedings and that this would effectively prevent an order for surrender being made where such an order had previously been refused. In this regard, the respondent relied on the Supreme Court decision in *Minister for Justice and Equality v. Tobin* [2012] IESC 37; [2012] 4 I.R. 147.

62. It was further submitted on behalf of the respondent that he had accrued a right as a result of the decision in *Bailey No. 1* not to be surrendered due to the lack of reciprocity required by s. 44 of the Act of 2003. It was submitted that this accrued right, or more particularly, the benefit which had been enjoyed as a result of same, could not be removed by any subsequent legislative change, unless the Oireachtas intended to so deprive the respondent. In this regard, reliance was placed upon ss. 4(1) and 27(1)(c) of the Interpretation Act, 2005 ("the Act of 2005") which provides as follows:-

"A provision of this Act applies to an enactment except in so far as the contrary intention appears in this Act, in the enactment itself or, where relevant, in the Act under which the enactment is made

Where an enactment is repealed, the repeal does not –

.... affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment."

63. On behalf of the applicant, it was submitted that the provisions of s. 27 of the Act of 2005 were of no relevance as the matter did not involve the repeal of an enactment or any amendment of s. 44 of the Act of 2003. It was further submitted that in *Bailey No. 1*, the Supreme Court, and also in *Bailey No. 2*, the High Court, had merely determined that the respondent could not be surrendered because he was a non-Irish citizen, while the High Court did similar. In the case of the earlier Supreme Court decision, surrender was also refused because at the time of application for surrender, the French authorities had not

decided to try the respondent for the offence. It was submitted that Irish law now permits the prosecution of a person for a murder committed outside of Ireland in circumstances where the alleged offender is ordinarily resident in this jurisdiction and the respondent is and was at all material times ordinarily resident in this jurisdiction. It was submitted that in those circumstances, a new issue arises for determination which has not previously been judicially determined, viz. whether, as a person ordinarily resident in Ireland, the respondent can be surrendered to France in respect of the offence in question. As the respondent has been tried, convicted and sentenced *in absentia* in respect of the offence, the issue as to an intention to try him does not arise in these proceedings.

64. Given the nature of the submissions, it is necessary to examine the operation of issue estoppel or any equivalent jurisdiction in relation to European arrest warrants and to ascertain what was determined as between the parties in *Bailey No. 1* and *Bailey No. 2*.
65. It is by now well established law in this jurisdiction that the principle of *res judicata* does not apply to proceedings seeking surrender or extradition. The refusal of a court to surrender on foot of a warrant is not of itself a bar to a subsequent request for surrender on a fresh warrant, and this is particularly so where the earlier refusal was based on some technical defect or inadequacy in the warrant before the court. It is equally well established that this does not mean that an issue estoppel may not arise in the context of such proceedings. In *Minister for Justice v. Tobin* [2012] IESC 37, [2012] 4 IR 147, Murray J., as he then was, explained:-

"[145] *On the question of res judicata I would observe that no issue concerning the application of that doctrine arises in this case, the parties having acknowledged the established principle that the doctrine does not apply to extradition cases. (The general application of the doctrine of res judicata should not be confused with the subsidiary principle of issue estoppel, which would apply, or with other issues).*"

66. In *Tobin* there had been a previous application for surrender in respect of a *conviction in absentia* which had been refused by the Supreme Court in 2008 because the respondent could not be regarded as having "fled", as was required by the provisions of s. 10 of the Act of 2003 at the time. That requirement was removed by an amendment in the Criminal Justice (Miscellaneous Provisions) Act 2009 (the "Act of 2009") and subsequently, a second application for surrender was made which was granted in the High Court but was refused in the Supreme Court. Mr. Tobin submitted that he had obtained a right not to be surrendered by virtue of the earlier decision and, pursuant to s. 27 of the Act of 2005, the amendment of the Act of 2003 could not divest him of that right unless the Oireachtas intended to do so. The Supreme Court had to determine whether any such right had accrued to him and, if so, the extent of such right and whether same had been affected by the amendment.
67. Denham C.J. in a dissenting judgment, with which Murray J., as he then was, concurred, would have ordered the surrender of the respondent. She accepted that a person could obtain the benefit of a previous decision in extradition proceedings, which could not be lost by subsequent statutory amendment unless the Oireachtas intended same, but

emphasised that this benefit or right would normally be limited to the discrete issues determined by the court, rather than a broad right not to be surrendered in the future. She referred extensively to her decision in *Bolger v. O'Toole* [2002] WJSC-SC 725, [2002] 12 JIC 0201.

68. Denham C.J. was of the opinion that the issue determined in the earlier proceedings was a very discrete issue regarding whether the respondent could be said to have "fled". Thus, insofar as any issue estoppel could be said to have arisen, it would only be on that narrow basis, and as that issue did not arise in the second proceedings, there was no bar to the second proceedings. As regards any vested right which may have accrued to the benefit of the respondent, she regarded this as being similarly limited to the discrete issue in relation to the "fled" issue, and that he enjoyed no general right not to be surrendered.
69. Hardiman J., as part of the majority, refused an order for surrender on grounds of abuse of process. However, as regards the question of what right might have accrued to the respondent as a result of the earlier proceedings, Hardiman J. stated:-

"[347] In the present case, I agree that it can properly be said that the outcome of the Minister for Justice v. Tobin [2007] IEHC 15 & [2008] IESC 3, [2008] 4 I.R. 42 proceedings was to confer or create a right, being a right not to be extradited or surrendered to Hungary so long as Irish law retained the 'fled' provision. That was a right, as opposed to a privilege or immunity. It is quite different from a right never to be forcibly rendered to Hungary, despite changes in the law: the contrary was not contended. I have read the ample discussion on this point contained in the judgment of O'Donnell J. and I agree with it.

[348] Once the effect of Minister for Justice v. Tobin [2007] IEHC 15 & [2008] IESC 3, [2008] 4 I.R. 42 is established as having been to create a right, however limited or transitory, the provisions of the Interpretation Act, 2005 are of decisive importance. There is no doubt that the effect of the 2009 Act is to permit, in a future case, even a person who has not 'fled' to be sent back to a jurisdiction in the position of Hungary in this case. But in relation to the appellant, who had, prior to the 2009 Act, acquired a right on the sort specified above, s.27(1)(c) of the 2005 Act, provides a presumption that this right is not interfered with by new legislation."

70. Hardiman J. appears to agree with Denham C.J., and therefore also Murray J., that the right which accrued to Mr. Tobin by virtue of the earlier proceedings was limited to the discrete "fled" issue, as opposed to a general right not to be extradited to Hungary in the future. However, at para. 348 Hardiman J. indicated that this limited right enjoyed the presumption under s. 27 of the Act of 2005, so that Mr. Tobin could not be divested of the benefit of it unless it could be shown that the Oireachtas intended to so deprive him.
71. Hardiman J. expressly stated his agreement with O'Donnell J. on this issue and went on to conclude that the Act of 2009, amending the Act of 2003, did not have the effect of removing the right vested in the respondent as a result of the earlier proceedings. Hardiman J. did not expressly refer to issue estoppel.

72. Fennelly J., also in the majority, expressly concurred with the judgment of Hardiman J. to decline to order the surrender of the respondent on grounds of abuse of process. However, he was not convinced that Mr. Tobin had acquired any right in law which survived the repeal of the "fled" requirement, although without doubt he had enjoyed that right pending the amendment of the legislation. While not expressly referring to issue estoppel, it seems clear that he regarded same or the equivalent thereof, as arising on the limited "fled" issue:-

"[367] Following the decision of this Court, the appellant enjoyed the status of a person who could not be surrendered to Hungary at least until the law was changed. All this has been fully and elegantly explored in the judgment delivered today by O'Donnell J. I regret that I am not, in the final analysis, convinced that the appellant acquired any right in law (for the purposes of s.27 of the Interpretation Act 2005) as a result of his success on appeal in Minister for Justice v. Tobin [2007] IEHC 15 & [2008] IESC 3, [2008] 4 I.R. 42 which survived the repeal of the 'fled' requirement. However, he without any doubt enjoyed that right pending the amendment of the legislation."

73. O'Donnell J., also in the majority, refused to surrender the respondent. However, he declined to do so on grounds of abuse of process. He did not specifically refer to issue estoppel. Dealing with the submission as regards s. 27 of the Act of 2005, he stated:-

"[443] ... On this argument, it is not necessary to go so far as to hold that the decision in Minister for Justice v. Tobin [2007] IEHC 15 & [2008] IESC 3 could not lawfully have been interfered with by subsequent legislation, or indeed that there had been conduct which amounted to an abuse of the process: it is sufficient that the appellant should be in a particular class of person who was entitled to have his case the subject of specific consideration by any amending legislation. As the quotation from Craies indicates, the question is whether something had happened which means that the appellant's entitlement was something more than to take advantage of the repealed legislation. In this regard, this case can usefully be contrasted with the decisions in Sloan v. Culligan [1992] 1 I.R. 223 and in the recent case of Minister for Justice v. Bailey [2012] IESC 16, [2012] 4 I.R. 1. In each of those cases it was determined in effect, that nothing had happened during the currency of the repealed legislation to give the individuals concerned any vested right which required to be specifically addressed to any subsequent repealing legislation. Here however something has happened. There was an application for a surrender hearing and a determination both by the High Court and this Court on appeal. The question therefore is whether that can be said to be 'something' for the purpose of the law so as to trigger the provisions of s. 27 of the Act of 2005.

[444] It is here that the discussion on abuse of the process and separation of powers becomes helpful. I have no doubt that a full hearing and determination of a request for surrender is certainly something. I think it can also be properly said that the outcome of Minister for Justice v. Tobin [2007] IEHC 15 & [2008] IESC 3, [2008] 4

I.R. 42 was to confer or create a right. In the aftermath of Minister for Justice v. Tobin the appellant could not have been extradited or surrendered to Hungary in respect of this sentence, so long as Irish law retained the fleeing requirement. That was a right, and not a privilege.... His entitlement not to be surrendered having been conclusively determined by the existing law, then I think it could be said he would have a right to be released, and certainly a right to resist surrender, which once established a court would be bound to uphold. Indeed, as the discussion in A v. Governor of Arbour Hill Prison [2006] IESC 45, [2006] 4 I.R. 88 shows, such a final determination would be proof against even a change in the common law in the shape perhaps of the subsequent Supreme Court determination which overturned the holding in Minister for Justice v. Tobin [2007] IEHC 15 & [2008] IESC 3 and determined that a person leaving in similar circumstances would be held to have fled. Such a determination might overturn the law established in Minister for Justice v. Tobin but would not affect the outcome of the appellant's own case. The final determination of his case, even if subsequently considered erroneous in law, would still be a bar to further proceedings. Indeed, it seems that even if the fleeing requirement was held to be repugnant to the Constitution of Ireland 1937 and therefore was prima facie never a part of the legislation, the final determination of the appellant's case would, as I apprehended it, still act to prevent surrender just as surely as the conviction in the case of Mr. A. in A. v. Governor of Arbour Hill Prison [2006] IESC 45 prevented his release from imprisonment notwithstanding the finding that the Criminal Law (Amendment) Act 1935 creating the offence of which he was convicted was, at least in one respect, inconsistent with the Constitution and deemed not to have survived the coming into force of the Constitution."

74. O'Donnell J. then referred to the decision in McMahon v. Leahy [1984] 1 IR 525 which he regarded as proceeding on the implicit assumption that the co-accused could not themselves have been the subject of a renewed application for surrender despite the change in the law relating to political offences. He also referred to *Pine Valley Developments v. Minister for the Environment* [1987] IR 23, which he stated appeared to have been dictated by a view of the significance of a determination, even in that case an adverse determination, by the court. He then went on to hold:-

"[445] These separate instances all support the conclusion that when a binding judicial determination is made by reference to the law then in force, something of legal significance happens and a right is acquired or accrues within the meaning of s. 27 of the Act of 2005. Accordingly, I have no doubt that what the appellant had acquired as a result of the decision in Minister for Justice v. Tobin [2007] IEHC 15 & [2008] IESC 3, [2008] 4 I.R. 42 and can properly be described as a right acquired or accrued for the purposes of s. 27 of the Act of 2005

Although here the act done to avail Mr. Tobin of a right is not done by Mr. Tobin himself, but rather is a consequence of proceedings in which he was a reluctant participant, the conclusion is in my view the same, and if anything stronger. By the

same token it is useful to consider the status of the High Court's rejection in Minister for Justice v. Tobin [2007] IEHC 15, [2008] 4 I.R. 42 of a number of grounds advanced by the appellant such as lack of correspondence. While it was not argued on this appeal, (perhaps for reasons of prudence as much as legal theory) it would seem that it would be arguable that those determinations created a res judicata against the appellant on those issues. In the circumstances, I have no doubt that the determination of Minister for Justice v. Tobin [2007] IEHC 15 & [2008] IESC 3 was an event by virtue of which a right was acquired or accrued."

75. The reference to *res judicata* in the above quote might be more appropriately regarded as a reference to "issue estoppel", as it relates to findings on specific issues.

76. O'Donnell J. went on to refer to the respondent/appellant as having acquired a right in general terms not to be surrendered as opposed to a right not to be surrendered for so long as the "fled" requirement was in place:-

"[446] That however is not the end of the inquiry. The right that the appellant had acquired or which had accrued after Minister for Justice v. Tobin [2007] IEHC 15 & [2008] IESC 3, [2008] 4 I.R. 42 was a right not to be surrendered. However, that right can be taken away by a change in the law. Here the law had changed, and the specific question which had to be addressed, and for which s. 27 of the Interpretation Act 2005 provides guidance, is whether that change in the law was intended to merely remedy prospectively the legal flaw identified by the decision in Minister for Justice v. Tobin [2007] IEHC 15 & [2008] IESC 3, or to go further and ensure the appellant himself was to be subject to the possibility of future surrender for the offences which had been the subject of the request in Minister for Justice v. Tobin."

77. O'Donnell J. pointed out that the mere existence of a right does not preclude statutory interference with that right, and that it might be relatively easy to infer such an intention in many cases. But in a case involving personal liberty, greater care, and specificity, may be required. He held:-

"[448] It is for the Oireachtas in the first place to decide whether it is fair in all the circumstances that the new rule should also apply to a person such as the appellant, before any court considers any question of constitutional fairness. In the case of the Act of 2009, language of general application is used. No differentiation is made between the different classes of person who might conceivably be subject to the now amended legislation. In such circumstances it cannot be said that a specific intention can be discerned from the legislation that, while eschewing any intention to target the appellant personally, it was intended that the appellant should be subject to surrender. In such circumstances it is the proper application of the presumption contained in s. 27(1)(c) of the Interpretation Act 2005, (itself a recognition of the proper interaction of the different organs of government in the making and interpretation of legislation), to hold that it has not been demonstrated that the Oireachtas has expressed any clear intention that the right which was

acquired by or accrued to the appellant on the decision in Minister for Justice v. Tobin [2007] IEHC 15 & [2008] IESC 3, [2008] 4 I.R. 42 was to be removed."

78. From the foregoing quotation, it is clear that O'Donnell J. took the view that once a person had succeeded in defeating an application for surrender on a substantive point of law, he acquired a right not to be surrendered despite a change in legislation unless the Oireachtas demonstrated an intention to apply the new law to that person, and other persons in similar circumstances, so as to make him amenable to surrender. As noted earlier, Hardiman J. expressed his agreement with the reasoning of O'Donnell J. on this issue.
79. There was a clear finding in *Tobin* that a party did derive a benefit from a judicial determination on a substantive, but specific, issue in the nature of an issue estoppel, or right, which was binding on the parties as regards that issue in relation to any subsequent application for surrender. However, there was no clear majority in *Tobin* as to whether the benefit of a finding on a substantive but specific issue in extradition proceedings was to be presumed to enure despite a legislative change unless the Oireachtas intended to take away that benefit, so as to defeat any subsequent application for surrender. O'Donnell and Hardiman JJ. were of the view that it did. Denham C.J. and Murray J., as he then was, were of the view that it did not, although accepting that a broad finding, such as a finding of abuse of process, could so operate. Fennelly J. was not convinced that it did and seemed to favour the view that it did not, however he does not appear to have categorically ruled on the matter.
80. In *Bailey No. 2*, Hunt J. reviewed the judgments of the Supreme Court in *Tobin* and concluded that issue estoppel could arise in the context of extradition proceedings and that the applicant was estopped from re-litigating the interpretation of s. 44 of the Act of 2003, or the application of that interpretation to the same salient facts, by reason of the final and conclusive determination by the Supreme Court of the same issues between the same parties in the litigation concerning the first arrest warrant. Hunt J. also considered the question of whether the respondent had acquired an accrued right not to be surrendered by virtue of the decision of the Supreme Court in *Bailey No. 1*. He stated:-
- "[41] I am satisfied that the final determination of Mr. Bailey's case on the section 44 point, even if subsequently considered erroneous in law, would still be a bar to these further proceedings. I am further satisfied that this determination gave Mr. Bailey an acquired or accrued right not to be surrendered on this basis, and nothing has occurred in the interim to deprive him of that right."*
81. He emphasised that the legal issues remained identical and there had been no relevant difference in the applicable facts or law. He also emphasised the importance of the finality of judgments as a shared value of the Irish legal system and the European Union ("the EU") legal system.
82. From my review of *Tobin* and *Bailey No. 2*, I am satisfied that the principle of issue estoppel can apply in the context of an application for surrender made under the Act of

2003. I am also satisfied that a final judicial determination on a substantive issue, as opposed to a technical issue or alleged defect in the warrant, resulting in a refusal to surrender can give rise to an accrued right not to be surrendered on the part of the requested party. As regards whether such an accrued right survives a change in the relevant law grounding the initial refusal, the Supreme Court jurisprudence does not appear to be conclusively settled. In so far as the Court is faced with a choice between the alternative positions put forward in *Tobin*, I prefer the reasoning of O'Donnell J. to the effect that a person is not to be deprived of such an accrued right unless it can be shown that it was the intention of the Oireachtas to do so. I believe that such an approach accords with basic fairness and the concept of mutual respect owed by one organ of government to another and the interaction between the different organs of government in the making and interpretation of legislation. Such an approach also accords with the principle of finality of judgments which is a shared value of both the Irish and EU legal systems. This does not mean that a person who obtains such an accrued right from a final judicial determination in proceedings seeking surrender under the Act of 2003 necessarily enjoys a permanent immunity from future surrender in respect of the same matter. It merely requires that the removal of such benefit or right should be intended by the Oireachtas and not come about as an unintended consequence. As O'Donnell J. pointed out in *Tobin*:-

"[447] The mere existence of a right does not preclude statutory interference with that right. Indeed, it may be relatively easy to infer such an intention in many cases. As Lord Rodger observed in Wilson v. First County Trust Ltd. (No. 2) [2003] UKHL 40, [2004] 1 A.C. 816 the presumption is a weak one and easily rebutted. All that the presumption requires is that the intention clearly appear either from the text of the specific words used, or from the context of the amending legislation."

83. Applying the reasoning of O'Donnell J. in *Tobin*, I am satisfied that the respondent is not merely someone who might have had a right to take advantage of the former legislative provision, but rather was someone in respect of whom "something" had happened so that a right vested in him or accrued to him. That "something" was an application for surrender hearing and a determination by the Supreme Court that he should not be surrendered. The question that then arises is whether in changing the relevant legislation to extend extraterritorial jurisdiction for murder to persons ordinarily resident in Ireland, the Oireachtas intended to deprive the respondent, or others in a similar position, of the benefit of that previous decision not to surrender and thus, make him amenable to future surrender. I do not believe it makes any material difference whether the law is changed by way of repeal or amendment of an existing statutory provision, whether the legislative provision is directly applicable, such as the Act of 2003, or indirectly applicable such as the Offences Against the Person Act, 1861. As O'Donnell J. pointed out in *Tobin* at para. 448, the presumption contained in s. 27(1)(c) of the Act of 2005 is itself a recognition of the proper interaction of the different organs of government in the making and interpretation of legislation.

84. It was not suggested to this Court that the change in the legislation was in any way specifically directed at the respondent or at any class of persons who may have resisted a surrender request by virtue of Ireland's restricted extraterritorial jurisdiction for murder. The amended statutory provision indicates no intention to deprive persons to whom a benefit or right has accrued through an earlier judicial determination. In the absence of any such intention, the respondent is entitled to retain the benefit or the right not to be surrendered to France as determined by the Supreme Court in *Bailey No. 1* and the High Court in *Bailey No. 2*.

85. Strictly speaking, as a result of my decision to refuse surrender on the basis of the respondent's first two grounds of objection, it is unnecessary for me to make a determination in respect of the remaining two grounds of objection. However, for the sake of completeness I will set out my views in relation to same.

III. Abuse of Process – Bailey No. 2

86. The respondent submits that this application constitutes an abuse of process and should accordingly be dismissed. He relies on a number of factors to support this, namely:-

- (a) *this is the third European arrest warrant issued by France seeking his surrender in respect of this matter;*
- (b) *surrender was refused in respect of the earlier two warrants;*
- (c) *the first application for surrender was made before there was a decision by the French authorities to prosecute him;*
- (d) *the second application for surrender was held by the High Court to be an abuse of process;*
- (e) *the Director of Public Prosecutions ("the DPP") in Ireland has reviewed the matter on a number of occasions and has directed that no charges be brought;*
- (f) *the Garda investigation was regarded by the then DPP as flawed and prejudiced;*
- (g) *there has been an excessive delay/lapse of time in bringing this application;*
- (h) *the respondent has been subjected to ongoing stress and anxiety for a prolonged period;*
- (i) *the respondent was not formally summoned to appear at the trial in France resulting in his conviction; and*
- (j) *in the course of the trial in France, use was made of statements of witnesses who were not present for the trial, one of whom had given contradictory statements.*

87. It was submitted that, taken collectively, these factors rendered the current application an abuse of process.

88. In *Bailey No. 1*, the majority of the Supreme Court determined that there was no abuse of process.
89. In *Bailey No. 2*, a finding of abuse of process was made by the High Court. Such a finding is clearly a determination of a broad issue, as opposed to a discrete issue, and could have the effect of defeating a subsequent application for surrender, as was acknowledged by Denham C.J. at para. 40 of her judgment in *Tobin*.
90. On behalf of the applicant, it was conceded that this Court was bound by the finding of an abuse of process in *Bailey No. 2* unless, as submitted by the applicant, the judgment of Hunt J. therein was to be properly regarded as given *per incuriam*, as per day 3, pp. 46 and 65 of the transcript.
91. It was submitted on behalf of the applicant that Hunt J. misdirected himself in *Bailey No. 2*, or failed to properly apply the appropriate law in relation to the issue of abuse of process in respect of extradition/surrender proceedings, so that this Court can effectively disregard the determination made in that case. I am not convinced that such an approach is the correct way to deal with the decision in *Bailey No. 2*, as that decision is not merely a relevant legal authority, but is a judgment in proceedings between the same parties involving the same issues. As it was not appealed, it is final and binding upon the parties as regards any substantive issue determined therein, whether that issue was determined correctly or incorrectly. However, in case I am wrong in that view, I will deal with the issue as submitted by counsel for the applicant.
92. The circumstances in which a judge of first instance may decline to follow the decision of another judge of the same court were considered by Clarke J., as he then was, in *David Hughes v. Worldport Communications Inc.* [2005] IEHC 467, [2005] IEHC 189, where he stated:-

"[17] ... It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. Huddersfield Police Authority v. Watson [1947] K.B. 842 at 848, Re Howard's Will Trusts, Leven & Bradley [1961] Ch. 507 at 523. Amongst the circumstances where it may be appropriate for the court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that the judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument. If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the

point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered. In the absence of a definitive ruling from the Supreme Court on this matter I do not, therefore, consider that it is appropriate for me to consider again the issue so recently decided by Kearns J. and I intend, therefore, that I should follow the ratio in Industrial Services and decline to take the view, as urged by counsel for the Bank, that the case was wrongly decided.”

93. Bearing the above reasoning in mind, I have to consider whether Hunt J. failed to review significant relevant authority in *Bailey No. 2*, or made a clear error in his judgment. The issue of whether a sufficiently lengthy period has passed since *Bailey No. 2* so as to justify revisiting the jurisprudence does not arise. Insofar as counsel for the applicant has referred to the principle of *per incuriam*, I regard this as an aspect of the factors identified by Clarke J. in *Hughes*.
94. In essence, it was submitted that Hunt J. had misdirected himself as to the law on abuse of process and/or had failed to consider the appropriate judgments in respect thereof. In particular, it was submitted that Hunt J. failed to have regard to the majority judgment in *Minister for Justice and Equality v. J.A.T. No. 2* [2016] IESC 17, [2016] 2 ILRM 262 as regards abuse of process, but rather regarded the law on abuse of process as set out by Hardiman J. in *Tobin*, as per day 3, pp. 32-35 of the transcript.
95. As regards *Bailey No. 2*, the French authorities had issued a second European arrest warrant dated 3rd August, 2016 for the respondent. This second application pre-dated the change in the law in Ireland as regards extraterritorial jurisdiction for murder. It is not clear why such a second application was brought in such circumstances. It was doomed to fail unless the Supreme Court revisited its earlier decision on the interpretation of s. 44 of the Act of 2003. Perhaps it was brought with a view to bringing the matter before the Supreme Court for such reconsideration or with a view to obtaining a referral of the matter to the Court of Justice of the European Union (“the CJEU”) for a ruling on whether such interpretation was compatible with the Framework Decision. However, the judgment of Hunt J. in *Bailey No. 2* was not appealed and is therefore binding as between the parties as regards the issues determined by it and the reasoning or strategy behind the second application remains somewhat of a mystery.
96. The jurisdiction of the Court to dismiss extradition proceedings as an abuse of process was not seriously disputed. In both *Tobin* and *J.A.T. (No. 2)*, the Supreme Court acknowledged the existence of such a jurisdiction in respect of extradition or surrender proceedings, but there were differences between members of the court as to whether the proceedings amounted to an abuse of process in each of those cases.
97. In *Tobin*, Denham C.J. made it clear that the issue of a second warrant seeking surrender of a person is not in itself an abuse of process, outlining:-

“[46] Thus on the claim that this subsequent warrant is an abuse of process, I am satisfied that a second or subsequent warrant seeking the surrender of a person is

not of itself an abuse of process. To establish abuse of process there would have to be additional factors.

[47] *As pointed out in Bolger v. O'Toole (Unreported, Supreme Court, 2nd December, 2002), if there was an abuse of process, a subsequent application may fail. Thus, even though there has been no mala fides by any person or institution, and the fact that a subsequent warrant is not per se invalid, it is necessary to consider whether there are factors, or whether the cumulative effect of all the circumstances are such that the appellant has suffered an abuse of process."*

98. On the facts in *Tobin*, Denham C.J. found that there was no abuse of process. Murray and O'Donnell JJ. also found there to be no abuse of process.

99. Hardiman J. found that there was an abuse of process in *Tobin*. As regards the nature of the abuse of process, he emphasised the public interest in finality in litigation, that a party should not be vexed by repeated litigation in the same matter and the imbalance in power between state authorities and the individual. Applying those various considerations to the facts in *Tobin*, Hardiman J. held:-

"[340] In my view, all of the considerations mentioned above are relevant to the present case. I refer particularly to the proposition that there should be finality in litigation and that the party should not be vexed twice in the same matter; that it is an abuse to subject the party to unjust harassment; that the appellant must therefore be protected from oppression; that it is important in the public interest, as well as that of the parties, that litigation should not drag on forever; and that a defendant should not be oppressed by successive suits where one would do. Similarly, I agree that these rules are rules of justice. They arise with particular force where there is a gross disparity in resources and powers between litigants; this is seen in this case with particular force because the state waged unending litigation from a bottomless purse whereas the appellant had to fund himself. Similarly, and for the reasons set out above, I believe that the term 'ordeal' is entirely apt to describe what the appellant and his family have been put through in the years since 2000, and since 2004 in particular, and that the least part of this ordeal is the embarrassment and expense to which the appellant has been put."

100. Fennelly J. agreed with Hardiman J. that the court should decline to order surrender on the grounds of abuse of process, but he stated:-

"[359] I explain that I do so because of the unique history of the case and that I do not share all the reasoning of Hardiman J."

101. Fennelly J. emphasised the State's pursuit of the matter on appeal as regards the earlier proceedings which exposed Mr. Tobin to unnecessary hardship, expense and distress. This had been caused by a legislative error and correction, for which Mr. Tobin was in no way to blame. It was different from a defect in the warrant which could be corrected and a fresh application made. Fennelly J. disagreed with Hardiman J. as regards the necessity to

introduce concepts such as inequality of arms or powers between the State and a private person.

102. From the foregoing analysis, it is clear that the jurisdiction to dismiss extradition litigation as an abuse of process was acknowledged by the Supreme Court in *Tobin*, but three of the judges found that there was no abuse of process on the particular facts of the case. Of the two judges who found an abuse of process on the facts, there was some difference between them as to the significance of certain matters, with Fennelly J. expressly rejecting delay or inequality of arms as factors in coming to his decision on abuse of process.
103. The issue of abuse of process in the context of the Act of 2003 came before the Supreme Court again in *J.A.T. (No. 2)*. That case concerned an application on behalf of the UK for the surrender of the respondent to face prosecution in respect of what were referred to in the warrant as "tax fraud offences", which were alleged to have occurred between 1997 and 2005. A European arrest warrant seeking the respondent's surrender was issued on 7th March, 2008. The respondent was arrested on foot of same and his surrender was refused by the Supreme Court on 21st December, 2010. A second European arrest warrant was issued and the respondent was arrested on foot of same on 24th July, 2012. The UK authorities stated that the second warrant had taken into account the judgment of the Supreme Court in the first set of proceedings. His surrender was ordered by the High Court despite a finding of abuse of process. On appeal, the Supreme Court refused surrender, with no dissenting judgments.
104. Denham C.J. was satisfied that there was an evidential basis upon which the High Court could, and did, find that there was an abuse of process. She was satisfied not to interfere with that finding. She regarded the issue which the Supreme Court had to determine as whether, in light of the findings of the High Court, it was sufficient or appropriate for the High Court to simply admonish the parties responsible while surrendering the appellant.
105. As regards delay, Denham C.J. was of the opinion that:-
- "[65] ... The time which has passed since the alleged offences, the first arrest on the first EAW, the second EAW, and the hearing of this appeal, is not of itself a factor upon which a request for surrender would be refused. However, this time period has to be considered in light of all the circumstances of the case."*
106. In terms of how a court should normally deal with an abuse of process she further stated:-
- "[72] In general, if there is an abuse of process by authorities they should not benefit. The rule of law, and the right to fair procedures, requires that such a general principle be applied."*
- [73] Of course, there may be circumstances where a court considers that there has been an abuse of process, but to a limited degree, and applying the principle of*

proportionality, a surrender procedure could proceed. However, such a finding would arise only in a situation where a process was found to be an abuse, but in a limited manner, and with limited effect.

[74] *In this case there is an accumulation of factors.*

[75] *It is clear, and remains the law, that simply because a second European arrest warrant is issued that does not of itself indicate any abuse of process. See Bolger v. O'Toole Unreported Supreme Court 2 December 2002, and Gibson v. Gibson Ex tempore Supreme Court 10 June 2004, Keane C.J..*

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

[77] *I have reviewed the circumstances of this appeal, which include the following factors:*

- (a) *this is the second EAW issued in relation to the offences alleged;*
- (b) *failings in the first EAW could have been addressed in the first application;*
- (c) *a considerable time has passed since the alleged offences and a considerable time has passed since the arrest of the appellant on the first EAW;*
- (d) *the medical condition of the appellant, who is a vulnerable person;*
- (e) *the medical condition of the appellant's son, for whom the appellant is a significant carer;*
- (f) *the family circumstances;*
- (g) *the oppressive effect which the two sets of EAWs have had on the appellant; on his son; and on his family;*
- (h) *no explanation has been given for delays;*
- (i) *there has been no engagement by the authorities with the issues as to the first EAW or the delays;*
- (j) *the central authority has a duty to bring to the attention of the issuing State authorities defects or internal contradictions in a warrant, and to consider whether all the documentation is complete and clear, before being relied upon for the purpose of seeking to endorse an EAW;*
- (k) *the duty of the court to protect fair procedures; and*
- (l) *the principle that a party in litigation should not benefit from proceedings which were de facto abusive of the court's process."*

107. Having taken such factors into account, 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 the surrender of the appellant."

108. From the foregoing, it is clear that Denham C.J. accepted that there had been an abuse of process and regarded the listed factors as relevant matters in determining that the appropriate judicial response to same was to refuse surrender.

109. O'Donnell J., with whom MacMenamin and Laffoy JJ. concurred, reluctantly agreed that the appropriate judicial response was to refuse surrender:-

"[1] I was myself doubtful, however, that even cumulatively, the matters relied on by the appellant were sufficient to justify a refusal of surrender in this case. But in the light of the views of my colleagues, and the judgment of the Chief Justice, I do not dissent from the order proposed. I would, however, emphasise that this is a rare, and indeed exceptional case. While exceptionality is not in itself a test, it can be a useful description, and it is, in my view, only cases which can truly be so described that will be those rare cases in which it may be said that surrender would offend due process and interfere with the rights of the appellant to such an extent that it must be refused."

110. O'Donnell J. sought to identify the principles involved, to identify the factors grounding a refusal and to determine the weight to be accorded to them. He doubted whether it was appropriate or useful to introduce the concept of a "duty of care" on the part of requesting authorities or the Irish authorities. He emphasised that the law of European arrest warrants was intended to provide a new and streamlined process for surrender between member states and represented a significant departure from the earlier approach. In his view, the starting point was that considerable weight is to be given to the public interest in ensuring that persons charged with offences face trial. As a decision to refuse surrender will often provide a form of limited immunity to a person so long as they remain in this jurisdiction, he stressed it is only if some quite compelling feature, or combination of features, is present that it would be appropriate to refuse surrender on grounds of due process or interference with rights. At para. 4, he emphasised it was important that the court should rigorously scrutinise the factual basis for any such claims against that background.

111. As regards the case before him, O'Donnell J. identified three factors as having been asserted as cumulatively leading to an order refusing surrender, namely the fact that it was a repeat application, delay/lapse of time and article 8 ECHR/personal and family rights aspects. He emphasised that a repeat application based on a fresh warrant could not in itself be regarded as an abuse of process. Dealing with delay/lapse of time, he was not satisfied that taken alone, or in conjunction with the repeat application, delay/lapse of

time in the circumstances established an abuse of process or justified refusal of surrender, as outlined at para. 9. Turning to the remaining factor of rights pursuant to article 8 ECHR, O'Donnell J. noted that the respondent was in a very difficult health situation but emphasised that the matter was not to be tested against some generalised consideration of personal sympathy, but rather as to whether the circumstances were such that it rendered it unjust to surrender the respondent. He noted that the respondent was the primary and, effectively, the sole caregiver for his son, in circumstances where that care was particularly important, and that his son would undoubtedly suffer very severely if the appellant was surrendered for trial. He stated that on their own, such matters would not justify refusal of surrender.

112. He then set out what he considered to be the relevant factors to be weighed cumulatively:-

"[10] It seems to me to be relevant that this is a second application, and moreover, that there has been avoidable delay on the part of the authorities in both jurisdictions in the preparation, submission, and execution of a second warrant, even though the evidence of the respondent's circumstances, and those of his son, had been adduced in the first European Arrest Warrant proceedings. These factors – repeat application, lapse of time, delay, impact on the appellant's son, and knowledge on the part of the requesting and executing authorities of those factors – when weighed cumulatively, are powerful. Even then, and without undervaluing the offences alleged here, it is open to doubt that these matters would be sufficient to prevent surrender for very serious crimes of violence. This illustrates that the decision in this case is exceptional, and even then close to the margin."

113. As regards matters that could be properly addressed by admonishment, O'Donnell J. doubted whether same would amount to an abuse of process at all.
114. From the foregoing, it appears that O'Donnell J. ultimately agreed that the facts in *J.A.T. (No. 2)* constituted an abuse of process, as he refused surrender. While he disagreed with the separate judgment of Denham C.J. on some of the issues she had included in her estimation of relevant factors, he expressly prefaced his judgment by indicating that in light of the views of his colleagues and the judgment of the Chief Justice, he did not dissent from the decision to refuse surrender. He was clear that each of the factors said to constitute an abuse of process would not in itself justify a refusal to surrender and, even taken cumulatively, the matter was close to the margin.
115. Having regard to the public interest in ensuring that persons charged with offences face trial, O'Donnell J. expressed doubt as to whether such factors would be sufficient to prevent surrender for very serious crimes of violence. However, he fell short of saying that such factors could never be sufficient to prevent surrender for serious crimes of violence. As he stated at para. 3, "[S]omething is either an abuse of process, or it is not", while he went on to outline:-

"[12] But the normal and logical remedy for an abuse of process is the striking out or staying of the proceedings constituting abuse."

He therefore appears to have left open a very rare possibility that if the factors constituting abuse were sufficiently truly exceptional, the appropriate remedy would be to strike out or stay the proceedings, even in cases involving allegations of serious crimes of violence.

116. In dealing with the abuse of process issue in *Bailey No. 2*, Hunt J. expressly referred to the two main authorities dealing with that issue in the context of European arrest warrant proceedings, *Tobin* and *J.A.T. (No. 2)*. It is clear that Hunt J. reviewed the significant relevant authorities. He quoted from the decision of Hardiman J. in *Tobin* as regards the distinction between *res judicata*, the abuse of process jurisdiction and also the importance of finality in litigation. More importantly, Hunt J. quoted from the decision of Denham C.J. in *J.A.T. (No. 2)* as regards delay as a factor in considering whether an abuse of process has taken place and, in particular, that delay is not of itself a factor upon which a request for surrender would be refused, but rather had to be considered in light of all the circumstances of the case. The fact that he chose to quote from the judgment of a particular judge in each of those cases to illustrate a particular point, does not mean that he did not consider the other judgments therein. Indeed, he specifically quoted from the judgment of O'Donnell J. in *J.A.T. (No. 2)* in dealing with the issue of *res judicata*/issue estoppel.
117. Ultimately, in *Bailey No. 2*, Hunt J. considered the particular facts of the matter before him in order to determine whether, taken cumulatively, same could be regarded as truly exceptional so as to amount to an abuse of process. In effect, this is the test set by the majority in *Tobin*. Hunt J. considered the circumstances on a cumulative basis, including the earlier binding decision of the Supreme Court in *Bailey No. 1*, the passage of time since then, the failure of the authorities to consider the decision of the DPP not to prosecute, the benefit or right Mr. Bailey had accrued from the earlier court decision and the fact that he regarded the second proceedings as a belated and direct challenge to the earlier decision on s. 44 of the Act of 2003, in circumstances where the applicant had specifically requested the court to rule on same in the earlier proceedings. He specifically referred to the unique features of the case:-

"[43] In my opinion, the combination of factors identified above result in the conclusion that this application should also be dismissed as an abuse of process. Such a conclusion will not be reached lightly in extradition litigation, but the unique features of this case justify termination of the process on this basis at this time."

118. There appears to me to be little difference in the use of the word "unique" rather than "exceptional" and, if anything, the use of "unique" underscores that he acknowledged the rarity with which the jurisdiction to dismiss extradition proceedings on grounds of abuse of process will be exercised.

119. I do not consider that Hunt J. failed to review the relevant authorities in *Bailey No. 2*, or that there is such a clear error in his judgment that I ought not to follow his decision. He reviewed the appropriate authorities, he correctly regarded the threshold which the respondent had to meet as an extremely high one and he looked at the various matters cumulatively rather than regarding any single factor as sufficient. Indeed, considering that the application in *Bailey No. 2* was doomed to fail in the High Court, and that no attempt was made to bring the matter before the Supreme Court for reconsideration of the relevant law or for a reference to the CJEU, it is difficult now, with the benefit of hindsight, not to agree with the finding of an abuse of process.
120. It was submitted on behalf of the applicant that if I was not satisfied that the decision of Hunt J. on the abuse of process issue in *Bailey No. 2* was *per incuriam*, then I was bound by same and the respondent would succeed on that point. I am not satisfied that the decision of Hunt J. was *per incuriam*, or that this Court should disregard same, and so, on the applicant's argument, I am bound by the decision on abuse of process in *Bailey No. 2*.
121. As I have already indicated, *Bailey No. 2* constitutes a final decision which is binding on the parties herein as regards the substantive issues determined therein. If the applicant believed the decision in *Bailey No. 2* was in error, on the basis of the facts or the law, it was open to appeal. The applicant did not appeal the decision and is thereby bound by a determination therein on a substantive issue raised therein. However, it must be noted that as regards the abuse of process issue, what was determined in *Bailey No. 2* was that that particular application amounted to an abuse of process. While a final judicial determination that a particular application for surrender amounts to an abuse of process will generally constitute a bar to a further application, there may be instances where not every further application is automatically to be regarded as an abuse of process or automatically barred. It may be the case that a change in the law or a change in the factual matrix could justify a repeat application despite the fact that an earlier application was held to be an abuse of process.
122. In *Bailey No. 1*, the Supreme Court refused surrender on grounds relating to s. 21A and s. 44 of the Act of 2003, with the majority of the court rejecting the submission that the application was an abuse of process. In *Bailey No. 2*, the High Court was fully entitled to find the second application to be an abuse of process where there had been no change in the law or facts in respect of s. 44 of the Act of 2003, and this application was doomed to fail in the High Court. However, there may occasionally be cases where the High Court can consider a new application, in circumstances where a previous application was found to be an abuse of process, such as where there is no suggestion of *mala fides* as regards the applications and where a material change in the law has occurred. Whether the High Court could entertain such a repeat application would depend upon the reasons why the earlier application was found to be an abuse of process and whether subsequent changes in the law or facts justified the High Court considering the new application. In *Bailey No. 1*, the majority of the Supreme Court held that the application was not an abuse of process. In *Bailey No. 2*, the High Court held that the second application was an abuse of process. The crucial difference is that at the time of the application in *Bailey No. 2*, there

had been no material change in the law or in the known facts, and the application seemed to be an unjustified attack upon the final and binding decision of the Supreme Court in *Bailey No. 1*. Had there never been a second application and if the matter was only now coming before the Court for a second time, I am not convinced, on the basis of the Supreme Court jurisprudence already set out in this part of my judgment, that the other matters relied upon by the respondent would render such an application an abuse of process where a *bona fide* issue arises in respect of a legislative change.

123. In the present case, there has been a significant change in Irish legislation in relation to extraterritorial jurisdiction in respect of murder. However, I have held herein that this legislative change does not render the respondent amenable to surrender.

IV. Section 37 of the Act of 2003 – Fundamental Rights

124. In light of my earlier determination of issues one and two herein, it is unnecessary for me to deal at length with the submissions in respect of s. 37 of the Act of 2003.

125. Section 37 of the Act of 2003 provides as follows:-

"A person shall not be surrendered under this Act if –

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

(i) the Convention, or

(ii) the Protocols to the Convention,

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

126. On behalf of the respondent, it was submitted that surrender is incompatible with the State's obligations under the ECHR and/or the Constitution. In this regard, counsel for the respondent laid particular emphasis on the following:-

(a) that the respondent's right to an expeditious trial, or trial within a reasonable time, has been breached and will be further breached by any future trial;

(b) that the respondent had not been and would not be given an adequate opportunity to participate in the investigative stage or other pre-trial procedures;

(c) use by the French court of a statement of Mrs. Farrell concerning a sighting of the respondent at a time and in a place compatible with the respondent having committed the offence, but which statement was later retracted by Mrs. Farrell;

(d) that the respondent might not be afforded sufficient opportunity to adequately confront and cross-examine witnesses;

(e) the respondent might be unreasonably limited in his ability to call witnesses;

- (f) *that the respondent would lose the benefit of previous Irish judicial decisions refusing his surrender (this is more appropriately dealt with in the section of this judgment dealing with issue estoppel and/or accrued rights); and*
- (g) *that the respondent would suffer inequality under the law as regards his treatment and that of others in respect of whom the DPP has decided not to prosecute.*

127. The respondent relied upon a report/statement of a French lawyer, Ms. Marie d'Harcourt, eventually in affidavit form, in support of the submissions.

128. Section 4A of the Act of 2003 states:-

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

129. The Framework Decision expressly recites that it respects fundamental rights and observes the principles recognised by article 6 of the Treaty on the European Union ("the TEU") and reflected in the Charter of Fundamental Rights of the European Union ("the Charter"), in particular chapter VI thereof. In effect, the Act of 2003 contains a rebuttable presumption that the issuing state will comply with the Charter, which to a large extent mirrors the rights under the ECHR. That presumption will only be rebutted by cogent evidence to the contrary. It is inherent in the European arrest warrant system that persons in one member state will be surrendered to another member state in circumstances where the practice, procedure, laws and rules regarding the operation of the criminal justice system will not be identical as between the two states and may be substantially different. This, in itself, cannot be a bar to surrender. In *Minister for Justice, Equality and Law Reform v. John Paul Brennan* [2007] IESC 21, [2007] 3 IR 732, Murray C.J. outlined:-

"[37] The effect of such an argument is that an order for surrender under the Act of 2003, and indeed any order for extradition, ought to be refused if the manner in which a trial in the requesting state including the manner in which a penal sanction is imposed, does not conform to the exigencies of our Constitution as if such a trial or sentence were to take place in this country. That can hardly have been the intention of the Oireachtas when it adopted s. 37(1) of the Act of 2003 since it would inevitably have the effect of ensuring that most requests for surrender or extradition would have to be refused. And indeed if that were the intent of the Framework Decision, which the Act of 2003 implements, and other countries applied such a test from their own perspective, few, if any, would extradite to this country."

Murray C.J. went on to explain:-

"[40] That is not by any means to say that a court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may

well be egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting state, where a refusal of an application for surrender may be necessary to protect such rights. It would not be appropriate in this case to examine further possible or hypothetical situations where this might arise. The sole matter which I wish to make clear here is that the mere fact that a trial or sentence may take place in a requesting state according to procedures or principles which differ from those which apply, even if constitutionally guaranteed, in relation to a criminal trial in this country does not of itself mean that an application for surrender should be refused pursuant to s. 37(2) of the Act."

130. In *Minister for Justice, Equality and Law Reform v. Marjasz* [2012] IEHC 233 and *Minister for Justice and Equality v. Magdalena Rostas* [2014] IEHC 391, Edwards J. stressed that in cases where surrender is sought to enforce a sentence imposed following a criminal trial, the court will in general be most reluctant to engage in any review of the trial process leading to the conviction upon which the European arrest warrant is based to determine whether it was fair and lawful. The default and starting position in all cases is that the court must proceed upon a presumption that the trial leading to the conviction in question was fair in respect of the respondent's fundamental rights, and that in the event of him having some complaint in regard to the fairness of the trial that led to his conviction, that it was incumbent upon him, at the material time, to seek an effective remedy in regard to that before the courts of the issuing state.
131. In *Minister for Justice v. Stapleton* [2007] IESC 30, [2008] 1 IR 699, the Supreme Court emphasised the principles of mutual trust and mutual recognition which lie at the heart of the European arrest warrant system. Fennelly J. pointed out that mutual confidence encompasses the system of trial in the issuing state, and it follows therefore that the courts of the executing member state, when deciding whether to make an order for surrender, must proceed on the assumption that the court of the issuing member state will, as required by article 61 TEU, respect human rights and fundamental freedoms. In *Minister for Justice, Equality and Law Reform v. Koncis* [2006] IEHC 379, Peart J. stated:-
- "[9] A respondent seeking to unsettle such a presumption and understanding has a heavy onus to discharge and a high hurdle to overcome before his/her surrender will be refused."*
132. In my opinion, the report/statement of the French lawyer, Ms. Marie d'Harcourt, falls far short of establishing, by way of cogent evidence, an egregious set of circumstances amounting to a fundamental defect in the French system of justice, or a real risk that the respondent's fundamental rights will be violated if he is surrendered. The matters raised by Ms. D'Harcourt could be raised before the courts of France at any rehearing or appeal.
133. As regards delay or, as may be more appropriate, "lapse of time", it is well established that this in itself should not bar surrender other than in truly exceptional cases. While in some regards this is certainly an exceptional case, the lapse in time since the date of the offence would not in itself be an automatic bar to a prosecution in this jurisdiction, particularly as regards an offence as serious as murder. Again, any prejudice to the

respondent arising out of lapse of time could be raised at the rehearing or appeal. The French authorities had tried unsuccessfully to obtain the surrender of the respondent for prosecution and it was only in 2019 that a change in the law regarding Ireland's extraterritorial jurisdiction in relation to murder afforded a new possibility to the French authorities for a further application for surrender. I do not regard lapse of time in this case as a ground for refusal of surrender in the context of s. 37 of the Act of 2003, either considered singularly or cumulatively, with the other factors raised in relation to s. 37 of the Act of 2003. In *Minister for Justice and Equality v. Vestartas* [2020] IESC 12, MacMenamin J. stated:-

"[89] Though a matter of legitimate concern, in this case the delay is to be viewed against the respondent's private and family circumstances. Unless truly exceptional or egregious, delay will not alter the public interest, although there may come a point where the delay is so lengthy and unexplained as to constitute an abuse of process, or to raise other constitutional or ECHR issues."

134. As regards the argument that the surrender of the respondent would represent a constitutionally prohibited unequal treatment of the respondent as opposed to other persons whom the DPP may have decided not to prosecute, I am of the opinion that there is no merit in this submission. The Supreme Court made clear in *Bailey No. 1* that the decision of the DPP not to prosecute the respondent did not give rise to any accrued or vested right on the part of the respondent not to be surrendered.

135. In terms of the respondent's right to a private and family life under article 8 ECHR, I note the contents of the respondent's affidavits as to the effect the various legal proceedings have had upon him but I do not view the respondent's personal or family circumstances as being in any way so exceptional as to justify a refusal to surrender. As MacMenamin J. pointed out in *Vestartas*:-

"[94] For an Article 8 defence to succeed, it can only be on clear facts based on cogent evidence. The evidence must be sufficient to rebut the presumption contained in s.4A of the Act (see, para. 41 above). The circumstances must be shown to be well outside the norm; that is, truly exceptional. In the words of s. 37(1), they must be such as would render an order for surrender 'incompatible' with the State's obligations under Article 8 of the ECHR. This would necessitate that the incursion into the private and family rights referred to in article 8(1) was such as to supervene the limitations on the right contained in article 8(2), and over the significant public interest thresholds set by the 2003 Act itself."

136. I do not regard any of the matters relied upon by the respondent, taken individually or cumulatively, as establishing that surrender is precluded by s. 37 of the Act of 2003 and I dismiss the respondent's objections in that regard.

Additional Information

137. I am of the opinion that the Court is able to perform its functions under the Act without requiring any additional documentation or information from the issuing state.

CJEU – Reference

138. It was submitted on behalf of the applicant that the Court should refer a question to the CJEU as to the definitive interpretation of article 4.7(b) of the Framework Decision and whether s. 44 of the Act of 2003 properly gives effect to that article. I do not consider it necessary to obtain a decision on that question in order to enable me to give judgment herein, particularly as I have also refused surrender on grounds not connected with the interpretation of article 4.7(b) of the Framework Decision, namely that the respondent has an accrued right not to be surrendered by virtue of previous judicial determinations and that the legislative change regarding extraterritorial jurisdiction did not divest him of that right.

Conclusion

139. In conclusion:-

- (a) *the surrender of the respondent is precluded by virtue of s. 44 of the Act of 2003, by reason of a lack of the requisite reciprocity required thereunder, notwithstanding the enactment of the Criminal Law (Extraterritorial Jurisdiction) Act, 2019;*
- (b) *the surrender of the respondent is also precluded by virtue of an accrued or vested right on the part of the respondent to the benefit of the previous judicial determinations refusing such surrender, which the respondent was not divested of by reason of the enactment of the Criminal Law (Extraterritorial Jurisdiction) Act, 2019;*
- (c) *in so far as it was argued that I am bound by the determination in Bailey No. 2 as to the issue of abuse of process unless same was determined per incuriam, I find that it was not so determined;*
- (d) *in the absence of Bailey No. 2, I would not regard the current application as an abuse of process; and*
- (e) *surrender is not precluded by virtue of s. 37 of the Act of 2003.*