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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

BEFORE A DIVISIONAL COURT

_____

IN THE MATTER OF AN APPLICATION BY LIAM CAMPBELL FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDUM

_____

AND IN THE MATTER OF AN APPLICATION BY LIAM CAMPBELL FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

_____

Before: Higgins LJ and McCloskey J

I INTRODUCTION

[1] The subject matter of this judgment is an application for a Writ of habeas corpus ad subjiciendum, coupled with an application for leave to apply for judicial review. The applications were heard together by this court, sitting as a Divisional Court, on 27th July 2009. On 31 July , the court announced that the applications would be dismissed . This judgment contains the reasons for thus concluding.

The Applicant is one of several persons whom the Republic of Lithuania have requested be extradited to that country. European arrest warrants were issued in both the United Kingdom and the Republic of Ireland. The Applicant was arrested in the Republic of Ireland on foot of the arrest warrant and proceedings were commenced in that jurisdiction to extradite him to Lithuania. He is, in the language of the governing legislation the "requested person" and Lithuania is the "requesting State" (or "issuing State"). The Applicant was represented by Mr. Fitzgerald QC and Mr. Devine. Mr. Gerald Simpson QC represented the Republic of Lithuania. This matter was listed for hearing at less than two working days' notice and, in the circumstances, no other potentially interested party was represented. Had the matter proceeded further, other parties with a clear interest, including in particular the Recorder of Belfast, would have had an opportunity to be represented and, if so advised, to contribute evidentially, by affidavit.

[2] II THE COUNCIL FRAMEWORK DECISION, DATED 13th JUNE 2002

[3] This is an instrument of EU law, which governs the extradition (in contemporary language "surrender") of individuals from one Member State to the other. Its full title is "Council Framework Decision of 13th June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States" (hereinafter "the Framework Decision"). The essence and objectives of this measure can be ascertained from its fifth recital, which states:

> "The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional co-operation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice".

The Framework Decision makes provision for the "European Arrest Warrant" ("the EAW"). This is described in the sixth recital as "the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the 'cornerstone' of judicial co-operation".

[4] According to the ninth recital, the role of the "Central Authority" in each Member State in the execution of a EAW "must be limited to practical and administrative assistance". The need for "sufficient controls" in decisions on the execution of a EAW is identified in the eighth recital as the rationale for requiring that decisions on surrender must be made by a "judicial authority" of the Member State where the requested person has been arrested. The recitals continue:

> "[10] The mechanism of the European Arrest Warrant is based on a high level of confidence between Member States …
>
> [11] In relations between Member States, the European Arrest Warrant should replace all the previous instruments concerning extradition".

The importance of respecting fundamental rights, coupled with the need for due process, is highlighted in the twelfth recital. The thirteenth recital provides, specifically:

> "No person should be removed, expelled or extradited to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment".

[5] The substantive provisions of the Framework Decision reflect and give effect to the values, standards and objectives expressed in its recitals, summarised above. Article 1(1) defines the EAW as "a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order". By Article 1(2):

> "Member States shall execute any European Arrest Warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision".

The category of criminal conduct falling within the scope of the EAW is detailed in Article 2. This includes, per Article 2(2), offences of terrorism punishable by a custodial sentence of at least three years in the "issuing" Member State. Under Article 3, the executing judicial authority must decline to execute the EAW in certain circumstances, whereas pursuant to Article 4 execution is discretionary in specified cases. Article 6 provides:

> "1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European Arrest Warrant by virtue of the law of that State.
>
> 2. The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European Arrest Warrant by virtue of the law of that State.
>
> 3. Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law".

Furthermore, by Article 7, each Member State may designate a "central authority" for the purpose of assisting the competent judicial authorities.

[6] In accordance with Article 8, the EAW must have a prescribed form and content. Further, it must be translated into the official language of the executing Member State. Chapter 2 of the Framework Decision regulates the procedure for the surrender of the requested person. Article 9(1) provides:

> "When the location of the requested person is known, the issuing judicial authority may transmit the European Arrest Warrant directly to the executing judicial authority".

In appropriate cases, the issuing judicial authority may also have recourse to an "alert", which is described as "equivalent to a European Arrest Warrant accompanied by the information set out in Article 8(1)." It is clear from Article 11 that the executing competent judicial authority has a proactive role from the time of the requested person's arrest. In particular, one of the decisions to be made is whether the arrested person should be detained. In this respect, Article 12 provides:

> "When a person is arrested on the basis of a European Arrest Warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State. The person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding".

The prominence given in this provision of the Framework Decision to the risk of absconding is noteworthy.

[7] Article 14 of the Framework Decision provides:

> "Where the arrested person does not consent to his or her surrender as referred to in Article 13, he or she shall be entitled to be heard by the executing judicial authority, in accordance with the law of the executing Member State".

The importance of expedition is emphasized in Article 17, which provides:

> "1. A European Arrest Warrant shall be dealt with and executed as a matter of urgency.
>
> 2. In cases where the requested person consents to his surrender, the final decision on the execution of

> the European Arrest Warrant should be taken within a period of ten days after consent has been given.
>
> 3. In other cases, the final decision on the execution of the European Arrest Warrant should be taken within a period of sixty days after the arrest of the requested person.
>
> 4. Where in specific cases the European Arrest Warrant cannot be executed within the time limits laid down in paragraphs 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further thirty days …
>
> 7. Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it shall inform Eurojust, giving the reasons for the delay."

Article 17(5) is also noteworthy:

> "As long as the executing judicial authority has not taken a final decision on the European Arrest Warrant, it shall ensure that the material conditions necessary for effective surrender of the person remain fulfilled".

Article 17(6) provides that where the executing judicial authority determines not to execute the EAW, reasons must be provided.

[8] The requirement for expedition on the part of the executing Member State features again in Article 23, which provides:

> "1. The person requested shall be surrendered as soon as possible on a date agreed between the authorities concerned.
>
> 2. He or she shall be surrendered no later than ten days after the final decision on the execution of the European Arrest Warrant.
>
> 3. If the surrender of the requested person within the period laid down in paragraph 2 is prevented by circumstances beyond the control of any of the

> Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within ten days of the new date thus agreed."

Where the requested person has been detained in custody in the executing Member State, credit for that period in custody must be given in the event of a custodial sentence being imposed ultimately. This is clear from Article 26:

> "1. The issuing Member State shall deduct all periods of detention arising from the execution of a European Arrest Warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed."

This provision reflects United Kingdom domestic law and, presumably, the equivalent domestic laws of certain other Member States.

III THE EXTRADITION ACT 2003

[9] The Extradition Act 2003 (the 2003 Act) gave effect in domestic law to the Framework Decision and comprehensively reformed the law relating to extradition. The two measures must be considered in conjunction with each other . The 2003 Act came into operation on 1st January 2004 and governs all extradition requests received on and after this date. The main features of the new extradition procedures which it establishes include a regime whereby each of the United Kingdom's extradition partners belongs to one of two categories designated by order of the Secretary of State; the adoption of the Framework Decision, which is widely acknowledged as creating "fast track" extradition arrangements amongst the EU Member States; a simplification of the procedures for authentication of foreign documents; the abolition of the requirement for prima facie evidence in certain cases; and a simplified single avenue of appeal for all cases.

[10] For present purposes, certain of the provisions of the 2003 Act fall to be highlighted. Pursuant to Section 67, the "appropriate judge" (viz. the executing judicial authority) is such County Court Judge or District Judge as is thus designated by the Lord Chief Justice. The Recorder of Belfast is the designated County Court Judge and, thus, the "appropriate judge" under Section 67. In accordance with the regime established by Sections 4-6, every arrested person must be brought swiftly before the appropriate judge and the EAW and accompanying certificate must be produced. Any failure to comply with the relevant time limit obliges the judge to discharge the arrested person: see Section 4(5) and Section 6(6). Section 8 provides:

> "(1) If the judge is required to proceed under this Section he must –
> (a) fix a date on which the extradition hearing is to begin;
>
> (b) inform the person of the contents of the [EAW];
>
> (c) give the person the required information about consent;
>
> (d) remand the person in custody or on bail.
>
> (2) If the person is remanded in custody, the appropriate judge may later grant bail."

The remaining provisions of Section 8 highlight the importance of expedition in the new statutory arrangements. Section 9 provides, in material part:

> "… (3) In Northern Ireland, at the extradition hearing the appropriate judge has the same powers (as nearly as may be) as a Magistrates Court would have if the proceedings were the hearing and determination of a complaint against the person in respect of the [EAW] was issued.
>
> (4) If the judge adjourns the extradition hearing he must remand the person in custody or on bail.
>
> (5) If the person is remanded in custody, the appropriate judge may later grant bail".

[11] Sections 8-19B contain an array of provisions arranged under the general heading "Bars to Extradition". These include matters such as the rule against double jeopardy, so-called "extraneous considerations" and the passage of time. The judge must decide whether the extradition of the requested person is precluded by any of the specified prohibitions. Further, the impact of the Human Rights Act 1998 is reflected in Section 21, which provides:

> "If the judge is required to proceed under this Section (by virtue of Section 11 or 20) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998.
>
> (2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.

> (3) If the judge decides that question in the affirmative he must order the person to be extradited to the Category 1 territory in which the warrant was issued."

[12] There is a right of appeal against an extradition order, by virtue of Section 26, which provides:

> "(1) If the appropriate judge orders a person's extradition under this Part, the person may appeal to the High Court against the order …
>
> (3) An appeal under this Section may be brought on a question of law or fact".

The time limit of seven days for appealing, prescribed by Section 26(4), is another reflection of the recurring theme of expedition. The appeal lies to the High Court, which is empowered to quash the extradition order and order the person's discharge, pursuant to Section 27(5). Section 32 makes provision for the possibility of a further appeal to the House of Lords. Finally, Section 34 provides:

> "A decision of the judge under this Part may be questioned in legal proceedings only by means of an appeal under this Part".

IV THE EUROPEAN ARREST WARRANT ("EAW")

[13] The evidence establishes that the requesting Lithuanian authority transmitted a EAW, dated 18 December 2008 , framed in identical terms, to the relevant agencies in both the Republic of Ireland and Northern Ireland. According to its terms, the issuing judicial authority is the "Prosecutor General's Office of the Republic of Lithuania" and it is signed by the Deputy Prosecutor General. It recites that it is based on a decision of the First District Court of Vilnius City, made on 15th December 2008. It contains particulars of the Applicant's name and date of birth, together with his nationality (Irish) and his known address, which is specified as Upper Faughart, Dundalk, County Louth, Ireland. It states that the Applicant is suspected of three offences, which are duly particularised and the nature whereof can be gleaned from the following passages:

> "Liam Campbell is suspected of criminal offences under [various provisions of] the Criminal Code of the Republic of Lithuania: while acting in an organised group, he made arrangements for illegal possession of a considerable amount of powerful firearms, ammunition, explosive devices and

> substances, organised the preparation for the smuggling thereof and supported terrorist group i.e. he illegally and without the specific permission, during the period from end of 2006 till the beginning of 2007 … made arrangements with Seamus McGreevey … Michael Campbell … Brendan McGuigan … and other unidentified persons to acquire in the Republic of Lithuania a big quantity of firearms, ammunition, explosive devices and substances … and transport them … to the Republic of Ireland without declaring them to the customs or avoiding the customs control in any other way, and without a permission, and in this way provide support to the terrorist group RIRA (Real Irish Republican Army)".

[14] The dates on which the EAW was transmitted by the issuing authority in Lithuania to the appropriate authorities in the Republic of Ireland and the United Kingdom are unclear. However, it is evident that there is only one EAW relating to the Applicant in existence. While the arguments addressed to the Recorder included a challenge to the validity of the EAW, this is no longer pursued. The proceedings in the two jurisdictions which the EAW has generated are outlined below.

V EXTRADITION PROCEEDINGS IN THE REPUBLIC OF IRELAND

[15] Based mainly on the Applicant's chronology, which was not disputed, the progress of the extradition proceedings in the Republic of Ireland on foot of the EAW has been as follows:

(a) On 14th January 2009, Peart J endorsed the warrant for execution by order of the High Court.

(b) On 20th January 2009, the Applicant was arrested.

(c) On 26th January 2009, the Applicant was admitted to bail.

(d) Subsequent adjournments followed. One of the main reasons evidently was that the publication of a report by the Council of Europe Committee on the Prevention of Torture relating to conditions in Lithuanian prisons was awaited. It was, apparently, the Applicant's intention to make the case that to extradite him to Lithuania would infringe his rights under Article 3 ECHR.

(e) The Applicant's "Points of Objection" were to be filed by 17th June 2009.

(f) On 17th June 2009, Peart J revoked the Applicant's sureties and issued a warrant for his arrest in the Republic of Ireland, for non-attendance.

(g) On 20th June 2009, Peart J conducted a further review hearing in which, it seems, the state of the available evidence was considered.

(h) The most recent hearing in Dublin was conducted on 22nd July 2009. The outcome was that the case has been listed for mention again, on 9th October 2009.

[16] One of the exhibits is a solicitor's "file memo" relating to the hearing on 22nd July 2009. This contains the following passages:

> "Counsel for the State indicated that as the court was aware Mr. Campbell was in custody in Northern Ireland. On the last occasion he had been seeking a stay on the proceedings under the arrest warrant pending in that jurisdiction and those proceedings had been determined against Mr. Campbell. Accordingly the arrest warrant proceedings that were pending are now proceeding. It was indicated that in those circumstances the Lithuanian Government had written to the State indicating that they no longer wished to pursue the request and that the entire proceedings could now be withdrawn".

A further exhibit to the latest affidavit is a letter dated 23rd July 2009 from Messrs. MacGuill and Company, representing the Applicant in the Dublin proceedings, addressed to the solicitors representing the Applicant in this jurisdiction, containing the following passage:

> "As you will see the case is in for mention again on 9th October. To that extent there are still proceedings before the High Court in Dublin, but the following have come to an end:
>
> 1. The Section 16 request has been withdrawn.
>
> 2. The bench warrant for the arrest of Liam Campbell has been withdrawn.
>
> 3. The State will not pursue an estreatment of bail in respect of Mr. Campbell or his surety".

It is common case that the import of the statement "The Section 16 request has been withdrawn" is that the Republic of Lithuania is no longer pursuing its extradition

application against the Applicant, on foot of the EAW, in the Republic of Ireland. It would appear that the hearing scheduled to proceed on 9th October 2009 in the Dublin High Court will be confined to determining the issue of costs and certain minor issues of an ancillary nature.

VI EXTRADITION PROCEEDINGS IN NORTHERN IRELAND

[17] The chronology is as follows:

(a) On 22nd May 2009, the Applicant was arrested by police under the Terrorism Act 2000 at Bessbrook Road, Armagh and was detained accordingly.

(b) On 26th May 2009, the Applicant was arrested at Antrim Serious Crime Suite pursuant to the EAW.

(c) On 27th May 2009, the Applicant appeared before the Recorder of Belfast and, on the same date, the Recorder communicated with the requesting authority in Lithuania in the following terms:

> "Mr. Campbell was arrested under the warrant in Northern Ireland on 26th May and appeared before me today. Previously the warrant had been executed in the Republic of Ireland on 14th January 2009. The requested person was released on bail by the judge in the Republic, a condition of which was that he was not allowed to leave the jurisdiction of the Republic without the court's consent.
>
> Medical evidence was produced to me showing that the wife of Mr. Campbell had injured her hand and needed to be driven to her place of employment which is in Northern Ireland near the border with the Republic. Mr. Campbell had brought her to work on 22nd September [sic] and was arrested when driving back to his home in the Republic. He had previously that day reported to the police in the Republic which was another condition of his bail. He has at all times complied with all other conditions of his bail …
>
> I was advised that the extradition proceedings in the Republic have been in progress for

> nearly six months and that a hearing has been fixed to hear legal argument on the 20th June 2009. It was argued … that I should grant bail to Mr. Campbell and have him transported to the border with the republic. That would allow the proceedings in the Republic to continue.
>
> I adjourned that decision to ask for your views on that request. The purpose of the Framework Decision is to allow for a speedy process in the extradition of any requested person. If the matter were to remain in Northern Ireland it may well take a much longer time to be heard than it would in the republic, who have been engaged with it already for six months.
>
> I personally see merit in returning Mr. Campbell to the Republic. Before doing so, could I ask for your opinion?"

(d) The Recorder conducted a further hearing, on 29th May 2009. It is evident that the Lithuanian requesting authority had by then responded to his communication. A copy of the response was not disclosed to any of the parties. However, the uncontested evidence before this court is that on 29th May the Recorder read aloud, in open court, a passage contained in the Lithuanian authority's response, in the following terms:

> "Due to the fact that Mr. Campbell was arrested in the United Kingdom, it is now the United Kingdom's responsibility to execute the warrant. Furthermore, the [Lithuanian requesting authority] sees no reason or merit in returning him to the Republic of Ireland."

(e) The Recorder determined that the extradition proceedings of which he was seised should continue. This was the impetus for an application to him, on behalf of the Applicant, that such proceedings should be stayed, on the ground that they constitute an abuse of process. The Applicant's contentions in this respect are contained in a detailed written submission prepared by his counsel, dated 15th June 2009 and included in the evidence before this court.

(f) On 19th June 2009, the Recorder conducted a further hearing, during which there was oral argument from counsel representing both the Applicant and the Republic of Lithuania. He reserved his ruling.

(g) On 8th July 2009, the Recorder promulgated his reserved ruling, in writing, rejecting the Applicant's contentions. The court was informed that the Recorder also gave certain directions for the future conduct of the proceedings

The evidence about the current state of the proceedings before the Recorder is somewhat limited. Counsel for the Applicant informed this court , on enquiry, that the matter was re-listed before the Recorder around the end of August, it being anticipated that a date for the substantive hearing would be determined then. This Court was further informed that the evidence on which the Applicant relies to resist the extradition application is presently available. Therefore , an early hearing of this application was anticipated. In accordance with the terms of the 2003 Act , the Recorder properly affords priority to these applications and deals with them expeditiously.

VII THE APPLICANT'S ARGUMENTS

[18] In an application for habeas corpus, it is well established that the High Court is empowered to order that the Writ issue and/or to order the release of a detained person. This is reflected in the procedural regime of Order 54 of the Rules of the Supreme Court. The burden of Mr. Fitzgerald's argument was that the court should order the release of the Applicant, on the ground that the continuation of the proceedings against him in the Recorder's Court constitutes an abuse of process. In short, as regards the habeas corpus application, Mr. Fitzgerald invited this court to disagree with the reasoning and conclusions of the Recorder and to find that the detention of the Applicant is arbitrary. This invitation was based on counsel's written submission (duly augmented in oral argument) which, it was confirmed, mirrors the written submission presented to the Recorder, with the exception of the deletions of paragraphs 25-35 of the original version [containing arguments challenging the validity of the EAW, which were no longer pursued].

[19] Relying on Linnett –v- Coles [1987] QB 555 (per Lawton LJ, at p. 561) and Nikonovs –v- Governor of HM Prison Brixton and the Republic of Latvia [2006] 1 WLR 1518 (per Scott Baker LJ, paragraph 18 especially), it was further submitted that (a) habeas corpus is the appropriate and established form of legal challenge in the context of extradition proceedings and (b) this has survived the enactment of the 2003 Act, in the sense that Section 34 does not operate to preclude a challenge of this kind. Mr. Fitzgerald further submitted that the formulation of the abuse of process complaint as a preliminary issue to be considered and determined by the Recorder and the consequential presentation of the same complaint in the challenges advanced before this court do not fall foul of the "norm" advocated by Lord Phillips

CJ in Regina (Government of the USA) –v- Bow Street Magistrates Court [2007] 1 WLR 1157, paragraph [80] (hereinafter "Tollmann"). It was submitted in particular that the abuse of process complaint had the character of a threshold issue, going to the heart of the entire proceedings before the Recorder and was, therefore, ideally suited for determination as a preliminary issue.

[20] The court was informed that the associated application for leave to apply for judicial review was lodged with a view to pre-empting any finding that this is the more appropriate form of legal challenge in the circumstances. Under both forms of challenge, the central complaint is the same, being to the effect that the Applicant's continued detention is unlawful because the Recorder should properly have found that the underlying extradition proceedings in Northern Ireland are an abuse of process. Mr. Fitzgerald confirmed that the primary remedy sought in the Order 53 proceedings is an Order of Certiorari quashing the Recorder's ruling of 8th July 2009. He acknowledged that this remedy would not, per se, effect the Applicant's release but would, rather, require the Recorder to reconsider his ruling. The grounds on which the ruling is challenged resolve to the proposition that, in rejecting the Applicant's abuse of process challenge, the Recorder erred in law and misdirected himself in certain respects, which are particularised in paragraph 4 of the Order 53 Statement.

VIII THE REQUESTING STATE`S ARGUMENTS

[21] On behalf of the Republic of Lithuania, Mr. Simpson QC, relying on Gronostajski –v- Governor of Poland [2007] EWHC 3314 (Admin) and The Queen -v- The Home Secretary, ex parte Cheblak [1991] 1 WLR 890, submitted that the Applicant's challenge should be by way of judicial review, rather than an application for habeas corpus. Mr. Simpson further submitted that, in any event, the EAW, in conjunction with Sections 7 and 8 of the 2003 Act, provides clear authority for the detention of the Applicant.

[22] Responding to the Applicant's judicial review grounds of challenge, Mr. Simpson essentially supported the reasoning and conclusions of the Recorder. In addition, relying on paragraph [80] of Tollmann, he argued that the present challenge has the character of inappropriate satellite litigation, contending that the appropriate forum for ventilation, and determination, of the Applicant's abuse of process complaint is the substantive hearing of the extradition application before the Recorder. He further submitted that, by virtue of Section 34 of the 2003 Act, the only avenue of challenge available to the Applicant at present is an appeal to the High Court against the final decision of the Recorder. Mr. Simpson submitted, in the alternative, that insofar as it was correct for the Recorder to rule on the abuse of process complaint as a preliminary issue and insofar as this court has jurisdiction to entertain the Applicant's challenge, whether by habeas corpus or judicial review, the grounds on which extradition proceedings should be stayed as an abuse of the court's process are very sparing. This argument is underpinned by the statement of

Rose LJ in The Queen (Kashamu) –v- Governor of Brixton Prison [2002] QB 887, where the Divisional Court held, in the context of extradition proceedings, that the court has jurisdiction to consider whether there has been an abuse of process rendering the detention of the requested person unlawful. See in particular paragraph [34]:

> "What is pertinent here in the present cases is solely whether the detention is unlawful by English domestic law and/or arbitrary, because of bad faith or deliberate abuse of the English court's procedure. The scope of the inquiry is, therefore, narrow. In that connection, it by no means follows merely because second proceedings have been instituted against Kashamu, following failure of the first proceedings in the circumstances earlier set out, that there has been an abuse. I add that it will only be in a very rare extradition case, provided the statutory procedures have been followed, that it will be possible to argue that abuse of process has rendered the detention unlawful under Article 5(4)".

[Emphasis added].

The tenor of paragraph [84] of the judgment of Lord Phillips CJ in Tollmann is to like effect. Furthermore, in Symeou –v- Greece [2009] EWHC 897 (Admin), Ouseley J emphasized that where a complaint of an abuse of process is raised in the context of extradition proceedings, the focus is on the conduct of the requesting state: see paragraphs [33] – [35].

[23] It was Mr. Simpson's submission that to the extent that this court considered itself competent to entertain the application for judicial review, leave should be refused, on the ground that no arguable error of law in the Recorder's ruling has been established.

IX CONSIDERATION AND CONCLUSIONS

Habeas Corpus or Judicial Review?

[24] The distinctions between these two forms of legal challenge are not merely technical. They include, most importantly, differences in procedure, parties and available remedies. The appropriate option will inevitably depend on the particular context. In cases of genuine doubt, the challenging party may wish to initiate both forms of proceeding, as in the present litigation.

[25] In Gronostajski –v- Governor of Poland [2007] EWHC 3314 (Admin), which entailed an application for habeas corpus in the context of EAW proceedings, Richards LJ observed:

> "[8] I have to say at the outset, although this point has not been taken by the requesting authority, that I have real doubts as to whether habeas corpus is the appropriate procedure in this case. The claimant is detained in prison pursuant to an order of the court that is, on its face, perfectly valid and within the jurisdiction of the court. That is not in dispute. The true target of the challenge is not the prison governor but the district judge, the case being that he erred in declining to order discharge. That seems to me to be a challenge properly brought by way of judicial review against the Magistrates Court, not by way of habeas corpus against the prison governor".

In Owens –v- City of Westminster Magistrates Court [2009] EWHC 1343 (Admin), the court duly noted this observation of Richards LJ: see paragraph [12]. The distinction between the two forms of proceeding is neatly encapsulated in The Queen –v- Home Secretary, ex parte Cheblak [1991] 1 WLR 890, at p. 894:

> "A Writ of habeas corpus will issue where someone is detained without any authority or the purported authority is beyond the powers of the person authorising the detention and so is unlawful. The remedy of judicial review is available where the decision or action sought to be impugned is within the powers of the person taking it but, due to some procedural error, a misappreciation of the law, a failure to take account of relevant matters, or taking account of irrelevant matters or the fundamental unreasonableness of the decision or action, it should never have been taken".

[26] In the present case, the proper Respondent to the application for habeas corpus is the governing governor of HMP Maghaberry. If the court were to order the Writ to issue, the effect of this would be to oblige the governor – in accordance with Order 54, Rule 7 - to return the Writ to the court, duly endorsed with "all the causes of the detainer of the person restrained". In the instant case, the endorsement would, predictably, refer to the EAW as the legal authorisation for the Applicant's arrest and detention and might also specify the Applicant's subsequent unsuccessful application to the Recorder for bail and the Recorder's ruling of 8th July 2009. This process would not expose, for determination, the real issue in this matter, which is the Recorder's reasons for rejecting the Applicant's abuse of process complaint. Nor

would it add anything to what is already fully known and understood by the parties and the court. Furthermore, this process would not involve the author of the impugned decision viz. the Recorder. Accordingly, the issue and return of a Writ of habeas corpus in the present case would be a comparatively sterile exercise. The following statement in Halsbury's Laws of England [4th Edition 2001 re-issue], Volume 1(1), paragraph 210 also appears apposite:

> "The Writ of habeas corpus … is a prerogative Writ, that is to say it is an extraordinary remedy, which is issued upon cause shown in cases where the ordinary legal remedies are inapplicable or inadequate".

[Emphasis added].

[27] We do not question the submission that, historically, challenges to the legality of a person's detention in extradition cases have, conventionally, been brought by applications for the Writ of habeas corpus. This is exemplified in The Queen –v- Governor of Brixton Prison, ex parte Mehmet [1962] 2 QB 1. In The Queen –v- Oldham Justices and Another, ex parte Cawley [1997] QB 1, Simon Brown LJ was disposed to accept that in extradition cases, habeas corpus has become "the accepted remedy" (at p. 17), echoing the language of The Law of Habeas Corpus (Sharpe, pp. 62-63). Notably, however, in the passage in this text there is a strong emphasis on the nature of the decision under challenge:

> "Perhaps the most important factor in any given case is to consider the nature of the decision or proceeding to be reviewed …
>
> Where the decision is one in respect of which there really is no other form of redress, or is one concerning which habeas corpus has become the accepted remedy, the courts will wield whatever powers of review are necessary to give relief where it is thought that something has gone wrong …
>
> The significant matter for consideration is the nature of the decision to be reviewed rather than the nature of the error alleged".

While this passage suggests that there should be some flexibility in the court's approach, having regard doubtless to the hallowed importance of the liberty of the citizen, it nonetheless supports the view expressed in Halsbury that the Writ of habeas corpus is a remedy of last resort.

[28] The context of the habeas corpus application in Cawley and its treatment by the court are noteworthy. Each of the Applicants had been committed to prison

having defaulted in the payment of fines imposed by summary criminal convictions. The issue concerned the validity of the warrants of commitment. Simon Brown LJ, immediately following the passage noted in paragraph [28] above, stated (at p. 19):

> "In my judgment habeas corpus has no useful role to play in reviewing decisions of the nature here under challenge. I recognise, of course, that where it applies, it enjoys precedence over all other court business, reverses the presumption of regularity of the decision impugned and issues as of right. In practice, however, no less priority is accorded to judicial review cases involving the liberty of the subject; the presumption counts for little in such cases (is indeed effectively reversed by a defective warrant) and the court would be unlikely in its discretion to withhold relief if the actual decision to detain were found legally flawed. Importantly, moreover, in judicial review the court has wider powers of disposal: whereas in habeas corpus the detention is either held unlawful or not and the Applicant accordingly freed or not, on judicial review the matter can be remitted to the justices with whatever directions may be appropriate. Furthermore, on judicial review, the challenge is directed where it should be – at the justices – rather than at the prison authorities whose involvement is in truth immaterial."

[Emphasis added].

The court concluded that, in the circumstances, an application for judicial review, rather than an application for the Writ of habeas corpus, was the appropriate vehicle for challenging the legality of the Applicant's detention.

[29] In the particular circumstances of the present case, we consider that an application for judicial review is more appropriate than an application for the Writ of habeas corpus. The former method of challenge has the merit of identifying the real Respondent and, in accordance with well established practice in this jurisdiction, putting such Respondent on notice of the challenge at the outset. This, in turn, enhances the court's prospects of being fully informed, receiving all material evidence and hearing argument from both parties at the earliest possible stage. The present case illustrates how desirable these advantages are, given the issue that was ventilated about the response of the Lithuanian requesting authority to the Recorder's enquiry of 27th May 2009 and, in this respect, the precise terms in which the Recorder expressed himself in court two days later (see paragraph [17](d), supra). Self-evidently, the prison governor could not have contributed to the court's understanding of these evidential issues. Nor would the governor have been in a

position to supply the court with the additional documentary evidence which was provided, without objection, by Mr. Simpson QC. The final consideration is that this conclusion entails no injustice to the Applicant (bearing in mind that his liberty is in issue), given that, on a precautionary basis, simultaneous applications for a Writ of habeas corpus and leave to apply for judicial review have been mounted.

[30] There is one further consideration which we would highlight. Given the differences between the rules contained in Order 53 and Order 54, an application for judicial review is more likely to address, in a focussed way, the allegedly unlawful nature of the Applicant's detention. This is illustrated by the simple exercise of comparing the Applicant's Notice of Originating Motion under Order 54 and his Statement of Case under Order 53, Rule 3(2). Whereas the latter expresses the particulars and grounds of the Applicant's challenge to the lawfulness of his detention with adequate clarity, the former conveys nothing of substance to the reader. It may be that this exposes something of a lacuna in the Rules. Notwithstanding, elementary principles and standards of contemporary practice dictate that every form of legal process should contain adequate particulars and grounds. It should also identify clearly the party against whom the application is brought.

Inappropriate Satellite Litigation?

[31] In Tollmann, the English Divisional Court stated:

> "[80] The 2003 Act makes express provision for extradition to be refused when the request is motivated by 'extraneous circumstances' that under English law would constitute an abuse of process and for these and human rights issues to be considered as part of the extradition hearing. Where extradition is challenged on grounds, such as abuse of process, which are not dealt with expressly under the Act they should nonetheless normally be considered within the extradition hearing. The 2003 Act lays down special rules in relation to extradition that are designed to ensure that extradition proceedings are concluded with expedition. This objective will be torpedoed if allegations of abuse of process are pursued outside the statutory regime".

[Emphasis added].

We have highlighted the word "normally" since its plain connotation is that this passage expresses a general, rather than absolute, rule, which this court would endorse.

It seems to us that the logic of the argument advanced by Mr. Simpson QC, based on this passage, is that the Recorder should not have dealt with the abuse of process complaint as a preliminary issue. Rather, he ought to have considered it at the stage of the substantive hearing and not sooner. While there is some merit in Mr. Fitzgerald's submission that the Applicant's abuse of process complaint had the character of a threshold issue which sounded on the propriety of the entire proceedings, nonetheless we consider that it is only in exceptional circumstances that preliminary hearings of this kind should be conducted in extradition applications. The same approach should apply to applications for judicial review during the currency of such proceedings. There is no reason why, exceptional circumstances apart, all issues cannot be considered within the extradition proceedings rather than have piecemeal hearings with consequent delay of the hearing of the main issue and increased costs. While the circumstances giving rise to the abuse of process application were unusual there was nothing so exceptional about them that they could not have been dealt with during the main hearing.

Availability of Remedies

[32] Founding on Sections 26 and 34 of the 2003 Act, Mr. Simpson submitted that the only avenue of challenge to the Recorder's ruling of 8th July 2009 available to the Applicant is an appeal against the final order in the court below. In order to determine the efficacy of this argument, it is necessary, firstly, to consider the nature of the lower court's jurisdiction to entertain a complaint of abuse of process.

[33] In The Queen (Bermingham and Others) –v- Director of The Serious Fraud Office [2007] 2 WLR 635, Laws LJ, having considered the views expressed by Lord Reid in Atkinson –v- United States of America Government [1971] AC 197 (at p. 233) stated:

> "[97] I should not leave the point without considering the nature of the juridical exercise involved in concluding, as I would, that the judge conducting an extradition hearing under the 2003 Act possesses a jurisdiction to hold that the prosecutor is abusing the process of the court …
>
> It is plain that the judge's functions under the 2003 Act, and those of the magistrate under the predecessor legislation, are and were wholly statutory. He therefore possesses no inherent powers. But that is not to say that he may not enjoy an implied power. The implication arises from the express provisions of the statutory regime which it is his responsibility to administer. It is justified by the imperative that the regime's integrity must not be usurped …

> The implication of an abuse jurisdiction – Lord Reid's inference – follows."

[Emphasis added].

Thus a complaint of abuse of process is to be added, by the mechanism of implication, to the various statutory bars listed in Section 11 of the 2003 Act and detailed in the ensuing Sections.

[34] How does this impact on Sections 26 and 34 of the 2003 Act? This very question arose in Nikonovs –v- Governor of HM Prison Brixton and the Republic of Latvia [2006] 1 WLR 1518, where the issue ventilated was whether the Applicant had, in compliance with Section 4(3) of the 2003 Act, been brought before the appropriate judge "as soon as practicable". The District Judge refused to discharge the Applicant and an application for habeas corpus ensued. This required the Divisional Court to determine whether this form of challenge was available, having regard to the appeal provisions of the 2003 Act. The court held that an application for habeas corpus could properly be brought. Having considered the relevant Hansard materials, Scott Baker LJ concluded:

> "[18] Habeas corpus is directed to the lawfulness of a person's detention. Section 34 is silent as to the right to challenge by habeas corpus the lawfulness of continuing detention resulting from an erroneous decision of a judge under Section 4(5) not to discharge the claimant. True by Section 4(6) a person is to be treated as continuing in legal custody until he is discharged under subsection (5) but I would not regard lawful custody as continuing after a decision is taken not to discharge him when he should have been discharged. Absent a right of appeal, did Parliament really intend habeas corpus should not be available. Did Parliament really intend that a person who ought to have been discharged because he should have been brought before the appropriate judge sooner, but nevertheless remains in custody, should have no remedy? In my view the passages from Hansard that I have cited make the answer clear beyond peradventure. It would in my judgment require the strongest words in a provision such as Section 34 to remove the ancient remedy of habeas corpus."

In thus concluding, the court also emphasized the historical pedigree and constitutional pre-eminence of the remedy of the Writ of habeas corpus.

[35] We agree with the decision in Nikonovs and propose to follow it accordingly. We would add that, in our view, the decision of the Recorder in this matter, given under the guise of a preliminary ruling, cannot be properly characterised, in the language of Section 34, a "decision of the judge under this Part". There is nothing in Part 1 of the 2003 Act which makes provision for a preliminary ruling of the kind made in the present case. Of course, having regard to the general rule enshrined in Tollmann, paragraph [80], the ruling of the court on any complaint of abuse of process will, in the generality of cases, be incorporated in its substantive decision on the extradition application. That, however, is not this case.

[36] Furthermore, we are satisfied that, taking into account the close association between the two forms of legal challenge and the uncertainties which may genuinely arise at the interface which separates them, the reasoning in Nikonovs applies also to applications for judicial review in the context of extradition cases. We consider that Section 34 does not have the effect of ousting the supervisory jurisdiction of the High Court in this field. The treatise in Administrative Law (Wade and Forsyth, 9th Edition, pp. 712-726) reinforces the correctness of this conclusion. As the authors observe, there is a presumption against any restriction of the supervisory powers of the High Court (p. 712). As the authors further observe, following the leading decision in Anisminic –v- Foreign Compensation Commission [1969] 2 AC 147:

> "According to the logic of the House of Lords, 'shall not be questioned' clauses must now be totally ineffective. Every error of law is jurisdictional; and error of fact, if material, is either jurisdictional or unreviewable anyway. So there is no situation in which these clauses can have any effect."

[P. 719].

Judicial Review Challenge

[37] We consider that the fundamental question which the Applicant's judicial review challenge throws up for determination is whether the Recorder erred in law in rejecting the Applicant's abuse of process complaint. Since error of law is a well established ground for judicial review, the Applicant's challenge becomes, in effect, an appeal against the correctness of the Recorder's ruling.

[38] In his application for leave to apply for judicial review, the particulars of the Applicant's challenge to the Recorder's ruling of 8th July 2009 are that the judge:

(a) Failed to acknowledge that the institution and continuation of extradition proceedings in this jurisdiction did constitute executive interference in the judicial proceedings ongoing in the Republic of Ireland.

(b) Misdirected himself, at paragraph [31], that there had been no executive interference with the judicial process.

(c) Wrongly ruled that there was no problem caused to the Applicant in there being parallel proceedings in this jurisdiction.

(d) Wrongly ruled that there was no improper forum shopping (on the part of the Republic of Lithuania).

(e) Failed to acknowledge that the removal of bail resulting from his decision necessarily involved a manipulation of the extradition process to deprive the Applicant of an advantage and impose on him a disadvantage.

Mr. Fitzgerald QC informed the court that the asserted interference with the due process of the extant proceedings in the Republic of Ireland constitutes the "central pillar" of the Applicant's challenge. The real vice, he submitted, was that the initiation and pursuit of parallel proceedings in this jurisdiction infringed the principle of the comity of nations; undermined the principle of equality of arms; constituted harassment and oppression; contravened the Applicant's due process rights in the other jurisdiction; amounted to "forum shopping" by the Republic of Lithuania; and deprived the Applicant of the advantage of bail, in a manner and to an extent undermining the rule of law. Mr. Fitzgerald was disposed to accept, in our view correctly, that the threshold for establishing a misuse of the court's process of this kind is a relatively high one. This is a reflection of the cautionary words of Rose LJ in Kashamau: see paragraph [23], supra. It is also a reflection of the well established principle that the court should have resort to its jurisdiction to stay proceedings as an abuse of its process sparingly and selectively: see paragraph [44], infra.

[39] The contours of the doctrine of abuse of the court's process have become familiar during recent years, particularly in the context of criminal prosecutions. As noted above, the operation of this doctrine in the specific context of extradition proceedings has been expressly acknowledged: see Bermingham and Tollmann. As explained by Laws LJ in Bermingham, this entails the implication of a statutory power designed to prevent the usurpation of the integrity of the statutory regime. We consider that it would be inappropriate to attempt any definition of the scope and boundaries of the court's jurisdiction in this respect. These will be developed gradually, on a case-by-case basis. Moreover, it must be remembered that a substantial proportion of the decided cases belongs to the sphere of criminal prosecutions. Some reflection on the evolution of the doctrine of abuse of the court's process is, however, instructive.

[40] In DPP –v- Connolly [1964] AC 1254, Lord Reid emphasized the responsibility of the courts to ensure that "the process of law is not abused" (at p.

1354). In The Queen –v- Derby Crown Court, ex parte Brooks [1985] 80 CR. App. R 164 Ormrod LJ devised the test of whether the prosecution "… have manipulated or misused the process of the court so as to deprive the Defendant of a protection provided by the law or to take unfair advantage of a technicality …" (at pp. 168-169). In The Queen –v- Horseferry Road Magistrates Court, ex parte Bennett [1994] 1 AC 42, the House of Lords recognised that the doctrine of abuse of process extends to cases where a prosecution "… offends the court's sense of justice and propriety …" (per Lord Lowry, at p. 74g). In the same case, Lord Griffiths spoke of executive conduct which "threatens either basic human rights or the rule of law" (at p. 62). In the language of Lord Bridge, the abuse of process jurisdiction encompasses "executive lawlessness" and "degradation" of the court's process (see pp. 67-68). As the decision in Bennett makes clear, a misuse of the court's process can potentially occur by virtue of the circumstances in which the Defendant is brought before the court. In The Queen –v- Hui Chi-Ming [1992] 1 AC 34, Lord Hope opined that the doctrine embraces "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all respects a regular proceeding" (at p. 57b).

[41] As appears particularly from the speeches of their Lordships in Bennett, an established feature of the doctrine of abuse of process of some importance is that it confers on the court a power to be exercised sparingly and selectively. See in particular per Lord Griffiths at p. 63, echoing the warning of Viscount Dilhorne in DPP –v- Humphries [1977] AC 1 that the court should have resort to this power only "in the most exceptional circumstances" and the formulation of Lord Lane CJ in The Queen –v- Oxford City Justices, ex parte Smith [1982] 75 CR. App. R 200, at p. 204 ("very strictly confined"). In Re DPP's Application [1999] NI 106, Carswell LCJ emphasized, at paragraph [33]:

> "1. The jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons …
>
> 2. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct".

We further consider that the celebrated statement of Lord Steyn in Attorney General's Reference No. 3 of 1999 [2001] 1 All ER 577, at p. 584, has some analogous force where applications to stay extradition proceedings are brought on the ground of abuse of process:

> "The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court

> to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family and the public".

We consider that where an abuse of process complaint is ventilated, a contextualised evaluation, tailored to the specific features and context of the individual case, will invariably be required. This will entail the formation of an evaluative judgment on the part of the court. This judgment must be formed at the stage when the complaint is canvassed. Furthermore, given these considerations, a complaint of this nature will almost invariably not be susceptible to an answer which may be characterised right or wrong. Thus there will be scope for differing opinions, a truism noted in the analogous context of abuse of process rulings based on unfair trial arguments in criminal prosecutions:

> "Whether a fair trial is possible will depend on the circumstances of the particular case and it is also a question on which even experienced judges might sometimes form different opinions".

[Regina –v- JAK (1992) CLR 30, at p. 31].

We consider that this observation applies with equal force to the present context.

[42] We would apply the principles outlined above to the present case in the following way. In doing so, we agree with Mr. Fitzgerald's submission that, in evaluating the Applicant's complaint of abuse of process, it is appropriate to consider both subjective and objective facts and factors. The only evidence of the subjective motivation and intention of the Republic of Lithuania is the passage read in open court by the Recorder on 29th May 2009: see paragraph [17](d) above. This must be considered in its full context, which includes, indisputably, the antecedent communication from the Recorder, dated 27th May 2009. Mr. Fitzgerald submitted that the Recorder should properly have inferred some improper aim or motive on the part of the Lithuanian authorities and an associated improper manipulation of the process of the Recorder's Court. He argued that, having regard to the available evidence, the threshold for requiring a fuller explanation from the Lithuanian authorities had been overcome. In our judgment, there is no warrant for the inference urged. We find no error of law in the Recorder's rejection of this submission. We similarly concur with the Recorder's dismissal of the assertion of forum shopping, which we find to be purely speculative in the circumstances. The offensive odour urged on both the Recorder and this court has no foundation, inferentially, in the evidence. On any reasonable objective analysis, no advantage of any kind accrues to the Republic of Lithuania by pursuing its extradition application in Northern Ireland, rather than the Republic of Ireland and no illegitimate motive can properly be inferred.

[43] Turning to the Applicant's assertion of improper interference in the process of the proceedings in the Republic of Ireland, which was portrayed as the centrepiece of his abuse of process complaint, we consider, firstly, that his reliance on the decision in Thomas –v- Baptiste [1999] 3 WLR 249 is of no avail to him in the present circumstances. There, Lord Millett, delivering the judgment of the Board, explained that the due process of law "… invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law …" (at p. 259h). He continues:

> "The clause thus gives constitutional protection to the concept of procedural fairness. Their Lordships respectively adopt the observation of Holmes J in Frank –v- Mangum (1915) 237 US 309, 347:
>
> > 'Whatever disagreement there may be as to the scope of the phrase due process of law, there can be no doubt that it embraces the fundamental concept of a fair trial, with opportunity to be heard'.
>
> Whether alone or in conjunction with Section 5(2) their Lordships have no doubt that the clause extends to the appellate process as well as the trial itself. In particular it includes the right of a condemned man to be allowed to complete any appellate or analogous legal process that is capable of resulting in a reduction or commutation of his sentence before the process is rendered nugatory by the executive action".

The context giving rise to the decision in Thomas is to be distinguished from that prevailing in the present case. In the proceedings in the Republic of Ireland, the Applicant was not the challenging party. He was not pursuing any relief or remedy or prosecuting any appeal. Rather, he was the Defendant in proceedings of a criminal character which could have as their ultimate outcome his prosecution and punishment for alleged serious terrorist offences. While the effect of the Recorder's ruling is that these proceedings will now be transacted in Northern Ireland there is no suggestion that the Applicant will be denied due process here.

[44] Equally important, it is apparent from all the evidence that the Recorder's ruling will not unduly delay the ultimate determination of the Republic of Lithuania's extradition request. It is clear that, hitherto, the case has not been ready for a substantive trial in the Republic of Ireland largely (it would seem) on account of the evidence preparation steps being taken on the Applicant's behalf. In this respect, the court was informed of the provision of an expert report, compelled by one Professor Morgan, as recently as 7th July 2009. The court was further informed (unsurprisingly) that the evidence on which the Applicant will rely in resisting the

extradition application in this jurisdiction is the same as the evidence accumulated on his behalf in the Dublin proceedings. Furthermore, the Applicant's case has been progressing in the High Court in Dublin in tandem with applications to extradite other persons and the evidence establishes that when Peart J reviewed all of these cases on 22nd July 2009, he fixed 5th November 2009 as the date for substantive hearing as regards the other two Defendants. When this is juxtaposed with the likely timetable for completion of the proceedings in the Recorder's Court, it is clear that, as a matter of probability, the Applicant will suffer no disadvantage. In his ruling, the Recorder states, at paragraph [33]:

> "I am satisfied that the period of time for hearing of this matter, including any appellate involvement, will not be longer than in the Republic of Ireland, and I put it no higher than that."

There was no challenge to this aspect of the Recorder's ruling.

[45] The Applicant's complaint of harassment and oppression highlights particularly his loss of the benefit of having been on bail in relation to the Republic of Ireland proceedings and his remand in custody in their Northern Ireland counterpart. We acknowledge that this loss of liberty is clearly not to be underestimated and operates as a substantial detriment to the Applicant. However, we consider that the Applicant had no expectation either that he would be the beneficiary of continuing bail throughout the entirety of the proceedings in the Republic of Ireland or that he would be able to comply with such additional or varied bail conditions as might be imposed. Furthermore, it seems to us that in cases where extradition is sought in connection with suspected terrorist offences of the gravity alleged here, the grant of bail pending final determination of the proceedings is more likely to be the exception than the rule. A further consideration is that the Applicant was at least arguably in breach of his bail conditions, when first arrested in Northern Ireland. In this respect, it is noted that one of the express conditions of bail enshrined in the order of the Dublin High Court dated 26th January 2009 was that the Applicant "… shall not depart from the area over which the jurisdiction of this court extends until the said proceedings against him shall be duly disposed of in this court". Any further consideration of this discrete issue is unnecessary, for present purposes and this court is alert to the Applicant's contention that he did not breach his conditions of bail.

[46] As regards other discrete aspects of the Recorder's ruling highlighted in the Applicant's grounds of challenge:

(a) We consider that in paragraph [31] of his ruling, the Recorder committed no error in characterising the requesting agency as a "judicial authority". This is entirely consonant with the language of the Framework Decision: see paragraph [5] above. Moreover, it is clear from paragraph [7] of his ruling that the Recorder was aware that, in

this particular instance, the "judicial authority" in Lithuania was the Prosecutor General's Office. There is no basis for any suggestion that the Recorder would not have been aware that this is an emanation of the executive, to be contrasted with a judicialised court or tribunal.

(b) For the reasons elaborated above, we find no flaw in the reasoning in paragraph [17](4) of the Recorder's ruling. Further, there is no challenge to the Recorder's exposition of the difference between the bars to extradition in the statutory regimes prevailing in the two jurisdictions. Nor could there be any sustainable complaint regarding his observation that there would be nothing perverse if the ultimate decision of the Recorder's Court in the Applicant's case were to differ from the final decision of the Dublin High Court in the case of his co-Defendants.

(c) The Recorder was clearly alert to the deprivation of the previous enjoyment of bail by the Applicant in the other proceedings and the related refusal to grant him bail in this jurisdiction: see in particular paragraphs [4] – [5], [17](2) and [32] – [33].

Finally, we find no substance in the Applicant's arguments regarding the doctrine of the comity of nations or the principle of equality of arms, properly understood. The former argument is without merit, given that the relevant measure of international law, the Framework Decision, does not preclude the initiation and pursuit of extradition proceedings against the Applicant in Northern Ireland, in the circumstances which have occurred. Nor does the Recorder's ruling entail any infringement of the principle of equality of arms, which is an aspect of a person's right to a fair hearing, whereby a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage to his adversary is to be afforded. See, for example, Neumeister –v- Austria [1968] 1 EHRR 91, paragraph [22] and Delcourt –v- Belgium [1970] 1 EHRR 355, paragraph [28]. There is no warrant for any suggestion that the Recorder's ruling will compromise the Applicant's enjoyment of this right in any way.

[47] Finally, we find that the effect of the Recorder's ruling, which is to permit the pursuit of the extradition application against the Applicant in this jurisdiction, with the result that it will not be open to the High Court in Dublin to order the Applicant's surrender to the Republic of Lithuania, if minded to so conclude, is harmonious with both the Framework Decision and the 2003 Act. If the Recorder had acceded to the Applicant's complaint of abuse of process, he would have been obliged to dismiss the extradition application and discharge the Applicant. In such eventuality, this would have placed the Applicant beyond the jurisdiction of both the Recorder's Court and the High Court in Dublin. This could conceivably have rendered nugatory the only extant proceedings against the Applicant in the Republic of Ireland. This would, plainly, have frustrated the operation of both the Framework Decision and the 2003 Act.

[48] Moreover, we consider that there is an increasing emphasis in public law on substance, in preference to form and on the desirability of the High Court, in the exercise of its supervisory jurisdiction, taking into account the present facts and realities, which may differ from those prevailing at the time of the impugned decision of the inferior court or tribunal. The present case is a paradigm example, in this respect. We consider that it would be wrong for this court to overlook the fact that, within two weeks of the Recorder's ruling, the Republic of Lithuania withdrew its extradition request in the Dublin High Court. It seems to us that the effect of this development was to extinguish the cornerstone of the abuse of process complaint advanced to the Recorder. Added to this is the unequivocal acknowledgement on behalf of the Applicant that there is no challenge to the validity of the EAW or the Applicant's initial arrest pursuant thereto or the initiation of the proceedings in the Recorder's Court. Rather, the Applicant's challenge focuses on the perpetuation of such proceedings. Self-evidently, this complaint loses much of its momentum as a result of the discontinuance of the associated proceedings in the Republic of Ireland. This development serves to enhance and reinforce the findings and conclusions of the Recorder.

X DISPOSAL

[49] To give effect to our conclusion that, in the particular circumstances of this case, the habeas corpus challenge was inappropriate, we order that the application for a Writ of habeas corpus ad subjiciendum be dismissed. For the reasons elaborated above, we concur with the Recorder's ruling and, hence, find no merit in the judicial review challenge. However, bearing in mind the full argument which was received, we are satisfied that the modest threshold for the grant of leave to apply for judicial review was overcome. We also record Mr. Fitzgerald's acknowledgement that all of the submissions which he wished to develop were addressed to the court at the hearing conducted on 27th July 2009. Bearing this in mind, and considering further that the evidential matrix before the court is complete, we consider that no purpose would be served by convening a further hearing. Accordingly, we grant leave to apply for judicial review, but dismiss the application.