THE HIGH COURT

[2025] IEHC 28

BETWEEN **Record No 2024 EXT 179**

MINISTER FOR JUSTICE

APPLICANT

v.

MARTIN JOHN MCAULEY

RESPONDENT

JUDGMENT of Mr. Justice Patrick McGrath delivered on the 17 January 2025

1. BACKGROUND

1.1. In this application, the Minister seeks an order for the surrender of the respondent to Northern Ireland on foot of one Trade and Co-Operation Agreement warrant ('TCAW').

1.2. This warrant was issued on the 26 July 2024 by District Judge George Connor at Laganside Magistrates Court, Belfast and seeks the surrender of the Respondent for prosecution in relation to three offences of Murder. The TCAW was endorsed by this Court on the 21 August 2024. The Respondent was arrested on that date and produced to this Court on the 22 August 2024 and was thereafter remanded on bail pending the outcome of these proceedings.

1.3. The warrant was issued by a 'judicial authority' in the issuing state within the meaning of s. 10 of the European Arrest Warrant Act, 2003 (as amended) ['the 2003 Act'].

1.4. Sufficient information is set out in the Warrant to provide the necessary details required under Section 11A of the 2003 Act.

1.5. The person before the court, the respondent, is the person in respect of whom this TCAW was issued. No issue is in any event taken in relation to identity.

1.6. The minimum gravity requirement under the European Arrest Warrant Act 2003 (as amended) ['the 2003 Act'] is met.

1.7. None of the matters referred to in sections 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the 2003 Act"), arise for consideration in this application and surrender of the respondent is not precluded for any of the reasons set forth therein.

2. CORRESPONDENCE

2.1. The circumstances of the offences for which surrender is sought are set out in part (e) of the Warrant.

2.2. At approximately 14.20hrs on the 27 October 1982, three RUC officers, namely Sergeant Sean Quinn, Constable Paul Hamilton and Constable Allan McCloy, were killed in a bomb attack at Kinnego Embankment close to Lurgan, County Armagh. The officers had been travelling in a car and a bomb, which had been placed in a culvert under the road, was remotely detonated from a raised embankment overlooking the road. The IRA subsequently claimed responsibility for the attack.

2.3. It is alleged that the bomb was detonated by two members of the IRA, Eugene Toman and John Burns, who are both since deceased, having been shot by RUC officers on the 11 November 1982. DNA profiles were recovered from multiple items at the detonation site. Profiles found on eight smoked cigarettes recovered therefrom matched the DNA of the Respondent. In addition, two of the eight smoked cigarettes contained DNA that could be from the Respondent and the deceased Eugene Toman and, in the opinion of a forensic scientist, the mixture of the profiles found thereon is consistent with both Eugene Toman and the Respondent sharing these cigarettes.

2.4. It is said that the presence of Mr McAuley's DNA on the smoked cigarettes links him to the detonation site and to Eugene Toman and that the evidence overall provides certain proof that the Respondent was involved in the bomb attack.

2.5. It is not in dispute that this is a case where it is necessary to establish correspondence in accordance with ss 5 and 38(A) of the 2003 Act.

2.6. Section 5 of the 2003 Act provides:-

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

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

2.8. An inquiry into correspondence must be distinguished from the question of the strength of the case. At paragraphs 19 -20 of her judgment in Minister for Justice v Stafford [2009] IESC 83, Denham J stated:-

> 'The question which arises for determination is whether the acts alleged on the warrant show a link with the requested person. It is not necessary to show a prima facie case. It is not necessary to show a 'strong case'. The issue of innocence is for the jury in the requesting state…there is no reason why an accusation of a crime based on circumstantial evidence could not be the basis for a European arrest warrant'

2.9. I am satisfied that the offences alleged correspond with the following offences under Irish Law:-

(i) Murder contrary to common law as provided by Section 4 of the Criminal Justice Act, 1964; and

(ii) Capital Murder, being the offence of murder of a member of An Garda Siochana in the course of his / her duty, contrary to Section 3(1)(a) of the Criminal Justice Act, 1990

3. GROUNDS OF OBJECTION

3.1. In his Notice of Objection, the Respondent objected to surrender on the following grounds:-

(a) He does not consent to surrender and awaits inquiry and proof of all matters necessary to ground an application for his surrender to the issuing state pursuant to section 16(1) of the 2003 Act;

(b) The purported promulgation of Section 4A of the 2003 Act by way of secondary legislation in Regulation 5 of the European Union (European Arrest Warrant) (Amendment) Regulations 2021 was *ultra vires* the powers of the Minister for Justice and of no lawful effect, in circumstances where no such presumption is contained in the Trade and Co-Operation Agreement or is required as a matter of Union Law in respect of a surrender procedure between the Union and the United Kingdom;

(c) The Respondent awaits proof that this surrender is not statute barred, in circumstances where s. 42 of the Northern Ireland Troubles (Legacy and Reconciliation) Act, 2023 provides that such a prosecution must have commenced prior to the 1 May 2024

(d) The Respondent objects to surrender under s. 37 of the 2003 Act for incompatibility with his personal rights under Articles 40.3.1 and 41 of the Constitution, Articles 6 and 8 of the European Convention on Human Rights and the Charter of Fundamental Rights of the Union on the basis that:

- Surrender would be unjust and disproportionate on the basis that there is a substantial risk he would spend significantly longer time on remand awaiting trial than he would be liable to serve if convicted of these offences;
- Relying on the egregious conduct directed against him by State agents within the requesting State (including the same police as involved in the present prosecution), as set out in *R v Martin McAuley 2014 NICA 60,* and his targeting

in circumstances where a significant number of equally serious offences of a similar vintage have not been pursued, his surrender would be unjust and disproportionate; and

- His justifiable apprehension that the true purpose of seeking his surrender is so that he will be amenable to onward extradition to Colombia.

4. EVIDENCE ADDUCED BY RESPONDENT

4.1. Three affidavits were filed in these proceedings, two by the Respondent and one by his solicitor, Mr Fearghal Shiels. The first affidavit of the Respondent was filed for the purposes of a bail application and the second affidavit is therefore the substantive one for the purpose of these s. 16 proceedings.

Personal Circumstances

4.2. In his second affidavit, the Respondent firstly outlines his personal circumstances. He has been residing in Kildare since 1998 with his wife Cristin. He is the father of three adult children (aged 38, 37 and 33) and the grandfather of five children and his family all reside in the state.

4.3. He is on medication for a heart condition and diabetes and spent a month in hospital in 2019 following a Transient Ischaemic Attack.

4.4. He has been employed as a mechanic with Oxigen Environmental for some 15 years and a reference has been provided by his employer confirming that he is a valued and reliable employee. He is the main source of income for his family and his wife devotes her time to volunteer work for the homeless. A considerable amount remains owing on the mortgage on their family home.

4.5. Mr McAuley and his wife provide considerable assistance and support to his daughter Roisin, who is a single parent and mother of three children with various needs and disabilities. A letter has been provided by his daughter setting out the relationship she and her children have with her father and the roles he plays in their various lives.

Background to Extradition Application

4.6. The Respondent states that he has the *'gravest concerns'* about the motivations behind and purpose of this application for his surrender. He further says that he has no confidence in the fairness and integrity of the criminal prosecution being taken against him in the requesting state.

4.7. Having referred to his willingness to engage with various inquiries into these matters including the police investigation, as he says is evidenced by correspondence exhibited between his solicitors and the authorities in Northern Ireland, the Respondent then goes on to outline dealings with the RUC over many years from 1982.

4.8. The Respondent firstly refers to the killing of his then 17-year-old friend, Michael Tighe, in November 1982 as part of what he says was a 'shoot to kill' policy by a squad within the RUC. The Respondent was in the company of Mr Tighe and was shot and wounded prior to his arrest in the same incident. Mr McAuley states that he has not been granted permission to exhibit the 'Stalker/Sampson' reports on this 'shoot to kill' policy which he says would provide detailed and official confirmation to this Court about *'the extent to which the police force in this jurisdiction engaged in deceit and deception and perversion of the course of justice after having unlawfully killed 5 unarmed men and 1 minor and greviously injured me'*. This he says would assist in showing why there could be no confidence he would receive a fair trial if surrendered to Northern Ireland on these matters.

4.9. The Respondent thereafter sets out the history of the various prosecutions and acquittals of members of the RUC arising from their alleged involvement in this 'shoot to kill' policy. He also refers to the well-known history of the Stalker and Sampson inquiries and the alleged frustration of the same by the UK authorities.

4.10. The Respondent next deals with the '*Legacy Inquests'*, namely inquests into the deaths which resulted from the alleged 'shoot to kill' policy and the deaths of the three officers allegedly murdered by Mr McAuley in 1982 in Lurgan. A number of these inquests had been suspended by the Chief Coroner, Mr Leckey, in 1994 following a ruling by Nicholson J in the High Court in Belfast ruling that the

Stalker/Sampson reports should not be made available for the inquests. Following a decision by the House of Lords in 2007 in *Jordan & Another v Lord Chancellor & Another* [2007] WLR *754*, Mr Leckey decided to reconvene these inquiries. Over the following years various preliminary steps were taken and rulings given in relation to these inquests. On the 28 September 2023, the Northern Ireland Troubles (Legacy and Reconciliation) Act, 2023 [*'the Legacy Act'*] became law. This provided inter alia that the legacy inquests, if not completed by the 1 May 2024, were to be stopped. A new body, the Independent Commission for Reconciliation and Information Recovery [*'ICRIR'*] was introduced to replace the coronial process and to investigate deaths between 1966 and 1998. This Act has been the subject of political criticism and various court challenges, some of which remain to be resolved in the UK Courts.

Previous Criminal Proceedings in Northern Ireland

4.11. On the 2 February 1985, the Respondent was convicted by Kelly J in Northern Ireland of an offence involving the possession of three firearms found in the hayshed in which he was shot and wounded by RUC officers (and where Michael Tighe was killed by the said officers) contrary to Article 23 of the Firearms (Northern Ireland) Order, 1981. He was subsequently sentenced to two years imprisonment, suspended for a period of three years. In the course of his ruling, Kelly J found the evidence of the RUC officers unreliable and excluded their evidence from his consideration. He however rejected the explanation offered by the Respondent as to how he came to be in the barn with the weapons and was satisfied of his guilt beyond a reasonable doubt.

4.12. The Respondent submits that this Court ought not to treat these matters as unfortunate historical facts from a bygone era. In this regard he submits that critically the United Kingdom is not to be treated as deserving the same level of trust as a member of the European Union. The court must therefore examine these matters of concern, raising the prospect of a possible breach of Article 49 of the Charter, now and without any undue deference to the authorities in the United Kingdom and the application of any presumption that the requested state will protect his rights post surrender.

4.13. The Respondent submits that, at a minimum, given the unprecedented gravity of the previous actions of the agents of the State in the United Kingdom targeting his fair trial

rights, and indeed his life, it would be appropriate for this court to seek information and an assurance from the requesting state in respect of the capacity of the Courts in Northern Ireland to prevent the occurrence of a further miscarriage of justice and protect him.

Surrender would be Disproportionate

4.14. The Respondent submits that in all the circumstances his surrender would be unjust and disproportionate as *inter alia* :

a. Whilst his expert Mr McGrory KC SC says there is a 'reasonable prospect' of bail, this is not certain, and he therefore faces a substantial risk of spending a significantly longer period of time in custody on remand awaiting trial than the maximum period of two years imprisonment which he would have to serve if convicted of these offences;

b. His apprehension that part of the purpose of seeking his surrender is so that he will be available for onward extradition to Colombia; and

c. The interference with his family life that would be occasioned by the inevitable lengthy proceedings in the requesting state.

4.15. Exhibited to this affidavit is a copy of the Judgment of Morgan LCJ in the Northern Ireland Court of Appeal, allowing the Respondents appeal against conviction – see *R v Martin McAuley* [2014] NICA 60. In the course of his Judgment, the Lord Chief Justice referred to the judgement of the trial judge and his doubts about the reliability of the police evidence and exclusion of the same from his consideration. Subsequently, the Criminal Cases Review Committee (*'CCRC'*) had gained access to sensitive material held by the Security Service and the Public Prosecution Service and had been provided with relevant portions of the Stalker / Sampson reports. This evidence showed there had been a recording of the operation by the RUC in the hayshed and tape recordings of the same had been subsequently destroyed by various state agencies and a full history of the same is set out in the Judgment. This led to a reference by the CCRC to the Court of Appeal pursuant to powers set out in Part II of the Criminal Appeal Act, 1985 in respect of the conviction of the Respondent.

4.16. Morgan LCJ referred to the leading authorities on abuse of process in the UK Supreme Court, including the following comments from Paragraph 13 of the judgment of Lord Dyson in *R v Maxwell* [2010] UKSC 48:-

> *'It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that the accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balance of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the Court concludes that in all the circumstances a trial will offend the court's sense of justice and propriety' (per Lord Lowry in R v Horseferry Road Magistrates Court, Ex p Bennett [1994] 1 AC 42, 74g) or will 'undermine public confidence in the criminal justice system and bring it into disrepute' (per Lord Steyn in R v Laitif [1996] 1 WLR 104, 112f)'*

4.17. On the facts of this case, the Court of Appeal found that both parts of the 'abuse of process' test applied. Given that the appellant had allegedly offered an explanation at the scene for his presence in the barn, the destruction of the tape deprived him of evidence that might assist his defence. Furthermore the deliberate destruction of the tape, together with the attendant circumstances and the subsequent behaviour of various state agencies, arguably amounted to a perversion of the course of justice and, looking at all the circumstances, it would offend the courts sense of justice and propriety to uphold the conviction.

Colombia

4.18. The Respondent refers to his trial in Colombia in 2003. Following his arrest there, he together with Niall Connolly and James Monaghan had been charged with offences involving the alleged training of FARC rebels and travelling on false passports. They were acquitted at first instance of the more serious training charge and convicted of travelling on false passports, for which they each received a suspended sentence.

Following a successful appeal by the prosecution, the three accused were convicted *in absentia* by an appeal court of the training offence and sentenced to 17 years imprisonment. By that time, they had left Colombia.

4.19. Following the brokering of a peace deal between the Government and rebels in Colombia, all three were granted an amnesty but this was later revoked. An appeal has been lodged in Colombia against this revocation.

4.20. The Respondent refers to what he categorises as unsatisfactory responses from the DPP in Northern Ireland, to recent queries as to whether or not there has been any contact between the authorities in the requesting state and the Colombian authorities since 2001. He then refers to contact between the National Crime Agency and the Colombian authorities in relation to the Respondent 'for reasons unknown' as set out in emails which are exhibited. Mr McAuley says that the ultimate aim of these proceedings is to facilitate his onward extradition to Colombia and that these contacts are confirmation of this suspicion.

Delay

4.21. A report has been filed from Mr Barra McGrory KC, former DPP of Northern Ireland, in relation to inter alia the possible delay in this case coming on for trial. He was asked to advice on three issues:-

(i) The impact of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 [*'the Legacy Act'*];

(ii) The prospect of delay in bringing this matter to trial in the Northern Ireland jurisdiction; and

(iii) The prospect of the Respondent being granted bail pending trial.

4.22. Insofar as the 2023 Act is concerned, Mr McGrory refers to the evidence that the decision to prosecute this Respondent was taken prior to the 'cut off' date specified in the legislation, namely 1 May 2024. Apart from this Mr McGrory refers to the politically controversial nature of the legislation and to the successful challenge to certain immunity provisions contained therein, which have been found by both the High Court and Court of Appeal in Northern Ireland [*In the matter of an Application*

by Dillon & Others, 2024 NIKB 13] to be incompatible with the *EU Victims Directive* [2021/19/EU] which continues to apply to Northern Ireland due to the international treaty between the United Kingdom and the European Union, commonly known as the Windsor Agreement.

4.23. Insofar as any possible delay in this case coming on for trial is concerned, Mr McGrory sets out a helpful precis of the procedures in Northern Ireland covering such matters as committal hearings in the Magistrates Court, the disclosure process and the management of cases in the Crown Court. In this case he notes that it has been indicated that the committal papers are ready to be served on the Respondent if surrendered and says that he would not envisage any significant delay in obtaining a trial date in this matter, once the parties are ready. He comments that he would assume that the defence would seek their own independent forensic evidence and that this will normally take a number of months to prepare.

4.24. The potential for delay in this matter would seem to really centre around possible arguments surrounding disclosure and / or any application for a stay of proceedings on the grounds of abuse of process. The jurisdiction of the trial court to grant a stay on the grounds of abuse of process is well developed in Northern Ireland and Mr McGrory states that a number of grounds may be advanced seeking such a stay in this case including (i) the delay of 42 years allegedly causing irreparable prejudice such as to deny a fair trial to the accused (ii) a claim that it would be unconscionable for the State to be allowed to pursue the Respondent at this remove in time and given the comments of the Court of Appeal in the previous case where his conviction for possession of firearms was overturned in 2014; and (iii) the fairness of any such trial given the likely issues surrounding disclosure as a result of the number of inquiries and reports into the 'shoot to kill' policy allegedly operated by the State and the various claims of privilege / immunity likely to be made seeking to resist disclosure of same.

4.25. Although Mr McGrory accepts he cannot say how the individual trial judge would approach any such application, which is normally done by way of a preliminary pre-trial application, it has the potential to cause very considerable delay in the commencement of the trial itself.

4.26. Mr Mc Grory finally considers the issue of bail and the likelihood the Respondent would be admitted to bail if surrendered. Having referred to the leading authorities in relation to bail in Northern Ireland and considered the circumstances of Mr McAuley, he concludes that he has a reasonable prospect of securing bail, albeit under tight restrictions.

5. SUBMISSIONS OF THE RESPONDENT

5.1. The Respondent refers the Court to the decision of the Grand Chamber of the CJEU in the *Alchaster* case, [CJEU Case 202/24]. He submits that the CJEU there emphasised that the EAW Framework Decision does not apply to TCAW cases, such as the present. Article 254 of the Trade and Co-Operation Agreement requires Member States to ensure that surrender to the United Kingdom is compatible with the provisions of the Charter on Fundamental Rights of the EU. The real risk of a breach of a Charter right is therefore sufficient to enable a refusal to surrender to the UK.

5.2. The Respondent contrasts the tests to be applied where a claim is made that surrender will likely lead to a breach of a Charter or ECHR right. Where it is alleged that surrender to another member state will lead to a risk of breach of a Charter right, he submits the case law of the CJEU requires a two-step analysis of the risk and the obtaining, if necessary, of supplementary information from the issuing member state (see *Aranyosi & Caldaru* C404/15 and C-659/15). Such a two-step approach applies where such issues are raised in EAW proceedings as the Framework Decision relies on a *'high level of trust which must exist between the Member States and the principle of mutual recognition which [….] constitutes the 'cornerstone' of judicial cooperation between Member States in criminal matters'*. This is integral to the creation and maintenance of the area of freedom, security and justice and requires all members states to consider that *'save in exceptional circumstances … all the other member states are complying with EU law and particularly with the fundamental rights recognised by EU law'.*

5.3. The Grand Chamber also compared the position of third countries, such as Norway, which are members of the European Economic Area and participants in various EU programmes including (in the case of Norway) the Schengen acquis and the Common

European Asylum system. The 'trust' afforded to countries such as Norway is greater than that afforded to the UK which is not a party to any such arrangements.

5.4. The Respondent submits that, unlike the *Aranyosi* two step approach, EU executing judicial authorities, such as this Court, must adopt a one-step approach when considering if there is a real risk of violation of a Charter / Convention right if a person is surrendered to the United Kingdom. The presumption of compliance which underlies the Framework Decision does not apply to TCAWs. The UK cannot be treated as before and there is therefore no longer a presumption that the UK, including its courts, are bound by the same legal obligations as member states and that fundamental rights will receive equivalent protection.

5.5. The one step approach involves a holistic evaluation, without reference to the presumption underlying the operation of the Framework Decision, of all the circumstances in order to consider whether there are *'valid reasons for believing that that person would run a real risk to the protection of his or her fundamental rights if that person were surrendered to the United Kingdom'*

5.6. The Respondent further submits that the Judgment in *Alchaster* has significant consequences for the application of aspects of the 2003 Act to the United Kingdom, through secondary legislation by the Minister relying upon *'the powers conferred on me by section 3 of the European Communities Act 1972 (No.27 of 1972) and for the purpose of giving full effect to Title VII of Part III of the Trade and Cooperation Agreement'*.

5.7. Referring to inter alia the decision of the Supreme Court in *Meagher v Minister for Agriculture* [1994] 1 IR 329, the Respondent submits that the presumption contained in section 4A of the 2003 Act (as amended) and as applied to the UK to give effect to the Trade and Cooperation Agreement cannot be said to be 'necessitated' by Union Law. Indeed, he goes further and submits that the section is incompatible with Union Law, which precludes such a presumption and contends that the Minister acted *ultra vires* in purporting to amend the primary legislation to apply s. 4A to the United Kingdom.

5.8. In these circumstances, therefore, the Respondent submits that the Court must disregard s. 4A of the Act and proceed to assess whether there is a real risk of an unfair trial without relying on any presumption arising by reason of mutual trust.

Breach of Article 8 of Convention

5.9. The Respondent relies upon the contents of his affidavit which, he says, demonstrates that this is one of those cases where it would be an impermissible interference with his, and his family's rights, under Article 8 of the ECHR to surrender him to stand trial for these offences.

5.10. The Respondent, relying upon the delay and his particular family circumstances, says that it would be unjust and disproportionate to surrender him to the UK and contrary to Section 37 of the 2003 Act.

Risk of breach of right to a fair trial under Article 49 of Charter

5.11. In support of his apprehension that he would not receive a fair trial if surrender on this TCAW, the Respondent relies upon:-

a. The existence of what he claims is 'cogent evidence' , including in the form of an official inquiry (which itself would appear to have been subverted) and Court judgments, which support the inference that agents of the state murdered the two other men suspected of involvement in this offence and attempted to murder the Respondent;
b. The egregious conduct he says was directed against him by State agents in Northern Ireland as set out in the Judgement of Morgan LCJ in *R v Martin McAuley* 2014 NICA 60, the details of which were referred to in his substantive affidavit and summarised earlier in this judgment;
c. The involvement of the same police in the current proposed prosecution;
d. The unjust targeting of the Respondent for prosecution in circumstances where a very significant number of other equally serious offences of similar vintage have never been pursued or prosecuted.

6. SUBMISSIONS OF THE APPLICANT

Section 4A and Trade and Cooperation Agreement

6.1. The Applicant submits that the Respondents argument is misconceived in so far as he claims the presumption set out therein cannot be relied upon in this case.

6.2. Section 4A of the 2003 Act (as amended) provides:-

> *'It shall be presumed that the issuing state will comply with the requirements of the relevant agreement, unless the contrary is shown'*

6.3. The Minister submits that the section refers to a presumption of compliance with the requirements of the 'relevant agreement' and that, at law, there are in fact two such agreements – namely, the Trade and Cooperation Agreement which governs the arrangements between the EU and the UK and the Framework Decision which governs the arrangements between the Member States of the EU.

6.4. The applicant further submits that, absent proceedings which challenge the constitutionality of s. 4A of the 2003 Act (as amended), it represents the law of the State. And finally, the Minister rejects the claim that it was ultra vires her power to make the relevant amendment in 2021 by statutory instrument.

6.5. The Minister submits that, whilst the Respondents arguments might at first instance appear to suggest that the *Alchaster* case has created a difficulty for Section 4A of the 2003 Act, this is not the case. There is a presumption which applies to TCA warrants, albeit the presumption is weaker than the presumption of mutual trust and confidence which applies where EAWs received from EU Member States are being considered by the High Court.

6.6. The Minister accepts that, following on from *Alchaster*, it is clear that the UK is not in the same position as Member States in relation to the special position of mutual trust and confidence that applies between member states. The judgment however makes clear that the long-standing respect by the UK for fundamental rights must be taken

into account and the Trade and Cooperation Agreement is an extradition procedure agreed between the EU (of which this state is a member) and the UK which involves solemn undertakings on both sides.

6.7. The Minister submits that the general principle of good faith recognised by the Courts in relation to requests received from non-EU countries with which this State has an extradition agreement, as acknowledged and explained by Edwards J prior to the amendment of Section 4A in 2021 in his judgment in *AG v O'Gara* [2012] IEHC, applies here.

6.8. The applicant submits that Section 4A of the 2003 Act (as amended) confirms the existence of a general presumption of good faith and ensures that it applies to the principles contained in the TCA. She submits that there is no new presumption, on any presumption which was unlawful for the Minister to insert, by way of statutory amendment in accordance with the provisions of the *European Communities Act, 1972,* into Section 4A of the 2003 Act.

6.9. The Applicant points to various provisions in the Agreement itself where it is envisaged that the parties thereto will act with mutual respect and good faith in carrying out the tasks flowing from the agreement, for example Article 3 thereof. Moreover, the United Kingdom remains a party to the European Convention on Human Rights and the Respondent enjoys fair trial rights under Article 6 thereof and additionally Northern Ireland remains a party to the European Union Charter of Fundamental Rights pursuant to Article 2 of the Windsor Agreement and Article 4 of the Withdrawal Agreement.

6.10. The Minister submits that the Respondent is therefore required to overcome a presumption of good faith and compliance with his fundamental rights, albeit a weaker presumption that that which applies where requests are received from a member state. An individual assessment must be carried out by the court to ascertain if there are substantial grounds for believing there is a real risk to his fundamental rights as claimed and the Court may be required to seek additional information or assurances if this weaker presumption is rebutted. In assessing whether this presumption is rebutted the court is entitled to take into account what was stated by the CJEU at paragraph 80

of the Judgment in *Alchaster* about the long-standing respect of the fundamental rights in the UK.

Prosecution in Northern Ireland may be statute barred

6.11. The applicant refers to the reply received by way of additional information, dated the 11 October 2024, from the issuing judicial authority, District Judge Connor, who confirmed that the Public Prosecution Service in Northern Ireland had confirmed that the decision to prosecute the Respondent for these three offences in the TCAW was taken on the 8 February 2024.

6.12. In these circumstances and absent any suggestion that reliance cannot be placed upon the said information, the Minister submits that the court can be satisfied that, pursuant to s. 42 of the *Legacy Act*, the prosecution began prior to the relevant date; namely the 1 May 2024.

Surrender would be Disproportionate

6.13. The Minister makes the general submissions that firstly, it must be assumed that that in issuing the TCA warrant the issuing judicial authority deemed it proportionate so to do in all the circumstances and secondly, that there is no general basis for a challenge to surrender on the basis of proportionality – see paragraph 58 of the Judgment of Donnelly J in *Minister for Justice v D.E.* [2021] IECA 180.

6.14. Insofar as it is claimed that it would be disproportionate to order surrender as there is a substantial risk the Respondent would spend more time in custody on remand than the maximum period he would serve if convicted, the Minister submits:-

(i) The Respondents own expert, Mr McGrory KC SC, considers that he has a reasonable prospect of securing bail pending trial, albeit under tight restrictions; and

(ii) Mr McGrory points out that any substantive delay in the trial of this matter could occur if the Respondent sought to advance a 'No Bill' and / or abuse of process

application and submits that the respondent cannot reasonably rely on any such potential delay brought about by applications made on his behalf.

Fair Trial

6.15. The Minister next deals with the submission that there would be a real risk that the respondent would not obtain a fair trial in breach of Article 6 of the ECHR and / or Title VI of the Charter. The Minister submits that, as a matter of principle, there is no substantive difference between the right to a fair trial as protected by Article 6 of the ECHR and Title VI of the Charter and no such difference had been identified by the Respondent. Moreover, the applicant refers to the interpretative provisions in Article 52 of the Charter in support of the contention that there is in fact no difference of substance between the right as protected under the ECHR and the Charter.

6.16. As a state party to the ECHR and in line with the general principles which underlie the operation of extradition agreements between this state and third countries, namely countries outside the EU, the Minister submits that this court can be satisfied that the UK will act in a manner which respects the fundamental rights of the Respondent, including his right to a fair trial. Moreover, as stated at paragraph 80 of *Alchaster*, the Court is entitled to take into account the fact that the UK is a party to the ECHR and therefore bound by the requirements of that convention, including the obligation to ensure a fair trial for the Respondent compliant with Article 6 thereof.

6.17. Insofar as the particular complaints which allegedly give risk to a risk of an unfair trial are concerned, the Minister submits that it is well settled that any assessment of such a risk must be forward looking, and she refers here to the comments of Edwards J in *O'Gara*.

6.18. The applicant submits that the principles set out in bullet point form by Denham J in *Minister for Justice v Rettinger* [2010] 3 I.R. 783, provide a useful template to be applied, albeit suitably modified to take into account the circumstances where such a claim is made in relation to a request from the UK under the TCAW.

6.19. The Minister observes that in many jurisdictions, including Ireland, there have been controversial cases where issues of concern have arisen with the potential to damage trust in the relevant authorities and / or system of criminal justice, for example the Shortt case from Donegal or the Guilford Four and Birmingham Six cases in England. The Respondent has pointed to matters in the past which may have led to concerns in this regard in general and in relation to the manner in which he was treated by the authorities in the issuing state. The Minister submits that whatever the historical position may have been, whether generally or in relation to this particular Respondent, applying a forward-looking test there is simply no objective evidence to support any assertion that Mr McAuley might not now obtain a fair trial if surrendered to Northern Ireland.

6.20. Moreover, the Minister submits that the evidence in the case, specifically that of Mr McGrory KC SC, identifies specific procedures in the issuing state which are available to guarantee that the Respondent will obtain a fair trial. Reference is here made to that part of McGrory's report where he refers to the possible application by the Respondent for a stay on these proceedings as an abuse of process on the grounds that:

(i) Due to delay and the resultant prejudice this may affect the prospect of a fair trial in this case;

(ii) It would be unconscionable for the requesting state to now pursue the Respondent where it had the information available for many years and where the State has previously been censured by the Northern Ireland Court of Appeal for engaging in 'reprehensible behaviour' amounting to 'grave misconduct' against the Respondent, albeit in separate proceedings; and / or

(iii) There is insufficient disclosure or failures of disclosure on the part of the State

6.21. The Minister submits that the issuing state is a state party of the ECHR and the Respondent therefore has a guarantee of a fair trial if surrendered thereto pursuant to Article 6, the Respondent has adduced no objective up to date evidence to give rise to any suspicion or concern that he would not now be accorded a fair trial in Northern Ireland and furthermore, though the evidential burden rests on him to adduce evidence to substantiate a risk he would not obtain a fair trial, his own expert evidence demonstrates a system of potential applications and procedures in the Courts of

Northern Ireland to challenge the actions and failures of the State which might impinge upon the fairness of his trial.

6.22. The Minister refers to the relevant test, applied by the courts when such allegations are made in relation to non - EU countries – see ***AG v Marques*** [2016] IECA , as being whether the Respondent has established a substantial risk of a *'flagrant denial of justice'* if surrendered to face trial on these charges. She submits that the Respondent has wholly failed to meet this *'very high test'*. The applicant submits that there is no basis to refuse surrender based on the arguments advanced by the respondent as they are remote and speculative in nature.

Colombia

6.23. The Minister refers to what she describes as a *'subjective apprehension'* on the part of the Respondent that the true purpose of this application is to facilitate his onward extradition to Colombia but there is no evidence to support the same.

6.24. There is a presumption under section 24(2) of the 2003 Act, reflecting Article 626(5) of the TCA, that the issuing state will not surrender a person surrendered to a third country unless consent is given by this Court at some future point. The Applicant submits that there is no evidence to suspect that the issuing state will not abide by the agreement and breach the Specialty Rule in this case.

Personal Rights

6.25. The Respondent submits that a surrender is not to be refused because a person may suffer disruption, even significant disruption, of family life. Referring to decisions of the Irish Court, including *Minister for Justice v Verstaras* [2013] 4I.R. 206 and *Minister for Justice v D.E.* [2021] IECA 188, she submits that a refusal of surrender on Article 8 grounds ought only to be contemplated where the interference constitutes a gross one and constitutes a clear and unequivocal failure to respect the family rights of a proposed extraditee.

6.26. In assessing any such claim, the applicant submits that this Court is required to conduct a rigorous scrutiny of the facts and that, if an order for surrender to be refused, the Respondent must satisfy the Court that to surrender him would be incompatible with the Convention and protocols. Referring to the jurisprudence of the Courts, she submits that such a finding will only be made in rare and truly exceptional circumstances. The Minister submits that, though his surrender will inevitably involve and interference with his family life, he has not discharged the evidential burden to show that the level of interference with his family life, and the rights of his family members, as a result of his surrender would be such as to amount to a breach of the Constitution and Convention, such that it would be disproportionate to order his surrender.

7. DISCUSSION

Section 4A of the 2003 Act (as amended)

7.1. The Respondent contends that the presumption contained in section 4A of the 2003 Act, as amended by SI 27 of 1972, cannot be relied upon in this case. He so submits for the following reasons:-

a. The presumption as contained in section 4A of the 2003 Act (as amended) was not 'necessitated' by Union Law;
b. Section 4A, as amended, is in fact incompatible with Union law as, following on from the decision of the CJEU in *Alchaster* the presumption of mutual trust and confidence applied thereby to TCAWs is contrary to Union law;
c. The Minister therefore acted ultra vires in purporting to amend Section 4 by secondary legislation, namely using the powers conferred upon her by section 3 of the European Communities Act, 1972; and
d. This court must therefore disregard section 4A of the Act and must proceed to assess whether there is a real risk that the Respondent will face an unfair trial and there is no onus to be overcome by the Respondent in this regard by reason of mutual trust.

7.2. There is no dispute between the parties that, following the decision of the CJEU in *Alchaster*, as a matter of law the presumption of mutual trust and confidence which

underlies the operation of the Framework Decision cannot apply where, as here, the Court is considering fundamental rights objections to surrender to the United Kingdom on foot of a TCAW. The Court agrees that the presumption of mutual trust and confidence has no application in this case.

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

7.4. Firstly, I agree with the submission of the Applicant that in the absence of proceedings which challenge the constitutionality of Section 4A, it represents the law of the State. No properly constituted proceedings have been brought to challenge the constitutionality of the amended Section 4A of the 2003 Act.

7.5. The submission of the Respondent as to the lawfulness and / or constitutionality of Section 4A of the 2003 Act (as amended) is in any event misconceived and based on a misinterpretation of the amended section.

7.6. Section 4A (as amended) provides:-

> *'It shall be presumed that an issuing state will comply with the requirements of the relevant agreement, unless the contrary is shown'*

7.7. Section 2 of the 2003 Act (as amended) defines 'relevant agreement' as follows:-

'relevant agreement' means

(a) In relation to a European arrest warrant, the Framework Decision,

(b) In relation to a Trade and Cooperation Agreement arrest warrant, the Trade and Cooperation Agreement, and

(c) In relation to an arrest warrant within the meaning of the EU – Iceland Norway Agreement, the EU – Iceland Norway Agreement'

7.8. Section 4A (as amended) therefore means that there is a presumption that the issuing state will comply with the requirements of whichever of the 'relevant agreements' applies. In this case the Court is concerned with the Trade and Cooperation Agreement, which is one of the three types of 'relevant agreement' as set out in Section 2 of the 2003 Act (as amended). Contrary to the submission made by the Respondent, Section 4A (as amended) does not seek to apply the principles of mutual trust and confidence to the Trade and Cooperation Agreement. Section 4A requires this Court to presume, unless the contrary is shown, that the United Kingdom will comply with the requirements of the Trade and Cooperation Agreement and there is no principle of mutual trust and confidence in or underlying the operation of that Agreement.

7.9. The Trade and Cooperation Agreement itself envisages that the parties thereto will act with mutual respect and good faith in carrying out the tasks flowing from the Agreement. By way of illustration, Article 3 of the Agreement provides:-

> *'1. The parties shall, in full mutual respect and good faith, assist each other in carrying out tasks that flow from this agreement and any supplementing agreement.*
>
> *2. They shall take all appropriate measure, whether general or particular, to ensure the fulfilment of the obligation arising from this Agreement and from any supplementing agreement, and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement or any supplementing agreement'*

7.10. I agree with the Ministers submission that the effect of Section 4A of the 2003 Act (as amended), insofar as it applies to the Trade and Cooperation Agreement, does no more than confirm the existence of the general presumption of good faith that applies to all extradition arrangements into which this state enters, and ensures its application to the

principles set out in the Agreement. The matter is put succinctly and correctly by the Applicant when she states that:

> *'There is no new presumption, or any presumption which was unlawful for the Minister to insert, by way of statutory amendment in accordance with the provisions of the European Communities Act, 1972, into section 4A of the 2003 Act'*

Article 6 of the Convention and Title VI of the Charter

7.11. No difference has been identified as to the protection afforded to the Respondents Right to a Fair Trial under Article 6 of the Convention and Title VI of the Charter. In any event the interpretative provisions of the Charter provide as follows at Article 52.3:-

> *'Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the Convention. This provision shall not prevent Union law providing more extensive protection'*

7.12. I am therefore satisfied that, when considering fair trial objections, no difference arises in this case between the right to a fair trial as guaranteed under the Convention and the Charter.

Test to be applied to objections to TCAW surrender

7.13. It is common case between the parties that, following on from the Judgment of the CJEU in *Alchaster,* the principles of mutual trust and confidence that underlie the operation of the Framework Decision and the consideration of applications from member states of the European Union, do not apply to the consideration of TCAWs received from the United Kingdom under the Trade and Cooperation Agreement.

7.14. Where objections are raised to surrender to the United Kingdom on the basis that, if surrendered to the United Kingdom on foot of a TCAW, there would be a real risk of a breach of his or her fundamental rights, then the Court cannot adopt the two stage test as set out in *Aranyosi & Caldaru*, as such a test only applies because of the system of mutual confidence and trust which applies under the Framework Decision and the United Kingdom is no longer a part of the EU and the Framework Decision.

7.15. A one step test applies which requires an evaluation, without any reference to the presumption underlying the operation of the Framework Decision, of all the circumstances in the individual case in order to consider whether there are valid reasons for believing that that person would run a real risk to the protection of his or her fundamental rights is surrendered to the United Kingdom. At paragraphs 78 to 80 of *Alchaster* , having distinguished between the one and two step tests, the CJEU described the approach to be adopted:-

> *78. It follows that the executing judicial authority called upon to rule on an arrest warrant issued on the basis of the TCA cannot order the surrender of the requested person if it considers, following a specific and precise examination of that person's situation, that there are valid reasons for believing that that person would run a real risk to the protection of his or her fundamental rights if that person were surrendered to the United Kingdom.*
>
> *79. Therefore, where the person who is the subject of an arrest warrant issued on the basis of the TCA claims before that executing judicial authority that there is a risk of a breach of Article 49(1) of the Charter if that person is surrendered to the United Kingdom, that executing judicial authority cannot, without disregarding the obligation to respect the fundamental rights enshrined in Article 524(2) of that agreement, order that surrender without having specifically determined, following an appropriate examination, within the meaning of paragraph 51 above, whether there are valid reasons to believe that that person is exposed to a real risk of such a breach.*
>
> *80. For the purposes of that determination, it is necessary, in the first place, to point out that, although the existence of declarations and accession to international treaties guaranteeing respect for fundamental rights in principle*

are not in themselves sufficient to ensure adequate protection against the risk of a breach of fundamental rights and freedoms (see, to that effect, judgment of 6 September 2016, Petruhhin, C-182/15, EU:C:2016:630, paragraph 57), the executing judicial authority must, however, take into account the long-standing respect by the United Kingdom for the protection of the fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the ECHR, which is expressly referred to in Article 524(1) of the TCA, and the provisions laid down and implemented in United Kingdom law to ensure respect for the fundamental rights set out in the ECHR (see, by analogy, judgment of 19 September 2018, RO, C-327/18 PPU, EU:C:2018:733, paragraph 52).

7.16. The principles governing the consideration of such objections would appear largely similar to those which have been applied by the Irish Courts when considering applications for surrender from other third countries with which this State has more traditional extradition arrangements, such as by way of example the United States of America, Canada and Australia. In considering any application from a third country, and objections made to surrender thereto, a Court will proceed on the basis that the third country will act in good faith and furthermore that such a state, with whom Ireland has after all agreed to enter into an extradition arrangement or treaty, will behave in a manner which will respect and vindicate the rights of the proposed extraditee.

7.17. Furthermore, although the Court will of course consider any relevant past or historic matters which touch upon any claim that there is a substantial risk that extradition to a third country will expose an extraditee to a risk of harm if now surrendered to that state, any assessment of such a risk must be forward looking and therefore any past matters must be relevant to the assessment of any future risk.

7.18. These general principles were helpfully analysed and summarised by Edwards J in *AG v O'Gara* [2012] IEHC 179, a case where the High Court was considering an application for surrender to the United States of America on foot of the Extradition Act, 1965 and the Washington Treaty [the then existing Treaty on Extradition between Ireland and the USA]. Edwards J there referred to the different approach between EAW and non-EAW cases in this regard in the following terms:-

*'**10.1** Somewhat unusually, the parties are not in complete agreement as to the law, and as it happens the Court does not completely agree with either party's submission as to what the applicable law is.*

***10.2** The Court does not agree with the respondent's contention that there is no presumption at all that the requesting state will respect the fundamental rights of the respondent. However, if the Court understands counsel for applicant's submission correctly, which places much reliance on the remarks of Murray C.J. (as he then was) in Altravicius quoted above, and the later further remarks of Fennelly J. in Stapleton also quoted above, the applicant is effectively contending that an identical presumption arises in extradition cases to that which arises in European arrest warrant cases. If that is the applicant's position then this Court does not agree with that either.*

***10.3** In the Court's view the true position with respect to a presumption lies in between the parties respective positions. The Court considers that a default presumption does arise in extradition cases that the other country will act in good faith and that it will respect a proposed extraditee's fundamental rights. As Fennelly J. has pointed out in Stapleton the making of bilateral extraction arrangements implies at least some level of mutual political trust and, at the judicial level, confidence in the legal systems of the co-operating states. However, in conventional extradition cases the presumption is much weaker and is much more easily rebutted than is the presumption that arises under the European arrest warrant system. This is because the whole European arrest warrant system is built and predicated upon the notions of mutual trust and confidence between member states, and mutual recognition of judicial decisions, and there is a continuing and ongoing commitment to abide by these principles as expressed in the recitals to the Framework Decision, including recital 12 thereto which expressly states that the Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union. Moreover, though it is by no means perfect, there is, by virtue of the fact that all member states operating the European arrest warrant system are signatories to the Convention, a greater common understanding*

between the States operating the European arrest warrant system of what constitutes an individual's fundamental rights, and what is required to be done to defend and vindicate those rights. Such is the level of mutual trust and confidence in other member states who are parties to the European arrest warrant system that the Oireachtas has given statutory effect to the presumption that arises - in s.4A of the European Arrest Warrant Act 2003 (as inserted by s.69 of the Criminal Justice (Terrorist Offences) Act 2005). S.4A provides that "It shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown." Neither the Extradition Act 1965, nor the Washington Treaty, contains a comparable provision. That is not to say that no presumption at all arises, but as the Court has stated it is very much weaker and more easily rebutted than is the case under the European arrest warrant system. Furthermore, it needs to be emphasised that rebuttal of the presumption does not of itself establish the existence of a real risk. It merely means that the Court is put on enquiry as to whether there is a real risk.'

7.19. Edwards J then referred to *Minister for Justice v Rettinger* [2010] 3 I.R. 783 where the Supreme Court had distilled the principles to be applied when considering objections to surrender on human / fundamental rights grounds in EAW cases. He said that, in so far as they must apply to the US extradition case then under consideration, those principles could with 'appropriate modification' be stated as follows:

· - By virtue of the absolute nature of the obligation imposed by Article 3 of the European Convention on Human Rights and Fundamental Freedoms, which provides that 'No one shall he subjected to torture or to inhuman or degrading treatment or punishment', the objectives of the [Washington Treaty] cannot be invoked to defeat an established real risk of ill-treatment contrary to Article 3. (See analagous remarks of Fennelly J. at p.813 in Rettinger *re the objectives of the system of surrender pursuant to the Council Framework Decision on the European Arrest Warrant);*

· - The subject matter of the court's enquiry "is the level of danger to which the person is exposed." (per Fennelly J. at p.814 in Rettinger*);*

· - *"it is not necessary to prove that the person will probably suffer inhuman or degrading treatment. It is enough to establish that there is a* 'real risk'.*" (per Fennelly J. at p.814 in* Rettinger*) "in a rigorous examination." (per Denham J. at p.801 in* Rettinger*). However, the mere possibility of ill treatment is not sufficient to establish an applicant's case. (per Denham J. at p.801 in* Rettinger*);*

· - *A court should consider all the material before it, and if necessary material obtained of its own motion, (per Denham J. at p.800 in* Rettinger*);*

· - *Although a respondent bears no legal burden of proof as such, a respondent nonetheless bears an evidential burden of adducing cogent "evidence capable of proving that there are substantial grounds for believing that if he (or she) were returned to the requesting country he, or she, would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention." (per Denham J. at p.800 in* Rettinger*);*

· - *"It is open to a requesting State to dispel any doubts by evidence. This does not mean that the burden has shifted. Thus, if there is information from an applicant as to conditions in the prisons of a requesting State with no replying information, a court may have sufficient evidence to find that there are substantial grounds for believing that if the applicant were returned to the requesting state he would be exposed to a real risk of being subjected to treatment contrary to article 3 of the Convention. On the other hand, the requesting State may present evidence which would, or would not, dispel the view of the court." (per Denham J. at p.801 in* Rettinger*);*

· - *"The court should examine the foreseeable consequences of sending a person to the requesting State." (per Denham J. at p.801 in* Rettinger*). In other words the Court must be forward looking in its approach;*

· - *"The court may attach importance to reports of independent international human rights organisations." (per Denham J. at p.801 in* Rettinger*)*

7.20. In my opinion the approach outlined by Edwards J in *O'Gara* is, with one modification, compatible with the approach to such matters outlined by the CJEU in *Alchaster.* That one modification arises from the observations by that Court at paragraph 80 of *Alchaster.* Although the principles of mutual confidence and trust do not apply when considering objections in the context of a TCAW warrant, this Court must nonetheless

approach fundamental / human rights objections to surrender to the United Kingdom cognisant of it being a party to the European Convention on Human Rights, its long standing respect for the protection of fundamental rights as set out in that Convention and the provisions in place in UK law to ensure the protection of such rights and freedoms.

Application of Test to facts of this case

7.21. The Respondent has made a number of separate, and to some extent interlinked, objections to his surrender in support of his contention that there is a substantial risk that there will be a violation of his fundamental rights, including his right to a fair trial, is surrendered to Northern Ireland on this TCAW.

Prosecution in Northern Ireland may be statute-barred

7.22. The Legacy Act, 2003 came into force on the 1 May 2024. By additional information received on the 11 October 2024, in response to a s. 20 request from this Court, the issuing judicial authority stated that it was confirmed by the Public Prosecution Service in Northern Ireland that the decision to prosecute this Respondent on indictment for these offences was taken on the 8 April 2024.

7.23. This matter was not pursued in written or oral submissions before this Court, and I am satisfied that the decision to prosecute the Respondent was taken prior to the 1 May 2024 and no issue arises as to whether this prosecution is statute barred.

Prosecution of the Respondent would be disproportionate and unfair in all the circumstances

7.24. I agree with the applicant's submission that, in issuing the TCAW in this case, it must be assumed that the issuing judicial authority deemed it proportionate to prosecute the Respondent.

7.25. The Minister further submits, correctly, that there is no general basis to challenge surrender on the basis of proportionality. In this regard I would refer to paragraph 59 of the decision in *Minister for Justice v D.E,* where Donnelly J stated:-

'In an application for surrender, the court is not carrying out a general proportionality test on the merits of the application. The court should apply the specific terms of the 2003 Act, albeit subject to a careful consideration of whether, if necessary, applying a proportionality test to Article 8 Convention rights, to order surrender would involve a violation of that Article 8 right to the extent of being incompatible with the State's obligations under the Convention'

7.26. There is therefore no general proportionality test to be applied to this application. The proportionality submission in this case is however made in the context of (a) the amount of time he might spend in custody on remand vs the time he might spend in custody if convicted, (b) delays in the prosecution of his case, (c) his possible onward extradition to Colombia from the United Kingdom and (d) the interference with his family that would necessarily result from his prosecution and/or conviction and sentence.

Time in custody may exceed maximum sentence upon conviction

7.27. Given the nature of the offences for which his surrender is sought, the Respondent will face a maximum sentence of two years imprisonment if convicted on these charges. He claims that, because of the lack of certainty in relation to bail and the length of time it will take for these matters to be resolved, there is a real risk he would spend more than 2 years in custody on remand.

7.28. On the available evidence, whilst it is not certain that he will obtain bail pending trial from the courts in Northern Ireland, in the words of Mr McGrory KC SC he has *'a reasonable prospect of securing bail, albeit under tight restrictions'* .

7.29. It would also seem, from the evidence available, that the preparations for this trial are well advanced and indeed the committal papers (equivalent to the Book of Evidence in this jurisdiction) are ready to be served upon the Respondent if he is surrendered. Mr McGrory also suggests that there will be less delay in the prosecution of this case because of the fact that it will be heard in the Laganside Court Centre and he does not anticipate any significant delay in obtaining a trial date here, once the parties are ready.

7.30. Any significant delays in the hearing of this trial would likely result from the various applications which are available to the applicant prior to the commencement of the trial itself and the Respondent cannot rely upon any potential delay which may be occasioned by the exercise by him of his right to seek various reliefs made in the conduct of his defence to these charges.

7.31. I am satisfied that there is no basis to refuse surrender on the speculative ground that he might spend more time in custody on remand awaiting trial than the maximum period of two years imprisonment which he would serve if convicted. He has a reasonable prospect of securing bail and the bulk of any delay which might arise would likely result from his pursuit of various remedies in the conduct of his defence before the Northern Irish courts.

Fear of Onward Surrender to Colombia

7.32. Whilst there may be a subjective apprehension on the part of the Respondent that the true purpose, or a purpose, of this application is to facilitate his onward transmission to Colombia, there is no evidence to support this fear.

7.33. In entering the Trade and Co-Operation Agreement, the parties (including the United Kingdom) affirmed their adherence to the Rule on Specialty, in other words to the general rule of extradition law that a country to whom a person was surrender would not, without the consent of the surrendering state, transfer that person to a third country.

7.34. Furthermore, pursuant to Section 24(3) of the 2003 Act there is a presumption that the United Kingdom ('the issuing state') does not intend to extradite Mr McAuley to any third country. In order for this to be permitted, an application would have to be received from the United Kingdom and this court would have to approve the same.

Risk of breach of right to fair trial

7.35. The Respondent submits that there is a substantial risk that if surrendered he will not obtain a fair trial and there will be a violation of his rights under Article 6 of the ECHR

and/or Article 49 of the Charter. In support of this submission the Respondent relies upon past matters, both generally and in relation to his treatment at the hands of the authorities in the requesting state. He asserts that he was a target of a 'shoot to kill' policy operated by elements of the security services in Northern Ireland in the 1980s and furthermore that, owing to misbehaviour and deceit by various parts of the state apparatus in Northern Ireland, he was wrongfully convicted of an offence of possession of firearms, which was only overturned in 2014 . The Respondent further claims that there is a real risk that there will be a failure on the part of the authorities in Northern Ireland to ensure that, if now surrendered he will receive a fair trial, and in this regard he particularly, though not exclusively, emphasises his real concern that there will be a failure to make proper disclosure to vindicate his right to a fair trial.

7.36. The Judgment of the Court of Appeal of Northern Ireland from 2014 points to serious failings on the part of certain state bodies which led to that conviction being overturned, following the matter being referred to that Court by the Criminal Review Body.

7.37. The Respondent further believes that he, together with the late Eugene Toman, were victims of a shoot to kill policy on the part of certain units within the RUC and he points to a series of investigations and inquiries into such a policy, many of which he submits have been frustrated by the ongoing failure of co-operation by the authorities in the requesting state. This leads him to a fear, supported he says by his subjective experience of both the alleged shoot to kill policy and the failures of the authorities in relation to his previous trial, that he will not receive a fair trial if now surrendered. In this regard he refers to the likelihood that he will face difficulty in obtaining sufficient disclosure, given the manner in which the various agencies of the state have previously behaved.

7.38. There is evidence to support his submission that, owing to the actions of certain elements within the state in the United Kingdom, there was a violation of his right to a fair trial under Article 6 which led to his conviction of unlawful possession of firearms. There was however an appeal where his fair trial rights were vindicated, albeit belatedly, by the Court of Appeal and this is an example of a criminal justice system which can and will act to correct error and injustice.

7.39. There has also been considerable controversy surrounding the alleged operation in the 1980s of a shoot to kill policy by certain units within the security forces operating in Northern Ireland. Investigations into these matters have been ongoing for decades and there has again been considerable political controversy as to the effectiveness of such investigations and there are ongoing allegations of a lack of willingness of the state authorities, or parts of the state, to co-operate with such inquiries and investigations.

7.40. The Respondent has however not put before the Court any up to date evidence to support the submission that, owing to the manner in which the criminal justice system currently operates in the requesting state, there is now a risk that there would be a violation of his right to a fair trial under the Convention or Charter. No reports or assessments pointing to any present concerns in relation to the operation of the criminal justice system from non-governmental bodies of a kind which are regularly considered and relied upon by the Courts in this jurisdiction, such as for instance Amnesty International or HumanRightsWatch, have been cited.

7.41. Additionally not only has no case law been cited, whether from the courts of the requesting state or the European Court of Human Rights, to give rise to any concerns as to any possible breach of Article 6 of the Convention, but the evidence of Mr Mc Grory KC SC points to a system of applications and remedies available to the Respondent and his lawyers in the requesting state to ensure that his right to a fair trial will be vindicated.

7.42. Whilst conscious of the decision of the Court of Appeal in Northern Ireland in 2014 and the failings of the various authorities referred to therein, the court must adopt a forward looking test and must consider whether, at this point in time, there is a substantial risk that, if surrendered to stand trial in Northern Ireland, there would be a failure to vindicate his rights under Article 6 of the ECHR.

7.43. In my opinion there is no evidence to support any such concern and indeed the evidence indicates that there are various applications which are available to the Respondent wherein he can seek remedies to ensure that his rights to a fair trial are vindicated. He can make applications to the trial court to ensure, for example, that full and proper disclosure is made and / or that he will not suffer prejudice as a result of the delay in

bringing this case to trial. No evidence has been adduced to suggest any concern that the courts of the issuing state will not, when considering such applications, vindicate his right to a fair trial by making various rulings up to and including, if warranted, a stay on his continued prosecution.

Article 8 Family Rights

7.44. There is a clear line of authority from the Irish Courts, including decisions such as *Minister for Justice v Ostrowski* [2012] IESC 57, *Minister for Justice v Verstaras* [2020] IESC 12 and *Minister for Justice v D.E* [2021] IECA 188, which have established that to be successful in cases such as the present, where a family/ private rights objection to surrender is raised, the circumstances must be truly exceptional. There must, when considering such objections to surrender, be cogent evidence to show the circumstance to be well outside the norm, that is truly exceptional and, in the words of S37 of the 2003 Act they must be such as to render surrender incompatible with the States obligations under Article 8 of Convention.

7.45. Where, as here, a complaint of delay is married to an objection under Article 8 of the Convention, the jurisprudence is clear that delay per se is never sufficient to justify a refusal to surrender. Truly exceptional circumstances must exist before surrender could amount to a breach of Article 8 rights but delay may be of relevance in this regard as, in the words of Charlton J in *Minister for Justice v Palonka* [2022] IESC 6 *'delay may enable the growth of circumstances where a new situation has emerged that engages Article 8 of the European Convention in a genuinely exceptional way as set in the context of the individual procedural circumstances of the case'.*

7.46. A legitimate aim is being pursued by the issuing judicial authority in seeking the surrender of Mr McAuley to stand trial for these serious offences. There is clear public interest in this state making an order for surrender in compliance with its obligations under the Trade and Co-Operation Agreement. As emphasised by Owens J in *Minister for Justice v T.N* [2019] IEHC 674, delay in itself is not a stand-alone ground on which surrender should be refused and furthermore a respondent can have no legitimate expectation that he can avoid surrender under extradition or EAW arrangements

because of passage of time arising from lack of resources or from the inefficiency of those who should be pursuing the matter.

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

- There is a strong public interest in the surrender of persons accused or convicted of criminal offences to countries with which this State has extradition or surrender agreements;
- Delay in itself cannot ever operate as a bar to surrender. A person can have no legitimate expectation that he or she will avoid surrender under extradition or surrender arrangements because of the passage of time arising from a lack of resources or inefficiency on the part of the requesting state;
- Disruption, indeed significant disruption, of family and private life is the norm where surrender is ordered and this cannot ordinarily justify a refusal to surrender on foot of an otherwise lawful request;
- Where the evidence shows a real, exceptional and oppressive disruption to family life in the most extreme and exceptional circumstances, delay may have led or contributed to the growth of circumstances where a new situation has emerged that engages Article 8 of the European Convention.

7.48. The ultimate question in a case such as this is whether this is one of those truly exceptional cases (though of course exceptionality is not the test) where, due to the emergence of particular family or personal circumstances in the time since the alleged offences, Article 8 of the Convention is engaged, and it would be disproportionate to order surrender in the particular circumstances.

7.49. The surrender of the Respondent will undoubtedly result in disruption, even significant disruption. of his family life and the family life of his wife and children. He is the main breadwinner for he and his wife and there remain ongoing mortgage payments to be made on their home. Furthermore, from the letter of his daughter Roisin and reports attached, it is clear that he takes a very active part in assisting her, a single mother with children with specific needs, in the raising of her children. Were he surrendered and

not admitted to bail and / or imprisoned if convicted of the offences in the Warrant, there would be difficulties caused for both his wife and his children and grandchildren. In such an eventuality, there would have to be considerable re-arrangement as to family matters. His wife's financial situation would be adversely affected and there may well be difficulties in making ongoing mortgage payments.

7.50. On the other hand, his surrender is, in my view, lawfully sought to stand trial for the most serious offences. Furthermore, there is a reasonable possibility that he will be admitted to bail pending the outcome of the proceedings in Northern Ireland.

7.51. Although there may be sympathy for the Respondent and particularly members of his family in the event that he is surrendered, in my view the disruption does not come close to the kind of gross disruption with family life such as to engage Article 8 of the Convention. Given the circumstances of this case and the seriousness of the offences for which surrender is sought, this is not a case where it could be said that his extradition to stand trial would constitute an unwarranted and unlawful interference with family rights such as to give rise to a breach of his or his family's rights under the Convention. In other words, though the circumstances may excite some sympathy, they are not exceptional such as to prevent his surrender.

8. CONCLUSION

8.1. For the reasons set out above I dismiss each of the grounds of objection raised by the Respondent in opposition to his surrender.

8.2. The Warrant is in order and satisfies the requirements of the 2003 Act and the Trade and Cooperation Agreement.

8.3. I will therefore make an order for the Respondents surrender to the issuing state on foot of this Trade and Cooperation Agreement Warrant.