**THE HIGH COURT**

**[2024] IEHC 282**

**Record No: 2023/168**

**IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT, 2003 (AS AMENDED)**

**BETWEEN:**

**MINISTER FOR JUSTICE & EQUALITY**

**Applicant**

**-and-**

**RICHARD SHARPLES**

**Respondents**

**Decision of Ms. Justice Melanie Greally delivered on the 29th of April 2024.**

1. This decision concerns an application for the surrender of the Respondent to Scotland pursuant to a Trade and Co-operation Agreement Warrant (TCAW) dated 23rd of September 2023 issued by Kenneth Campbell KC, Sheriff of Lothians and Edinburgh. The Respondent is sought for prosecution for two offences: possession of a firearm and assault.

2. The TCAW was endorsed for execution on the 25th of September 2023 and the Respondent was arrested on the 30th of September 2023 and was brought before the High Court on the same date when the presiding judge was satisfied that the Respondent was the person in respect of whom the TCAW issued and there remains no dispute in relation to identity.

3. Part B of the TCAW states the decision on which the TCAW is based is a petition warrant granted at Glasgow Sherriff Court on the 24th of November 2021 by Sherriff Reid.

4. Part C of the TCAW states the maximum sentence for the firearms offence is ten years imprisonment and life imprisonment is the maximum sentence for the assault offence, therefore, no issue arises in relation to minimum gravity.
   Part D has no application.

5. Part E provides an account of the circumstances under which the offences are alleged to have been committed.
   On the 16th of September 2021, the Respondent is alleged to have had a firearm in his possession with intent to cause Christopher Begg to believe that unlawful violence would be used against him.
   The same conduct if committed in this State would constitute an offence of unlawful possession/use of a firearm contrary to Section 2(1) of the Firearms Act 1925 (as amended). In the alternative, it could amount to possession of an imitation firearm contrary to Section 9A of the Firearms and Offensive Weapons Act 1990 (as inserted by Section 40 of the Criminal Justice (Miscellaneous Provisions) Act 2009).
   On the same date the Respondent is alleged to have struck Christopher Begg on the head with a brick. He is alleged to have put him in a headlock and gouged his eyes. He is also alleged to have kicked and punched him on the head and body.
   This description of the offence corresponds with an offence under Section 3 of the Non-Fatal Offences Against the Person Act 1997.
   Correspondence is therefore satisfied.

   Background to the Application.

6. This is the second TCAW warrant seeking the surrender of the Respondent for these offences.
   On the 29th of June 2023 Mr. Justice McDermott refused an application for surrender on the basis that he was not satisfied that the Respondent's needs would be met in the Scottish prison to which he was likely to be sent and consequently, there was a real or substantial risk that he would be subjected to conditions which would amount to inhuman and degrading treatment or punishment contrary to Article 3 of the ECHR and Article 4 of the EU Charter of Fundamental Rights.
   The TCAW to which the refusal related was dated the 1st of March 2022.
   The concerns which gave rise to the refusal related to the content of three reports furnished by Professor Patricia Casey which addressed the Respondent's history of having autistic spectrum disorder/ Asperger's.

   Mr. Justice McDermott sought a specific assurance that the Respondent's medical needs as set out in the reports would be adequately catered for.

7. By way of response the Scottish Authorities provided the following:

   > *"Every individual is assessed by the NHS on their admission into SPS custody, and they will determine an offender's medical needs. It is not possible to provide a specific assurance that Mr Sharples medical needs, as detailed in the reports of Professor Casey, will be adequately catered for throughout any period on remand or during a sentence of imprisonment in SPS custody. (Emphasis added) However, SPS can provide assurance that it will follow any assessment and care plan provided by the NHS within the establishment. Further matters such as*

*clothing, mealtimes, items in use, and supportive measures cannot be determined until an individual is in SPS custody and for operational reasons may not be possible."*

Mr. Justice McDermott considered the response fell far short of addressing the concerns raised in the reports and refused surrender due to "*a real and substantial risk of inhuman and degrading treatment based on factors specific to his case*".

Objections to surrender.

The Respondent objects to his surrender on several grounds.

8. Ground one -Non-compliance with Section 11(1A) (d) and (f) of the European Arrest Warrant Act 2003.
Section 11 (1A) (f) requires that the circumstances in which the offences were allegedly committed, including the time and place of their alleged commission and the degree of alleged involvement of the Respondent in the commission of the offences should be set out. It is submitted that there is a lack of clarity as to the number and nature of the offences for which surrender is sought by reason of the content of Part (h) of the warrant.
I do not consider that the content of paragraph (h) creates any ambiguity regarding the offences for which surrender is sought. Part (e) of the warrant makes it abundantly clear to what offences the TCAW relates and the underlying circumstances. I do not consider that part (h) has any impact on the content of part (e).
I therefore dismiss this ground of objection.

9. Ground two – Surrender must be refused under Section 37 of the Act due to the real risk of the Respondent receiving an indeterminate sentence in the form of an Order for Lifelong Restriction (OLR).
This ground of objection was not pleaded and arises from the advice of Fred McIntosh, a Scottish KC who was engaged by the Respondent to give advice on the competence of the Crown Office to provide the letter of assurance and to offer an opinion on the likely sentence the Respondent would receive if he were convicted. I accept that the inquisitorial nature of the proceedings under the EAW Act may, from time to time, lead the Court into areas which were not necessarily contemplated from the outset. However, that is not the case here. If the point had any immediate relevance to the issues which relate to the Respondent, I would consider an application to receive this submission, however, I consider that as the TCAW is an accusation warrant, the question of his likely sentence upon conviction is not a matter to which this Court can have any regard. There is no suggestion that an OLR is a mandatory sentence for either of the offences for which the Respondent is sought. At most, it can be said that it is one of a range of sentencing options available to the sentencing court.

This is an entirely speculative objection which was not appropriately pleaded and with which I am not prepared to engage.

10. Ground three – Issue estoppel applies to the question of whether the surrender of the Respondent would expose him to a real risk of inhumane and degrading treatment.

Respondent's submissions

Mr Munro SC on behalf of the Respondent maintains that issue estoppel applies to the decision of McDermott J., that the Respondent is exposed to a real risk that his surrender to Scotland will result in inhuman and degrading treatment. The Respondent relies substantially on the decision of the Supreme Court in *Tobin (No.2) [2012] 4 IR 147* and the judgment of Burns J. in *Bailey (No.3) [2020] IEHC 528* in support of this ground. It is argued that the Respondent, like the Respondents in *Tobin (No.2)* and *Bailey (No.3)*, has accrued a right not to be surrendered for these offences and the adequacy of assurances which accompany the second TCAW cannot be re-opened. The Respondent also relies on the review of *Tobin (No.2)* and *Bailey (No.2)* and *(No.3)* conducted by Burns J. in the *Minister for Justice v Klubikowski [2021] IEHC 292.*

11. Applicant's submissions

In response, Mr Kennedy SC for the Applicant points to the recent Supreme Court decision in *Minister for Justice v Fassih [2022] IESC 10* as the most recent and authoritative judgement on issue estoppel and submits that it supersedes the decisions in *Tobin (No.2)* and *Bailey (No.3)*. Mr Kennedy SC relies on a series of passages in the judgement of Ms. Justice O'Malley in *Fassih* to support his argument that there has been a significant refocussing of the approach to issue estoppel in the context of surrender proceedings. He maintains that given the *sui generis* and inquisitorial nature of surrender proceedings under the European Arrest Warrant Act 2003, the issue of estoppel has limited applicability. Mr Kennedy also points to the obiter remarks of Burns J. in *Machazka (No2) [2022] IEHC 38*.

12. The Law

The nature and scope of issue estoppel provided by Sir Owen Dixon in *Blair v Curran (62 CLR 464)* was approved by the Supreme Court in *Belton v Carlow County Council [1997] 1 IR 172* at page 80:

*"A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared. The distinction between res judicata and issue-estoppel is that in the first the very right or cause of action claimed or put in suit has in the formal proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of*

*some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order."*

Both parties agree *res judicata* does not apply to surrender proceedings.

13. Although the present proceedings are not concerned with technical defects in the TCAW a discussion of estoppel in the context of extradition proceedings is incomplete without reference to the judgment of Denham J. in *Bolger V O'Toole ex tempore, Unreported, Supreme Court per Denham J, 2nd December 2002.* In *Bolger,* a fresh set of warrants issued and cured the defects which led the discharge of the Applicant in respect of the first set of warrants. In her judgment Denham J said the following:

*"The warrants are new and any issues which may be raised will be different. The fact that the applicant was discharged by the District Court on foot of a previous set of warrants where there two errors does not exclude a fresh set of warrants being produced and being endorsed. New warrants which have been endorsed now arise to be considered by the District Court. It is for the District Court to exercise its jurisdiction under the Extradition Act, 1965 as amended. The fact that a previous set of warrants existed and on which the applicant was discharged does not prima facie exclude the production and endorsement of a second set of warrants. It may well be that for good reason, in the circumstances of a case, a court may determine that an application for extradition should be refused. Thus, if it were an abuse of process the application may fail. In this case the applicant has been refused the leave to make a specific application grounded on specified issues of abuse of process. However, that would not be a bar to any subsequent application for habeas corpus on different issues. Similarly, issues such as delay, which may arise in accordance with the legislation as well as the Constitution, are separate issues which may be raised. However, these matters are not before this Court."*

The starting point, therefore, is that a previous refusal of surrender does not preclude the issuance of a subsequent warrant.

14. The Respondent's objection to surrender is based on a claim of an accrued right in accordance with the determinations made in *Tobin (No.2)* and *Bailey (No.3)*. The Court's assessment of the suggested parallel between the decision of McDermott J. refusing surrender and the decisions refusing surrender in *Tobin* and *Bailey*, necessitates re-visiting the circumstances which gave rise to the two decisions in question.

*15.* <u>*Tobin*</u>

The surrender proceedings against Ciaran Francis Tobin related to two EAWs in respect of which the surrender of the Respondent was refused.

The first decision of the High Court refusing surrender was upheld by the Supreme Court in *Tobin (No.1)* in July 2007.

The decision of the Supreme Court in *Tobin (No.1)* hinged on the wording of Section 10 (d) of the European Arrest Warrant Act 2003 which imposed a requirement for the

requested person to have "fled" from the requesting State after a sentence of imprisonment had been imposed. The Supreme Court decided on the 19th July 2007 that the requested person did not "flee" and as Section 10 (d) was the only provision which was capable of applying to the Respondent, surrender could not be ordered. Section 10 of the European Arrest Warrant Act 2003 was amended by the Criminal Justice (Miscellaneous Provisions) Act 2009 which removed the requirement for the requested person to have "fled from the issuing State" and a second EAW issued on the 17th of September 2009 which was substantially the same as the first EAW.
The High Court made an Order for the surrender of the Respondent which was successfully appealed to the Supreme Court and was the subject of the judgement in *Tobin (No.2) [2012] 4 IR 147*.

O'Donnell J. (with whom Hardiman J. agreed) was compelled to 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 Accordingly, I have no doubt that what Mr. Tobin had acquired as a result of the decision in Tobin (No. 1) and can properly be described as a right acquired or accrued for the purposes of s.21 of the Interpretation Act 2005."*

O'Donnell J. was of the view that there was a clear finding in *Tobin (No. 1)* that the party had derived a benefit from a judicial determination on a substantive, but specific issue in the nature of an issue estoppel, or a right which was binding on the parties as regards that issue in relation to any subsequent application for surrender.

16. <u>Bailey</u>

The events which gave rise to the issuing of three EAWs by the French authorities in the trilogy of cases concerning Ian Bailey are well-known. The Respondent was suspected by the French authorities of having committed the murder of Sophie Toscan du Plantier, a French citizen, on the 22nd/23rd of December 1996 at her home in Skull, Co. Cork. Following an investigation by the Irish police, the Director of Public Prosecutions decided not to prosecute the Respondent for the killing of Mme du Plantier.

The first of three EAWs was issued by the French authorities on the 19th February 2010 and the High Court ordered his surrender but was overturned on appeal by the Supreme Court.

One of the two grounds for refusing surrender was that Section 44 of the Act of 2003 precluded it.

Section 44 of the Act of 2003 provided 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."*

17. The second warrant issued on the 3rd of August 2016 and surrender was refused by Hunt J. on several grounds including abuse of process and that surrender was prohibited by Section 44 of the Act of 2003.

18. In 2019, the Criminal Law (Extraterritorial Jurisdiction) Act 2019 came into force and extended the extraterritorial jurisdiction for murder under Irish law to include persons ordinarily resident in Ireland. As a British citizen residing in Ireland, the restriction of extra territorial jurisdiction to Irish citizens had been a bar to surrender in the first two applications for surrender.

19. A third warrant issued on the 21st of June 2019 and the case was heard by Burns J. who delivered a lengthy judgement which comprehensively reviewed the Supreme Court decision.

    Notwithstanding the amendment to the Act, Burns J. ultimately concluded he was bound by the decision of the Supreme Court in *Bailey (No.1)* which found that there was an absence of reciprocity between Ireland and France in how each State exercised its extra-territorial jurisdiction for the offence of murder and consequently, surrender was prohibited by Section 44.

*20.* Burns J. was required to engage with the submission regarding issue estoppel and in so doing, he referred extensively to the judgements of the Supreme Court in *Tobin*. Applying the reasoning of O'Donnell J. in *Tobin (No.2)* he made the following statements in paragraph 82 of his judgment:

    *"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."*

    Later in the same paragraph Burns J. states:

    *"This does not mean that a person who obtains such an accrued right from a final judicial determination proceeding seeking surrender under the Act of 2003 necessarily enjoys a permanent immunity from future surrender under the Act of 2003. 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."*

    At paragraph 83 of the judgement Burns J. continued:

    *"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."*

*21.* The Respondent in these proceedings maintains that the right which has accrued to him is the right not to be surrendered to degrading and inhuman prison conditions in circumstances where the issuing State was given every opportunity to put its best foot forward in accordance with the decision of the CJEU in *ML Case C-220/18 PPU.*

The Respondent points to recent cases in which issue estoppel was successfully argued:

In the *Minister for Justice and Equality v Klubikowski [2021] IEHC 292* the inability of the Minister to establish dual criminality was found to be a bar to surrender by Donnelly J. in her decision refusing surrender in 2015. The problem arose from a reference to hemp (rather than cannabis) in the translation of the warrant. Cultivation of hemp is not an offence under Irish law. A second warrant dated 5th September 2018 sought surrender for the same offence. The description of the offence in the Polish version of the warrant was identical to the description in the first warrant and it became apparent that there had been an error in the English version of the first warrant and that "hemp" instead of cannabis was a translation error. Burns J. had to decide whether the Applicant was entitled to re-argue "the substantive issue" of correspondence.

In deciding that the Minister was estopped from re-arguing the issue of correspondence Burns J. relied on the judgement of Donnelly J. in *Minister for Justice and Equality v. Leopold [2020] IEHC 84***,** a case which also concerned a refusal of surrender based on lack of correspondence. Donnelly J. concluded that she was bound by the previous decision of Edwards J. on the issue of correspondence.

At paragraph 30 of the judgement in *Leopold* Donnelly J stated:

*"A decision on correspondence goes to the heart of the issue of whether surrender/extradition is permitted. It is not a technical issue of the type which had resulted in the District Court refusing the extradition in Bolger, by way of example. It is also important that in that respect, that EAW 7 (the present EAW) does not 'correct' any defect in the original warrant. There is no new information provided to this Court. It is the same request being asked in exactly the same manner."*

*22.* The final decision to which the Court was referred relating to the issue of estoppel and abuse of process was the *Minister for Justice and Equality v Nowakowski [2023] IEHC 253.* The background to the case was as follows:

*23.* In 2015 Hunt J. refused surrender based on the absence of adequate assurances that the conditions of detention in Poland would address the Respondent's serious and complex medical needs. The decision of the High Court was not appealed. A second warrant issued on the 24th of May 2021 with assurances regarding the medical treatment the Respondent would receive if surrendered.

24. In deciding that the issuing of the second warrant was an abuse of process Naidoo J. stated the following:

*"Refusal to surrender was not because of some technical defect in the formal content of the warrant, or due to some logistical difficulty transferring the respondent to the requesting State, it was because of a legitimate concern on the part of the court hearing the application about the Respondent's medical condition, which the requesting state did not address to the satisfaction of Hunt J. No further request having issued within a reasonable period after the refusal to surrender, the Respondent was, in my view, justified in thinking that the matter had reached finality."*

25. Fassih

The current law in respect of issue estoppel underwent extensive review in the decision of O'Malley J in *Fassih*.

At paragraph 97 of her judgement O' Malley J highlights the unique nature of proceedings under the EAW Act stating:

*"The authorities concerning the applicability of res judicata and issue estoppel must, therefore, be considered with the unique nature of the EAW process in mind. Principles intended to assist in the just determination of adversarial disputes may not always be appropriate to proceedings where the emphasis must be on the inquisitorial role of the court and the obligation to comply with commitments made to other States."*

At paragraph 125 of her judgement O'Malley J states:

*"It seems to be clear from all of the foregoing that issue estoppel can, in principle, arise in the context of EAW proceedings. It will not prevent consideration of a new warrant, after a refusal to surrender in respect of an earlier one, for the purpose of determining whether or not the respondent should be surrendered. However, it may, in the absence of a change in the relevant legal or factual circumstances, determine the outcome of an issue sought to be raised in relation to that new warrant. I would consider, in this context, that a distinction between "technical" and "substantive" issues may not be particularly helpful. However, it seems that a conclusive ruling on a legal issue that is not specific to the terms of the individual warrant before the court may in principle be binding on the parties to the litigation in which the ruling was given, in the absence of any material change to the law. Similarly, it would seem that a refusal to surrender based on a factual finding that will not change (for example, in relation to the age of criminal responsibility) could be binding. However, a decision that arises from the terms of the warrant itself may not have the same effect, since each new warrant can give rise to new issues and must be given full consideration. It is apparent from the foregoing passage in Fassih that issue estoppel does not apply where there is "a material change in circumstances."*

*26.* Decision

Applying the foregoing authorities to the present case, it is clear that this Court must decide whether the decision of McDermott J. refusing surrender on Article 3 grounds conferred on the Respondent a right never to be surrendered to Scotland and, if it did not, whether the provision of more substantial assurances by the Scottish authorities "is

a material change of circumstances" which justifies the Article 3 objection being revisited.

27. It appears plain to me that even on the authorities relied upon by the Respondent that the refusal to surrender was a refusal which conferred the right not to be surrendered but was not a privilege or immunity from surrender. The right was one not to be surrendered so long as the Issuing Judicial Authority was unable or unwilling to give assurances that his complex needs would be addressed within the Scottish prison system. The determination of McDermott J. did not involve a determination of the law, and insofar as there was a determination of fact, it was a determination that what the Scottish authorities had offered by way of assurance was inadequate.

28. The objective of finality in litigation recedes in importance in the context of extradition proceedings. The *sui generis* nature of the proceedings under the 2003 Act permits second and subsequent warrants to be transmitted to address deficiencies in previous warrants.

29. The letter provided by the Scottish Crown Office is an assurance which was not extended during the first application. The detail of the assurances attached to the EAW constitute an advance of substance on the information which the Issuing Judicial Authority made available to McDermott J.

    As such, the provision of the letter of assurance constitutes "a material change in circumstances". In all the circumstances, I am quite satisfied that the Minister is not estopped from arguing the sufficiency of the assurances which have been provided by the Issuing Judicial Authority.

Ground Four - Abuse of Process

30. Having rejected the argument based on issue estoppel, the Court must now consider whether in the circumstances of this case, the issuing of a second TCAW by Scotland and the initiation of surrender proceedings pursuant to it is an abuse of process.

    It is accepted that where issue estoppel is deemed not to apply, abuse of process may come into play.

Respondent's Submissions

The grounds upon which the respondent argues an abuse of process are as follows:

(a) Surrender was refused by the High Court.
(b) The High Court gave a reasoned judgement based on the submissions of both parties.
(c) The refusal was on substantive not technical grounds.

(d) The issuing State could have given an appropriate assurance.
(e) No explanation has been given for the failure to give a better assurance in the first proceedings.
(f) The reasons for the issuing State being in a position to give another purported assurance within a short period of the refusal remains opaque.
(g) The grounds for refusing surrender remain the same.
(h) The within proceedings constitute the second attempt to surrender the Respondent.
(i) These proceedings are having a detrimental effect on both the Respondent and his family.
(j) The Respondent has a specific condition and can be categorised as a "vulnerable person" by reason thereof.
(k) The Court has a duty to protect fair procedures.

In addition, the Respondent relies on the fact that McDermott J. gave a reasoned judgement based on the hearing of the arguments for both sides and the decision was not appealed.

31. In essence, the Respondent claims that in circumstances where the Article 3 risk has already been determined in the Respondent's favour, and where no explanation has been forthcoming for the unavailability of the specific assurance sought by McDermott J, the cumulative effect of the preceding factors together with the vulnerability of the Respondent and the detrimental effect on his life and that of his family warrant a refusal of surrender on the grounds of abuse of process.

32. The Respondent suggests his position is comparable to that of the Respondent in *Nowakowski*. In *Nowakowski* Naidoo J. refused to re-open the subject of conditions of detention which had not been adequately addressed by the Issuing Judicial Authority five and a half years previously and, which led to a refusal of surrender by Hunt J. on medical grounds.

33. <u>Applicant's submissions</u>
The Minister maintains that there is no bar to a second TCAW issuing and refutes the suggestion that the proceedings before this Court are an abuse of process.
Mr Kennedy SC submits that the issuing of a second warrant cannot be considered an abuse of process *per se,* suggesting that the authorities relied upon in relation to the issue of estoppel amply demonstrate that abuse of process requires an additional element or elements and the refusal of surrender based on abuse of process is exceptional. He suggests the information provided by the Scottish Prison Service was provided in good faith and that it was simply inadequate to address McDermott J.'s concerns. Mr Kennedy observes that the Issuing Judicial Authority reconsidered the issue and provided an additional assurance without any undue delay.

34. Mr Kennedy opened the leading authority on abuse of process, *Minister for Justice and Equality v J.A.T. No. 2 [2016] IESC 17* from which it is abundantly clear that the level

of mutual trust and confidence which underpins the TCA is such that refusal based on abuse of process is rare and exceptional.

At paragraph 1 of his judgement O'Donnell J. states:

*"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."*

At paragraph 4. O'Donnell J. stresses the public interest in ensuring persons accused of criminal misconduct face trial:

*"There is a constant and weighty interest in surrender under an EAW and extradition under a bilateral or multilateral treaty. People accused of crimes should be brought to trial. That is a fundamental component of the administration of justice in a domestic setting, and the conclusion of an extradition agreement or the binding provisions of the law of the European Union means that there is a corresponding public interest in ensuring that persons accused of crimes, in other member states or in states with whom Ireland has entered into an extradition agreement, are brought to trial also."*

In relation to the reciprocity associated with extradition agreements O'Donnell J. goes on the say:

*"There is also a corresponding public interest in avoiding one country becoming, even involuntarily, a haven for persons seeking to evade trial in other countries."*

At the conclusion of paragraph 4. O'Donnell J. states:

*"I think it is fair to say that it is only if some quite compelling feature, or combination of features, is present that it would be appropriate to refuse surrender on grounds of due process or interference with rights. It is important that courts should also rigorously scrutinise the factual basis for any such claims against that background."*

Mr Kennedy SC submits that *J.A.T (No. 2)* implies that there is no requirement on the Scottish authorities to explain why the assurances which are now offered were not extended when requested by McDermott J.

O'Donnell J. stated at paragraph 7.

*"If explanation was ever required, it was more naturally required in the context of the proceedings in which the error was identified. It would, I think, border on the perverse to refuse surrender now on foot of what is ex hypothesi a perfectly valid warrant because the authorities had not given a more elaborate explanation of an error made in an earlier warrant, which itself had been found to be defective by a final decision of this Court (at least when there is no suggestion of bad faith or concealment calling for explanation…)".*

O'Donnell J. argues against the undue extension of the concept of abuse of process and suggests: *"If it is considered that matters can properly be addressed by admonishment, then it is open to doubt that the conduct amounts to an abuse, de facto or otherwise, at all."*

35. Burns J. helpfully distilled the principles applicable to breach of process in *Angel [2020] IEHC 699* at paragraph 31:

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

Decision

36. In 2023 the Scottish authorities did not engage with the concerns of McDermott J. to the extent that was expected and appropriate to the special needs of the Respondent. The letter received from the Scottish Prison Service was mildly dismissive in its tone and content, but it is highly questionable whether that lack of diligence brings the case into the realm of abuse of process.

37. The Respondent's mother, Marina Sharples swore an affidavit which gives insight into the impact of the Respondent's disorders (ASD and ADHD) on his day-to-day life and the difficulties he encounters in carrying out mundane tasks. It is apparent that the Respondent is very dependent on his parents for practical and emotional support. He suffers from separation anxiety when separated from his parents. He suffers from insomnia and takes sleeping tablets. Stress makes the insomnia worse. He suffers from bouts of depression and anxiety and has been recently diagnosed with ADHD

*38.* Realistically, it must be recognised that some of the Respondent's sensory difficulties and his insomnia are such that he experiences them regardless of his living conditions.

The three reports of Professor Casey elaborate upon the issues identified by Marina Sharples and recommendations are made (Reports appended).

*39.* The Respondent has a disorder which makes day-to-day life challenging for him and his family and which requires considered and careful management. This is the second set of proceedings within two years and the proceedings have been a source of stress to the Respondent and his family.

40. I have had regard to all the factors identified by the Respondent and the Applicant specific to these proceedings and the Respondents personal circumstances. The factors which conceivably feed into the abuse of process argument are primarily those lettered (h), (i), and (j) above. The balance of the factors relied upon involve a merger by the Respondent of the arguments made in respect of the issue of estoppel.

41. The words of Hardiman J. in *Tobin [2012] 4 IR 147* are illuminating in terms of what abuse of process jurisdiction aims to combat:

*"There will rarely be a finding of abuse unless the later proceedings involve what the Courts regard as unjust harassment of a party."*

42. One of the weightier factors which is prominent in cases where abuse of process was successfully argued is lapse of time. Lapse of time does not feature here.
In fact, the Scottish authorities addressed the shortcomings in the original assurance letter with promptness. The second TCAW issued approximately 15 months after surrender was refused. Consequently, the Respondent has not been led to believe, for any appreciable length of time, that he no longer faced the risk of being prosecuted for these offences.

43. The threshold for abuse of process is set at a very high level and jurisdiction will be exercised in the rarest of cases. The Respondent is accused of committing an immensely serious assault and having possession of a firearm. There is a compelling public interest in ensuring persons responsible for crimes of extreme violence, such as these, are made accountable.

44. At the conclusion of his judgement in *J.A.T (No. 2)* O'Donnell J states the following:

*"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."*

45. In my view, the cumulative factors which may be taken into consideration on behalf of the Respondent fall significantly short of what is required to establish abuse of process.

I am therefore dismissing this ground of objection.

Ground five -Competence of Issuing Judicial Authority to Give Assurances.

46. The competence of the Crown Office to give assurances regarding the respondent's conditions of detention is challenged. Part F of the TCAW states:
**"***That request (Original TCAW) was refused by the court who were not satisfied by the information provided regarding the conditions in which the requested person would be. held were he to be returned to Scotland and remanded. Having considered the terms of the judgement, which was issued, further information has been gathered from Police Service of Scotland, Scottish Prison Service and the National Health Service for Scotland which it is believed will allow the judge to find that surrender would not be incompatible with the convention rights of the requested person."*

Reference is made to the attached document containing the further information and assurances. The letter is signed by C. Kennedy on behalf of Julie Clarke, Head of Extradition, at the International Cooperation Unit at the Crown Office in Edinburgh. The Respondent questions the competence of the Issuing Judicial Authority and the signatories to provide the information contained in the assurance document.

Several observations were advanced in connection with this point of objection:

(a) In the previous application the information came directly from the Scottish Prison Service. The new information attached to the TCAW does not emanate directly from the Scottish Prison Service.
(b) Ms Kennedy and Ms Clarke, on whose behalf the letter of assurance was signed, are civil servants (Procurator Fiscal Deputes) who have no direct experience of Scottish Prison conditions.
(c) According to the Affidavit of Fred McIntosh KC, the Lord Advocate, the head of the system of prosecution in Scotland, may give advice but it does not bind anyone outside the Crown Office or the Procurator Fiscal Service. Therefore, the assurance would bind Scottish Ministers but not employees of the Scottish Prison Service.
(d) Although it is accepted that it is entirely within Sherriff Campbell's power as the Issuing Judicial Authority to state what is stated in part F, he does not say that he obtained the information or satisfied himself that it was accurate, nor does he assert that he's offering any assurance. He appears to have been merely "consulted".
(e) The Respondent questions the status of the information previously given by the Scottish Prison Service which maintained that specific assurances could not be given.

The Respondent points to the case of *Minister for Justice -v- Bradshaw, unreported High Court, McDermott J., 8th May 2023* as an authority for the proposition that in certain circumstances the Court must re-visit the information previously received and question whether the information received by way of explanation has emanated from the appropriate authority. In *Bradshaw*, the Issuing Judicial Authority had certified the

offence of Murder in circumstances where it should never have been included in the EAW and an explanation for its inclusion by the CPS and the police was considered inadequate by McDermott J. It was evident that the Issuing Judicial Authority had not been told about the executing judicial authorities concerns.

In his judgement McDermott J. stated:

*"I am not satisfied in this case to interpret the EAW which expresses a judicial decision to certify matters relevant to murder without any understanding of how the certification occurred or why it should be ignored and in circumstances in which the Issuing Judicial Authority has not been informed of this Court's concerns. It appears to me that it would be disrespectful to the Issuing Judicial Authority to draw inferences from the information provided as to how and why that certification was made and whether it was made in error or otherwise. On such a fundamental issue, in respect of a serious offence, absolute clarity is required, and in this instance from the Issuing Judicial Authority."*

47. The Minister in response relies on the decision of the Court of Justice in *ML C220/18 PPU*.

48. *ML* is the leading authority in relation to how concerns regarding prison conditions in the issuing State should be addressed. The decision expressly addresses the issue which arises when the executing judicial authority is unable to ascertain if the information came from an authority within the issuing State other than the Issuing Judicial Authority itself.

49. Paragraph 108 to 114 of the judgment states:

*108. It should be recalled that Article 15(2) of the Framework Decision explicitly enables the executing judicial authority, if it finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, to request that the necessary supplementary information be furnished as a matter of urgency. In addition, under Article 15(3) of the Framework Decision, the issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.*

*109. Moreover, in accordance with the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, the European Union and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties (judgment of 6 September 2016, Petruhhin, C-182/15, EU:C:2016:630, paragraph 42).*

*110. In accordance with those provisions, the executing judicial authority and the issuing judicial authority may, respectively, request information or give assurances concerning the actual and precise conditions in which the person concerned will be detained in the issuing Member State.*

*111. The assurance provided by the competent authorities of the issuing Member State that the person concerned, irrespective of the prison he is detained in in the issuing Member State, will not suffer inhuman or degrading treatment on account of the actual and precise conditions of his detention is a factor which the executing judicial authority cannot disregard. As the Advocate General has noted in point 64 of his Opinion, a failure to give effect to such an assurance, in so far as it may bind the entity that has given it, may be relied on as against that entity before the courts of the issuing Member State.*

*112. When that assurance has been given, or at least endorsed, by the issuing judicial authority, if need be after requesting the assistance of the central authority, or one of the central authorities, of the issuing Member State, as referred to in Article 7 of the Framework Decision, the executing judicial authority, in view of the mutual trust which must exist between the judicial authorities of the Member States and on which the European arrest warrant system is based, must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of Article 4 of the Charter.*

*113. In the present instance, the assurance given by the Hungarian Ministry of Justice on 20 September 2017, and repeated on 27 March 2018, that the person concerned will not be subjected to any inhuman or degrading treatment on account of the conditions of his detention in Hungary was, however, neither provided nor endorsed by the issuing judicial authority, as the Hungarian Government explicitly confirmed at the hearing.*

*114. As the guarantee that such an assurance represents is not given by a judicial authority, it must be evaluated by carrying out an overall assessment of all the information available to the executing judicial authority."*

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50. It seems, therefore, that the executing judicial authority must consider information provided by the authorities of the issuing member state, other than the issuing judicial authority, including assurances that the individual concerned will not be subjected to inhumane or degrading treatment within the meaning of Article 4 of the Charter.

51. The Minister also relies on the decision of Donnelly J. in *MJE v. Henn [2019] IEHC 379* where *ML* was applied.
In *Henn* Donnelly J. carried out an assessment of an assurance provided by the Hungarian Prison Service in circumstances where objection was taken to the assurance because it wasn't furnished by the Ministry of Justice, as requested.

At paragraph 22 she states:

*"The principle of mutual trust requires this Court to have confidence in the organs of the issuing state. That principle is broader than the principle of mutual recognition of judicial decisions."*

And at paragraph 23:

*"In the context of what has been asked and how it has been answered, this Court has no basis for rejecting that assurance on the basis that it has not been given by an issuing judicial authority in the issuing state. Furthermore, in light of the decision in ML, the Court is entitled to accept an assurance given by a competent authority in the member state. It is for the Court to assess the assurance."*

52. Mr Kennedy suggests that the judgment in *Bradshaw* is in fact supportive of the Minister's submission that the assurance given by the Crown office has emanated from an authority competent to give such an assurance.
*Henn* has been applied in *Minister for Justice and Equality v István Szántó [2021] IEHC 537*.

Decision

53. It is evident that the assurance letter which accompanies the warrant, and which is referred to specifically in Part F of the TCAW, is a letter which was prepared as the result of a process involving consultation with the Scottish Police, the Prison Service, and the NHS. All the foregoing parties have knowledge relevant to the conditions of detention which the respondent will experience if he is surrendered. The information has been considered and the Issuing Judicial Authority expresses its view that it will enable the executing Court to conclude that the Respondent's convention rights will be respected.

I have no misgivings about the fact that the information collated has been furnished to this Court by the Crown Office. It appears to me to be that the extradition section of the Crown Office has the competence to offer the assurance contained in the letter.
The decision in *ML* and its application in *Henn* and subsequent cases leaves me in no doubt that the assurance which has been provided by the Crown Office is an assurance which can be relied upon by this Court, and which is enforceable by the Courts in the Issuing State. Once the content of the assurances adequately addresses the Article 3 concerns, the paramount consideration should be that the assurance can be enforced, should the need arise.

54. The mutual trust and respect underlying the EAW regime extends to the Trade and Co-operation Agreement and the Court should assess the adequacy of the assurance on its own merit.

I am dismissing this ground of objection.

Ground six – The Respondent if Surrendered is Exposed to a Real Risk of Degrading and Inhumane Treatment.

55. Respondent's submission
The Respondent submits that the assurance letter provided by the Scottish authorities does not address the risk of degrading and inhumane treatment and that it is not a meaningful advance on what was previously made available to McDermott J by the Scottish Prison Service.
The Respondent argues that the assurances are not sufficiently specific, and they do not adequately implement the recommendations of Professor Casey.

Applicant's submission

56. Mr Kennedy argues that the letter attached to the TCAW comprehensively addresses the concerns regarding the conditions of detention.

57. The Court has been guided through the assurance document provided by the Scottish authorities and those parts which address the deficiencies in the letter provided to McDermott J have been highlighted:

58. The prison to which he will be sent has been specified as Lowmoss and he will be housed in a single cell.

Under "Healthcare" it states:
"*the requested person will have a healthcare consultation with an NHS healthcare professional within 24 hours of arrival at the prison, using a nationally agreed admission process. An assessment will be made of his physical health, mental health and any addiction issues. The initial consultation will identify healthcare conditions, other vulnerabilities and medication requirement. A care plan will then be put in place tailored to his specific needs using a holistic, person-centred approach. It will take account of any clinical and support needs he has on account of his neurodevelopmental diagnosis. All prisons have access to a mental health tems comprising mental health nurses, forensic psychiatrists and clinical psychologists. This team will provide the necessary assessment and support for the requested person. Following this assessment, the individual needs of the requested person will be identified, and appropriate support services or management plans put into place*".

59. In relation to recommendations by Professor Casey the following accommodations are offered:
The provision of earplugs, if required.
Meals may be taken in his cell.
Where arrangements can be made, he can exercise separately.
Most of the time prisoners wear their own clothes. For visits he will be allowed to wear baggy clothes and to select the size of his own T-shirt, sweatshirt and jogging pants.

60. His medical needs are to be catered for through access to psychiatry and psychological services, speech and language therapists, occupational therapists, and physio therapists. The respondent will have access to the services of the Clinical psychology Interventions Service. He will be triaged for this service within 2 to 4 weeks of admission. All practitioners have experience of working with people with diagnoses of ASD and ADHD. They will "ensure that the requested person can access the appropriate level and intensity of psychological treatment required to meet his needs at any given time". The Clinical psychology interventions service assist in helping staff to understand what the requested person's ASD means for him and how it may impact on the way he interacts with others or follows prison rules.
    The letter also gives details of off-site healthcare services, the Anti-bullying policy, visits, telephone access, and postage for letters. The Respondent will also be entitled to apply for repatriation if he receives a sentence.

Decision

61. The letter from the Crown Office in Edinburgh which has been reviewed by Kenneth Campbell KC in Section F of the TCAW offers assurance regarding the Respondent's medical treatment which was expressly unavailable in the letter from the Prison Service in 2022.

62. There is express assurance that the conditions of detention the Respondent will experience will be modified to accommodate his neurodiversity:
    *"A care plan will then be put in place tailored to his specific needs using a holistic, person-centred approach. It will take account of any clinical and support needs he has on account of his neurodevelopmental diagnosis".*

    I am satisfied that the care plan for the Respondent will be tailored to his needs and that the medical personnel available to him at Lowmoss prison have the relevant skills and experience of persons with ASD and ADHD to cater for his emotional and psychological needs.

    I am satisfied that the practical accommodations regarding earplugs, meals, and clothing are part of the assurance. I am also satisfied that the medical needs identified by Professor Casey will be catered for. I consider that the document provided offers the Court as much specificity as can be offered remotely and without an in-person assessment of the Respondent being conducted by the Scottish prison service and the NHS.

63. I reject the suggestion that the assurance is insufficiently specific and that it does not alleviate the previous concerns regarding the risk of inhuman or degrading treatment. I am quite satisfied that previous concerns regarding the respondent's conditions of

detention have been addressed and that his surrender will not expose him to the risk of inhumane or degrading treatment.
I am dismissing this ground of objection.

64. I have considered each of the objections to surrender advanced on behalf of the Respondent and in each case, I have dismissed the objection.

    Consequently, there is no impediment to making an order for his surrender.

65. I am satisfied that none of the matters referred to Sections 21A, 22, 23, and 24 of the Act of 2003 arise, and that the surrender of the Respondent is not prohibited for any of the reasons set forth in those sections.

66. I am also satisfied that surrender is not prohibited by Part 3 of the Act of 2003 or any other provision of the Act.

    Accordingly, I am making an order for surrender in respect of the Respondent pursuant to Section 16(1) of the European Arrest Warrant Act 2003.

**JUDGE MELANIE GREALLY**