Neutral Citation No. [2012] NIQB 32

Ref:	**McCL8453**

*Judgment: approved by the Court for handing down (subject to editorial corrections)**

Delivered:	**03/05/12**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BEFORE A DIVISIONAL COURT

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Before: Morgan LCJ, Higgins LJ and McCloskey J

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IN THE MATTER of the Extradition Act 2003

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BETWEEN:

JOSE IGNACIO de JUANA CHAOS

Appellant:

-and-

KINGDOM OF SPAIN

Respondent:

____

McCLOSKEY J

I INTRODUCTION

[1] Jose Ignacio de Juana Chaos ("*the Appellant*"), a Spanish national, appeals to this court against the order of the Recorder of Belfast, dated 1st March 2010, whereby he acceded to the application of the Kingdom of Spain ("*the Respondent State*") that the Appellant be extradited to that country. In the language of the Extradition Act 2003 ("*the 2003* Act"), the Appellant is the requested person, while the Respondent State is the requesting state.

[2] This is the judgment of the court to which all members have contributed. The first issue which the judgment addresses was raised at the

instigation of the court and was prompted by clear evidence that the Appellant was in breach of the Recorder's order granting him bail, had evidently absconded to a destination unknown and had provided no instructions to his solicitors since the initiation of the appeal. The background to this particular issue can be ascertained from an earlier judgment of this court: see [2010] NIQB 68.

II PRELIMINARY ISSUE: PROSECUTION OF THIS APPEAL

[3] On the date when he made the extradition order, 1st March 2010, the Recorder, exercising his power under Section 21(4) of the 2003 Act, remanded the Appellant on bail. The evidence which this court has considered includes a duly completed "Form 3", bearing the title "Recognizance of Requested Person in a Part 1 Extradition Matter". It is dated 1st March 2010. It has three signatories and there is no dispute that these are, respectively, the Appellant, the Governor (or Deputy Governor) of the relevant prison and the Chief Clerk of the Recorder's Court. The court was informed that no separate bail order of the Recorder is in existence. This is unsurprising, given that, conventionally, orders made in the County Court are not generated automatically but must be specifically bespoken. It is undisputed that the executed recognizance reflects the terms of the Recorder's bail order. It recites, in relevant part:

> "*The undersigned Jose Ignacio de Juana Chaos, of* [address], *the principal party to this recognizance, hereby binds himself to perform the following obligations:*
>
> *1. To surrender himself to the custody of Police Service for Northern Ireland for the purposes of extradition on a date to be fixed.*
>
> *2. In the event of your extradition to the Category 1 territory in which the Part 1 warrant was issued, to surrender to the custody of the court if so directed by or on behalf of such court, for the purpose of extradition.*
>
> *And upon condition that:*
>
> *(i) He reports daily to a PSNI station at a time agreed with the police.*
>
> *(ii) He resides at an address provided and given to police.*
>
> *(iii) Curfew from 8.00am until 7.00am to be lifted to enable the Defendant to work in* [a specified café].

(iv) *He presents himself at the door as and when police call.*

(v) *Any passport or national identity card that can be used to travel in Europe be surrendered to the police.*

(vi) *Defendant not to leave the jurisdiction of Northern Ireland*".

This court has clearly construed the second of the two "*obligations*" imposed on the Appellant by the terms of his bail as referring to the relevant court of the requesting State, to be contrasted with any court in this jurisdiction.

[4] By Notice of Motion dated 26th April 2010, the Respondent State applied to this court for an order revoking the Appellant's bail, committing him to custody and estreating his recognizance. In moving this application, it was asserted on behalf of the Respondent State, without challenge, that since 25th March 2010 the Appellant has failed to comply with the first, second and fourth of the aforementioned conditions. Whether he is also in breach of the sixth condition is not entirely clear. Counsel for the Appellant confirmed to the court that the last contact between his client and the solicitors who continue to represent him occurred on 26th March 2010. In summary, it was asserted that the Appellant had committed, and continued to commit, fundamental breaches of the Recorder's bail order and this is not disputed. This court gave judgment on 2nd June 2010: see [2010] NIQB 68. Its conclusions were threefold:

(i) The High Court, which by statute exercises an appellate function in extradition cases, has no jurisdiction, statutory or inherent, to revoke the Appellant's bail, commit him to custody and estreat his recognizance.

(ii) Following the initiation of the appeal to this court, the Recorder had no implied statutory power to take any of these measures.

(iii) Provided that the relevant statutory provisions are satisfied, and subject to the observations of the court in paragraphs [31] and [33] of the judgment, the Appellant may be liable to be detained, and prosecuted, via a combination of Part II of the 2003 Order and Article 26 of PACE.

The Appellant has not been detained by the police and remains at large.

[5] Since the earlier judgment of this court was promulgated, there have been periodic listings of the appeal for review. On each of these occasions the Appellant has been legally represented. It has been represented consistently to this court that there have been no communications between the Appellant and his solicitors since 26th March 2010. In these circumstances, the court proactively raised the question of whether the Appellant is entitled to have the merits of his appeal heard and determined. The alternative course would be to dismiss it *in limine* for want of active prosecution by him. While his legal representatives contended that the Appellant enjoys the right in question, this is contested by the Respondent State.

The EAW in Outline

[6] By virtue of the terms of the European Arrest Warrant ("*the* EAW"), the effect of the Recorder's order was to extradite the Appellant to Spain in respect of the offence described as:

> "*Public justification of terrorist acts (his own and that of others), which caused humiliation and intensified the grief of both the victims and their relatives*".

According to the EAW, the essence of the case against the Appellant is that he aided and abetted an offence of public justification of terrorists' actions (his own and those of others) causing humiliation and intensifying the grief of victims and their relatives, contrary to various specified provisions of the Spanish Criminal Code. It is asserted that, at a pro-Basque independence public event on 2nd August 2008, in San Sebastian, one of the main cities in the Basque Country, an unidentified person –

> "*… read a letter given by Jose Ignacio de Juana Chaos to be read in his name, in which reference was made, among other issues, to a call to continue with the armed struggle and also specific reference was made to the historical leader of the terrorist organisation ETA* [named], *directly involved in his participation in five terrorist assassinations and terrorist attacks by planting bombs … and it also made reference to extraordinary measures against the 'Basque Political Prisoners' War Tribunals' and specifically to the 'remaining long way ahead to achieve the independence of the Basque Country', thus inciting the approximately 500 people attending the meeting to continue using violent and criminal ways to achieve this objective*".

The EAW further recites that on the date in question, 2nd August 2008, the Appellant had just been released from prison, having served a sentence of twenty-one years for twenty-five offences of murder and one offence of threats.

The Judgments of the Recorder

[7] The Recorder delivered two reserved judgments. In the first, dated 10th March 2009, he held:

(a) That the Appellant is an "*accused person*" within the meaning of Section 2(2) of the Extradition Act 2003 ("*the 2003 Act*").

(b) That the Appellant is accused of an extraditable offence for the purposes of Section 10(2) of the 2003 Act.

This gave rise to the omnibus conclusion that the Respondent State had established all of the preliminary matters relating to the EAW. In his second judgment, delivered on 26th February 2010, the Recorder, firstly, by reference to the Framework Decision and binding authority, emphasized that the court of the Requested State is not competent to enquire into and determine whether the conduct alleged against the requested person in the EAW establishes a case to answer: The sufficiency of the evidence to be adduced against him, in the event of extradition, is a matter into which the courts of the Requested State will not enquire. Secondly, drawing on the principle of mutual recognition, the Recorder observed that the courts of the Requested State should place confidence in the integrity of the judicial system of the Requesting State. Next, the judge recorded that there was no evidence whatsoever in support of a series of complaints levied by the Appellant's legal representatives against the processes and procedures of the Respondent State, describing the allegations against the judicial authority of that state as "*unfounded*". The Recorder then addressed the grounds upon which the court was requested to refuse the extradition of the Appellant. These, in summary, raised issues relating to an alleged abuse of the extradition process; disqualifying extraneous considerations under Section 13 of the 2003 Act, linked to alleged illegitimate political persecution of the Appellant; oppression, based on the Appellant's alleged mental condition; and infringement of the Appellant's rights under Articles 3, 5, 6, 8 and 10 ECHR. Dismissing all of these grounds of challenge, the Recorder held, in brief compass:

(i) There was no evidence of abuse of process or *mala fides* on the part of the Respondent State.

(ii) There was no evidence whatsoever that the EAW had been issued for the purpose of prosecuting or punishing the Appellant on account of his political opinions.

(iii) (Following a meticulous review of the evidence) to extradite the Appellant would not be unjust or oppressive by reason of his mental condition.

(iv) The extradition of the Appellant would not infringe the Convention rights invoked on his behalf.

(v) There was no warrant for concluding that, in the event of the Appellant's extradition, he would be prosecuted for any offence other than that specified in the EAW.

Notice of Appeal

[8] By his Notice of Appeal, the Appellant challenges the order of the Recorder on the following grounds, in summary:

(a) The EAW is invalid.

(b) The EAW fails to establish an extraditable offence.

(c) Extradition should have been refused on the ground of unjust oppression, by reason of adverse impact on the Appellant's mental and psychological health.

(d) The order of the Recorder infringed the Appellant's rights under Article 8 ECHR.

(e) The Recorder erred in finding that the Appellant was the subject of a prosecution, rather than a (mere) investigation.

(f) As extradition of the Appellant would result in no possibility of the grant of bail, the order infringed his rights under Article 5 ECHR.

(g) The Recorder wrongly declined to stay the proceedings as an abuse of the court's process in rejecting the Appellant's contention that he could not be efficaciously prosecuted for the index offence in Spain.

Statutory Framework

[9] Bearing in mind the first issue to be determined by this judgment, the relevant statutory provisions are as follows. Firstly, by virtue of Section 67 of the 2003 Act, the Recorder of Belfast is "*the appropriate judge*" for the purposes of the statute. Section 21 of the 2003 Act addresses the topic of bail, in the

context of the court making an extradition order at first instance. Per Section 21(4):

> *"If the judge makes an order under subsection (3) he must remand the person in custody or on bail to wait for his extradition to the Category 1 territory".*

This is the power exercised by the Recorder on 1st March 2010. This preceded the Notice of Appeal.

Section 21(5) continues:

> *"If the person is remanded in custody, the appropriate judge may later grant bail".*

As noted in the first judgment of this court, the appropriate judge's statutory power to grant bail at the conclusion of the proceedings is linked directly to the making of an extradition order. This power is unconnected with any ensuing appeal pursued by either party. Provision for an appeal by the requested person to the High Court is made in 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.*
>
> *(2) But subsection (1) does not apply if the order is made under section 46 or 48.*
>
> *(3) An appeal under this section may be brought on a question of law or fact.*
>
> *(4) Notice of an appeal under this section must be given in accordance with rules of court before the end of the permitted period, which is 7 days starting with the day on which the order is made."*

The powers of the High Court in determining an appeal of this kind are contained in Section 27, which provides:

> *"(1) On an appeal under section 26 the High Court may –*
>
> *(a) allow the appeal;*
>
> *(b) dismiss the appeal.*

(2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.

(3) The conditions are that –

(a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;

(b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.

(4) The conditions are that –

(a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;

(b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;

(c) if he had decided the question in that way, he would have been required to order the person's discharge.

(5) If the court allows the appeal it must –

(a) order the person's discharge;

(b) quash the order for his extradition."

For completeness, the 2003 Act makes provision for a second type of appeal. Where the outcome of the hearing at first instance is an order discharging the requested person, Section 28 empowers the requesting state to pursue an appeal on a question of law or fact. By virtue of Section 29, where an appeal of this *genre* is pursued two specific powers are exercisable by the High Court. In the event of allowing the appeal, the court must remand the requested person in custody or on bail. Secondly, the court is empowered to substitute an initial remand in custody by a later grant of bail.

The Parties' Competing Contentions

[10] The submissions of Mr. Devine (of counsel) on behalf of the Appellant entailed, firstly, the contention that the grounds of appeal are "respectable". Secondly, emphasis was placed on the *right of appeal* conferred on the

Appellant by Section 26 of the 2003 Act. Thirdly, counsel's submissions drew on Article 6(3) ECHR, which provides, in material part:

> *"Everyone charged with a criminal offence has the following minimum rights: …*
>
> *(c) To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".*

It was submitted that there is a clearly established theme in the Strasbourg jurisprudence to the effect that, in criminal matters, the right of an accused person to legal representation is not forfeited by virtue of his absence. These decisions, it was argued, are not confined to hearings, or trials, at first instance. This argument invoked in particular the decisions of the European Court in ***Pelladoah –v- Netherlands*** [1994] 19 EHRR, paragraph [40] and ***Lala –v- Netherlands*** [1994] 18 EHRR 586, paragraphs [33] – [34]. Finally, Mr. Devine cited the decision of the House of Lords in ***R –v- Jones*** [2002] UKHL 5 as authority for the proposition that while an accused person has a right to attend his trial, or appeal hearing, this is a right to be exercised at his option, with the result that there is no corresponding *obligation* to do so. This gives rise to the proposition that, in appropriate circumstances, an accused person can be lawfully convicted in his absence.

[11] The main argument advanced by Mr. Ritchie (of counsel) on behalf of the Respondent State was that extradition proceedings do not engage the protections of Article 6 ECHR, as they do not entail any determination of a criminal charge against the requested person: ***Soering –v- United Kingdom*** [1989] 11 EHRR 439 and ***Mamatkulov and Askarov –v- Turkey*** [2005] 41 EHRR 25. It was argued that since there would be no infringement of the Appellant's rights under Article 6, it was open to this court to dismiss the appeal for non-appearance and want of prosecution.

<u>First Issue:</u> <u>Discussion and Conclusions</u>

[12] There is a clear and consistent line of authority in decisions of the English Court of Appeal to the effect that **a criminal appeal** does not fall to be dismissed *in limine* merely by virtue of the failure of the Appellant to appear to prosecute his appeal. The analogy with extradition proceedings is a tenable one, given the essentially criminal flavour of this species of litigation. One of the main decisions in this field, ***R –v- Tucker*** [2001] 2 Cr. App. R. 15, was influenced by the Article 6 ECHR jurisprudence. The Court of Appeal stated:

> *"52 Whilst noting the considerable differences between French criminal procedure and our own, nonetheless it*

seems to us that there could well be a breach of Article 6(1) if an applicant who has absconded could not succeed with an application for leave to appeal solely because it is treated as ineffective by the Registrar or dismissed for the reason in Jones (No. 1) and because any subsequent applications for extensions of time to make or renew the application were summarily dismissed because there was no good reason for the delay.

53 There seems to us to be a good policy reason for not taking such an inflexible approach. If an applicant, for example, has been sentenced to an unlawful sentence then the sooner it is so declared the better. If the result of an appeal is to be an order for a retrial it will usually be in the interests of the prosecution to have that retrial started as soon as possible after the appellant's arrest.

54 Having considered the matter carefully, we do not share the view expressed in Jones (No. 1) that where a defendant has, by absconding, put it out of his power to give instructions, his solicitors have not been duly authorised to prosecute appeal proceedings on his behalf. We derive some comfort from the case of Gooch in reaching this conclusion. Whilst accepting the remote risk that the absconder does not want to appeal, we take the view that a single judge or the full Court is entitled (but not bound), to conclude that the legal representatives submitting the application for permission have the actual or implied authority so to do. The applicant might have wished grounds to be advanced further to those which his legal representative decides to advance. That must be a risk which he takes. Nor do we think that it is appropriate for the Registrar in future to treat an application in these circumstances as ineffective. Applications should be put before the single judge. We direct that Tucker's application should now be submitted to a single judge. Should the single judge refuse leave, then notices of that refusal (as in the Charles case) should be sent in accordance with regulations 12 and 21(c). Any application for renewal will be put before the full Court in the usual way."

Where Article 6 ECHR is, for whatever reason, not invoked or inapplicable, it is incumbent on the court to consider the extent of an Appellant's common law right to a fair hearing. It may further be said that where issues of this kind are raised an accused person's constitutional right of access to the courts also arises for consideration. This was described, in terms, as a hallowed

common law right of constitutional stature in ***R –v- Lord Chancellor, ex parte Witham*** [1998] QB 575, p 585, per Laws LJ.

[13] We consider, firstly, the question of whether, given the character of these proceedings, the Appellant can invoke the protections of Article 6 ECHR. If "yes", it is incumbent on this court to avoid acting incompatibly with his Convention rights, by virtue of Section 6 of the Human Rights Act 1998. In the two cases mentioned in paragraph [11] above (and in others), the European Court of Human Rights considered the question of whether Article 6 ECHR applies to extradition hearings and has provided an unequivocal negative answer : see ***Maaouia –v-France*** [2001] 33 EHRR 42, paragraph [40] and ***Salgado –v- Spain*** [Application No. 56271/00, 16th April 2002]. Referring to these decisions, the court stated in ***Mamatkulov –v- Turkey*** [2005] 41 EHRR 25:

> "[81] *The Applicants alleged that they had not had a fair hearing in the criminal court that had ruled on the request for their extradition, in that they had been unable to gain access to all the material in the case file or to put forward their arguments concerning the characterisation of the offences they were alleged to have committed.*
>
> [82] ***The Court reiterates that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an Applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6(1) of the Convention.***
>
> [83] *Consequently, Article 6(1) is not applicable in the instant case*".

[Emphasis added]

Having regard to the obligation imposed on this court by Section 2(1) of the Human Rights Act and in the absence of any compelling reason to adopt any other course, we conclude that, in the context of this extradition appeal, the Appellant is unable to invoke the protections of Article 6 ECHR. It is, however, open to him to argue by analogy with the line of authority exemplified by the decision in ***Tucker*** (*supra*) that a similar principle should apply to extradition appeals.

[14] In the Appellant's favour, is clear that the principles of common law fairness apply to extradition proceedings with full force: see ***R (Raissi) –v- Secretary of State for the Home Department*** [2008] EWCA. Civ 72, paragraph [139] – [140] especially. The proposition that this Appellant enjoys a common law right to a fair hearing is unassailable. It is necessary to consider the constituent elements of this right in the present context. The Appellant's

present whereabouts are unknown. However, it is clear that he gave instructions to his legal representatives to prosecute an appeal against the extradition order of the Recorder. Furthermore, he is at continuing and indefinite peril of being extradited to Spain from Northern Ireland on foot of the Recorder's order. Thus the appeal cannot be condemned as academic. We concur with both the philosophy and the caution clearly identifiable in the decision in ***Tucker*** (*supra*). We consider that a decision by this court to dismiss the Appellant's appeal *in limine*, in the circumstances prevailing, would not merely deprive the Appellant of his common law right to a fair hearing. It would, rather, have the more Draconian impact of impairing his right of access to this court in the exercise of the right of appeal conferred on him by Section 26 of the 2003 Act. Furthermore, to dismiss this appeal without a hearing on the merits *on* the basis that the Appellant has committed fundamental breaches of the bail order of the Recorder, has given no further instructions to his solicitors subsequent to his initial instructions to pursue this appeal and is currently of unknown whereabouts would entail the invocation by this court of a power not expressly conferred on it by the 2003 Act. Finally, such a power is not contained in the provisions of the Framework Decision and, taking into account particularly the emphasis which both this EU measure and its transposing domestic counterpart place on the protection and enjoyment of a series of rights and protections conferred on the requested person, coupled with the conferral on the latter of an unencumbered statutory right of appeal to this court, we would be reluctant to imply a power to summarily dismiss the present appeal. It is inappropriate to address the question of whether a power of this nature could *ever* be implied. For this combination of reasons, we conclude that in the particular circumstances of this case the Appellant is entitled to have the merits of his appeal considered and determined.

III THE SUBSTANTIVE APPEAL

The Main Issue

[15] The issue which occupied most time and attention upon the hearing of the appeal related to the validity of the EAW. It is appropriate to examine both the statutory framework and the pro-forma EAW annexed to the Framework Decision. The latter is of some importance for two reasons. The first is that it sheds some illumination on the correct determination of this discrete issue. The second is that in the present case, in common with many others which have arisen in this jurisdiction, the requesting State has, in compiling the EAW, modelled its surrender request on the pro-forma.

The Framework Decision and the Pro-Forma EAW

[16] The recitals to the Framework Decision include the following:

> "[5] *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 next succeeding recital is noteworthy:

> "[6] *The European Arrest Warrant provided for in this Framework Decision is 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.*"

Recital No. [7], considered in conjunction with the other recitals surrounding it, records the need to replace the system of multilateral extradition established by the European Convention on Extradition (1957). Per Recital [5], the aim was to introduce "*a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences*", removing "*the complexity and potential for delay inherent in the present extradition procedures*". The new EAW mechanism is described in Recital [10] as being based on "*a high level of confidence between Member States*". Recital [12] records that this new mechanism "*… respects fundamental rights and observes the principles recognised by Article 6* [TEU] *and reflected in the* [Lisbon Charter of Fundamental Rights]". The remaining passages in Recital [12] emphasize the prohibition on surrender for the purpose of prosecuting or punishing a person on a series of familiar proscribed grounds (gender, race, political opinion and others). The scheme of Article 2 of the Framework Decision may be summarised thus:

(i) Where a sentence has already been passed, it must entail at least four months' detention. In other cases, the minimum detention period is twelve months.

(ii) There is a specially prescribed Article 2.2 surrender category of offences belonging to the lengthy list which follows where the minimum period of detention/imprisonment is three years. In such cases, certification of double criminality ('correspondence') is not required.

(iii) There is a separate Article 2.4 surrender route for other offences, where surrender "*… may be subject to the condition that the acts for which the* [EAW] *has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described*". This is the long established and traditional surrender mechanism. By virtue of Article 2.1,

offences belonging to this category must attract a minimum period of twelve months' detention/imprisonment.

[17] Article 8 of the Framework Decision regulates, according to its title, the "*Content and Form of the European Arrest Warrant*". Here one finds the first reference to the EAW pro-forma. Article 8 provides:

> "***<u>Content and form of the European Arrest Warrant</u>***
>
> *1. The European Arrest Warrant shall contain the following information set out in accordance with the form contained in the Annex:*
>
> > *(a) The identity and nationality of the requested person;*
> >
> > *(b)* [The particulars of the issuing judicial authority];
> >
> > *(c) Evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Article 1 and 2;*
> >
> > *(d)* ***The nature and legal classification of the offence, particularly in respect of Article 2;***
> >
> > *(e) A description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;*
> >
> > *(f) The penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;*
> >
> > *(g) If possible, other consequences of the offence.*"

[Emphasis added]

Accordingly, while Article 8 does not unequivocally mandate that the validity of a EAW is dependent upon employment of the pro-forma, it contains three clear prescriptions. The first is that it must contain the information specified therein. The second is that it must do so "*in accordance with the form contained in the Annex*". There is a third prescription, namely that the EAW must be translated into the official language of the requested state. Article 15.2 of the

Framework Decision must also be mentioned, having regard to the events which post-dated execution of the EAW in this case. It is entitled "Surrender Decision" and provides:

> *"1. The executing judicial authority shall decide, within the time-limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.*
>
> *2. If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in Article 17. L 190/6 EN Official Journal of the European Communities 18.7.2002*
>
> *3. The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority."*

This is an eminently sensible provision, entirely consonant with the aims and objectives expressed in the recitals and cognizant of the real possibility of some human error or inaccuracy in the compilation of the EAW. In passing, while Article 15.2 clearly has direct effect, it has not been transposed by any provision of the 2003 Act.

[18] The scheme and shape of the pro-forma EAW annexed to the Framework decision are as follows. Firstly, it makes provision for inclusion of the information which must, per Article 8.1, be specified. Next, in cases of future (rather than completed) prosecutions, it requires particulars of the maximum length of the applicable custodial sentence or detention order. Section (E) of the pro-forma contains an array of passages in which provision is made for the following:

(i) Specifying the number of offences to which the EAW relates.

(ii) Describing "*the circumstances in which the offence/s was/were committed, including the time, place and degree of participation in the offence/s by the requested person*".

(iii) Providing particulars of the "*nature and legal classification of the offence/s and the applicable statutory provision/code*".

At this juncture, Section (E) is broken down into two further parts. The first of these recites:

> "*(i) If applicable, tick one or more of the following offences punishable in the issuing Member State by a custodial sentence or detention order of a maximum of at least three years as defined by the laws of the issuing Member State*".

The list which follows replicates the list of offences contained in Article 2.2 of the Framework Decision. The second further part continues:

> "*(ii) Full description of offence/s not covered by Section (1) above …*".

Section (F) of the pro-forma has the following heading:

> "*Other circumstances relevant to the case (optional information) …*".

Section (G) is confined to cases where the EAW is directed to the seizure and handling of property required as evidence. In cases of conviction, where a "*custodial life sentence*" or "*lifetime detention order*" has been imposed, certain particulars must be included in Section (H). Section (I) requires particulars of the judicial authority which issued the EAW.

The Extradition Act 2003

[19] Within the scheme of the domestic transposing legislation, the Extradition Act 2003 ("*the 2003 Act*"), the EAW under scrutiny in the present case is a so-called "Part 1 Warrant". By Section 2(3) of the 2003 Act, every EAW of this *genre* must contain the following prescribed statement:

> "*(3) The statement is one that –*
>
> *(a) the person in respect of whom the Part 1 warrant is issued is accused in the Category 1 territory of the commission of an offence specified in the warrant; and*
>
> *(b) the Part 1 warrant is issued with a view to his arrest and extradition to the Category 1 territory for the purpose of being prosecuted for the offence*".

Every 'Part 1' EAW must also contain the following prescribed information:

> "*(4) The information is –*
>
> *(a) Particulars of the person's identity;*

(b) Particulars of any other warrant issued in the category 1 territory for the person's arrest in respect of the offence;

(c) Particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence and any provision of the law of the Category 1 territory under which the conduct is alleged to constitute an offence;

(d) Particulars of the sentence which may be imposed under the law of the Category 1 territory in respect of the offence if the person is convicted of it".

These provisions of Section 2 of the 2003 Act must be considered in conjunction with Section 64, which provides in material part:

"(1)This section applies in relation to conduct of a person if—

(a)he is accused in a category 1 territory of the commission of an offence constituted by the conduct, or

(b)he is alleged to be unlawfully at large after conviction by a court in a category 1 territory of an offence constituted by the conduct and he has not been sentenced for the offence.

(2)The conduct constitutes an extradition offence in relation to the category 1 territory if these conditions are satisfied—

(a)the conduct occurs in the category 1 territory and no part of it occurs in the United Kingdom;

(b)a certificate issued by an appropriate authority of the category 1 territory shows that the conduct falls within the European framework list;

(c)the certificate shows that the conduct is punishable under the law of the category 1 territory with imprisonment or another form of detention for a term of 3 years or a greater punishment.

(3)The conduct also constitutes an extradition offence in relation to the category 1 territory if these conditions are satisfied—

(a)the conduct occurs in the category 1 territory;

> *(b)the conduct would constitute an offence under the law of the relevant part of the United Kingdom if it occurred in that part of the United Kingdom;*
>
> *(c)the conduct is punishable under the law of the category 1 territory with imprisonment or another form of detention for a term of 12 months or a greater punishment (however it is described in that law".*

The Present EAW

[20] Those passages of the EAW rehearsing the substance of the alleged offending conduct have been set out in paragraph [6] above. The author of the EAW is Judge Velasco Nunez, a magistrate belonging to one of the Central Magistrates Courts of the Audiencia Nacional (the High Court) of Madrid. The latter is the "*judicial authority*" for the purposes of the Framework Decision and Judge Nunez is described as its representative. The proceedings in the Audiencia Nacional are described as "*Preliminary Proceedings*" and the reference number is specified. From the perspective of the validity issue, the EAW has the following material ingredients:

Section (C)

(i) The maximum custodial sentence which may be imposed for the alleged offence is stated to be two years.

Section (F)

(ii) It is stated that the warrant relates to one offence. There follows the Respondent State's description of the circumstances in which the alleged offence was committed.

(iii) It is asserted that the conduct of the Appellant in the events described constituted an act of "*aiding and abetting … an offence of public justification of terrorist actions (his own and that of others) which cause humiliation and intensify the grief of both the victims and their relatives … punished by … a sentence of imprisonment from one to two years…*". In this paragraph, several provisions of the Spanish Criminal Code are specified.

Section (E), Part (i)

(iv) Here, none of the Article 2.2 list of offences is selected: there is no tick anywhere.

Section (E), Part (ii)

(v) Under the heading *"Full Description of Offence/s not covered by Section (i) above"* there is no entry.

Section (F)

(vi) Here the EAW recites:

> *"The European warrant is based on the provisions for terrorism included on the list of crimes excluded from the double classification principle which appears in Article 2.2 of the Framework Decision …"*

The remaining completed passages in the EAW are immaterial for present purposes.

Subsequent Intra-Judicial Communications

[21] The EAW signed and issued by Judge Nunez is dated 11th November 2008. Thereafter, the relevant sequence of events was that the EAW was executed by the arrest of the Appellant in Northern Ireland on 17th November 2008. At the first hearing before the Recorder which followed, the Appellant's legal representatives challenged the validity of the EAW on the ground that it did not disclose an extraditable offence. Following initial argument, it was agreed that the Recorder should seek clarification from Judge Nunez. Also relevant in this context is Section 10 of the 2003 Act, which, under the rubric "Initial Stage of Extradition Hearing", enjoins the court in the Requested State to decide whether the offence specified in the EAW is an extradition offence and compels the discharge of the requested person in the event of a finding that it is not. The Recorder proceeded to transmit a request to Judge Nunez for certain information. Judge Nunez responded with admirable speed. His response included the following extract from Article 578 of the Spanish "Codigo Penal" [Criminal Code]:

> *"Extolling or justifying by any means of public expression or divulgation the crimes included in Articles 571 – 577 of this Code or the authors that have participated in their execution, or carrying out acts that involve discredit, contempt or humiliation to the victims of the crimes of terrorism or to their relatives* ***shall be punished with prison of one to two years.****"*

[Emphasis added].

The response elaborated on the accusation against the Appellant in the following terms:

> "*1. Justifying or extolling terrorist acts made by himself and by another member of ETA, including murder and placement of bombs, inciting a high number of attendants to reach political* [sic] *through non democratic, violent and criminal means, extolling his personal terrorist history and that of another person.*
>
> *2. Contributing, directly or indirectly, to the development of a public act that objectively entails contempt and sorrow for the victims and their relatives of the acts committed by the two extolled terrorists*".

The remainder of the response acknowledged, in terms, the erroneous invocation of Article 2.2 of the Framework Decision in the EAW. The response continued:

> "*Therefore, the required* [obviously "requested"] *State should analyse* [Article 2.4] *and its own laws to see if according to it any of the facts (of the prescribed criminal actions) constitutes also a crime of extolling or inciting terrorism in the required* [sic] *State (as seems to do, in the opinion of the Prosecution Services of the United Kingdom, in Section 64 of* [the 2003 Act] *and Article 1 of Act 2006* [evidently a reference to Section 1 of the Terrorism Act 2006])".

A further exchange between the two judicial authorities concerned elicited a ***second*** response from Judge Nunez. This included the following passages:

> "*Thus the required person is accused of elaborating/ executing the attached text… whose reading before 500 people, sympathizers if ETA's radical terrorism …* ***constituted the spinal cord of the meeting glorifying not only of himself, as an individual that was sentenced for the commission of two terrorist murders, but also of another terrorist…*** [named] ***… in a language that uses terms and codes easy to understand by those who attended the extolling meeting …*** [examples provided] *… that produce great harm and sorrow to the relatives of innocent murdered victims and to all those injured or disabled by said terrorists … and issuing coded messages that have the clear intention of lecturing those attending the meeting to go on using violent methods … inducing armed struggle …*".

[Emphasis added]

[22] The attachments to this second response from Judge Nunez included the complete text of the letter read on the occasion under scrutiny. The letter (it is alleged) is signed by the Appellant and is dated 2nd August 2008, which coincided with the date of the Appellant's release from prison. Part of the text contained an expression of regret by the author of his inability to attend the offending event. In this second response, Judge Nunez also highlighted various pieces of evidence pointing firmly (it was argued) to the conclusion that the Appellant is the author of the offending letter. Having received these responses, the Recorder considered further argument from the parties and then delivered the first of his reserved judgments. Recording the acknowledgement contained in the response of Judge Nunez, the Recorder held, firstly, that the conduct alleged against the Appellant could not constitute an extraditable offence under Article 2.2 of the Framework Decision. The correctness of this assessment is unassailable and, on appeal, it has not been challenged by the Respondent State. The Recorder then considered whether the alleged conduct could constitute an extraditable offence under Article 2.4 of the Framework Decision, with specific reference to Section 64(3) of the 2003 Act. Thus it was incumbent upon the Recorder to determine whether the requirement of double criminality, or correspondence, was satisfied. The determination of this question required what he described as a "*transposition exercise*" as explained in ***R –v- Governor of Pentonville Prison, ex parte Tarling*** [1980] 70 Cr. App. R 77, at p. 136:

> "*In considering the jurisdiction aspect it is necessary to suppose that England is substituted for Singapore as regards all the circumstances of the case connected with the latter country and to examine the question whether upon that hypothesis and upon the evidence produced the English courts would have jurisdiction to try the offence as charged*".

It is evident from the passages which follow in the judgment that the main thrust of the challenge by the Appellant's legal representatives to the EAW was directed to the content and particularity of the description of the offending conduct. The remainder of the judgment is to be understood in this context. In determining this issue in favour of the Respondent State, the Recorder paid particular attention to the *second* of the responses elicited from Judge Nunez. His conclusion was that the accusation alleged against the Appellant in the EAW, considered in conjunction with the responses of Judge Nunez, constituted an extraditable offence under Article 2.4 of the Framework Decision.

<u>The Main Issue : Consideration and Conclusions</u>

[23] In the opinion of this court, the main issue to be determined is whether the EAW is incurably invalidated by reason of its erroneous invocation of Article 2.2 of the Framework Decision and its simultaneous failure to expressly invoke Article 2.4. As the above outline demonstrates, whereas the Respondent State, by the terms of the EAW, requested the arrest and surrender of the Appellant invoking Article 2.2, in its supplementary responses this was effectively amended to reliance on Article 2.4. As set out in paragraph [17] above, Article 8 of the Framework Decision stipulates that every EAW shall contain specified information, one element whereof is "*the nature and legal classification of the offence, particularly in respect of Article 2*". The provisions of the 2003 Act transposing Article 8 are also set above. The question of law which arises is whether, in circumstances where Article 2.2 was mistakenly invoked initially in the EAW and, in terms, amended to (or substituted by) Article 2.4 subsequently, the court is impelled to find that the Article 2.4 surrender route is not a permissible option for the requested state, giving rise to a further finding that the offence specified in the EAW is not an extraditable offence, with the result that the initial error vitiates the EAW to the point of fatality.

[24] The House of Lords has pronounced authoritatively on the aims and principles of and philosophy underpinning the Framework Decision. In ***Office of the King's Prosecutor, Brussels –v- Cando Armas*** [2006] 2 AC 1, in which questions regarding the proper construction of Section 65 of the 2003 Act arose, Lord Bingham commented on the transposition of the Framework Decision in the following terms:

> "*[8] Part 1 of the 2003 Act did not effect a simple or straightforward transposition and it did not on the whole use the language of the Framework Decision. But its interpretation must be approached on the twin assumptions that Parliament did not intend the provisions of Part 1 to be inconsistent with the Framework Decision and that, while Parliament might properly provide for a greater measure of co-operation by the United Kingdom than the Decision required, it did not intend to provide for less.*"

Lord Hope also reflected on the genesis of the Framework Decision:

> "*[21] The Tampere European Council of 15 and 16 October 1999 which laid the foundations for this system was the highlight of Finland's first Presidency of the European Union. Its theme was the creation of an area of freedom, security and justice within the EU, based on a shared commitment to freedom based on human rights, democratic institutions and the rule of law…*
> *There was to be a new approach to judicial co-operation between Member States. The essence of that approach is*

described in Recital (5) of the preamble to the Framework Decision …".

Lord Hope continued:

> "*[22] … What Part 1 of the 2003 Act provides for, in its simplest form … is really just a system of backing of warrants. It is designed to enable the persons against whom they are directed to be handed over in the shortest possible time to the requesting authorities. The grounds on which a Member State can decline to give effect to the European Arrest Warrant are … very limited.*
> *[23] But a system of mutual recognition of this kind … is ultimately built upon trust. Trust in its turn is built upon confidence. As Recital (10) of the preamble puts it, the mechanism of the European Arrest Warrant is based on a high level of confidence between Member States …*
> *The system has, of course, been designed to protect rights. Trust in its ability to provide that protection will be earned by a careful observance of the procedures that have been laid down.*
> *[24] … But the liberty of the subject is at stake here and generosity must be balanced against the rights of the persons who are sought to be removed under these procedures. They are entitled to expect the courts to see that the procedures are adhered to according to the requirements laid down in the statute. Unfortunately this is not an easy task, as the wording of Part 1 of the 2003 Act does not in every respect match that of the Framework Decision to which it seeks to give effect in domestic law. But the task has to be approached on the assumption that, where there are differences, these were regarded by Parliament as a necessary protection against an unlawful infringement of the right to liberty.*"

In the opinion of Lord Scott, one finds a somewhat different, though not inconsistent, emphasis:

> "*[50] … The Framework decision was intended to simplify the procedures for extradition of individuals from one Member State to another either for the purpose of being prosecuted for alleged criminal conduct or for the purpose of serving a sentence imposed after conviction …*
> *In relation to offences falling within the so-called framework list the requirement of double criminality was removed …*
> *[51] Secondly, the Framework Decision was intended to make it unnecessary, whether in relation to framework list offences or any other offences, for the requesting state to show that the individual had a case to answer under the law*

> *of that state. The merits of the extradition request were to be taken on trust and not investigated by the Member State from which extradition was sought …*
> *[52] The principle underlying these changes is that each Member State is expected to accord due respect and recognition to the judicial decisions of other Member States. Any inquiry by a Member State into the merits of a proposed prosecution in another Member State or into the soundness of a conviction in another Member State becomes, therefore, inappropriate and unwarranted …*
> *[53] Accordingly, the grounds on which a Member State can decline to execute a European Arrest Warrant issued by another Member State are very limited …*
> *None of these grounds enables the merits of the proposed prosecution or the soundness of the conviction or the effect of the sentence to be challenged.*"

[25] The decision in ***Dabas –v- High Court of Justice, Madrid*** [2007] UKHL 6 concerned the proposed surrender of the Appellant to be prosecuted in Spain for complicity in Islamic terrorism, related to the notorious Madrid train bombings of 11th March 2004. After setting out various parts of the Preamble to the Framework Decision and some of its provisions, Lord Hope commented:

> "*[18] These provisions show that the result to be achieved was to remove the complexity and potential for delay that was inherent in the existing extradition procedures. They were to be replaced by a much simpler system of surrender between judicial authorities.* ***This system was to be subject to sufficient controls to enable the judicial authorities of the requested state to decide whether or not surrender was in accordance with the terms and conditions which the Framework Decision lays down. But care had to be taken not to make them unnecessarily elaborate. Complexity and delay are inimical to its objectives.***"

[Emphasis added].

Lord Hope noted in paragraph [25] that while the 2003 Act may have exceeded the Framework Decision in certain respects, it is within this statute that one finds the domestic legal rules giving effect to the United Kingdom's obligation under Article 34(2)(b) of the Treaty on European Union regarding the result to be achieved:

> "*The wording of the provisions of the Act that are under scrutiny must be construed in that context*".

In paragraph [38], Lord Hope elaborated on this theme:

> *"The search for the meaning and effect of the reference to a 'certificate' does not consist only of an examination of the words of the statute. The Framework Decision, to which Part I of the 2003 Act gives effect in national law, must be interpreted in conformity with Community law. This is in fulfilment of the state's obligations under European Union law and the general duty of co-operation referred to in Article 10 EC."*

He then referred to the decision in ***Pupino*** [2006] QB 83, paragraphs [34] and [42]-[43] especially. In a later passage, Lord Hope alluded to Section 2(2) of the 2003 Act in these terms:

> *"**[49]** I would add two further observations in response to this question. First, a judge conducting an extradition hearing under s 10 of the 2003 Act may find that the information presented to him is insufficient to enable him to decide whether or not the offence specified in the Pt 1 warrant is an extradition offence within the meaning of s 64(2) or s 64(3). If so, he will be at liberty to request further information from the appropriate authority of the category 1 territory, and to adjourn the hearing to enable it to be obtained. He has not been given power to do this expressly by the statute. But arts 10.5 and 15.2 of the Framework Decision show that it is within the spirit of this measure that the judge should be assumed to have this power. The principle of judicial cooperation on which it is based encourages this approach.*
> ***[50]** I wish to stress, however, that the judge must first be satisfied that the warrant with which he is dealing is a Pt 1 warrant within the meaning of s 2(2). A warrant which does not contain the statements referred to in that subsection cannot be eked out by extraneous information. The requirements of s 2(2) are mandatory. If they are not met, the warrant is not a Pt 1 warrant and the remaining provisions of that Part of the Act will not apply to it."*

In the opinion of Lord Bingham, the importance of interpreting the transposing domestic legislation, the 2003 Act, in the light of the wording and purpose of the Framework Decision receives due emphasis in a passage worthy of full reproduction:

> ***" [4]** But Pt 1 of the 2003 Act must be read in the context of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between member states (2002/584/JHA; OJ 2002 L190, p 1).*

This was conceived and adopted as a ground-breaking measure intended to simplify and expedite procedures for the surrender, between member states, of those accused of crimes committed in other member states or required to be sentenced or serve sentences for such crimes following conviction in other member states. Extradition procedures in the past had been disfigured by undue technicality and gross delay. There is to be substituted "a system of surrender between judicial authorities" and "a system of free movement of judicial decisions in criminal matters" (recital (5) of the preamble to the Framework Decision). This is to implement the principle of mutual recognition which the Council has described as the cornerstone of judicial cooperation (recital (6)). The important underlying assumption of the Framework Decision is that member states, sharing common values and recognising common rights, can and should trust the integrity and fairness of each other's judicial institutions.

***[5]** By art 34(2)(b) of the Treaty on European Union, reflecting the law on directives in art 249 of the EC Treaty, framework decisions are binding on member states as to the result to be achieved but leave to national authorities the choice of form and methods. In its choice of form and methods a national authority may not seek to frustrate or impede achievement of the purpose of the decision, for that would impede the general duty of cooperation binding on member states under art 10 of the EC Treaty. Thus while a national court may not interpret a national law contra legem, it must "do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with art 34(2)(b) EU" (Criminal proceedings against Pupino (Case C – 105/03) [2006] QB 83, paras 43, 47, [2006] All ER (EC) 142, [2005] 3 WLR 1102)."*

The overarching EU legal obligation in play - which, ultimately, derives from Article 6 TEU - is expressed with particular clarity by Lord Brown:

"*[76] Put shortly, **Pupino** imposes upon national courts the same interpretative obligation to construe national law as far as possible to attain the result sought to be achieved by framework decisions as the ECJ in **Marleasing SA ...** had earlier imposed upon national courts to achieve the purpose of directives*".

This is followed by an analogy with Section 3 of the Human Rights Act 1998. Thus the association between the Framework Decision and the 2003 Act must never be overlooked. In short, the latter is to be construed in a manner

harmonious with the former, promoting its objectives and values, unless it is not possible to do so.

[26] In ***Boudhiva –v- National Court of Justice, Madrid*** [2007] 1 WLR 124, the English High Court held that the validity of a EAW is a pre-requisite to the assumption of jurisdiction by both the first instance court and the High Court on appeal. Delivering the judgment of the court, Smith LJ stated:

> "[15] … *if, at any stage of the proceedings, the question of validity is raised, it calls jurisdiction into question. For that reason, despite the absence of an express power to consider compliance with Section 2(3) or 2(4), I am satisfied that the appropriate judge is entitled to consider and determine whether, as a result of non-compliance with those provisions, he does not have jurisdiction. Furthermore, the jurisdiction of this court is also dependent on the validity of the warrant.*"

It was further held that the High Court is at liberty to examine the validity of a EAW even though this issue has not been raised at first instance. These were the main issues of law determined in ***Boudhiva*** and, while this decision is not binding on this court, it is clearly harmonious with ***Dabas*** (*supra*) and we consider that it should be followed.

[27] There are two relevant recent decisions of the Supreme Court of Ireland which fall to be considered. The first is ***Minister for Justice, Equality and Law Reform -v- Desjatnikovs*** [2009] 1 IR 618 in which the EAW, which sought the extradition of the Respondent to Latvia, was in the form prescribed in the annex to the Framework Decision. However, it failed to select or identify any of the offences in the Article 2.2 list. The Supreme Court held, firstly, that in default of selection by the Requesting State, it is not open to the courts of the Requested State to inquire into whether the facts alleged in a EAW are referable to any of the listed offences. The Supreme Court considered that, as regards the Article 2.2 route, selection by the Requested State is a mandatory requirement: see paragraphs [52] – [54] (per Denham J). In the absence of selection by the Requesting State of one of the offences in the Article 2.2 list, the surrender of the requested person is not permissible by this route. However, the Supreme Court concurred with the judge at first instance that, notwithstanding this defect, the surrender of the requested person via the "corresponding offence" route under Article 2.4 was, in principle, permissible. This conclusion, in our view, is clearly implicit in the judgment of the court. The appeal succeeded on the ground that the judge at first instance had failed to recognise the Article 2.2 selection requirement as mandatory. There was no criticism of the exercise which he performed in inquiring into whether the offence specified in the EAW corresponded to an offence under the law of the Irish State and determining that it did not.

[28] On the same date (31st July 2008) the Irish Supreme Court gave judgment in ***Minister for Justice, Equality and Law Reform –v- Ferenca*** [2008] 4 IR 480. In this case, the EAW sought the surrender of the requested person to Lithuania for the purpose of serving a term of two years and nine months imprisonment imposed in respect of three offences. At first instance, Peart J found that the second and third offences listed in the EAW corresponded to offences under the law of the Irish State. With regard to the first offence, the judge found that there was no corresponding offence under Irish Law and, further, that it did not fall within the remit of Article 2.2 of the Framework Decision. The EAW had not selected *any* of the Article 2.2 list of offences in respect of any of the three offences in question. However, Peart J held that the Applicant could be surrendered in respect of the first offence also based on his assessment that this offence belonged to one of the Article 2.2 categories (fraud). Consistent with its decision in ***Desjatnikovs***, the Irish Supreme Court held that the surrender of the Applicant in respect of the first of the three offences was impermissible as the absence of selection in the EAW constituted a failure to comply with a mandatory requirement. The court's conclusion on this issue is expressed succinctly in the judgment of Murray CJ:

> "[70] … *Accordingly, an issuing state must, for the purpose of the European Arrest Warrant, state that an offence in such a warrant is an offence to which Article 2.2 applies if it wishes that paragraph to apply to an offence in the warrant* …
>
> [72] … *Article 8(1)(d) of the Framework Decision expressly imposes on the issuing state the obligation to classify the offence in the warrant issued by it 'particularly in respect of Article 2'"*.

While agreeing with the assessment of the first instance judge in relation to the second and third of the offences specified in the EAW, the Supreme Court, noting that the sentence in question was a composite punishment imposed for the three offences collectively, held that there was no basis upon which it could apportion the sentence amongst the three offences, with the result that the request for surrender must be refused in its entirety. Notably, as in ***Desjatnikovs***, there was no criticism in the judgment of the Supreme Court of the exercise conducted by the first instance judge in inquiring into and determining the "corresponding offence" issue.

[29] In summary, in the two Irish cases, the defect in the EAWs concerned, namely a failure by the requesting state to select one of the types of offence in the Article 2.2 menu, was considered fatal to the surrender of the requested person via the Article 2.2 route. However, this failure did not operate to invalidate the EAW. Rather, the Article 2.4 route was considered to remain a permissible option. This prompts, firstly, the question of whether the EAW in

either of the two cases concerned expressly sought the surrender of the requested person under Article 2.4. In ***Desjatnikovs***, Denham J recorded, in paragraph [10] of her judgment, that the EAW specified "*the nature and classification of the offence*". Later in her judgment, in paragraph [71], after referring to the Article 2.4 surrender route, she added:

> "*Paragraph (e)(ii) of the arrest warrant relates to offences not covered by Article 2.2* ***and was completed on the warrant in this case. This enables a decision on whether or not there is a corresponding offence***."

[Emphasis added].

Accordingly, the question of whether a requesting state's failure to complete the Article 2.4 surrender route section in the EAW, which is contained in the final part of Section (E), did not fall to be determined in this decision. In the second of the Irish Supreme Court decisions, ***Ferenca***, in the judgment of Murray CJ, the brief description of the EAW in paragraph [3] makes no mention of Article 2.4. The Chief Justice continued:

> "[11] *In this case, of the three offences in respect of which the Respondent is being sought for the purpose of serving a single term of imprisonment, the High Court judge found that the second and third offences as listed in the* [EAW] *corresponded to offences under the law of the State. No issue has arisen in this appeal concerning that determination. Therefore there is no bar to surrender in relation to those two offences as they fulfil the test set out in Section 38(1)(b)*".

[The Chief Justice is referring here to the governing Irish statute, the European Arrest Warrant Act 2003: in passing, the reference to Section 38(1)(b) seems *per incuriam,* or is a reporting error, since the correspondence provision in the statute is contained in **Section 38(1)(a)**]. The Chief Justice continued:

> "[24] … *In this case, if the issuing judicial authority in Lithuania had ticked one of the boxes so as to identify the first offence in the warrant as one of the Article 2.2 offences then the courts in this country would rely on that statement, for that is in effect what it is.* ***There would be no need to consider whether the offence in question was an offence which corresponded to an offence in this State, or address the question of double criminality, as the Framework Decision calls it***."

[Emphasis added].

The remainder of his judgment provides no clue as to whether the Lithuanian EAW invoked Article 2.4. The same is true of the judgments of the other two members of the Supreme Court. Each of these, particularly the detailed concurring judgment of Macken J, is concerned predominantly with the construction of certain provisions of the Irish 2003 Act. Notably, notwithstanding the unanimity of the Court that the selection defect precluded surrender of the requested person under Article 2.2, the clear flavour of the two main judgments is to the effect that surrender under Article 2.4 would still have been possible if there had been correspondence in respect of all of the three offences under scrutiny.

[30] Accordingly, in ***Desjatnikovs,*** the Latvian EAW, while relying (inefficaciously) on Article 2.2, also relied on Article 2.4. In ***Ferenca***, the judgments are silent on this issue. In both cases, the selection failure was held to be fatal to the Article 2.2 surrender route. Notwithstanding, and acknowledging the distinction between the two cases mentioned above, the Article 2.4 surrender route was considered to remain open. The question of whether this option is conditional upon express reliance by the requesting state on Article 2.4 in the EAW is not addressed directly in any of the Supreme Court judgments. However, interestingly, one clear theme emerging from the judgments of Murray CJ and Geoghegan J is that the Article 2.2 mechanism is to be viewed as an exception to the traditional Article 2.4 mechanism – which is unassailably correct - the implication being that the requested state should *first* consider the question of correspondence. This is what Peart J did in the High Court, at first instance, and this approach is, broadly, mirrored in that adopted by Murray CJ – subject to what the Chief Justice stated in paragraph [24] of his judgment (quoted above).

[31] Thus, in the two Irish cases, the defect in each EAW was a failure to make any selection from the Article 2.2 menu of offences. This failure occurred in circumstances where the requesting state was attempting to procure the surrender of the requested person under Article 2.2: the intention was clear. In the present case, the relevant part of the EAW is contained in Section (E). This is clearly based on the pro-forma contained in the Annex to the Framework Decision. The menu of Article 2.2 offences follows these introductory words:

> "***If applicable***, *tick one or more of the following offences punishable in the issuing Member State by a custodial sentence or detention order of a maximum of at least three years as defined by the laws of the issuing state*".

The two words in bold italics are of obvious importance. In the present case, in completing this section of the EAW the Respondent State did not select any of the offences in the Article 2.2 list. Notwithstanding , it is clear from the terms in which Section (F) was completed that the Respondent State was

attempting to procure the surrender of the Appellant under the Article 2.2 route. The statement made in the relevant part of the EAW betokened a clear intention to this effect. However, this intention was inefficacious by reason of the selection failure and, in full agreement with the decisions of the Irish Supreme Court and the assessment of the Recorder, we conclude that this failure precluded the surrender of the Appellant to the Respondent State under Article 2.2.

[32] As noted above, the Recorder, following execution of the EAW, engaged in certain communications with Judge Nunez. In two subsequent responses, the Respondent State acknowledged that it had *erroneously* based its surrender request on Article 2.2 and requested, instead, the surrender of the Appellant via the Article 2.4 route. The Recorder duly acceded to this revised request. Properly analysed, the sole feature which distinguishes the present case from the two Irish cases is that the requesting State, in a supplementary communication, expressly requested surrender of the subject via the Article 2.4 surrender route. This amended request was made in circumstances where Section (F) of the EAW had both expressly invoked Article 2.2 **and** did so in terms acknowledging that it was invoking the surrender mechanism "*excluded from the double classification principle*".

[33] The question which arises is whether, in the circumstances outlined above, the Recorder erred in law in ordering the surrender of the Appellant to the Respondent State under Article 2.4 of the Framework Decision. In determining this issue, it is incumbent on the court to be guided by the overarching aims and principles of the Framework Decision. Foremost amongst these are the promotion of freedom, security and justice in the EU area; a high level of confidence amongst Member States; mutual recognition; judicial co-operation; the creation of a streamlined, more efficient and expeditious surrender process; respect for fundamental rights; and due process. The Recorder was clearly alert to these principles: see in particular paragraphs [5] – [16] of his second reserved judgment. In ***Cando Armas*** (paragraph [21] above) Lord Hope adverted to the need for "*a careful observance of the procedures that have been laid down*" in the Framework Decision, given that the context involves the liberty of the subject. His Lordship further stated that requested persons are entitled to have the prescribed procedures observed. In ***Dabas*** (paragraph [22], *supra*) Lord Hope was at pains to stress that the **first** task for the court of the requested state is to determine whether the EAW is compliant with the mandatory requirements of Section 2 since, if it is not, it does not constitute a Part 1 Warrant and the surrender request must thereby be dismissed.

[34] While Articles 2 and 8 of the Framework Decision feature prominently in the issues raised by the ground of appeal under consideration, Article 15.2 is also of some importance: See paragraph [17], *supra*. In ***Kingdom of Spain – v- Arteaga*** [2010] NIQB 23 this court noted that, in the particular

circumstances of that case, the EAW did not stand alone but had been supplemented by two subsequent communications from the Spanish judicial authority. In the present case, what was tantamount to an amended surrender request emerged during the process of communication instigated by the Recorder with Judge Nunez following execution of the EAW. The trigger for a valid Article 15.2 process of this kind is **insufficiency of information in the EAW**. Furthermore, where a request of this kind elicits further information, we are of the opinion that this may be permissibly considered by the court of the requested state only where it has the character of *additional or supplementary information*. What materialised during the exchange of intra-judicial communications in this case was essentially threefold: firstly Judge Nunez undoubtedly supplied some additional information; secondly, he acknowledged the erroneous invocation of Article 2.2 in the EAW; thirdly, he expressly requested the surrender of the Appellant under Article 2.4, rather than Article 2.2. We are alert to the cautionary words of Lord Hope in ***Dabas*** (*supra*) that a warrant which is non-compliant with Section 2 of the 2003 Act cannot be cured by the provision of further information by the requesting state. In other words, there is an irreducible threshold of validity. Thus the fundamental question becomes: does the present EAW comply with Section 2 of the 2003 Act?

[35] We answer this question affirmatively for the simple, but central, reason that Section 2 of the 2003 Act does not mandate that an EAW state expressly that the surrender of the requested person is sought under Article 2.4 of the Framework Decision. Similarly, a requirement of this kind is nowhere to be found in the provisions of the Framework Decision. Accordingly, Section 2 of the 2003 Act is in harmony with the Framework Decision. We consider that the information in an EAW required by Section 2(4) of the 2003 Act is designed to ensure that the nature and legal classification of the offence, with particular reference to any of the provisions of Article 2, can be determined by the court in the requested state. The information contained in every EAW must be sufficient for this purpose. In our view, this construction of Section 2 is reinforced by Section 64(3). It may be said that these statutory provisions, harmonious with the overarching aims and principles of the Framework Decision, place the emphasis on substance rather than form. Furthermore, we are satisfied that this conclusion is compatible with Article 8.1(d) of the Framework Decision. In particular, we see force in the view of the Irish Supreme Court that the "*legal classification*" requirement of this provision mandates the inclusion in the EAW of particulars of the relevant domestic criminal law provisions of the requesting state concerned. This requirement was duly observed in the present case by the terms of the EAW, reiterated subsequently by Judge Nunez. The Recorder was, in consequence, sufficiently equipped to assess the nature and classification of the offence alleged against the Appellant and to embark upon an informed consideration and determination of whether the requirement of double criminality was satisfied. We recognise that Judge

Nunez acknowledged the erroneous reliance in the EAW upon the Article 2.2 surrender route and made an amended request, expressly invoking Article 2.4 instead. Given our analysis above of the relevant provisions of the 2003 Act and Framework Decision, we consider this to be of no moment. We consider that the Recorder would have been obliged to determine the propriety of ordering the surrender of the Appellant under Article 2.4 irrespective of the amended request which materialised. We conclude that, whatever the motive or impetus may have been, the Recorder was correct in law to consider and determine the Article 2.4 surrender route. While it would have been preferable that the EAW avoid the error discussed above and specify its reliance on Article 2.4 of the Framework Decision, thereby according with best practice, we are satisfied that these failures are not fatal to its validity.

[36] For this combination of reasons, we conclude that the EAW on which the surrender of the Appellant to the Respondent State was ordered by the Recorder is valid. While it was unquestionably imperfect, the relevant imperfection operated to preclude the surrender of the Appellant under the Article 2.2 route but did not prohibit his surrender under Article 2.4

The Remaining Grounds of Appeal

[37] The conclusion expressed immediately above disposes of the first two grounds rehearsed in the Notice of Appeal (paragraph [8], *infra*). The remaining grounds of appeal were fully articulated in both written and oral argument by Mr. Devine on behalf of the Appellant. As we find ourselves in agreement with the Recorder's determination of these issues, our conclusions thereon can be expressed in relatively short compass.

[38] In the Appellant's skeleton argument, the grounds of appeal were refined to five in number. The first two of these have been determined above. The third, relying on the medical evidence and associated materials, rests on the contention that the surrender of the Appellant to the Respondent State would be unjust or oppressive by reason of his mental condition, contrary to Section 25(2) of the 2003 Act. The first argument advanced by the Appellant under this banner consists of an *assertion* that, in the event of his surrender, the Appellant has no realistic prospect of being released on bail. Having considered all of the evidence, we find that this assertion has no adequate basis. It is clear that, in the event of the Appellant invoking his Article 5 ECHR rights, the Respondent State will be obliged to act in compliance with the Convention. Furthermore, the Appellant's primary contention fails to recognise that Article 5 ECHR does not guarantee an absolute right to bail and that bail decisions depend upon an exercise of discretion by the judicial authority concerned. The second aspect of this ground of appeal is based on the evidence of Dr. Grounds, consultant psychiatrist. In paragraphs [41] – [55] of his second judgment, the Recorder reviewed and evaluated this

evidence with obvious care. In determining this issue, he referred to relevant authority – ***Boudhiva –v- National Court of Justice, Madrid*** [2006] EWHC 176, paragraphs [64] – [65] and ***R (Warren) –v- Secretary of State for the Home Department*** [2003] EWHC 1177, paragraphs [27] and [40] – [42] especially. He noted that the Appellant's mental condition could be canvassed in any application for bail and, further, that his fitness for trial would be a matter to be determined by the relevant Spanish judicial authority. He observed, further, that the Appellant's representations about his mental condition could, in the event of his conviction, be brought to the attention of the sentencing court. To this we add that, in the events which have occurred, all of the medical evidence is now of some vintage although we are disposed, somewhat generously, to assume that it remains unchanged with the passage of time. We find no error in the approach, assessment or conclusions of the Recorder as regards this ground of appeal.

[39] The next ground of appeal complains that the surrender of the Appellant to the Respondent State would infringe his rights under Article 8 ECHR. As recognised correctly by the Recorder, this ground of appeal overlaps substantially with the Section 25 ground, considered and rejected above. In the circumstances outlined in paragraphs [2] – [5] of this judgment, there is no evidence before this court of any current private or family life enjoyed by the Appellant. Furthermore, all of the evidence upon which this discrete ground of appeal rests is of significant vintage. For example, the principal report of Dr. Grounds and the instructions of the Appellant appended thereto are now of some three years vintage. As a result, there is no evidence before this court that the Appellant has any established private or family life at present. If one generously makes the assumption that he has, it is patent that, having regard to all the evidence, the surrender of the Appellant to the Respondent State will advance the legitimate aims enshrined in Article 8 ECHR of promoting public safety, preventing disorder or crime and protecting the rights and freedoms of others. All of these aims are fully consonant with those enshrined in the Framework Decision. No submission to the contrary was advanced on behalf of the Appellant. We take into account also the unexceptional principle that a person against whom an accusation of criminal misconduct is made should, as a strong general rule, be subjected to the ensuing process established by the criminal legal system of the state concerned. All of the Appellant's complaints under this umbrella are founded on his apprehended detention. We have already held that the possible release of the Appellant on bail will be a matter for determination by the competent Spanish judicial authorities. We further hold, in agreement with the Recorder, that it is entirely inappropriate for the courts of the Requested State to attempt any forecast of the outcome of such prosecution as may ensue. We have also held that all of the representations based on the Appellant's mental health can be ventilated before the Spanish judicial authorities at various stages of the legal process in that state. We further consider that if the Appellant is, ultimately, successfully prosecuted and

convicted, his ensuing exposure to a maximum sentence of two years' imprisonment will not infringe the principle of proportionality. On a broad European Union canvas, we consider that the proposition that those convicted of terrorist offences of this kind should be vulnerable to condign punishment is unassailable. Beyond this we do not venture since, ultimately, the forum in which the proportionality of any sentence to be imposed upon the Appellant will be that of the Audiencia Nacional de Madrid. In short, the Appellant's complaint of disproportionality is grounded on a series of unsubstantiated assertions, imponderables and unwarranted assumptions as to future events. Furthermore, it overlooks the pressing social need underpinning the European extradition regime. It is without merit accordingly.

[40] The next issue raised by this appeal relates to the uncompleted legal process to which the Appellant is currently subject in Spain. The first complaint under this heading is that the Appellant is the subject of a mere investigation, rather than a prosecutorial process. In essence, the requirements of the Framework Decision (Articles 2 and 8 in particular) are that the requested person be the subject of a specified accusation, while Section 2(3) – (4) of the 2003 Act require, in terms, that where a requested person is surrendered this should be effected for the purpose of prosecuting the subject in question in the Requesting State. We observe that this ground of appeal is inconsistent with the earlier ground which complains that the EAW is designed to extradite the Appellant for the purpose of prosecuting or punishing him on account of his political opinions. Paragraphs [8] – [9] of the first judgment of the Recorder contain the following analysis:

> "*All jurisdictions have different procedures in relation to the criminal process, both its investigatory process and when that changes into the criminal prosecution stage …*
>
> *The summons represented a stage in the investigatory process, but once that was completed – in this case by the failure of* [the Appellant] *to take part – the matter then moved to the next stage which was for the arrest of the* [Appellant] *for the purpose of prosecution for the alleged offence.*
>
> *[10] This view is reinforced by the terms of the* [EAW] *which itself was a step in the prosecutory role of the* [Appellant] *for the alleged offence. I am therefore satisfied that … the* [Appellant] *is an accused person and that the* [Respondent State] *has discharged the burden of proof beyond a reasonable doubt that this is his status.*"

We concur with the assessment and conclusion of the Recorder in respect of this discrete issue. The second dimension of this ground of appeal invites this

court, impermissibly, to inquire into the strengths and merits of the evidence upon which the accusation against the Appellant is based. This is an inappropriate exercise and, in agreement with paragraphs [21] – [22] of the first judgment of the Recorder, we reject this ground of appeal.

[41] The final ground of appeal ventilates a complaint that the Appellant should be discharged on the ground that the EAW constitutes an abuse of the court's process. In its judgment in ***Re Campbell's Application*** [2009] NIQB 82, this court expounded the essence of the doctrine of abuse of process in extradition litigation : see paragraphs [39] – [41] and in particular the following short passage:

> "[41] *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.*"

The Recorder considered, and rejected, this discrete ground of challenge in paragraphs [33] – [37] of his second judgment. He concluded that the exacting threshold for establishing an abuse of process had not been overcome. We concur with his assessment and conclusion.

IV OMNIBUS CONCLUSION AND DISPOSAL

[42] We resolve the preliminary issue regarding prosecution of this appeal in favour of the Appellant. Having done so, we find that none of the grounds of appeal possesses any merit. We dismiss the appeal accordingly. It follows that the Appellant is now liable to be extradited to Spain pursuant to and in accordance with the Recorder's order. Having regard to this court's earlier judgment, he **may** also be vulnerable to prosecution in this jurisdiction for breaching the terms of the bail order on which he was released following the extradition order at first instance.