JUDICIARY OF
ENGLAND AND WALES

IN THE CENTRAL CRIMINAL COURT

THE QUEEN

- v -

JOHN ANTHONY DOWNEY

JUDGMENT: ABUSE OF PROCESS

Introduction

1. ~~For obvious reasons, I make an order under s.4(2) of the Contempt of Court Act 1981 prohibiting the reporting of this judgment until further order.~~[1]

2. The defendant, who is now aged 62 (and ordinarily resident in the Republic of Ireland) has pleaded not guilty to five charges – four of murder and one of doing an act with intent to cause an explosion. The alleged offences arise out of the notorious bombing carried out by the Irish Republican Army ("IRA") in Hyde Park, London on the morning of Tuesday 20 July 1982. A Remote Control Improvised Explosive Device which contained about 20-25 pounds of commercial high explosive with wire nails as shrapnel and was hidden in the boot of a blue Morris Marina car, registration LMD 657P, which was parked in South Carriage Drive, was detonated as the Guard (consisting of sixteen members of The Blues & Royals Regiment of the Household Cavalry and their horses, accompanied by two mounted police officers) was passing en route from Knightsbridge Barracks to Horse Guards for the Changing of the Guard. Four of the Guard were murdered – Lieutenant Anthony Daly, who was aged 23, and Trooper Simon Tipper, who was aged 19, died at the scene (Counts 1 & 2); Lance Corporal Jeffrey Young, who was aged 19, died the following day (Count 3); and Squadron Quartermaster Corporal Roy Bright, who was aged 36, died two days after that (Count 4). A total of 31 other people were injured (a number of them seriously) and 7 horses were destroyed.

[1] **Following the Crown informing the Court on 25 February 2014 of its decision not to seek to appeal this judgment Mr Justice Sweeney has lifted all reporting restrictions in relation to this case save for an order prohibiting reporting of the defendants address beyond that it is Donegal and prohibiting the reporting of sureties' addresses.**

3. On the defendant's behalf it is submitted that I should stay the prosecution as being an abuse of process. The submission is advanced on four grounds, namely (in broad outline) that:

(1) A fair trial is no longer possible given the passage of more than thirty years since the event, the fact that a number of significant witnesses are now dead, the fact that key exhibits are irretrievably lost, and the existence of further trial prejudice.

(2) It would be unfair for the defendant to be tried in the light of the expectation created by governmental statements that prosecutions would not be pursued in respect of those who would otherwise qualify for early release (as, it is common ground, the defendant did and does) under the scheme provided (in accordance with the Good Friday Agreement) by the Northern Ireland (Sentences) Act 1998 ("the 1998 Act").

(3) It would be unfair for the defendant to be tried because on 20 July 2007 [25 years to the day after the bombing and under an administrative scheme in relation to so-called "on the runs" ("OTRs") which was intended to advance the peace process in Northern Ireland] he was given a clear written assurance on behalf of the Secretary of State for Northern Ireland and the Attorney General that there was no outstanding direction for prosecution in Northern Ireland in relation to him, that there were no warrants in existence, that he was not wanted in Northern Ireland for arrest, questioning and charge by the police, and that the Police Service of Northern Ireland ("PSNI") were not aware of any interest in him by any other police force in the United Kingdom - whereas in reality the PSNI were aware, at the time that the letter was given to him, that he was wanted by the Metropolitan Police in relation to the Hyde Park bombing (and had been almost continually since May 1983), and the PSNI had also appreciated, after the letter had been given to him, that it was misleading in that regard, but did nothing to correct the situation; and because thereafter, in reliance upon the letter and to his eventual detriment, the defendant (who is a proven strong supporter of the peace process) travelled on a number of occasions to Northern Ireland and the mainland - including the final such occasion when, on 19 May 2013, he was arrested at Gatwick Airport en route to Greece and was thereafter charged with the instant offences.

(4) Even if the above-mentioned grounds do not in themselves justify a stay, their cumulative effect (particularly given the enormous and unjustifiable delay and the existence of the sort of "sense of security from prosecution" which would act as a bar to extradition) requires that the prosecution be stayed.

4. On behalf of the prosecution it is submitted, in summary, that:

(1) Despite the long delay the defendant can receive a fair trial, and the trial process can accommodate the issues raised on his behalf such as to ensure a fair trial. In particular, whilst the failure to extradite the

defendant from the Republic of Ireland in the past explains some of the delay, it does not impact on the ability of the defendant to receive a fair trial now.

(2) The political process and past governmental commitment not to pursue prosecutions, underlying the administrative OTR scheme under which the 20 July 2007 letter was transmitted to the defendant, should not impact upon an independent prosecutorial decision to prosecute.

(3) In any event, the 20 July 2007 letter was the product of error during the PSNI's Operation Rapid as opposed to any act of bad faith; it did not constitute an unequivocal assurance that the defendant would not, or would never be, prosecuted on the mainland for any terrorist offences committed before the Good Friday Agreement; the terms of the letter do not, and were never intended to, amount to an amnesty for the recipient; and the defendant has not acted on any such assurance to his detriment.

(4) There is no basis in law for ruling that the delay coupled with the letter of 20 July 2007 has engendered a "false sense of security" in the defendant such that the court should hold it an abuse of process to allow the prosecution to proceed.

The papers and hearings

5. The prosecution provided the court with, among other things:

(1) An Updated Case Summary dated 29 November 2013 (66 pages).

(2) A Summary setting out the essence of the prosecution case for the purposes of the abuse hearing (4 pages).

(3) A Skeleton Argument on abuse of process (55 pages).

(4) A Prosecution Bundle for the abuse hearing – the content of which includes two witness statements by Kevin McGinty (whose role in the period from December 1997 until May 2010 was to advise the Attorney General on Northern Ireland matters), and a number of authorities.

(5) Two Notes on Disclosure (dated 19 January 2014 and 30 January 2014) by Mr Little, counsel instructed to conduct the disclosure exercise on behalf of the prosecution.

(6) A file of disclosed materials in relation to the consideration, in the period from 1983 to 1993, of the extradition of the defendant from the Irish Republic (312 pages).

(7) Two files of disclosed materials in relation to the relevant negotiations in the Northern Ireland peace process, the circumstances in which the defendant was provided with the letter dated 20 July 2007, and what was realised after the letter had been provided (802 pages).

(8) Two files containing the witness statements and exhibits to be relied upon if the case goes to trial, together with Victim Personal Statements.
(9) Witness statements and a small quantity of other materials that were disclosed during the course of the abuse hearings.
(10) Further Submissions on Limb 2 on abuse of process (7 pages).

6. The defence provided the court with, among other things:
(1) A Skeleton Argument on abuse of process (60 pages).
(2) A Defence bundle for the abuse hearing – the content of which includes witness statements from Jonathan Powell (the Chief of Staff to the then Prime Minister, Tony Blair and the British Government's chief negotiator in the peace process) and Gerard Kelly MLA (a member of Sinn Fein's negotiating team in the peace process and the initial recipient of the letter addressed to the defendant dated 20 July 2007), together with witness statements by the defendant's wife and people involved with the defendant in the wider peace process.
(3) An outline chronology – which was amended by the prosecution and cross-referenced to the papers.
(4) 2 files containing a total of 56 authorities.
(5) A witness statement by the Rt. Hon. Peter Hain MP (who was the Secretary of State for Northern Ireland from 6 May 2005 until 27 June 2007).
(6) A Summary of submissions on breach of promise (8 pages).

7. I have read all of these papers.

8. The abuse of process argument was initially due to begin on 14 January 2014 but, at the request of the prosecution, was put back until 17 January 2014 in order to enable the Attorney General to consider and approve the prosecution's Skeleton Argument before it was served.

9. It had been recognised from an early stage in the overall proceedings that in consequence of the provisions of s.29(1C) of the Criminal Procedure and Investigations Act 1996 a preparatory hearing had to be held. At the outset of the hearing on 17 January 2014 the parties indicated that they were agreed that no witnesses would be called by either side and that I should decide any disputed factual issues (of which there were relatively few) on the papers.

10. It became apparent at an early stage in the abuse hearings that there had been no investigation, as such, instituted by the prosecution into the precise circumstances in which the letter dated 20 July 2007 had come into being, and into why it had not been corrected thereafter. Rather, in the period between September 2013 and November 2013, Mr Little had carried out a conventional disclosure exercise at the Crown Prosecution Service, the Attorney General's Office, the Northern Ireland Office ("NIO"), the PSNI, the Public Prosecution Service in Northern Ireland ("PPS"), the Ministry of Defence and the Cabinet Office.

11. Over the weekend of 18-19 January 2014, at the court's request, Mr Little re-reviewed the materials at the Attorney General's Office and discovered that a relevant letter dated 27 June from the Deputy Director of the PPS to Mr McGinty at the Attorney General's Office had been omitted in error from the files of disclosed documentation.

12. The hearings continued on 20, 22 and 24 January 2014 - during the course of which the defendant was arraigned.

13. Initially, the prosecution sought to argue that whilst it was clear from PSNI documentation that in April/May 2007 the PSNI had been aware that the defendant was wanted by the Metropolitan Police in relation to the Hyde Park bombing, there must have been a failure by the PSNI, in the run up to the preparation of a vital letter dated 6 June 2007 from ACC Sheridan to the Director of Public Prosecutions (Northern Ireland) ("DPP(NI)") (which was the trigger for the eventual letter from the NIO to the defendant dated 20 July 2007) to check the PNC, or its own records, or (in the alternative) that if any such checks had been made they must have been conducted negligently such that the fact that the defendant was so wanted was missed.

14. In the meanwhile, following comments by the court, Detective Inspector Corrigan of the PSNI had been tasked by the prosecution to investigate a chain of emails (primarily between two PSNI officers) in 2008 – which appeared to indicate that the PSNI had been aware of the fact that the defendant was wanted by the Metropolitan Police and of the fact that this had not been mentioned in ACC Sheridan's letter to the DPP(NI) in June 2007, but which did not indicate whether any action had been taken in consequence.

15. In a witness statement dated 21 January 2014 DI Corrigan reported that he had spoken to a number of those involved at the time, that he had established a sequence of events in 2007, that he had reviewed the relevant Policy Decision Log Books which demonstrated that it <u>was</u> known by the PSNI, at the time that the relevant decisions were made in 2007, that the defendant was wanted by the Metropolitan Police in relation to the Hyde Park bombing, and that no additional action had been taken in 2008. In a further witness statement dated 24 January 2014 DI Corrigan produced a copy of the relevant policy decision which had been recorded by Acting DCI Graham in a Policy Decision Log Book on 2 May 2007. It was that decision that began the process that led to ACC Sheridan's letter and the record referred in terms to the fact that the defendant was wanted by the Metropolitan Police (in connection with the Hyde Park bombing).

16. The Policy Decision Log Books had not been made available to Mr Little when he had conducted his disclosure exercise at the PSNI. In consequence of concerns expressed by the defence and the court, Mr Little returned to

Belfast on 29 January 2014 and carried out a further disclosure exercise – the results of which are set out in his Further Note on Disclosure dated 30 January 2014. In the result, further documents were disclosed including a signed copy of the Terms of Reference of Operation Rapid (albeit that other versions had already been disclosed), additional emails relating to events in June 2007, and a number of July 2008 emails which were found in the relevant Policy Decision Log Book of Acting DCI Graham adjacent to the page dealing with the defendant and the Hyde Park Bombing (albeit that they had already been disclosed as part of a longer chain of emails recovered elsewhere).

17. In consequence a further hearing was held on 31 January 2014 during the course of which Mr Little (to whom the court is grateful) gave a verbal report, and answered a number of questions asked by the court. Final oral submissions were then completed – during which it was re-confirmed that neither side intended to call any live evidence. On 2 February 2014, following an earlier request, the parties provided the court with further submissions in relation to the alleged breach of promise arising from the letter dated 20 July 2007.

Overview of the background

18. The Marina, registration LMD 657P, which was used to carry out the bombing had been bought a week before, on Tuesday 13 July 1982, at a car auction in Enfield. The purchaser was a man with an Irish accent who had given false personal details.

19. The prosecution case is that the involvement of the defendant in the bombing is proved, in particular, by the combination of:
    (1) His conviction (aged 22) in Dublin on 21 May 1974 for membership of the IRA on 28 February 1974.
    (2) The fact that his appearance in 1982 is consistent with photofits and/or artist's impressions prepared with the assistance of (or in one case recognised by) three witnesses as variously being one of two men apparently carrying out reconnaissance from a car parked in South Carriage Drive as the Guard was passing on 30 June and 1 July 1982 (Mark Chrusciel); one of two people seated in the rear of an orange Ford Cortina to which two other men walked from a Marina registration "…..65..P" which was then parked in Hertford Road in North London on 14, or 15 or 16 July 1982 (Robert Day); the driver of blue car registration "LM…..P" which was seen (and the driver spoken to by the witness) in Edgware Road on the morning of Friday 16 July 1982 (Phyllis McGowan).
    (3) The finding of three of his fingerprints on the ticket that was dispensed when the Marina was driven into the NCP car park in Portman Square at 2.14pm on Saturday17 July 1982 and parked there,

and which was surrendered when the Marina was driven out of that car park at 6.14pm on Sunday 18 July 1982.

(4) The finding of two of his fingerprints on the ticket that was dispensed when the Marina was driven into the NCP car park at the Royal Garden Hotel in Kensington at 6.39pm on Sunday 18 July 1982 and parked there, and which was surrendered when the Marina was driven out of that car park at 6.51am on Tuesday 20 July 1982 (just under four hours before the bombing).

20. It appears that the defendant's involvement was first suspected in consequence of a match that was made on 13 August 1982 between a fingerprint found on the Royal Garden Hotel NCP ticket and a set of the defendant's fingerprints that had been taken by the Garda in the Republic of Ireland on 7 July 1980 and which had thereafter been informally supplied (under an operational arrangement) to the Royal Ulster Constabulary and the Metropolitan Police. Likewise a Garda photograph of the defendant was obtained from a "delicate source" and was believed to match the witness Mark Chrusciel's photofit / artist's impression. Given that any formal use of the photograph was believed to risk compromising the source who had provided it, an artist's impression was made of the defendant on 28 August 1982.

21. The events over the following seven years included:

(1) The circulation by the Metropolitan Police to the press, in September 1982, of what was said to be an artist's impression of a suspect seen by witnesses (but was, in fact, the artist's impression of the defendant referred to immediately above).

(2) The identification by the witness Day (above) of that artist's impression as being of the man that he had seen.

(3) The identification, by a Garda officer on a visit to New Scotland Yard on 30 January 1983, of the defendant as being the person depicted in the same artist's impression.

(4) The provision of information to the press by the Metropolitan Police in May 1983 that the defendant was wanted for the bombing, and providing the press (again) with the artist's impression (now on a wanted poster).

(5) The circulation on the Police National Computer ("PNC") on 29 May 1983 of the fact that the defendant was wanted by the Metropolitan Police for conspiracy to murder on 20 July 1982.

(6) The publication in the Sunday Times on 21 October 1984 of a photograph of the defendant and allegations including the fact that he was wanted for the bombing; that he was at the top of Scotland Yard's Most-Wanted list; that Scotland Yard believed that, after two years of investigation, it had amassed enough evidence to extradite him; that attempts to do so would soon begin; that he bore a close resemblance to one of the witness's photofits; and that he had claimed never to have left the Irish Republic.

(7) The publication of further articles in the Sunday Times in June 1985, March 1986 and October 1987 - each of which asserted that the defendant was still wanted for the bombing.

(8) The consideration, by the authorities in this country, on a number of occasions, of the chances of a successful extradition request being made to the Republic of Ireland, or of a successful request being made to the Irish Legal Authorities for proceedings to be commenced against the defendant there under the Criminal Law (Jurisdiction) Act 1976.

(9) The resolution of concerns (caused by the absence of evidence from two NCP employees) as to the admissibility of the relevant NCP tickets, and concerns as to the admissibility of the fingerprint matches (caused by the absence of formal proof of the defendant's fingerprints).

22. On 21 November 1989 the then Attorney General (Sir Patrick Mayhew QC MP) held a meeting in relation to the defendant's case. The meeting was attended by (among others) the then Solicitor General, counsel, the CPS and the Metropolitan Police. It was recognised that (under the then current legislation in relation to business records) the parking tickets were likely to be admissible; that the fingerprint evidence existed, but that to ask a jury to infer criminal involvement (rather than simply having moved the car two days before it was used as a car bomb) "might be… to take too great a leap of faith in the post Guildford and Woolwich climate"; and that the lapse of time (then over 7 years) need not be fatal to an application for the defendant's return from the Republic of Ireland, but none the less was quite likely to be so. Ultimately the Attorney General concluded, and everyone else at the meeting agreed, that the case was not one in which it would be appropriate to seek extradition. Given the limited inferences that it was believed could fairly be drawn from the fingerprint evidence, the Law Officers agreed that "a marker should be put down to ensure that the case was properly reviewed before any decision was taken to prosecute Downey if he should enter the jurisdiction voluntarily…".

23. In June 1991 the defendant's case was reviewed by the Metropolitan Police, and the conclusion reached that a request for extradition "would not meet with approval at this particular time" and that the case would be "put away until further evidence is forthcoming and a more suitable political climate for extradition requests prevail". In September 1993 it was recorded by the Metropolitan Police that "the subject is not extraditable but is obviously arrestable should he be detained within the UK jurisdiction…there are enormous difficulties with the NCP exhibits and continuity in this case and the identification evidence of the Garda officer must be questionable. I strongly suspect that the CPS would be less than enthusiastic to pursue this to prosecution but I believe the circulation should remain".

24. The fact that the defendant was wanted by the Metropolitan Police for conspiracy to murder on 20 July 1982 remained on the PNC until 29 August 1994, when it was removed in error. The error was, however, realised and on 31 October 1994 the defendant was re-circulated on the PNC as being wanted by the Metropolitan Police for conspiracy to murder on 20 July 1982. It was that re-circulation which was still on the PNC when the defendant arrived at Gatwick Airport on 19 May 2013, and which resulted in his arrest.

25. In the meanwhile, however, momentous events had been taking place in Northern Ireland. They resulted, on 10 April 1998, in the signing of the Good Friday Agreement – which involved a multi-party agreement by the majority of Northern Ireland's political parties and an international agreement between the British and Irish Governments. That was followed by Referenda in both Northern Ireland and the Republic of Ireland that approved the Good Friday Agreement; the coming into force on 28 July 1998 of the 1998 Act; and the coming into force of the Good Friday Agreement itself on 2 December 1999.

26. The 1998 Act was not an amnesty (given that the Government was mindful of the brutal nature of terrorist crime), but provided a framework, in accordance with the Good Friday Agreement, for the early release of serving prisoners. It was designed to ensure (subject to certain safeguards for the protection of the public) that any qualifying prisoners who remained in custody two years after the commencement of the scheme would be released at that point. In *R v SSHD* [1999] NIQB 68 Girvan J (as he then was) concluded that the 1998 Act applied to all proceedings and sentences imposed throughout the UK. By the end of July 2000 (two years after the 1998 Act came into force) no qualifying prisoners affiliated to the IRA, whose charges were the result of IRA actions prior to the Good Friday Agreement, remained in prison in Northern Ireland, England or the Republic of Ireland (where equivalent arrangements had been put in place).

27. The Good Friday Agreement did not, however, deal with those who were suspected of (but not charged with) relevant offences prior to the Good Friday Agreement, or who had been charged with such offences but had thereafter escaped, or who had been convicted of such offences and thereafter escaped. A number were the subject of extradition proceedings. They became known collectively as "on the runs" or (as indicated above) "OTRs".

28. A second phase of negotiations began in July 1998. It was during those negotiations that the position of the OTRs was addressed. Sinn Fein argued, inter alia, that given the fact that many of the cases were very old, and given the introduction of the early release scheme by the 1998 Act, the position of the OTRs was anomalous. The more so, it was said, as a number of the OTRs were strong supporters of the Good Friday Agreement, whose presence in Northern Ireland, free from the risk of arrest, would further the peace

process. Thus Sinn Fein wanted the Government to find a way to enable OTRs to return to, or to go to, Northern Ireland free from the risk of arrest / prosecution (including, where necessary, the dropping of outstanding extradition requests), and free from any adverse consequence flowing from arrest. Sinn Fein made clear that it regarded a successful outcome in relation to OTRs as being of critical importance to the eventual success of the Good Friday Agreement. Sinn Fein's position was broadly supported by the Irish Government.

29. Whilst, from a political perspective, the Government was broadly sympathetic to Sinn Fein's arguments in relation to OTRs, it was recognised that there were considerable problems in achieving a solution. Legislation (whether by way of amnesty or otherwise) was generally recognised to be the best way ahead, but also to involve significant political problems making enactment very difficult. Other solutions, for example a review of each individual's case to check whether he/she was (still) wanted, if so whether the evidential test for prosecution was met and, if so, whether the public interest test was also met, were also recognised to give rise to potentially difficult political, legal and logistical problems.

30. In April 1999, in the early stages of discussions about the issue, Sinn Fein raised the question with the Government of whether a particular individual who had successfully resisted extradition, but who held an important role within Sinn Fein and was active in pressing forward the peace process, could be allowed to return to Belfast. This was referred to in a letter dated 5 November 1999 from the Prime Minister, Tony Blair to the President of Sinn Fein, Gerry Adams. The Prime Minister underlined that the question of whether to pursue prosecutions was a matter for the DPP(NI) and the Attorney General who, constitutionally, acted independently of government, but that the Attorney General (by then Lord Williams QC) had indicated that he wished to use the discretion that he had to review, without commitment, whether the public interest still required a prosecution in such cases.

31. In the period between February and May 2000 the Northern Ireland Assembly was suspended. On 18 April 2000 and 2 May 2000, there were meetings among Government officials in relation to the OTR issue. At that stage the Royal Ulster Constabulary ("RUC") believed that there were about 200 OTRs. The Minutes of the second meeting recorded that: "The meeting agreed that the following way forward should be given further consideration. That there should be a public statement made, possibly by written PQ, that the Government was prepared to take a systematic and broadly sympathetic view approach to individuals who had cause, or felt they had cause, to fear arrest on return to Northern Ireland. Where necessary, cases could be considered again by the Attorney General / DPP(NI) in the light of evidential sufficiency and, if necessary, on public interest grounds. Such a process, even if not resulting in any great number of cases being dropped would have the benefit of allowing individuals to determine where they stood in relation to

the prosecuting authorities". The Minutes went on to record that it had to be clearly understood that this was a legal process and that cases could not simply be dropped as part of a wider political process.

32. Also on 2 May 2000 there were meetings at the Irish Embassy in London between officials from both governments and Sinn Fein. The Minutes of those meetings record that Jonathan Powell (the Government's Chief Negotiator) indicated that the Government was prepared to operate a similar system in relation to OTRs to the one then being operated by the Irish Government. He indicated that if the Government was given a list of names, it would clarify with the police and the prosecuting authorities the position of those individuals and, where appropriate, would review whether it remained in the public interest to pursue a prosecution. He further indicated that it was thought that the Government could deal with, say, 12 names in a month – but no guarantee could be given on the outcome of any review, because that was an independent decision for the prosecuting authorities under the Attorney General.

33. It was against that background that on 5 May 2000, following negotiations at Hillsborough Castle which resulted in agreement as to a process for disarmament (and during which private assurances were again given to Sinn Fein that, one way or another, the OTR issue would be sorted out), and in the continuing absence of a legislative solution, the Prime Minister wrote to Mr Adams, as follows: "I can confirm that, if you can provide details of a number of cases involving people 'on the run' we will arrange for them to be considered by the Attorney General, consulting the Director of Public Prosecutions and the Police, as appropriate with a view to giving a response within a month if at all possible. You have also questioned whether it would be in the public interest to mount any prosecutions after 28 July for offences alleged to have been committed before the Good Friday Agreement, since by then all remaining eligible prisoners will have been released, and have raised other related issues around the 28 July date. I would be willing to have these matters considered rapidly, with the aim of deciding the way forward before 28 July. Prosecution decisions are, of course, a matter for the Director of Public Prosecutions and the Attorney General…..".

34. On 19 May 2000 Sinn Fein provided a "preliminary" list of OTRs, which contained 36 names, to Mr Powell, who passed the list on to the Attorney General.

35. On 24 May 2000 the Attorney General wrote to Mr Powell and indicated, amongst other things, that he had forwarded the list to the DPP(NI) and had asked him to try to locate files for each of the persons named, and that once files had been located the task of reviewing the evidence would begin (involving, in most cases, if not all, tracing witnesses and consulting the police). The DPP for England & Wales would be forwarded any names of relevance to him. The Attorney General underlined that no decision as to the

sufficiency of the evidence could be reached unless a careful examination of the evidence was conducted, and continued that: "Insofar as it is compatible with the proprieties of my position I will do what I can to assist. But the integrity of the criminal justice system is a fragile thing and in reaching any decision as to prosecution, acting outside Government as I do, I must not act for reasons of political convenience – however desirable any immediate effect may be. My decision has to be justifiable in terms of the test for prosecution that applies to every case, whatever its nature, considered for prosecution. Each decision that is reached in any case is susceptible to judicial review……so that I can only agree to a decision if I am satisfied that that decision can be justified before the courts. If the expectation is that the thirty- six persons so far named (and that total may rise) should be free to return to the United Kingdom regardless of the individual circumstances of their case that can only be achieved by legislative amnesty. It is not appropriate for me to consider the thirty-six cases on public interest grounds at this stage……..I will consider the current evidential sufficiency of each of the cases and will do so in accordance with the Test for Prosecution. I will ensure that the process is carried out promptly but I am sure you will understand that as Attorney General my first responsibility is to ensure the integrity of the criminal justice system and the propriety of decisions taken". The Attorney General did, however, state that he would consider the public interest test in relation to the particular individual mentioned in paragraph 30 above.

36. On 2 June 2000 the Attorney General wrote to the then Secretary of State for Northern Ireland ("SSNI"), Peter Mandelson stating: "…..I am seriously concerned that the exercise that is being undertaken has the capacity of severely undermining confidence in the criminal justice system in Northern Ireland at this most sensitive of times. Individual prosecution decisions have to be justifiable within the framework in which all prosecution decisions are reached and I am not persuaded that some unquantifiable benefit to the peace process can be a proper basis for a decision based on the public interest……"

37. That was followed by further correspondence and meetings (whether between Ministers or officials) during the course of which the need to proceed "by the book" was accepted. It was stressed that the DPP(NI) was the head of an independent prosecuting authority, subject to the superintendence of the Attorney General who, when considering prosecution matters, acted not as a minister but outside government and independent of it.

38. In the end, the DPP(NI) decided, and the Attorney General agreed, that the evidential test was met in relation to the particular individual mentioned in paragraph 30 above, and that the public interest required that there be a prosecution of that individual.

39. On 15 June 2000 Mr Powell wrote to Mr Kelly enclosing letters signed by him representing decisions by the Attorney General and the Director of Public Prosecutions for England & Wales. The letters were in the following terms: "Following a review of your case by the Director of Public Prosecutions for England and Wales, he has concluded that on the evidence before him there is insufficient to afford a realistic prospect of convicting you for any offence arising out of… You would not, therefore face prosecution for any such offence should you return to the United Kingdom. That decision is based on the evidence currently available. Should fresh evidence arise – and any statement made by you implicating yourself in… may amount to such evidence – the matter may have to be reconsidered. The Crown Prosecution Service is nto [sic] aware of any police interest in interviewing you in relation to any other offence nor of any interest from anotehr [sic] country seeking extradition. If there were to be other outstanding offences or requests for extradition these would have to be dealt with in the usual way.
This decision would normally be conveyed to you by the Police or to your Solicitor but as this is not possible the Attorney General has asked that I write to you."

40. In the meanwhile work continued by way of evidential reviews of the cases of the remainder on the "preliminary" list – plus a handful of others whose names had also come to light. It was slow and difficult work. Sinn Fein regularly complained about how long it was all taking – see e.g. a letter from Mr Adams dated 14 July 2000.

41. A broader solution was however found in relation to those who had escaped from custody after sentence and who, in view of the provisions of the 1998 Act, would be released within a short time after any return to Northern Ireland. On 29 September 2000 the SSNI announced that, following the release on 28 July 2000 of all remaining qualifying prisoners who had served at least two years of their sentence, he had concluded that it was no longer proportionate or in the public interest to seek the extradition of those who, if successfully extradited, would be released immediately under the 1998 Act or would only have minimal periods left to serve in prison. Such persons, if they returned to Northern Ireland were to be brought within the early release scheme. Arrangements were made with Sinn Fein to minimise the procedure involved – with the relevant individual being technically arrested at an hotel near the border, but not taken into custody (instead they would be issued with temporary release forms pending their release on licence under the 1998 Act). However, whether such persons would be prosecuted for any offence in relation to their escape, or for any other outstanding offence, remained the subject of individual review. Likewise, the SSNI made clear that any cases involving the extradition of individuals wanted for, or charged with (as opposed to convicted of) terrorist related offences would continue to be considered on a case by case basis.

42. By way of example, on 8 November 2000 the Attorney General wrote to the SSNI concerning decisions by the DPP(NI) in relation to four of those on the "preliminary" list, indicating in relation to all four that there was no outstanding direction for prosecution in Northern Ireland; that, apart from the unexpired portion of their sentences, they were not wanted in Northern Ireland for arrest, questioning or charge by the police in respect of any other matter; and that the RUC was not aware of any interest from any other police force in the United Kingdom in relation to them.

43. In the meanwhile consideration was being given to other potential solutions. For example, in January 2001, following earlier work in November 2000, Sir Quentin Thomas produced a report for the Government setting out the available options in relation to the remaining OTRs, including - continuing the normal processes of the law; deciding as a matter of policy in the public interest not to pursue extradition in respect of some or all of those suspected; providing an automatic amnesty in respect of all relevant offences; providing a selective amnesty whereby only "deserving" applicants would benefit; providing a conditional inhibition on prosecutions so that prosecution in respect of relevant offences would not be possible unless the offender was engaged in terrorism or was a supporter of a specified organisation; using the Royal Prerogative by way of pre-conviction pardons; or legislating to refine the considerations which inform the assessment made by the prosecuting authorities of the public interest in mounting a prosecution (although this was not assessed to provide a viable option). Sir Quentin concluded that whilst a conditional prohibition on prosecutions offered the best combination of political defensibility, acceptability to Republicans and administrative convenience, an automatic amnesty would be more straightforward and would minimise the contamination of the system of justice.

44. However, given the difficulties involved in those solutions, only the review of individual cases by the DPP(NI) under the superintendence of the Attorney General, and with any necessary investigation being carried out by the RUC, provided a way to make some progress. The process thus continued. It became known as the administrative scheme or process for dealing with OTRs, and included regular overviews of progress. Over time, the RUC became the PSNI and the Office of the DPP(NI) became the PPS.

45. On 19 January 2001 the Prime Minister gave Sinn Fein a written assurance that: "…The Government recognises the difficulty in respect of those people against whom there are outstanding prosecutions for offences committed before 10 April 1998. At present, they face the possibility of extradition or prosecution even though the offences if proven were committed before the key date for the early release scheme under the GFA. The Government is committed to dealing with the difficulty as soon as possible, so that those who, if they were convicted would be eligible under the early release scheme are no longer pursued…".

46. In a letter dated 23 January 2001 the Attorney General expressed concern about the making of any statement that implied that Government, rather than Parliament, would seek to influence or even prevent the prosecution of individuals - pointing out that not only would that be constitutionally wrong, but that it would not be possible either – given that neither he nor the DPP(NI) could be influenced by any such statement of Government intent. He also expressed concern as to the possible use of any such statement in any abuse of process arguments that might arise at any trial of any individual covered by the statement.

47. On 29 January 2001 the Attorney General wrote to the SSNI stating that information had come to his attention that one of the four individuals mentioned in his letter of 8 November 2000 (see para.41 above) was now liable to questioning by the police about involvement in a criminal offence, and had (it appears) been informed of the position. The Attorney General underlined that the remarks in the letter of 8 November 2000 had followed a standard pattern and referred to the position of each individual as it was known at the time that the letter was written; that whilst the checks had been thorough they did not amount to an amnesty, and that if other offences were discovered, or new evidence was found that linked individuals with offences, or fresh offences were committed, then the individual concerned would face arrest or questioning in the usual way.

48. On 8 March 2001, during crisis talks at Hillsborough Castle, it was publicly accepted for the first time by all parties, including the Prime Minister and the Taoiseach, that the position of the OTRs was an anomaly and that it would be addressed. Both Governments accepted that: "In the context of the agreement of May 2000 being implemented, it would be a natural development of the [early release] scheme for such prosecutions not to be pursued and would intend as soon as possible thereafter to take such steps as are necessary in their jurisdictions to resolve this difficulty, so that those concerned are no longer pursued…..". The Attorney General made clear within Government that legislation was required.

49. At a meeting on 12 March 2001 Mr Kelly, on behalf of Sinn Fein, produced a further list of 30 OTRs for consideration, pointed out that new names were continually emerging, and said that what was required was a system which would deal with such cases in a proactive manner and push them through to completion. He pointed out that the Prime Minister had given a commitment to sort the issue out and that if legislation was necessary it needed to be got on with.

50. In mid-March 2001 the Attorney General suggested to the NIO that a letter to a particular OTR should include the following paragraph: "On the basis of information currently available, there is no outstanding direction for prosecution in Northern Ireland, there are no warrants in existence, nor are

you wanted in Northern Ireland for arrest, questioning or charge by the police. The RUC are not aware of any interest in you from any other police force in the United Kingdom. If any other outstanding offence or offences came to light, or if any request for extradition were to be received, these would have to be dealt with in the usual way." The Attorney general stressed that it was essential that that the NIO checked the accuracy of the paragraph, and that it also seemed sensible for the RUC to be kept informed of any letter that was issued so that the opportunity for confusion to arise as to status was lessened.

51. In late March 2001 an internal paper set out the procedures involved in the conduct of the administrative scheme and the difficulties which by then were besetting the police, the DPP(NI) and the Crown Solicitors (who dealt with extradition requests) in relation to it. The difficulties included being provided with only sketchy details of the individuals; the scale and complexity of the tasks involved in carrying out intelligence checks on each individual; the scale and complexity of the tasks involved in the police, the DPP(NI) and the Crown Solicitors identifying all files held by each in respect of each individual; in the police carrying out a full evidential review of each live file in relation to each individual – including establishing whether original documentation still existed (including documentation held by others), whether witnesses (including military witnesses who had since left the army and returned to live on the mainland) were still available and willing to give evidence; in the DPP(NI) carrying out an evidential review on foot of any files submitted by the police – with some individual OTRs having a large number of such files; and in carrying out checks as to whether individuals were wanted by any other police force in the UK, or by any other country – which involved research of the Police National Database and contact with Interpol.

52. At a meeting with the SSNI in May 2001 Mr Adams expressed the view that, in terms of Republican confidence, it would be better if there was an invisible process for dealing with OTRs, but accepted that the Government had no alternative but to legislate on the issue – albeit that such legislation would be extremely difficult to take through Parliament.

53. In mid-2001 six days of further crisis talks were held at Weston Park, Staffordshire. It was again acknowledged by all parties, including the Prime Minister and the Taoiseach, that the position of the OTRs constituted an anomaly that would be addressed. Paragraph 20 of the resultant Weston Park Treaty provided that:
"Both Governments also recognise that there is an issue to be addressed, with the completion of the early release scheme, about supporters of organisations now on cease fire against whom there are outstanding prosecutions, and in some cases extradition proceedings, for offences committed before 10 April 1998. Such people would, if convicted, stand to benefit from the early release scheme. The Governments accept that it would be a natural development of the scheme for such prosecutions not to

be pursued and will as soon as possible, and in any event before the end of the year, take such steps as are necessary in their jurisdictions to resolve this difficulty so that those concerned are no longer pursued".

54. By October 2001, Lord Goldsmith QC had become Attorney General, and had made clear within the Government, among other things, that he would have very great difficulty in seeing that the public interest would be other than to proceed with prosecutions in cases where there was sufficient evidence of involvement in serious crime; that, in any event, he was only prepared to consider the public interest on an individual case by case basis, given that a blanket basis would be improper and that it was for Parliament to decide whether there should be an amnesty; and that (in terms of maintaining public confidence in the DPP(NI) and in the administration of justice in the longer term) it was of fundamental importance to maintain an impartial prosecution process which was not influenced by political considerations. He doubted, however, that any court would seriously entertain an abuse of process argument based on an expectation said to arise from a statement made by the Prime Minister.

55. By October 2001 a total of just over 100 names had been put forward by Sinn Fein under the administrative scheme, which continued. In early November 2001 a further 19 names were provided by Sinn Fein. By the end of November 2001 the cases of 41 individuals had been resolved (one way or the other) with 8 more expected to be resolved shortly. The Royal Prerogative was used in a small number of cases. In meetings, Mr Adams and Mr Kelly (on behalf of Sinn Fein) expressed frustration as to the length of time that the administrative scheme was taking. In the meanwhile, it was recognised within Government that it would be extremely difficult to ensure the passage of any legislation.

56. Further names were put forward by Sinn Fein to the NIO including, in January 2002, a list of 55 names which included the name of the defendant. I set out in detail below (starting at paragraph 83) what happened thereafter in relation to the defendant. The list was forwarded by the SSNI to the Attorney General. In the accompanying letter the SSNI said: "….I would also be grateful if you could ask the necessary people to look urgently into these new cases to establish their status in terms of whether they are free to return to the UK jurisdiction without facing prosecution."

57. At a meeting with officials and officers from the PSNI on18 February 2002 the DPP(NI) explained the difficulties, given the numbers now involved, in coping with the demands of the administrative scheme. He indicated that he was going to take personal control of the process, and that he was going to carry out the Attorney General's request that the names be checked to ascertain their status. The Note of the meeting recorded that the DPP(NI) understandably felt that it was important that, before anyone was given the green light to return to Northern Ireland, he was personally satisfied that all

avenues of enquiry had been exhausted, and a negative return filed. It was underlined that the retrospective review of cases and files was a very time consuming exercise.

58. On 26 February 2002 the SSNI wrote to the Prime Minister indicating that, whilst draft legislation was ready it would be a mistake to introduce it, or to invite the Queen to exercise the Royal Prerogative of Mercy in a small number of cases, and that they should ask the Attorney General and the DPP to continue to work through the Sinn Fein lists.

59. In March 2002 internal proposals were put forward within the NIO to speed up the administrative scheme, and were later raised with the Attorney General. It was, however, recognised within the NIO that there were considerable, possibly insuperable, difficulties with each idea and that the worst outcome would be to let people back who subsequently came to police attention, and were then arrested for old crimes for which the DPP decided that there was still sufficient evidence to justify a prosecution. The proposals included a summary of how the administrative scheme was then working, and an indication of the standard of research required, and what was expected of the reviewing PSNI officer. In short, the names provided by Sinn Fein to the NIO were forwarded to the Attorney General, who forwarded them to the DPP(NI), who then passed on the names to a dedicated team in the PSNI. That team then carried out checks on their computerised database (ICIS) and with collators and Special Branch – as well as consulting the PNC and Interpol to see if an OTR was wanted in the rest of the UK or internationally, and with the Crown Solicitors in relation to extradition issues. Where existing evidence included witnesses, they would be tracked down and their willingness to give evidence checked. They would also check the continuing existence or otherwise of exhibits and forensic evidence (including deciding whether further tests were now available and required). Where there was intelligence, a Superintendent would take the decision as to whether there remained a requirement to interview an individual, and would complete a pro forma accordingly. At the end of all that a full report would be put before the DPP(NI). In many cases he would ask for further evidence to be obtained before making a final decision. The final decision would be provided to the Attorney General and (through him) to the NIO, who would then pass it on to Sinn Fein for onward delivery to the relevant individual.

60. On 22 March 2002, in a briefing note to the Prime Minister in preparation for a meeting with Mr Adams, it was recorded that Sinn Fein had now provided a total of 161 names – 35 of them since the New Year. Of these, 47 had so far been cleared (of whom 22 who had escaped whilst serving a sentence had been brought within the early release scheme). In 12 cases the DPP(NI) had said that there remained a requirement to prosecute, and in a further 10 the police had sufficient evidence to warrant arrest for questioning. The remaining 102 cases almost all involved people who had gone on the run before they could be prosecuted. It was said that officials had been arguing

for a more rough and ready, and therefore more high risk, approach, but so far without success.

61. At the subsequent meeting, Mr Adams sought assurance that the 30 or so problem cases would be sorted out over a period of eighteen months or so. A possible legislative solution was also discussed.

62. As part of the ongoing consideration by Ministers and officials as to whether the administrative scheme could be speeded up, an official in the Legal Secretariat to the Law Officers wrote to the DPP(NI) at the end of March 2002 canvassing the possibility (which had been raised by the NIO) of removing consideration of whether there was any outstanding requirement to prosecute the individual, and confining the administrative scheme to answering the questions whether an individual was wanted by the police in Northern Ireland and Great Britain, or was the subject of on-going extradition proceedings – with Sinn Fein being informed correspondingly. It was acknowledged that this would increase the danger of an individual being told that they could return and then have proceedings brought against them, and that it would be necessary to include in the NIO's "comfort letter" a qualification as to the level of comfort given. A suggested draft was provided, by the NIO (which had decided that there should be no reference to the DPP(NI) as the resultant difficulty in drafting would make the letter so technical as to be unclear or so vague as to "undermine the reassurance such a letter is designed to provide"). The draft was in the following terms: "The Secretary of State has been informed by the Chief Constable of the PSNI that on the basis of the information currently available, there are no warrants in existence nor are you wanted in Northern Ireland for arrest, questioning or charge by the police. The PSNI are not aware of any interest in you from any other police force in the United Kingdom. If any other outstanding offence or offences came to light, or if any request for extradition were to be received these would have to be dealt with in the usual way".

63. On 4 April 2002 the DPP(NI) replied pointing out that not much less work would be required under the new proposal, and that it was difficult to see how changing the question would provide a reliable response. It was, nevertheless open to the Chief Constable to provide answers on the basis of more limited and less reliable research. The possibility of the proposed change was then raised with, and rejected by, the PSNI. Thus the administrative scheme continued as before, and with any letter of comfort / reassurance continuing to be in the terms set out in paragraph 49 above.

64. In June 2002 the Attorney General wrote to the SSNI pointing out that although the administrative process continued, it would not provide the means by which the Government's commitment in relation to OTRs would be met. He underlined that the prosecution process could not provide an amnesty, and that he and the DPP(NI) had been careful to ensure that each case was considered on its own merits and was subjected to the same Test

for Prosecution as applied in all cases – only by that route could the integrity of the prosecution process be assured.

65. An internal NIO briefing note dated 3 September 2002 set out the history in relation to OTRs, and noted that the grand total of names provided by Sinn Fein was now 162 (of whom 61 had been told they could return), with a further 10 raised by the Prison Service and a further 2 by the Irish Government. The note recorded that it had been known all along that there would be a hardcore of unconvicted cases, likely to run to a few dozen, which could not be resolved within the present law.

66. In May 2003, following negotiations at Leeds Castle, the British and Irish Governments issued a Joint Declaration in which provision was made: "To discuss appropriate issues with the parties including through the implementation group….". Proposals in relation to the OTRs were published in parallel.

67. However, as later recorded by the Attorney General in a letter dated 27 February 2006 to the SSNI, work on the administrative scheme came to a halt in 2004 – albeit, as will become clear, some work was done in relation to the defendant up to September 2004.

68. On 28 July 2005 the leadership of the IRA announced that it had ordered an end to its armed campaign. In response the then Secretary of State for Northern Ireland, Peter Hain, indicated that the Government would now implement the areas of the Joint Declaration of May 2003 that were dependent on the IRA's decision.

69. At the end of September 2005 the Independent International Commission on Decommissioning reported that the IRA had placed its arms completely and verifiably beyond use. On 13 October 2005 Mr Hain made a wide-ranging statement to the House of Commons in response, during the course of which he reminded the House that the government had undertaken to legislate in relation to the OTRs, and that the proposals had been published alongside the Joint Declaration in May 2003. He continued: "This is not an amnesty. Nevertheless the implementation of those proposals will be painful for many people. I fully understand this. But the Government believes that it is a necessary part of the process of closing the door on violence forever".

70. The Northern Ireland (Offences) Bill was introduced on 29 November 2005 to: "Make special provision about certain offences committed, or alleged to have been committed, before 10 April 1998". It attempted to address the position of all persons who would be liable to prosecution, including members of the police and armed forces, and provided (amongst other things) for the granting of certificates of eligibility by a Commissioner, exemption from arrest for those holding such a certificate, trial by a Special Tribunal and entitlement to a licence enabling the relevant individual not to

serve any part, or any further part, of any sentence imposed by the Special Tribunal in custody.

71. However, the Bill was withdrawn on 11 January 2006 when, in a statement to the House of Commons, Mr Hain said:

"Every Northern Ireland party vigorously opposed the Bill, bar Sinn Fein. Now Sinn Fein opposes it, because it refused to accept that the legislation should apply to members of the security forces charged with terrorism-related offences. To exclude from provisions of the Bill any members of the security forces who might have been involved in such offences would have been not only illogical but indefensible, and we would not do it. Closure on the past cannot be one-sided. That was, and is, non-negotiable.
The process would have made people accountable for their past actions through the special tribunal before being released on licence. Sinn Fein has now said that any republican potentially covered by the legislation should have nothing to do with it. But if no one went through the process, victims who would have suffered the pain of having to come to terms with the legislation would have done so for nothing. That is unacceptable, and I am therefore withdrawing the Bill."

72. It appears, see again the Attorney General's letter dated 27 February 2006, that it was the introduction of, and/or the failure of, the legislation which prompted the restart of the administrative scheme.

73. In October 2006, following all party negotiations at St Andrews, the Government published the St Andrews Agreement.

74. On 28 December 2006, in a confidential letter, the Prime Minister assured Gerry Adams that the Government, having already announced that it would no longer pursue the extradition of individuals convicted of pre-1998 offences who had escaped from prison and who would, if they returned to Northern Ireland and successfully applied for the early release scheme, have little if any of their time left to serve, was now working with a renewed focus on putting in place mechanisms to resolve all other OTR cases – including "expediting the existing administrative procedures" and stating that "I have always believed that the position of these OTRs is an anomaly which needs to be addressed. Before I leave office I am committed to finding a scheme which will resolve all the remaining cases".

75. In February 2007 the PSNI commenced Operation Rapid, which was the operational name for a review of persons circulated as "wanted" by the PSNI in connection with terrorist related offences up to 10 April 1998. The purpose of it was to examine what basis, if any, the PSNI had to seek the arrest of those individuals identified by Sinn Fein to the Government and passed to the Chief Constable. The Terms of Reference recorded, among other things, that responsibility for the expeditious completion of the review

rested with the Head of Branch C2 of the PSNI (who would ensure that a proper detailed record auditing the review and decision making process would be made and retained); that there would be a small team of investigators (a Detective Chief Inspector, 2 Detective Sergeants and 3 assistant civilian investigators); that the review would be conducted on terms of conditional reporting in order to prevent a misinterpretation of its purpose; that the Assistant Chief Constable, Crime Operations would supply a list of those individuals identified to the PSNI as having requested information as to their status with the PSNI as a "wanted person"; that each offence would be reviewed on an individual basis; and that recommendations would be made in accordance with particular forms of words set out in the Terms (although the forms of words in relation to a person wanted for arrest did not include one for someone who was wanted by another police force in the UK).

76. It is clear that Operation Rapid marked the beginning of direct engagement between Sinn Fein and the PSNI in order to try to expedite the remaining cases. The first Operation Rapid meeting took place on 7 February 2007. It was chaired by the Head of Branch C2, DCS Baxter and attended by among others ADCI Graham (who was appointed SIO). A note of the meeting was disclosed during the hearings. It recorded that: "The HoB provided a brief background as to why a review would be taking place into those persons termed as being 'On the Run'. He stated that Mr McGrory, Solicitor, who acts on behalf of the OTR's, had requested information about the current legal status of his clients. Under Article 3 of the ECHR and Human Rights Act all persons have a legal right upon request to be informed if police require them for questioning. He stated that police were therefore obliged to review all those cases and determine the current status of these persons… it was agreed that the terms of reference for the enquiry should be twofold. Firstly, to establish the legitimate basis why a person 'On the Run' was wanted. Secondly, to establish the status and the integrity of the evidence. Formal terms of reference would be drafted by ACC Crime Operations and forwarded to D/C/Insp Graham for guidance. Where it was established that no current legitimate basis existed to have a person arrested, this information would be passed to ACC Crime for onward transmission to their Solicitor. Alternatively, if reasonable grounds still existed to suspect a person of committing a specific terrorist offence when balanced against Human Rights considerations, a firm recommendation would be made to have these persons to remain circulated as wanted for interview and records updated appropriately. It was agreed that all OTR decisions should be based on purely policing considerations and that the enquiry should remain neutral, proportionate and ethical at all times. …Upon publicity reaching the press regarding the review of OTR cases, it was agreed that the following press statement would be released. 'As a result of information made available to the Police Service of Northern Ireland, officers from Crime Operations Department are conducting a review of individuals wanted for serious terrorist crime dating back a number of years. Inquiries are at an early stage

but police are working to determine whether there remains a lawful basis for arrest, having regard to current human rights legislation. Where evidence exists, and meets required standards, it remains the role of police to bring those responsible for crime before a court, regardless of their current whereabouts'".

77. On 8 May 2007 the Northern Ireland Executive was sworn in.

78. It is of interest to note that, in his letter to the PSNI dated 27 February 2006 (to which reference is made above) Lord Goldsmith QC stated that: "As you are aware, your predecessors in office asked that consideration be given to whether or not certain individuals were free to return to the United Kingdom without fear of arrest…"

79. As to the witnesses who took part in the negotiations in relation to, and/or the implementation of, the administrative scheme, Mr Powell states, among other things, that:
"As we were not able to find an across the board solution that worked we had to deal with the 'On The Runs' as individual cases through an administrative scheme that had begun as an interim measure requiring individual requests for consideration to be submitted to the Northern Ireland Office through Sinn Fein, and thereafter a series of reviews and decisions to be taken by all of the relevant ministries or agencies, including the Police Service of Northern Ireland (who in turn would obtain information from other forces or agencies or via Interpol), the Attorney General, the DPP in Northern Ireland and/or in England and the Secretary of State for Northern Ireland. The first letters containing assurances that the individuals concerned were not wanted for arrest, questioning or charge were sent from 10 Downing Street to the President of Sinn Fein, Gerry Adams, to be given to the addressees. I was the signatory of the initial letters. Later signatories to similar letters were senior officials in the Northern Ireland Office. *What each letter was intended to reflect, was that on the basis of information then available to the authorities and carefully considered in each case individually, an assurance was being given that the individual would not be subject to arrest and subsequent prosecution if he or she returned to the United Kingdom*. Although this had not been the solution first envisaged by the British government in its wish to deal with this particular aspect of the past, nevertheless it was intended to provide a solution that worked in practice even if more slowly and in a more cumbersome and less universal way than had been wished by those negotiating on behalf of Sinn Fein.
The issue of the OTRs was at no time a single, isolated issue, but was dealt with as part of the overall negotiation. All aspects were simultaneously in play; agreement to one issue by one party was critical to obtaining the agreement of another party to another issue. I set out my recollections of the decade long negotiations in a book entitled, 'Great Hatred, Little Room: Making Peace in Northern Ireland' published in 2008 for which I was

permitted by the Cabinet Office to have access to the No 10 papers relating to my time in Downing Street.
In the book I make clear my view that the most challenging part of the peace process in Northern Ireland, as in most other peace processes, is its implementation. Agreements are necessary precisely because the two sides do not trust each other and agreements by themselves do not establish trust. *It is only when the two sides actually implement what they have promised to do that the trust begins to be created as part of a process of peace building. If either side reneges on its undertakings or fails to implement what it has promised to do, trust can be fatally undermined*.
The intention behind the British Government giving written assurances to individual OTRs was to try to resolve the issue given the failure to find a workable general approach and to provide individual letters that Sinn Fein could use to reassure the individuals concerned that they could return to the UK without fear of arrest." (*My emphasis*)

80. Mr Kelly (who includes in his statement a breakdown of the number of persons who were informed each year from 2001 to 2012 that they were not wanted) states, among other things, that:
"Sinn Fein for whom I speak in this statement emphasises that it is impossible to overstate the importance of the assurances given to the 187 recipients, which included John Downey, being maintained. These were essential in the achievement of the series of agreements that began with the Good Friday Agreement in 1998, and were consolidated in… the commencement of the Northern Ireland Assembly in 2007. The Court will be aware from the presence of Sinn Fein MPs at the hearings to date in this case, as well as the presence of the Irish Government, of the importance that is attached to the firmness of each of the building blocks of the peace process in the North of Ireland and the reliance upon the assurances given, by all parties to those agreements, to those assurances being honoured by those who gave them. The peace process remains a process; there has to be constant vigilance and effort. The effect of John Downey's arrest and prosecution has caused enormous concern both as to the obvious question marks now raised in relation to identical assurances given in identical circumstances to many others and as to the wider implications of a firm assurance on a key issue emanating from a lengthy process that is no longer being adhered to.
There had been throughout the administrative process, a reliance that those responsible for preparing and presenting an assurance (or a refusal) were in a position to provide an unequivocal statement. It was on that basis that Sinn Fein felt able to advise those who had sought its help in asking for such assurances, that they meant what they said and on this basis, that the recipients thereafter believed they were able to organise their lives accordingly." (*My emphasis*)

81. Mr Hain states, among other things, that:
"The proposed legislation was in due course laid before the House, but it was not passed. I do not set out here the different objections that led to its

abandonment. It was in this context that the already ongoing administrative scheme, although begun as a temporary measure, became the mechanism by which all of the "On the Run" applicants were enabled to have their position clarified.

The scheme addressed the position of individuals who through Sinn Fein put their names forward. To qualify for consideration the offences for which each individual who believed he or she might be suspected, or "wanted" (in some cases already convicted and having escaped from prison), should have been committed before the signing of the Good Friday Agreement in 1998 and have been connected with the conflict in Northern Ireland. The group to which the individual concerned was affiliated (ie the IRA) must adhere to the commitment to cessation of armed conflict. Whilst the first cases pressed by Sinn Fein concerned those who lived and had family in the North of Ireland, the scheme extended to applicants in the Republic of Ireland who had no such relationships and to persons whose extradition had been actively sought from within other jurisdictions. The scheme was not limited to offences committed in the North of Ireland.

As Secretary of State, I was conversant not just with the implications but with the running of the scheme, which was a scheme endorsed by every branch of the Government including those tasked with considering prosecutions. The procedure was in a number of ways wholly unprecedented. *The individuals concerned were told, in terms and in writing, by the Northern Ireland Office in response to Sinn Fein in respect of each applicant, either that they were liable to arrest if they entered the jurisdiction or, via a personal letter whose key phraseology was in essence common to all, that on the basis of current information that they were not wanted and would not be arrested*. I was involved in the extensive discussions that surrounded attempts to bring legislation and/or to consider alternative mechanisms. When these could not be achieved, it was the administrative scheme that persisted.

There were a number of exceptional features to the scheme. The first, of course, involved Sinn Fein being formally put on notice; individuals who otherwise might not know with any certainty that they could be subject to arrest were alerted. The second was that the scheme progressed in a non public manner. Confidentiality was maintained for the individuals who submitted their names to the scheme; neither the names of the applicants nor the outcome of the applications were subjected to publicity. *There was in consequence an enhanced reliance upon internal checks being correctly done and correctly notified as the recipient was dependent upon and trusting in the sole evidence of an assurance, namely the letter he/she (or on his/her behalf Sinn Fein) received from the Northern Ireland Office*. I am informed that the Court has been provided with internal documents that show that at a number of junctures discussion took place with a view to reducing to burden of verification that rested upon the departments concerned, but this was rejected on the basis that corners could not be cut. *It was intended that the assurance be just that, reliable assurances as to the position of the applicants and implicit in that, that the process by which the assurances had come to be*

given, had been competent and robust. Throughout my period of time in office, I was confident that was precisely the position." (*My emphasis*)

82. In his first witness statement Mr McGinty states, among other things, that: "… in the absence of any statutory scheme, Sinn Fein through the Northern Ireland Office, began to provide the prosecuting authorities with names of individuals who were outside the jurisdiction and had ground for believing they might be subject to arrest or prosecution if they returned to the jurisdiction. *I believe it was understood by all that at best this administrative scheme would identify those cases where individuals were not in fact wanted or where the evidential test could no longer ever be met*. The prosecuting authorities accepted the administrative scheme with some reluctance. In part this was because the actual and perceived impartiality of the prosecution authority was of crucial importance to the maintenance of public confidence and the administrative scheme would only benefit one side of a divided community. The second reason was that it was not usual for an assessment of the evidence to be made in the absence of the individual concerned. The third reason was that where an individual was still wanted, to inform them that they would be arrested if they returned to the jurisdiction could amount to "tipping off". This last concern was mitigated to some extent by the fact that given that an individual's name had been put forward in itself suggested that that individual had cause to believe they were in fact wanted for arrest. These concerns had two consequences. The first was that in assessing the evidential sufficiency for prosecution, the usual test, namely whether there was sufficient evidence to afford a reasonable prospect for conviction, was amended slightly to a test of whether there was now, or could ever be, sufficient evidence to meet the test for prosecution. The reason for this was that if an individual returned and was arrested, the evidential position may change. There may be forensic tests that could be carried out, fingerprints would become available and admissions may be made in interview.
The second consequence followed on from the first, and was reflected in the wording of the letters sent to those who were told they could return. *The letters made clear that the assessment was based on the evidence then available. That position could change. It was to the forefront of the minds of the prosecutors that if an individual who had received such a letter returned to the jurisdiction and started commenting publicly through the authorship of books, articles or appearance on television that they had in fact been involved in terrorist activity (which was not as farfetched as it may seem) public confidence in the criminal justice system would require the authorities to be able to act. It followed that the letter sent could never amount to an amnesty of absolute and final promise not to prosecute*.
I believe the limitations of the scheme were understood by all. I believe it was understood by the Irish government because at one stage they asked the Attorney General to consider whether the promise made by government could be met by the use of pre conviction pardons. *I believe it was also understood by Sinn Fein as it was patently obvious that the scheme only sought to identify those individuals who were able to return without fear of*

arrest and provided no remedy for those who remained wanted." (*My emphasis*)

The defendant & the administrative scheme

83. As I have already indicated above, the defendant's name was first put forward by Sinn Fein in January 2002 (see General Matters Vol 2 p.514). In due course a folder was created in relation to him.

84. On 26 March 2002 it was recorded that the defendant was still one of those being considered or positively identified (p. 579-580).

85. On 30 April 2002 the defendant's PNC record was printed out (p. 688-694). It recorded that he was wanted for murder on 20 July 1982 in the jurisdiction of the Central Criminal Court, and that he had been reported as such on 29 May 1983. It included the words: "Conspiracy to murder IRA terrorist… do not interrogate contact Commander SO13…" (i.e. the Anti-Terrorist Branch of the Metropolitan Police).

86. In June and July 2002 it was recorded that enquiries into the defendant were ongoing (pp. 635 and 642).

87. On 17 September 2002 the Department of the DPP (NI) wrote to the PSNI to indicate that a search had revealed a file in the defendant's name which was concerned with the murder of two members of the UDR and causing an explosion at Enniskillen on 28 August 1972. A direction for no prosecution had been issued on 28 May 1985 with the proviso that : "Should any further evidence come to light in the future to connect Downey with (the) explosion, the file should be re-submitted". The PSNI were asked to confirm that no further evidence had come to light.

88. On 7 November 2002 the PSNI wrote to the DPP (NI) to indicate that it appeared that no further evidence had come to light in relation to the Enniskillen bombing, but that the OTR team was reviewing the defendant's suspected involvement in a number of crimes, including the Enniskillen bombing, and hoped to be in a position to advise the DPP (NI) shortly (p.663). Towards the end of that month (p. 668/9) it was recorded that enquiries were ongoing.

89. On 28 March 2003 it was indicated that enquiries were ongoing, and that the Crown Solicitor was to carry out a file check (p. 671/2).

90. On 9 April 2003 it was recorded that the police were hoping to submit a report shortly, that the defendant was wanted, but that the Crown Solicitor had no interest (p. 676/7).

91. On 27 August and 9 October 2003 it was recorded that a letter from the police was to issue shortly (pp. 679/680 and 696/7).

92. On 9 December 2003 there was no reference to a letter from the police (p. 699/700). However it is clear that the PSNI investigated the defendant in relation to five incidents in Northern Ireland and that they also made some enquiries of the Metropolitan Police in relation to the Hyde Park Bombing. Each of the six incidents was the subject of a template. The Hyde Park Bombing was the subject of the sixth template. At some point an Assessment Form in relation to that template was completed (p. 681/2), and recorded that the defendant was circulated as being wanted for conspiracy to murder in relation to the Hyde Park explosion in London on 20 July 1982 and that there was fingerprint evidence in the case. The materials in relation to the sixth template also included a Special Branch report (p. 684) which also recorded that the defendant was required for questioning in relation to the Hyde Park Bombing by the Metropolitan Police. There was also an ICIS summary in relation to the defendant (p. 686/7) and his PNC record (already referred to above, p.688-694).

93. On 22 July 2004 an internal PSNI document (p.701) recorded that the arrest and interview of the defendant had been approved in respect of a number of Northern Irish incidents, including the Enniskillen bombing. It was also recorded that the defendant had been identified on fingerprints in relation to the Hyde Park Explosion on 20 July 1982, and that the Anti-Terrorist Branch had confirmed that no extradition had been attempted, but that it was their intention to arrest the defendant should he come within the jurisdiction.

94. On 14 September 2004 the PSNI wrote (p.702) to the DPP (NI) pointing out that the defendant had never been interviewed in relation to the incident at Enniskillen, and that it may be that further evidence would come to light during such an interview. The letter also indicated that, in addition, the defendant was wanted by the PSNI for arrest and interview in relation to a number of serious terrorist offences.

95. On 27 January 2006 the NIO wrote, following a meeting, to the PSNI asking whether it was now confirmed that the defendant was wanted (p.722-724).

96. On 31 January 2006 the PSNI wrote to the NIO underlining the importance of the NIO, PPS, PSNI and Attorney General's office being in agreement as to what exactly the position in relation to all persons named on all Sinn Fein lists

was, and suggesting a roundtable meeting of all the above-mentioned parties (p.727-732).

97. On 27 February 2006 (see above) the Attorney General wrote to the SSNI (by then, Mr Hain) and informed him that the defendant was wanted for arrest and questioning in respect of serious terrorist offences. There was no mention, as such, of the Hyde Park Bombing (p. 733/4).

98. In March 2006 the NIO wrote to Mr Kelly stating that in relation to four individuals there was no outstanding direction to prosecute in Northern Ireland, that there were no warrants in existence, and nor were the individuals wanted in Northern Ireland for arrest, questioning or charge by the police. Letters to the four individuals were included – each in the terms set out in paragraph 49 above. However, the letter to Mr Kelly went on to indicate that three other individuals, one of whom was the defendant, would in the current circumstances of their cases face arrest and questioning if they returned to Northern Ireland (p. 735/6).

99. In June 2006 (p. 741/2) the defendant appeared on a list of persons who were confirmed as being wanted by the NIO and wanted for questioning by the PSNI.

100. In January 2007 a PSNI schedule (p. 745) recorded that the defendant was currently wanted by the PSNI, and that enquiries confirmed that he was sought for arrest and interview in relation to a number of serious terrorist offences, and that the NIO had informed Sinn Fein accordingly in March 2006.

101. It will be recalled that it was around February 2007 that Operation Rapid commenced. I have already summarised its Terms of Reference in paragraph 74 above. It will be recalled that it was a review of persons circulated as "wanted" by the PSNI in connection with terrorist related offences up to 10 April 1998 and its purpose was to examine what basis, if any, the PSNI had to seek the arrest of those individuals identified by Sinn Fein to the Government and passed to the Chief Constable.

102. On 13 April 2007 email messages within the PSNI show that, at the request of Operation Rapid, a check was made on the PNC to see whether the defendant was still wanted for the Hyde Park Bombing and that it was confirmed that he was (p.758).

103. On the same day an Operation Rapid update in relation to the defendant (p.760), which included a cross reference to the Special Branch report (p. 684 – see above), made reference to the sixth template in his case. It was recorded that that template related to the Hyde Park Bombing on 20 July 1982; that no case papers were available in Northern Ireland but that: "Downey is alerted on PNC as wanted for murder if arrested inform SO13 evidence is by way of fingerprints. The alert is current and was last

updated/confirmed by this team on 13/4/07. There is no further information to add to this template. Should Downey be arrested in Northern Ireland for offences here we would be duty bound to inform SO13 New Scotland Yard".

104. On 7 May 2007 Acting Detective Chief Inspector Graham of Operation Rapid carried out a review of the defendant's case. It is said that he had available to him the 2003 OTR documentation relating to Hyde Park (p. 681/694) and the 13 April 2007 update (p. 760/1) – both of which referred to the Hyde Park Bombing. The record of ADCI Graham's review in relation to the Hyde Park Bombing (the sixth template) did not emerge until enquiries were commenced during the hearing (see paragraphs 15-16 above). ADCI Graham recorded his decision in a Policy Decision Log Book as being: "That subject is not wanted by PSNI, however there is information to suggest that he is wanted by Metropolitan Police, I will request an up to date report from Metropolitan Police on current status of their circulation." The officer recorded his reasons as being:
"1. Conspiracy to murder allegations relate to incidents that occurred in London 1982. It is not known where the conspiracy was carried out.
2. There is no evidence on file that would give me grounds to consider circulation by or on behalf of PSNI for any offence within the jurisdiction.
3. The evidence i.e. fingerprint does <u>not</u> specify that the fingerprint belongs to subject. He is however circulated on the PNC as being wanted by the Metropolitan Police.
4. I consider that the present circulation by/on behalf of Met Police should remain subject to further clarification from the English authorities."

105. In a report later that day to Detective Chief Superintendent Baxter, ADCI Graham indicated that he had completed a review in respect of the defendant, "with due consideration being given to the agreed Terms of Reference"; that all the templates in relation to the defendant were based on intelligence, including the template relating to the bomb at Hyde Park, and that he had reviewed the papers and could find no evidence that the defendant was wanted by the PSNI for that offence, but that the defendant was still wanted by the Metropolitan Police in relation to it – subject to any further evidence. He indicated that, in respect of the other templates, there was no evidence or material that could provide sufficient grounds to have the defendant circulated at that time. He therefore recommended that the defendant be listed as not wanted by the PSNI at that time, and that clarification should be sought from the Metropolitan Police as to the current position with their circulation of the defendant. To date, no record of any request for clarification has been found.

106. On 10 May 2007 DCS Baxter who, it is said, would (unless he asked for further documentation) only have considered ADCI Graham's report of 7 May, reported to Assistant Chief Constable Sheridan in relation to a number of individuals. As to the defendant, he said that: "The above person is a native of the Republic of Ireland and is a citizen of the Irish Republic. He has not

resided in Northern Ireland and remains resident in his native district. He is not currently "on the run" from his home. I have reviewed his case and there is no basis in my professional opinion to seek his arrest currently for any offence prior to the signing of the Good Friday Agreement. The above person should be informed that he is not currently wanted by the PSNI for offences prior to the Good Friday Agreement 1998, but it should be borne in mind that should new properly assessed and reliable intelligence, or new evidence which has been judged to retain its integrity, emerge which creates reasonable grounds to suspect his involvement in offences then he will be liable to arrest for any such offence which may have been committed during this period." (p.765).

107. Thus it is clear that although DCS Baxter knew from ADCI Graham's report about the fact that the defendant was wanted in relation to the Hyde Park Bombing, he made no reference to it or to the defendant being wanted in relation to it. When asked by DI Corrigan (see paragraphs 14 and 15 above) during the course of the hearings he said that he reported to ACC Sheridan via a strict application of the Operation Rapid criteria and agreed parameters. He said that the defendant was not wanted by the PSNI and was not considered to be on the run as he was not a resident of Northern Ireland, and that there was no statutory requirement to supply any further information as per agreed parameters.

108. On 6 June 2007 ACC Sheridan wrote (p.766) to the DPP (NI) referring to the ongoing review and stating in relation to the defendant that: "the above person is not a resident of Northern Ireland and is a citizen of the Republic of Ireland. He has not resided in Northern Ireland and remains a resident in the Republic. He is not therefore currently "On the Run" from his home. Enquiries indicate that John Downey is not currently wanted by the PSNI…".

109. On 7 June 2007 the Operation Rapid team made an entry in PSNI records indicating that the defendant was "not currently wanted by PSNI unless a new appropriate alert is created by an Investigating officer".

110. On 12 June 2007 (p.767) the Acting DPP (NI) provided a member of his staff with, among other things, ACC Sheridan's letter in relation to the defendant, and requested that checks be made against the files and information held by the DPP (NI) in accordance with previous instructions for the task (which do not appear to have been disclosed), and thereafter to prepare letters for the Attorney General's Office and ACC Sheridan.

111. Around mid-June 2007 the NIO requested confirmation in writing from Operation Rapid that all checks with outside forces had been carried out in relation to subjects under review. A number of emails in relation to that request were disclosed during the hearing. In particular, on 13 June 2007 ACC Sheridan's D/Staff Officer emailed DCS Baxter and ADCI Graham seeking confirmation in writing that such checks had been carried out.

112. On 14 June 2007 Mr McGowan (a member of the Operation Rapid team) emailed ADCI Graham as follows: "the original version of the review template did not specifically ask for an individual's Police National Computer (PNC) and/or Interpol numbers, or if such had been checked. Subsequent letters, however, from Head of Branch C2 made reference to enquiries indicating if the person was wanted by other UK forces or by any other country by Interpol. The letters stipulated that no enquires had been made with An Garda Siochana. It seems that it was practice for the review team to check for PNC entries and to check via Interpol liaison for international alerts but there appears to have been no formal means of recording, or apprising the Head of Branch of, the results of such enquiries (although in some of the older files there is a checklist which includes Gazette/PNC/Interpol). The current review team has examined whether individuals are wanted by the PSNI in connection with terrorist-related offences up to 10 April 1998 (as per terms of reference). It has been practice, however, for the current team to examine ICIS for indications of PNC entries by examining the PNC ID field with the nominal's "view person" screen. This is the screen that opens when an individual is "searched" for by means of an ICIS unique reference number (URN). PNC itself is only accessed during "searches" when the individual is sought by means of a name and date of birth or age. The vast majority of this team's searches are done by means of an ICIS URN relying therefore on the accuracy of the PNC ID fields. Sample checks carried out today have revealed that ICIS cannot be relied upon in this respect. Ten people on our list of those recently reviewed have been scrutinised. None of the ten have entries in the PNC ID field but five are recorded when PNC itself is checked. Three of the individuals are alerted as wanted in Northern Ireland and two simply have PNC nominal entries. None of the ten were recorded as wanted by any other agency. (As discussed we did recently check one individual who was recorded on PNC as wanted in England and carried out further enquiries with the Met). It is now clear that we cannot rely on the ICIS "view person" screen and must carry out specific PNC checks on every individual. In response to the request below this office cannot state that "all checks with outside forces" have been carried out, as Interpol has not been consulted and earlier reliance on "PNC ID" fields is clearly flawed. The review team can now recheck PNC itself via ICIS in respect of those nominals already reviewed and can submit those names to Interpol liaison which has not been the practice of this team. It appears that requests to Interpol will require provision to them of significant information, including reason or justification for the check and details of any offences of which suspected. The original review template was amended to answer questions of continuity/intelligence origins etcetera and will now be amended to state that PNC/Interpol checks have been done. All individuals will be specifically searched on ICIS for PNC entries and Interpol liaison at PSNI Criminal Justice Department will be asked to conduct enquiries at Interpol. (Subject to your confirmation that this must be done). A copy of the SOCA form for use with Interpol is attached for your information".

113. That was passed on to DCS Baxter who later on 14 June 2007 emailed ADCI Graham as follows: "The issue is probably resolved. As I understand it – if a person with a domicile address in Northern Ireland is wanted by police on mainland UK then the PSNI are formally notified and an entry is made against their nominal on ICIS. Similarly, if an individual is wanted outside the UK e.g. a European country then a current European Arrest Warrant is the formal and legal means of notifying the PSNI. Once again such an arrest warrant is logged against the nominal of an individual on ICIS. If ICIS checks are not flagging an individual as wanted by a GB police force or under a European Arrest Warrant then it is correct to report that that individual is not wanted by the PSNI on behalf of either a GB force or a European country. It would be impossible to check 100 per cent as to whether or not an individual is suspected of offences which have not reached a level of evidence to formally seek arrest and to do so throughout Europe. I hope this guidance is helpful. What we need to establish is the following "Is X wanted for arrest by the Police Service of Northern Ireland for an offences (sic) pre the Good Friday Agreement or circulated as wanted for arrest by an external force and the existence of reasonable grounds (within the UK) or a European Arrest Warrant. This can be established by an ICIS check and I do not believe that investigations beyond this are necessary as the ten examined has shown".

114. That was forwarded by ADCI Graham to Mr McGowan saying: "please see the views from HOB C2 which are forwarded for information. We will stick to our agreed principles and progress as necessary…"

115. On 20 June 2007 there was email correspondence (again disclosed during the hearing) between Mr McGowan, ADCI Graham, DCS Baxter and ACC Sheridan's D/Staff Officer in which it was made clear that Interpol checks as such were not being undertaken.

116. On 27 June 2007 the Acting DPP (NI) wrote to Mr McGinty in the Legal Secretariat to the Law Officers (p.769 A-D) in relation to 8 individuals – including the defendant. He quoted from ACC Sheridan's letter of 6 June 2007 including the assertion that enquiries had indicated that the defendant was not currently wanted by the PSNI and added that the one file held by his service (in relation to the Enniskillen bombing) was closed.

117. On the same date ACC Sheridan wrote (p.769) to the Director Political at the NIO stating, in answer to her earlier query, that he could confirm that: "our review set out to establish if X is wanted for arrest by PSNI for any offences pre the Good Friday Agreement or circulated as wanted for arrest by an external force and the existence of reasonable grounds (within the UK) or a European Arrest Warrant. This can be established by an ICIS check (PSNIs computer system), checks with An Garda Siochana and the Police National Computer (PNC). These checks have all been carried out in relation to the letters forwarded to the Director of Public Prosecutions from the PSNI and

they are the same checks which have been carried out during previous reviews."

118. On 11 July 2007 Mr McGinty wrote (p. 785) to the NIO in relation to 10 individuals including the defendant – in relation to whom he quoted the Acting DPP (NI) letter of 27 June in full.

119. In his second witness statement Mr McGinty states, among other things, that:
"… *By the time the Downey letter was sent, the process was familiar and had been running for some years. I no longer informed the Attorney General of individual decisions and the letter to the Northern Ireland Office would be sent by me to an official there*… I confirm that in respect of Mr Downey, his name was one of a number in a letter from the Deputy DPP identified as not being wanted. I did not see any other material in relation to him until his arrest. I did not recognise his name and did not connect him with the Hyde Park bombing. The consideration of his extradition happened before my arrival here and none of those who dealt with it at the time were in the Attorney General's office when the Downey letter was sent… *In summary, in relation to the vast majority of names considered, including that of Mr Downey, the role of this office was simply to forward information to the NIO that was being provided to us by the PPS*. The name Downey meant nothing to me. I was not aware of any other information about him and the Law Officers and this office took no part in the consideration given to his position by the PSNI or the PPS". (*My emphasis*)

120. On 20 July 2007, following an earlier attempt on 18 July, Mr Mark Sweeney of the NIO emailed the D/Staff Officer to ACC Sheridan (p. 770/1) seeking confirmation of an earlier conversation during which the Staff Officer had said that the PSNI had checked whether any of the individuals named in Mr McGinty's letter of 11 July (who included Mr Downey) were wanted by an external force as far as the PSNI could ascertain, and had established that they were not. The email further recorded that during the earlier conversation it had been agreed that Mr Sweeney would email the D/Staff Officer and that she would check that Mr Sweeney's understanding was correct or would put him right.

121. Within minutes the D/Staff Officer replied (p. 770): "The letter from ACC Sheridan dated 27 June confirms that prior to forwarding all details to the Director of Public Prosecutions our review team conduct all searches through our own computer system ICIS, the Police National Computer (PNC) and checks with An Garda Siochana. This is the process conducted for all individuals reviewed prior to any letters being sent from this office and this will continue to be the case. To confirm, these checks have been carried out on the ten names in the 11 July letter". It was clearly implicit in the email that not only had the checks been done, but that they were negative.

122. Later that same day (20 July 2007) Mr Sweeney wrote to Mr Kelly of Sinn Fein (p.773/4) stating that: "You have previously been in correspondence with the Northern Ireland Office about a number of individuals who are currently on the run but want to return to Northern Ireland and wish to be informed of their status if they were to do so. Following investigations made by the relevant authorities in Northern Ireland I can now confirm that the necessary checks have been completed on 10 more individuals. On the basis of the information currently held in respect of the 10 individuals, there is no outstanding direction for prosecution in Northern Ireland, there are no warrants in existence nor are they wanted in Northern Ireland for arrest, questioning or charge by the police…"

123. Letters to each individual were enclosed. The body of the letter to the defendant (p.780), in common with the other letters was (as previously set out above) in the following terms "The Secretary of State for Northern Ireland has been informed by the Attorney General that on the basis of the information currently available, there is no outstanding direction for prosecution in Northern Ireland, there are no warrants in existence nor are you wanted in Northern Ireland for arrest, questioning, or charge by the police. **The Police Service of Northern Ireland are not aware of any interest in you from any other police force in the United Kingdom**. If any other outstanding offence or offences came to light, or if any request for extradition were to be received, these would have to be dealt with in the usual way". (**My emphasis**)

124. Another of the recipients was one of the other two people who had been informed at the same time as the defendant in March 2006 that he was wanted. The status of the third person to be warned in March 2006 was not changed. (In his witness statement, Mr Kelly gives the example of another person who was informed in 2001, 2002 and 2010 that he was wanted, but was thereafter informed in December 2012 that he was not wanted).

125. On 7 May 2008 (p. 790) another enquiry team in the PSNI who were investigating a double murder in September 1972 made enquiries of the Operation Rapid's team in relation to the 7 June 2007 entry in PSNI records, seeking confirmation of their presumption that it meant when any other evidence became available. That was confirmed in a reply which stated that: "… the decision by Head C2 that Downey is "not currently wanted" is based on information available at the time of the assessment. If further evidence comes to light the matter would then be reviewed by an appropriate SIO".

126. On 23 July 2008 (p. 794) Mr McGowan emailed ADCI Graham and ACC Sheridan's D/Staff Officer in relation to the defendant's suspected involvement in the Enniskillen bombing, as follows: "In June 2007, following Operation Rapid review, a letter was issued stating that Downey was not considered to be On The Run by virtue of his not having lived in Northern Ireland. The letter added that he was not currently wanted by PSNI. There

was no caveat to the effect that he could become liable to arrest if further evidence came to light. I have just spoken with HET in relation to this matter. HET expressed some concern that Downey was not considered as wanted. They informed me that they have located a crucial piece of evidence in relation to a double murder for which we submitted a review template. It is probable that they will have an SIO create a new wanted alert in respect of the murders concerned. This situation reflects the circumstances catered for by the addition of a caveat in Op Rapid ICIS entries and the relevant letters. In this case however, presumably because Downey was not considered to be OTR, there was no caveat in the letter issued to the PPS. Given that Downey did not have a Northern Ireland address it is unlikely that he will now seek to live in this jurisdiction. It is of course possible that he might visit here and, if a new alert is created, be subject to arrest".

127. On 25 July 2008 (p.794) the D/Staff Officer replied stating that: "since the letter in relation to this individual went out some time ago stating he was not to be deemed as wanted I will need a report detailing what action should/can be taken now to present to ACC Sheridan as soon as possible".

128. On 28 July 2008 (p.793) Mr McGowan emailed ADCI Graham setting out the background in relation to the investigation of the defendant in connection with the Enniskillen bombing and continued: "… It has always been the case that new evidence could potentially be uncovered by HET or others investigating cases previously reviewed (under specific criteria) by Op Rapid. It is my understanding that it has been made known to concerned parties that the assessment of a person as "not currently wanted" was always subject to the condition that new evidence could result in that person becoming liable to arrest if located in this jurisdiction. Although the letter relating to Downey did not specifically carry this caveat all interested parties are apparently aware that this condition applies. HET have indicated that they will now seek to have a new alert created in respect of John Anthony Downey. Consequently he is likely to be described as wanted for murder upon creation by the HET of an appropriate alert. This office has not examined the murder investigation conducted by HET and has no remit to do so. There could however be value in a Senior Investigating Officer appointed by D/C/Supt Baxter liaising with HET on this matter in order to clarify the grounds to overturn the decision of the Op Rapid review. Despite the understanding that new evidence would overturn an Op Rapid assessment there is potential that PSNI could be accused of abuse of process or acting in bad faith, particularly since the letter specific to Downey did not contain the appropriate caveat".

129. On 29 July 2008 (p.792/3) ADCI Graham updated DCS Baxter and recommended that, before circulation was considered, an SIO should be appointed to review the relevant material and liaise with the PPS as appropriate.

130. An hour later on 29 July 2008 (p.794 A) Mr McGowan (who had been copied in on the earlier email) emailed ADCI Graham (copying in ACC Sheridan's D/Staff Officer) stating that: "I have advised HET of the existence of the DPP direction dated May 1985. I will also confirm that they are aware of the Met's interest. *I have checked PNC and the Met wanted alert for murder is still on the system (it does not specify the Hyde Park Bomb). The report from then Head C2 to ACC Crime Ops and the subsequent letter to the DPP do not state that Downey is wanted by the Met*". (*My emphasis*)

131. A few minutes later (p.794A) ADCI Graham replied (copying in DCS Baxter): "Noted. Thank you".

132. The series of emails dated 23-29 July 2008 (excluding the one dealing with the Hyde Park Bombing) were printed out by ADCI Graham on 29 July 2008 and were found by Mr Little during the disclosure exercise inside ADCI Graham's relevant 2007 Police Decision Logbook in front of the page dealing with the sixth template (which related to the Hyde Park Bombing). There was no relevant entry in ADCI Graham's 2008 Policy Decision Logbooks.

133. The PSNI did not alert the DPP (NI), or anyone else, to the fact that the defendant had been wanted by the Metropolitan Police in relation to the Hyde Park Bombing at the time of the critical correspondence in June/July 2007, or to the fact that the defendant was still wanted by the Metropolitan Police in July 2008.

134. ADCI Graham told DI Corrigan that he did not recall the 2008 emails, as did DCS Baxter (now retired). As I have already indicated, Mr Baxter also stated that there was no requirement to provide further information as per agreed parameters.

135. There was further email correspondence in relation to the Enniskillen bombing on 4 August 2008 (p. 792).

136. On 21 October 2009 an internal PSNI report (p.796) recorded that the defendant was one of a number of individuals whose name was checked against lists held by Operation Rapid with the result: "Status reviewed by Op Rapid and assessed as 'not currently wanted' by PSNI. *He is, however, alerted on PNC as wanted for murder 20/07/82 (Hyde Park Bombing)*". (*My emphasis*)

137. Again, nothing was done to alert the DPP (NI), or anyone else, in relation to the defendant being wanted by the Metropolitan Police in connection with the Hyde Park Bombing.

138. As to failure to warn the defendant, in the letter of 20 July 2007 and thereafter, that he was still wanted by the Metropolitan Police, Mr McGinty says in his second statement: "As set out in my earlier statement, I worked

closely with the PPS in respect of this scheme and other matters. *I am confident that if any information came to the attention of the PPS, NIO or this office that there was some specific doubt about Mr Downey or any other individual on the list, the matter would have been looked at again. There was no intention by officials to mislead any individual into believing it was safe to return to the jurisdiction and then arresting them when they did. The consequences of that happening would have been serious and cast doubt on the whole process. It would call into question the status of all others who had been notified they were safe to return*. In preparing for disclosure in the current case, counsel was given full access to all relevant files held by AGO, NIO, PPS and PSNI and other departments. I have been asked to comment on whether there was any further communication between PSNI and AGO regarding Mr Downey after 2008. There was not. I am equally confident that had information been passed to the PPS or NIO I would have been told. This was a difficult, time consuming and, in some ways, controversial process. *Had it come to our attention that Mr Downey, or any other individual had wrongly been told they could return to the jurisdiction without fear of arrest, we would have had a major problem. I would have immediately informed the Attorney General and DPP (NI) and, in the circumstances, the CPS. I cannot speculate on what we may have done after this. It would have been a major incident and would have been reflected as such on our files and those of the PPS and NIO*…". (*My emphasis*)

139. Mr Hain, who has been shown the underlying documentation and Mr McGinty's statement, states: "I have been made aware that John Downey, an "On The Run" applicant in July 2007 received a letter in the same terms as other persons at the same time. *I have seen the letter, which in phraseology repeated in letters to many applicants previously, provides an assurance that he was not liable to arrest if he entered the jurisdiction. On its face it informed him that he was not wanted in the north of Ireland. Nor was there any interest from any other police force in the United Kingdom (on the basis of information from the PSNI). I confirm that was the assurance that was intended by the Government to be understood by the recipient of such letters*… I note the internal communications in which requests for additional confirmation are made by officials at the Northern Ireland Office as to the exact position in relation to ten applicants of whom Mr Downey was one. In response the Northern Ireland Office is informed by the PSNI that all the names have been checked through the ICIS, the PNC and the An Garda Siochana computer systems. I note that the successive requests to ensure accuracy made by the Northern Ireland Office received confirmation of its understanding of Mr Sheridan's letter, provided by a Detective Sergeant, a Staff Officer to the Assistant Chief Constable. *The care with which the NIO sought to confirm its understanding is consistent with my experience of the way in which the scheme was and was required to be conducted and upon which the Government in its dealings with Sinn Fein on this issue depended. These were important assurances to be processed responsibly and carefully, issued in the name of the Government, intended by the Government to be*

reliable and anticipated as being relied upon… I have been asked to comment from the viewpoint of the Secretary of State had it been brought to my attention at any stage that a letter had been sent out by the Northern Ireland Office to Sinn Fein and to an individual which contained so serious an error. *I am entirely sure that it would have been considered right and appropriate immediately to inform Sinn Fein that a letter had been provided that was provided in error. I do not speculate as to what steps the prosecuting authorities would have taken, but as Mr McGinty rightly says, and as I can confirm, the British government did not intend individuals to be misled into believing they were safe to return to the jurisdiction and then be arrested. The opposite was the case; it was intended at all times that they should know with accuracy their position; hence the exceptional step taken from that time of the Weston Park talks and thereafter, of positively notifying Sinn Fein that particular individuals who had put their names forward were liable to arrest, an indication that no doubt allowed each to decide whether or not they might enter the jurisdiction in full knowledge of the risks if they did so. If despite what had been said in a letter to the contrary, Sinn Fein was thereafter informed that the individual concerned was still "wanted" he or she would have no doubt immediately been told; a transparent precautionary step would have in these exceptional circumstances been appropriately taken that would have allowed for the individual as well as the well being of the process as a whole to be protected from unintended risk, consistently with both the letter and spirit in which this unique scheme had been constructed. No mistake of such importance could or should have been permitted to have gone uncorrected. I am aware of how critically important it was throughout that most difficult of periods that promises made by and in the name of Government must be able to be taken at face value and adhered to*. The underlying difficulty all had to overcome was the fear that any parties to the process, including the governments concerned, might make false promises or might not be true to their word. The entire record of the more than ten years of extraordinary and often almost impossible obstacles to progress reflects precisely this. *The peace process is not one that was fixed at any moment of time, whatever the major milestones achieved. It was and is one that has required constant adherence on all sides to their undertakings*. I continue to maintain a close interest in the progression of the political process in Northern Ireland and maintain close contact with many of those currently involved in Government. I am aware of the level of serious concern and uncertainty that this situation has engendered; I provide this statement in the hope that the Court might be assisted by my assessment of what each letter was intended by the Government to provide". (*My emphasis*)

140. Mr Downey relied upon the letter sent to him by the NIO in July 2007 to travel outside the Republic of Ireland. In particular;

(1) In the summer of 2008, before travelling to Canada with his wife to visit his son and grandchild, the defendant (guided by the experience of his friend Danny Morrison) contacted the Canadian authorities to seek a temporary residence permit stating: "The reason for the above

application is that I served a term of imprisonment in Portlaoise prison in the Irish Republic in 1974. [Please see enclosed police cert] I was named in some British newspapers as being responsible for the Hyde Park & Regents Park bombings in 1982, which I strenuously deny. No warrant was ever issued by the British authorities to have me extradited and I understand from contacts which have taken place between the British and Sinn Fein that they, the British, have no further interest in me. I have strongly supported the peace process from the very beginning of the talks and I believe that the only way forward for all people on the island of Ireland north and south is in peaceful co-operation and mutual respect and understanding for each other…" The application was granted and the defendant duly travelled to Canada.

(2) As part of playing a "central and significant role" in the development of greater understanding between Republican Ex prisoners and Loyalist ex prisoners he visited Londonderry on 4 April 2009 and Belfast on 7 November 2009.

(3) He travelled to and stayed on the mainland of the United Kingdom in February, March and April 2010, April 2011, November 2011, July 2012 and January 2013 – all without incident.

(4) In 2012 he attended the National Commemoration of the Hunger Strikes which took place in Northern Ireland.

(5) As a continuation of being an active persuader for a peace strategy he led a Republican Group to two residential workshops with members of the Irish Border Security Personnel at the Corrymeela Peace Centre in Northern Ireland in November 2012 and March 2013.

141. As already touched on above, the defendant was arrested at Gatwick Airport on 19 May 2013 whilst in transit on route to Greece. The prosecution assert that he told the police "I am surprised that this had come up as I have travelled in and out of the UK on a number of occasions to see family and I have travelled to Canada from Dublin. When I went to Canada I contacted the UK government to check it would be OK as I didn't want any problems. They said it would be fine".

The defendant's medical condition

142. There is no doubt that the defendant suffers from a number of medical conditions – these are set out in the statement of his wife dated 2 January 2014, in a report from his GP and in the medical records which have been placed before the court. The conditions include, in particular, very high blood pressure and recurrent unpredicted collapse. It is not necessary to go into any further detail.

The relevant law

143. There was relatively little dispute between the parties as to the relevant law.

144. Adopting the formulation of Lord Dyson in R v Maxwell [2011] 1 WLR 1837 at para 13:

> "… it is well established that the Court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises…"

145. As to the first category I was referred, in particular, to *Attorney General's Reference (No 1 of 1990)* [1992] QB 630, *Attorney General's Reference (No 2 of 2001)* [2004] 2 AC 72, *R v S (SP)* [2006] 2 Cr App R 23 and *R v F (S)* [2012] QB 703. I bear in mind, in particular, the principles identified at para 21 of the judgment in *R v S (SP)*, namely that:

> "(1) Even where delay is unjustifiable, a permanent stay should be the exception rather than the rule;
> (2) where there is no fault on the part of the complainant or the prosecution, it will be very rare for a stay to be granted;
> (3) no stay should be granted in the absence of serious prejudice to the defence so that no fair trial can be held;
> (4) when assessing possible serious prejudice, the judge should bear in mind his or her power to regulate the admissibility of evidence and that the trial process itself should ensure that all relevant factual issues arising from delay will be placed before the jury for their consideration in accordance with appropriate direction from the judge;
> (5) if, having considered all these factors, a judge's assessment is that a fair trial will be possible, a stay should not be granted."

146. As to the second category, the judgment of Lloyd-Jones LJ in *SSHD v CC and CF* [2013] 1 WLR 2171 provides a helpful summary of the general principles to be applied, as follows:

> "91. In the present case it is common ground that we are concerned only with the second category of abuse. That limb is not related in any way to resulting unfairness in the ensuing proceedings. (See *Warren* per Lord Dyson at paragraph 35.) Its purpose is the more general one of protecting the integrity of the legal system and thereby maintaining the rule of law.
>
> 92. The threshold for the second category of abuse is very high. The question for the court will be whether the court's sense of justice and propriety or public confidence in the justice system would be offended if the proceedings were not stayed. I do not understand Lord Dyson in *Warren*

to qualify this very high threshold in any way. On the contrary his speech reaffirms it.

93. To establish an abuse of process under the second category involves more than the satisfying of a threshold condition. It requires an evaluation of what has occurred in the light of competing public interests. In *Latif* Lord Steyn explained as follows:

"The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed; *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42. *Ex p Bennett* was a case where a stay was appropriate because a defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The speeches in *Ex p Bennett* conclusively established that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. The general guidance as to how the discretion should be exercised in particular circumstances would not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crime should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means".

94. The abuse jurisdiction is not of a disciplinary character. Thus in *Bennett* Lord Lowry observed (at p.47 H):

"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. Accordingly, if the prosecuting authorities have been guilty of culpable delay but the prospect of a fair trial has not been prejudiced, the court ought not to stay the proceedings merely "pour encourager les autres".

The same theme is taken up by Lord Dyson in his speech in *Maxwell* at paragraph 24 where he refers to Lord Lowry's speech in *Bennett*. Similarly in *Warren* the Board implicitly endorsed the observation of Lord Lowry in *Bennett* while adding, with reference to the decision of the Court of Appeal in *R v Grant* [2006] QB 60 to refuse to order a retrial, a decision which it considered incorrect:

"[I]t may not always be easy to distinguish between (impermissibly) granting a stay in order to express the court's disapproval of official conduct "pour encourager les autres" and (permissibly) granting a stay because it offends the court's sense of justice and propriety. But it is difficult to avoid the conclusion that in *Grant* the proceedings were

stayed in order to express the court's disapproval of the police misconduct and to discipline the police". (at para. 37).

95. It is possible to identify factors which are often taken into account by the courts in performing this balancing exercise. However, Lord Steyn's words of caution against general guidance as to how the discretion should be exercised remain of critical importance. As Lord Dyson observed in *Warren* (at paragraph 36), the exercise of the discretion depends on the particular circumstances of each case and rigid classifications are undesirable. In the context of criminal proceedings the balance must always be struck between the public interest in ensuring that those that are accused of serious crime should be tried and the competing public interest in ensuring that executive conduct does not undermine public confidence in the criminal justice system and bring it into disrepute. With those warnings firmly in mind, it is appropriate to consider what factors have been considered in the authorities to be indications of abuse of process.

96. The connection between the abuse of executive power and the proceedings which are said to be an abuse of process is likely to be a highly relevant consideration. Thus it will often be the case that but for the wrongful conduct the defendant would not be before the court at all. However, the existence of such a causative link is neither a pre-condition nor a conclusive demonstration of abuse. It is simply a relevant consideration. Thus in *Maxwell* the majority considered that the fact that the confessions on which a retrial would be based would not have been made but for the misconduct was not determinative of whether there should be a retrial. Similarly in *Warren* Lord Dyson observed:

    "The Board does not consider that the "but for" test will always or even in most cases necessarily determine whether a stay should be granted on the grounds of abuse of process. The facts of the present case demonstrate the dangers of attempting a classification of cases in this area of the law and disregarding the salutary words of Lord Steyn. For reasons which will appear, it is the Board's view that the Commissioner reached the right conclusion in this case, or at least a conclusion that he was entitled to reach. And yet it was accepted at all times by the prosecution that *but for* the unlawful and misleading misconduct of the Jersey Police in relation to the installation and use of the audio device, the prosecution in this case could not have succeeded and there would be no trial unless the police were able to obtain the necessary evidence by other (lawful) means." (at paragraph 30).

97. Clearly the gravity of the misconduct and the degree of culpability on the part of the wrongdoers will be highly relevant in determining whether the threshold test has been satisfied and in which direction the balancing exercise should be resolved. In this regard the Secretary of State submits that as a matter of principle and authority actual knowledge of illegality

is necessary. It is submitted that misconduct cannot be so grave as to amount to an affront to the public conscience unless it is deliberate. Furthermore it is submitted that the reported cases have been concerned not with conduct that was merely negligent or even reckless but rather with instances of deliberate and flagrant disregard of legal requirements. In addition it is submitted that there is no case in which the required level of misconduct has been established after arguments as to the precise nature and effect of foreign local law and attempts to suggest that more enquiries should have been made by the authorities to establish its precise nature and effect.

98. I accept that actual knowledge has often been a key element in establishing an abuse of process. For example, in *R v Mullen* [2000] QB 520 the Court of Appeal recorded with approval the defendant's concession that proof of actual knowledge of illegality was required.

"Mr Mackay accepted that the burden of proving abuse of process is on the defendant and that knowledge on the part of the English authorities that local or international law was broken must be shown" (at p. 529D).

Similarly in *Bennett* Lord Griffiths stated the principle as follows:

"In my view your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of these procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party". (at p. 62G.)

99. However, it does seem to me that Mr O'Connor's approach in this regard is over-prescriptive. A case involving actual knowledge of illegality will necessarily be regarded as a particularly serious matter. However, the objective of maintaining the integrity of the legal system can be achieved only by a consideration of the entirety of the conduct in question and untrammelled by any rigid rules. Moreover, as Mr O'Connor himself submits, there are many gradations of states of mind including actual knowledge, wilful blindness, constructive knowledge and recklessness. The court should be free to reflect these matters in its examination of each case in the round. There may be situations in which reckless or possibly even negligent conduct could justify a stay on grounds of abuse of process. Everything will depend on an analysis of the particular features of each case in its entirety.

100. On behalf of the Secretary of State Mr O'Connor further submits that in a case of an alleged "disguised extradition" the party seeking to establish the abuse is required to prove not only a flagrant and knowing disregard of the law but also that the authorities colluded in or procured the deportation for some ulterior or wrongful purpose. I accept that it will usually be necessary to show that the UK authorities acted so as to

procure the individual's removal to the United Kingdom. (*R v Staines Magistrates' Court ex parte Westfallen* [1998] 1 WLR 652.) However, I consider that here once again Mr O'Connor's suggested approach is unduly prescriptive. Clearly, the existence of a wrongful ulterior motive will be a highly relevant consideration. However the court must be free to consider the conduct in its entirety.

101. In *Warren* the Board recognised that in abduction and entrapment cases the court will generally conclude that the balance favours a stay. However, it was at precisely this point in his speech (paragraph 26) that Lord Dyson warned against the undesirability of rigid classifications and emphasised the need to balance competing interests. Clearly it is insufficient to label a case as falling within a particular category. A challenge on grounds of abuse of process calls for a more refined analysis of the facts and the balancing of the competing interests. It is, however, instructive to observe the approach of the courts to abduction cases given the Respondents' contention that it is in substance what has happened to them in this case."

147. It was common ground that although coming under the umbrella of the second category there is a distinct body of case law in relation to alleged breach of promise cases. In this regard I was referred, in particular, to *Chu Piu-Wing v The Queen* [1984] HKLR 411, *R v Croydon justices, ex parte Dean* [1993] QB 769, *Bloomfield* [1997] 1 Cr App R 27, *Townsend* [1997] 2 Cr App R 540, *Hyatt/Wyatt* [1997] 3 Archbold News 2, *R v D* [2000] 1 Archbold News 1, *Edgar* (200) 164 JP 471, *Taylor* (2004) EWHC 1554 (Admin), *Abu Hamza* [2007] QB 659, *Guest v DPP* [2009] 2 Cr App R 26, *Gripton* (2010) EWCA Crim 2260, *Killick* [2012] 1 Cr App R 10 and the Northern Irish case of *McGeough* [2010] NICC 33 [2012] NIQB 11 [2012] NICA 28.

148. In *Abu Hamza* Lord Phillips CJ reviewed the authorities to date, and at para 54 of the judgment said: "These authorities suggest that it is not likely to constitute an abuse of process to proceed with the prosecution unless (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and (ii) that the defendant has acted on that representation to his detriment. Even then, if facts come to light which were not known when the representation was made, these may justify proceeding with the prosecution despite the representation".

149. It must however be noted that in *Gripton*, at para 27 of the judgement, the court observed: "Thirdly, so far as the approaches propounded in *Bloomfield* and *Abu Hamza* are concerned, we note that neither was intended by the court adopting it to be a comprehensive binding rule. In *Bloomfield* Staughton LJ expressly stated that the court was not seeking to establish any precedent or any general principle in regard to abuse of process. Similarly in *Abu Hamza* Lord Phillips CJ emphasised the difficulties of propounding a test of abuse of

process, and the formulation adopted in that case is expressed in terms that conduct would be unlikely to constitute an abuse of process unless certain criteria were satisfied. He was certainly not laying down requirements which would be indispensable in any case. The reason for this is clear: the courts are here concerned with considerations of fairness and they must be free to respond to the circumstances of each case".

150. Mr Blaxland QC helpfully summarised the Commonwealth authorities in relation to breach of promise at paras 136-137 of the defence Skeleton Argument.

First ground – Submissions

151. Whilst conceding that this was his weakest ground, Mr Blaxland argued that it is not possible for the defendant to receive a fair trial. He relied, amongst other things, on the following:
(1) That the alleged offences took place more than thirty years ago.
(2) That a significant part of that delay was caused by the decision not to seek extradition.
(3) No identification parades or other form of independent testing of the identification evidence were undertaken at the material time (despite having been discussed with the Garda as early as 1983); the witness Mark Chrusciel is now dead; DC Kemp (the officer who obtained the artist's impression of the defendant) can no longer remember the precise circumstances of doing so; the artist Worsley (who created that impression) is now dead; the "identification picture" referred to by the witness Phyllis McGowan cannot be found; the artist Waller who created an artist's impression with McGowan (upon which there is a description that bears little relationship to McGowan's statement) is also now dead; and there are various troubling aspects of the original police investigation (for example deliberate leaks to the press naming the defendant and another man called Sean O'Callaghan, who was in fact a police informant being given cover by the disclosure), that cannot be properly explored absent the lead investigator Detective Superintendent Lamper who is now also dead.
(4) The defendant's ill health.

152. As part of this submission, and whilst accepting that a violation of the defendant's Article 6 ECHR rights would not lead inexorably to a termination of the proceedings, Mr Blaxland argued on foot of *Attorney General's Reference (No.2 of 2001)* (above) that the defendant was "substantially affected" within the meaning of Article 6 when he was deliberately blown to the press in the 1980's, at which point he was "officially alerted" to the likelihood of criminal proceedings against him.

153. In reply, Mr Altman QC argued, in short, that the defendant was not "officially alerted" in the 1980's and that all the matters complained of could

be fairly dealt with within the trial process – whether by way of the exclusion of evidence, or by appropriate directions to the jury, or by sitting hours which accommodated the defendant's health problems.

154. When I suggested the possibility of submissions under s78 of the Police and Criminal Evidence Act 1984 in relation to the identification evidence to test the proposition that the trial process could fairly deal with the issues, both sides agreed that that was not necessary.

First ground – Conclusion

155. Notwithstanding the points made on the defendant's behalf I have no doubt that it is possible to give the defendant a fair trial. The trial process will ensure it. Although not critical, and for what it is worth, I also incline to the view that the defendant was not "officially alerted" in the 1980's.

Second ground - Submissions

156. The essence of Mr Blaxland's submission in relation to this ground was that, even if the defendant had received no written assurance in 2007 he (and the other cases not solvable by the administrative scheme) were subject to an ongoing commitment made by the UK Government since 2001 to take steps not to pursue prosecutions in cases to which the provisions of the early release scheme applied, such that it amounted to an affront to justice to prosecute the defendant for qualifying offences.

157. In this regard Mr Blaxland invited attention, amongst other things, to;
(1) The Government's sympathetic attitude towards OTRs throughout the post Good Friday Agreement negotiations.
(2) The private commitments given – see e.g. May 2000 (paras 32 and 33 above), January 2001 (para 45 above), and December 2006 (para 74 above).
(3) The public assurances given – see e.g. March 2001 (para 48 above), mid-2001 (para 53), and May 2003 (para 66 above).

158. Mr Blaxland submitted that such statements gave rise to an expectation that prosecutions would not be pursued in respect of those whom (like the defendant) would otherwise qualify under the early release scheme and thus serve no more than two years of any sentence of imprisonment imposed.

159. Mr Blaxland accepted that the resolution of this ground required a balancing exercise between the public interest in requiring that those who are accused of serious crimes should be tried and the competing public interest in ensuring that executive conduct does not undermine public confidence in the criminal justice system and bring it into disrepute.

160. Mr Altman submitted, in short, that the Government's sympathetic attitude towards OTRs and the general commitments and assurances given both privately and publicly came nowhere near making this prosecution an affront to justice. He points out that the reality (clearly understood on both sides and eventually publicly) was that OTRs remained subject to prosecution if there was sufficient evidence against them.

Second ground – Conclusion

161. I agree with Mr Altman's submissions. Whilst I infer that the defendant was told about the private commitments, neither they nor the public assurances amounted to any sort of indication such as, in themselves, to make this prosecution one which, upon that limited ground, offends the court's sense of justice. The balancing exercise in relation to this submission comes down in favour of the continuation of the prosecution. That is not, however, to say that the commitments and assurances are not relevant in relation to the third submission – they plainly are.

Third ground – Submissions

162. This ground involves a balancing exercise between the public interest in ensuring that those who are accused of serious crime should be tried and the competing public interests in ensuring that executive conduct does not undermine public confidence in the criminal justice system and bring it into disrepute, and in holding officials of the state to promises they have made in full understanding of what is involved in the bargain.

163. The parties' arguments in relation to this submission are set out in detail in their respective written submissions supplied on 2 February 2014.

164. Mr Blaxland submitted, amongst other things, that;

(1) The only reasonable interpretation of the 20 July 2007 letter was that it provided an unequivocal promise to the defendant that he would not be prosecuted for the Hyde Park Bombing – given that e.g. it was in significant contrast to what had publicly been stated in 1983 – 1987 and the March 2006 letter; it expressly informed him that he was not, to the knowledge of the PSNI, of any interest to any other police force in the United Kingdom and that could only mean to him that he had been given specific reconsideration (as others had been or later were); such reconsideration was the essence of the administrative

scheme; there was express reference to the PSNI and to the Attorney General; he was an active proponent of the peace process; the timing would have appeared non coincidental with the swearing in of the Northern Ireland Assembly in May 2007; the overall circumstances in which the letter was provided were intended to engender confidence in the context of such letters; and it would be wrong to construe the defendant's letter to the Canadian authorities as demonstrating a lack of confidence in the assurance letter – rather than the reverse.

(2) The only limitation in the assurance intended to be conveyed by the letter was the emergence of fresh evidence or further offences – neither of which arise in this case. In this regard the administrative scheme was not intended to provide limited comfort, and the internal proposal that it could be amended to do so was rejected as being incompatible with the purpose and intent of the scheme. In any event the four principal witnesses – Powell, Kelly, Hain and McGinty all agree about the intended effect of the letters:
"Powell: "*to reassure the individuals concerned that they could return to the UK without fear of arrest.*" Kelly: "*an unequivocal statement… that they meant what they said… that the recipients thereafter believed that they were able to organise their lives accordingly.*" McGinty: "*the scheme only sought to identify those individuals who were able to return without fear of arrest.*" Hain: "*The British government did not intend individuals to be misled into believing they were safe to return to the jurisdiction and then arrested*"."

(3) The nature and consequence of the detriment suffered by the defendant was relevant to the balancing exercise – particularly given that he was a proponent of the peace process.

(4) As the prosecution accepted in oral argument, the defendant was positively misled.

(5) Whilst the likelihood was that the letter was the product of error, that conclusion remained open to doubt given that the PSNI was aware in 2007 that the defendant was still wanted for the bombing; that as a result they needed to check with the Metropolitan Police what the current position was before deciding whether to issue a positive letter; and the assertion in the D/Staff Officer's email of 20 July to the NIO that such checks had been carried out (with the obvious implication that they have been negative). The failure by the prosecution to conduct a full investigation into the circumstances in which the letter was issued meant that there remained gaps and if, in consequence, the court was left in lingering doubt as to whether all relevant material had been obtained, then the indictment should be stayed for that reason alone.

(6) If it was an error, it was the responsibility of the State – see e.g. *Blackledge* [1996] 1 Crim App R 326.

(7) The State's culpability was very high – the prosecution had presented it as a "catastrophic" system failure. It involved both the PSNI and the Attorney General's office. The former because it was aware that the

defendant was wanted, and was aware of the need to conduct PNC checks and to report their result accurately. The latter because, by July 2007, there was no real consideration or oversight by the Attorney General's Office and thus the letter was misleading.

(8) The seriousness of the original "catastrophic" failure was compounded by the further failure, still unexplained, to put matters right in 2008 and 2009 as to which Mr Hain had commented; "*No mistake of such importance could or should have been permitted to have gone uncorrected*"; and Mr McGinty had stated: "*Had it come to our attention that Mr Downey; or any other individual, had wrongly been told that they could return to the jurisdiction without fear of arrest, we would have had a major problem… I cannot speculate on what we may have done thereafter but this would have been a major incident…*".

(9) The breach of promise in this case was particularly serious because it was given as part of a wider process – involving multiple recipients and a consequent effect on the wider political process.

(10) The seriousness of the offence had to be viewed in the light of the Good Friday Agreement and the 1998 Act and the inference that Parliament had assessed that the continued public interest in the prosecution and punishment of all pre-Good Friday Agreement terrorism offences, however individually serious, yielded to the greater public interest in maintaining the peace process.

(11) The case fell fairly and squarely within the *Abu Hamza* criteria.

165. On behalf of the prosecution Mr Altman submitted, amongst other things that:

(1) The charges that the defendant faces were of the utmost gravity which was a powerful public interest in favour of the prosecution.

(2) The letter to the defendant was equivocal and qualified.

(3) That said, the assurance that the PSNI was not aware of any interest in him from any other police force in the UK was wrong and the result of fundamental failure – in that the PSNI had been aware since 2003, and was aware at the material time in 2007, that he was wanted by the Metropolitan Police in relation to the Hyde Park bombing.

(4) The defendant must have known or believed that the letter was wrong given his knowledge of the media reports in 1983-1987, the March 2006 letter, and his failure to produce the July 2007 letter to the Canadian authorities in 2008.

(5) The July 2007 letter served merely to confirm the defendant's status as best the authorities were able to establish it, and the fact that the information was wrong demonstrated the frailty of the system.

(6) The letter gave no unequivocal representation that the defendant would not be prosecuted, and made no express reference either to the "involvement" of the Attorney General or the SSNI in the decision-making process, and any criticisms of the absence of evidential or

public interest assessment by the PPS or the Law Officers overlooked the simplicity of what the PSNI should have done to avoid error.

(7) The claim to "lingering doubt" in relation to the disclosure exercise was entirely misplaced, given that any decision not to prosecute would not have been that of the PSNI, and if there had been such a decision the defendant would not have remained circulated – with random border checks (per the statement of DCS Hanley) being the likely cause of the failure to arrest the defendant sooner.

(8) Given the burden of proof on an abuse application the defence concession of the likelihood of error being the cause sufficed to make it impossible to find any cause other than unexplained systemic or individual error.

(9) The political process was not relevant to the facts to be weighed in the balancing exercise given that the Government's public commitments were made to the public at large and not directed to the situation of individual OTRs; those commitments could only be delivered by a legislative amnesty, which never materialised; they were not capable of being delivered, and were not delivered by the administrative scheme and the assurance letters, despite the intentions of the politicians; the administrative scheme provided no complete amnesty, as was understood by all; at no time did any member of the Government or police or of any prosecution service make any private promise to the defendant personally about his status; the defendant was not party to the private negotiations between the Government and Sinn Fein or to the private correspondence between Ministers, or their staff, setting out their private views about the OTR administrative scheme and its intentions; and there was no statement from the defendant, and no evidential support, for the contention that the establishment of the new executive in May 2007 led the defendant to proceed on the basis that that was the trigger for the letter which he received in July.

(10) If the court found that the letter did amount to an assurance not to prosecute the defendant, making himself amenable to the jurisdiction was a very different matter to the letter "inducing" him to do so; at no time did anyone in authority deliberately mislead him into believing he was safe to return; it was not brought to the attention of anyone outside the PSNI that there had been either a failure to check the PNC or that such a check had produced a positive result; rather, on the day the letter was sent the PSNI assured the NIO that the relevant check had been carried out.

(11) The alleged wider detriment to the peace process was not a legitimate area of enquiry for the court on the issue whether there had been an abuse of process - that was a matter for the politicians or Parliament to address. In any event there was no evidence that up to and including July 2007 the defendant was close or so close to the further development of the peace process as to make his presence in

Northern Ireland of such significance as to make an important public interest factor against prosecution.

(12) On the exceptional facts of this case the balancing exercise fell in favour of the prosecution – the peace process had not extinguished prosecution for outstanding terrorist crimes, it had simply sought to resolve the status of OTRs and put them on an equal footing to those benefiting under the Good Friday Agreement where checks showed it was appropriate to do so. When striking the balance, the non-deliberate misleading of the defendant since July 2007 should yield to the greater interest in the prosecution of those accused of the gravest crimes.

Third ground – Conclusion

166. Whilst I have necessarily had to consider, and to set out at length, aspects of the peace process in Northern Ireland it is no part of my function to express a view about the rights or wrongs of them, save to the extent required in deciding whether it offends the court's sense of justice and propriety to be asked to try the defendant in the particular circumstances of this case.

167. In conducting the necessary balancing exercise (in which there is an obvious overlap between the public interest in ensuring that executive conduct does not undermine public confidence in the criminal justice system and bring it into disrepute, and the public interest in holding officials of the state to promises they have made in full understanding of what is involved in the bargain) I recognise that the threshold for a stay is a very high one, and that it involves an evaluation of what has occurred in the light of the competing public interests involved. It is not a disciplinary jurisdiction, is untrammelled by rigid rules, and all depends on the particular facts of the case viewed in its entirety.

168. I accept Mr Altman's submission that I should not take into account any effect that my ruling might have on the continuing peace process – that is a matter for politicians and Parliament. But that does not mean that I propose to ignore the fact that the events with which I am concerned occurred during an international peace process in which the building of confidence and the ability to rely upon assurances given were critical elements.

169. I also take Mr Altman's point that neither the defendant nor the Sinn Fein negotiators (save to the extent that such matters were thereafter revealed to them) would have been aware of internal communications within Government, the DPP(NI) / PPS and the PSNI. But, notwithstanding the absence of a statement from the defendant himself, and the fact that (in his statement) Mr Kelly does not deal with what passed between himself and the defendant in relation to the letter, there is an obvious inference (which I draw) that the defendant was told about the assurances that had been given to Sinn Fein, and (against that background) was also told about the

confidence with which he could rely upon the assurances given to him in the letter of 20 July 2007.

170. The vast majority of the materials now before the court were originally in the possession of the various Departments and Services which were the subject of the disclosure exercise. Hence, until disclosure, the defence were largely unable to investigate what had happened. There was no investigation as such on behalf of the prosecution until the hearings commenced, and then only an informal one. There was further disclosure, some of it significant, during the hearings. There remain gaps in the documentation and a lack of sensible explanation as to what actually happened within Operation Rapid in relation to the defendant. Given that it was only viable for the prosecution to get to the bottom of what actually happened, and albeit that there is a burden on the defence on a balance of probabilities, the gaps and lack of sensible explanation cannot be relied upon by the prosecution in their own favour. On the other hand, I am not persuaded that, given the gaps and lack of sensible explanation, I should grant the stay sought on that basis alone.

171. Applying the burden of proof on the defence on a balance of probabilities, I have no hesitation in accepting the powerful evidence of Mr Powell, Mr Kelly and Mr Hain. I see no significant conflict between their evidence and that of Mr McGinty, which I also accept.

172. In broad terms, and other than as indicated immediately above, I accept the arguments advanced by Mr Blaxland and reject those advanced by Mr Altman.

173. Applying the burden and standard of proof that I have indicated, and whether as a result of direct evidence or reasonable inference, I find the following core facts:

(1) At all material times the defendant was a citizen of the Republic of Ireland, and was domiciled there.

(2) At all material times from 29 May 1983, save for a short period in 1994, it was recorded on the PNC that the defendant was wanted by the Metropolitan Police for conspiracy to murder on 20 July 1982.

(3) From at least October 1984 onwards, the defendant was aware that he was wanted by the Metropolitan Police in relation to the Hyde Park Bombing.

(4) In November 1989 a final decision was taken not to seek to extradite the defendant from the Republic of Ireland.

(5) From at least the spring of 2000 in private, and from March 2001 in public, the Government assured Sinn Fein that it was sympathetic to the argument that the position of the OTRs was an anomaly and that the issue would be addressed.

(6) The beginnings of what became the administrative scheme in relation to OTRs, which was the product of suggestions made by the Government, can be seen in events, in particular, in April/May 2000.

(7) The beginnings of what became the broadly standard letter sent to those who were not wanted can be found in letters from the Attorney General to the SSNI and the NIO in November 2000 and mid-March 2001.

(8) The standard letter did not amount to an amnesty as such. However, its terms (and in particular the references to the SSNI and the Attorney General) were intended to and did make clear that it was issued in the name of the Government and that the assurances within it could be relied upon with confidence as meaning what they said, namely an unequivocal statement that the recipient was not wanted - with the obvious implication from the remainder that thus the recipient would not be arrested or prosecuted unless new evidence came to light or there was a new application for extradition.

(9) As Mr Powell says in his witness statement: "What each letter was intended to reflect, was that on the basis of information then available to the authorities and carefully considered in each case individually, an assurance was being given that the individual would not be subject to arrest and subsequent prosecution if he or she returned to the United Kingdom…..The intention behind the British Government giving written assurances to individual OTRs was to try to resolve the issue given the failure to find a workable general approach and to provide individual letters that Sinn Fein could use to reassure the individuals concerned that they could return to the UK without fear of arrest".

(10) As Mr Hain says in his witness statement: "It was intended that the assurance be just that, reliable assurances as to the position of the applicants and implicit in that, that the process by which the assurances had come to be given, had been competent and robust."

(11) The assurances given in the letter were not only given in the name of the Government in the course of an international peace process, but were intimately connected with the criminal justice system in respect of very serious offences.

(12) Accordingly, at least until 2007, it was clearly appreciated by those involved in the conduct of the administrative scheme that it was vitally important that the relevant checks were exhaustively and accurately done, and that the results were correctly notified to each recipient. Hence the amount of time and care that was taken in the conduct of the scheme up to 2007.

(13) As Mr Kelly says in his witness statement: "There had been throughout the administrative process a reliance that those responsible for preparing and presenting an assurance (or a refusal) were in a position to provide an unequivocal statement. It was on that basis that Sinn Fein felt able to advise those who had sought its help in asking for such assurances, that they meant what they said and on this basis, that the recipients thereafter believed they were able to organise their lives accordingly."

(14) It was equally appreciated by the Government that an error in telling someone that they were not wanted, when in fact they were, would be an extremely serious matter ("the worst outcome") both politically and legally – with the likelihood of an abuse of process application based upon a breach of the relevant assurance in the letter.

(15) It was such concerns that led, amongst other things, to:

(a) Correcting the error in relation to the individual referred to in the Attorney General's letter of 29 January 2001.

(b) The rejection by the DPP(NI) and the PSNI in March/April 2002 of the more rough and ready (and therefore more high risk) approach then being mooted.

(16) In March 2006 the defendant was told that he was wanted – albeit that the relevant letter was not clear as to whether that was in relation to offences in Northern Ireland, to the Hyde Park Bombing, or to both.

(17) Operation Rapid commenced in around February 2007.

(18) Checking the PNC was a straightforward process.

(19) At the time of Operation Rapid's review of the defendant's case, it was aware that the defendant was wanted by the Metropolitan Police in relation to the Hyde Park bombing, but failed to pass that on to the DPP(NI).

(20) That was, as the prosecution conceded, a catastrophic failure.

(21) It was compounded by the fact that:

(a) Operation Rapid was aware of the need to check whether an individual was wanted by another UK police force.

(b) When specifically asked by the NIO (before the issue of the letter to the defendant) whether such a PNC check had been done in relation to the defendant (and others) Operation Rapid informed the NIO that such checks had been done, but failed to mention that the check in relation to the defendant had shown that he was wanted by the Metropolitan Police in relation to the Hyde Park bombing.

(22) When the defendant received his letter he was entitled to and did believe that it was the product of careful and competent further work, and that there had been a genuine and correct change of mind about him – particularly given that he was a supporter of the peace process. He also believed, as a result of assurances (whether direct or indirect) from individuals in Sinn Fein who had been involved in the negotiations with the Government that he could rely upon the assurances given in the letter.

(23) Hence he relied upon the assurance given by the Government that; "The Police Service of Northern Ireland are not aware of any interest in you from any police force in the United Kingdom" – which he rightly believed to be an assurance that if he went to the UK mainland he would not be at risk of arrest or prosecution unless (as the letter went on to say) "…any other outstanding offence came to light, or if any

request for extradition were to be received" – neither of which apply in his case.

(24) However that assurance was wholly wrong – he was wanted by the Metropolitan Police in relation to the Hyde Park Bombing, which involved the causing of an explosion and four murders. Thus, as the prosecution conceded, the defendant was wholly misled

(25) The defendant was not aware that in 2007 the Attorney General was no longer as closely involved in the administrative scheme as he had been the case in the past.

(26) The catastrophic failures of Operation Rapid in 2007 were further compounded in 2008, when it was appreciated by Operation Rapid that the DPP(NI) had not been informed in 2007 that the defendant was wanted for the Hyde Park bombing, but no step was taken to put matters right.

(27) The Operation Rapid failures were further compounded in 2009, when it was again appreciated that the defendant was wanted for the Hyde Park bombing, but nothing was done to put matters right.

(28) As Mr Hain said in his witness statement: "No mistake of such importance could or should have been permitted to have gone uncorrected".

(29) As yet, there has been no sensible explanation for the various Operation Rapid failures.

(30) Relying on the letter, the defendant travelled to Canada, and on a number of occasions to Northern Ireland (including visits in furtherance of the peace process) and to the UK mainland.

(31) The defendant was again acting in reliance on the letter when he sought to transit Gatwick Airport on route to Greece on 19 May 2013.

(32) As the prosecution conceded in argument the defendant suffered detriment as a result - by way of arrest, the loss of his freedom for a time, the imposition of strict bail conditions, and being put at risk of conviction for very serious offences (albeit that the latter is tempered, to some extent, by the fact that even if convicted of all the offences he would, in consequence of the 1998 Act, serve no more than two years in prison).

174. I reject the prosecution arguments based on the case of *McGeough* (above) in which the facts were very different.

175. Given the core facts as I have found them to be, and the wider undisputed facts, I have conducted the necessary evaluation of what has occurred in the light of the competing public interests involved. Clearly, and notwithstanding a degree of tempering in this case by the operation of the 1998 Act, the public interest in ensuring that those who are accused of serious crime should be tried is a very strong one (with the plight of the victims and their families firmly in mind). However, in the very particular circumstances of this case it seems to me that it is very significantly outweighed in the balancing exercise by the overlapping public interests in ensuring that executive

misconduct does not undermine public confidence in the criminal justice system and bring it into disrepute, and the public interest in holding officials of the state to promises they have made in full understanding of what is involved in the bargain. Hence I have concluded that this is one of those rare cases in which, in the particular circumstances, it offends the court's sense of justice and propriety to be asked to try the defendant.

176. I therefore uphold this ground and propose to order that the indictment be stayed.

Fourth Ground – Submissions

177. It will be recalled that this ground is premised on the failure of all the preceding grounds. Therefore, in view of my conclusion in relation to the third ground, I can deal with this ground shortly.

178. In essence, Mr Blaxland argued that extradition cases, such as *Kakis v The Government of the Republic of Cyprus* [1978] 1 WLR 779, demonstrated that it was rare for cases involving both substantial delay and any breach of a "sense of security from prosecution" to result in extradition. Therefore it was submitted that because both exist in this case, and given the cumulative effect of the other grounds, there should be a stay.

179. Mr Altman argued that there was no merit in this ground, pointing out that reliance on *Kakis* was disapproved of in *Abu Hamza* (above).

Fourth ground – Conclusion

180. I reject this ground.

Overall Conclusion

181. For the reasons set out above, I reject the first, second and fourth grounds for a stay advanced on behalf of the defendant. However, again for the reasons set out above, I uphold the third ground and order that the indictment in this case be stayed.

Sweeney J
21 February 2014