# THE HIGH COURT

**[2024] IEHC 515**

**BETWEEN** **Record No 2023 EXT 130**

**MINISTER FOR JUSTICE**

**APPLICANT**

**v.**

**PETER ANTHONY KEATING**

**RESPONDENT**

**JUDGMENT of Mr. Justice Patrick McGrath delivered on the 15th day of July 2024**

1. In this application, the applicant seeks an order for the surrender of the respondent to the United Kingdom on one Trade and Co-Operation Agreement warrant ('TCAW').

2. This warrant was endorsed by the High Court on the 17 August 2023. The Respondent was arrested on the 14th of September 2023 and produced to the High Court on that date. He has been remanded in custody on this matter since that date.

3. I am satisfied that the person before the court, the respondent, is the person in respect of whom this TCAW was issued. No issue is taken in relation to identity.

4. The minimum gravity requirement under the European Arrest Warrant Act 2003 (as amended) ['the 2003 Act'] is met as the maximum sentence in respect of these alleged offences range from 5 to 10 years imprisonment.

5. I am satisfied that none of the matters referred to in sections 21A, 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the 2003 Act"), arise for consideration in this application and surrender of the respondent is not precluded for any of the reasons set forth in any of those sections.

6. The TCAW was issued by District Judge John Zani at the City of Westminster Magistrates Court on the 24th of November 2022, an issuing judicial authority within the meaning of the 2003 Act and the Trade and Co-Operation Agreement.

7. At Part B of the warrant, it is stated that a warrant of arrest was issued on the 16th of August 2022 at Westminster Magistrates Court for nine offences: 2 offences of Conspiracy to Possess a firearm, 2 offences of Conspiracy to Possess Ammunition, 2 offences of Conspiracy to Possess a Prohibited Weapon, 2 offences of Conspiracy to Possess Prohibited Ammunition and 1 offence of Conspiracy to Pervert the course of Justice. The Respondent is sought for prosecution for these offences.

8. The Respondent delivered points of objection on the 9th of November 2023. At the section 16 hearing, the Respondent pursued the following objections:-

   (i) His proposed temporary surrender to the United Kingdom, in the course of his serving a sentence of imprisonment in this Jurisdiction, creates significant uncertainty in respect of a constitutional right not to be deprived of one's liberty *'other than in accordance with law.* His proposed surrender would therefore

amount to a violation of his right to liberty under Article 40.4 of the Constitution;

(ii) The Applicant has not demonstrated correspondence between the offences alleged in the United Kingdom and offences in this jurisdiction;

(iii) The alleged offences were committed outside the territory of the Requesting State. Surrender must be refused as the laws of this State do not allow for the prosecution of offences committed in similar circumstances; and

(iv) If surrendered the Respondent will be exposed to prison conditions and a regime of pre-trial detention that will violate his rights under the Constitution, including his right to physical and mental integrity and his right not to put at risk of inhuman and degrading treatment such that his surrender would be in breach of section 3 of the European Convention on Human Rights Act, 2003 and Articles 3 and 8 of the European Convention on Human Rights.

***Breach of Article 40.4 of Constitution***

9. The Respondent was sentenced by the Special Criminal Court in this State on the 2nd of September 2021 to a sentence of 12 years imprisonment, with the final year suspended and backdated to 1st of July 2020. His scheduled release date is sometime in 2028. The Respondent submits that this extradition request exposes his Irish sentence to a significant level of legal and factual uncertainty. He makes this submission in circumstances where he states no clarification has been provided to the effect that his surrender on foot of this TCAW would have in relation to his current sentence.

10. The Respondent further submits that this uncertainty gives rise to significant legal and factual unknowns in the Respondents knowledge in relation to his deprivation of liberty,

in particular its factual and legal basis. Referring to *A v Governor of Arbour Hill Prison* [2006] IESC 45 and *Minister for Justice v Tobin* [2012] IESC 37, the Respondent submits that legal certainty in sentencing matters is an established principle in this jurisdiction and the uncertainty in his case, were he to be surrendered on foot of this TCAW, violates his constitutional right to liberty under Article 40.4 of the Constitution particularly in light of his right not be deprived of liberty *'otherwise than in accordance with law'.*

11. The Applicant does not dispute the essential constitutional requirement of certainty in the deprivation of liberty. She however disputes that the current request by the United Kingdom for his temporary surrender on foot of this TCAW gives rise to any uncertainty in this regard.

12. The Minister submits that the question of temporary surrender only arises in the event that an order for surrender is made and cannot give rise to an argument against surrender. Contrary to the submission made by the Respondent, the Applicant says that this TCAW and s19 of the 2003 Act (giving effect to Article 622 of the Trade and Co-Operation Agreement), provide a framework of certainty which is to his advantage. Section 19 of the 2003 Act provides:-

*'(1) Where a person to whom an order under section 15 or 16 applies has been sentenced to a term of imprisonment for an offence and is, at the time of the making of the order, required to serve all or part of that term of imprisonment in the State, the High Court may, subject to such conditions as it shall specify, direct that the person be surrendered to the issuing state for the purpose of his or her being tried for the offence to which the relevant offence warrant concerned relates.*

*(2) Where a person is surrendered to the issuing state under this section, then any term of imprisonment or part of a term of imprisonment that the person is required to serve in the State shall be reduced by an amount equal to any period of time spent by that person in custody or detention in the issuing state consequent upon his being surrendered, or pending trial'*

13. Firstly, I agree that it is premature to consider these matters until an order is made under Section 16 of the 2003 Act and an application is thereafter made for the Respondents temporary surrender. The time at which to consider this issue is when such an application is made and the issues raised by the Respondent in this regard are not relevant to the question now before the Court of whether or not to make an order for surrender under S16 of the Act.

14. The matter of temporary surrender and the provision of undertakings was considered by Edwards J in *Minister for Justice v Gordon* [2013] IEHC 515 and he commented as follows:-

*'Further, the issuing judicial authority has indicated that if it receives a request for the necessary undertakings from this Court to facilitate the temporary surrender of the respondent in this case it will provide those undertakings.*

*In the circumstances, the Court is disposed in principle to make an order for the conditional surrender of Mr. Gordon to enable him to face trial in Northern Ireland for the offences to which the European arrest warrant relates. The section 19 order will not, however, be made until the undertakings that this court is disposed to request from the issuing state have been received in writing from the issuing state'*

15. The issuing judicial authority has here indicated in Paragraph F of the TCAW that a request for temporary surrender will be made in the event that an order for surrender is made under s.16 of the Act. Upon receipt of such a request, this court will consider whether to surrender the respondent temporarily and what, if any, conditions, or undertakings must be provided by the issuing Judicial Authority. The Respondent will be able to make any arguments he deems appropriate in response to any such application for temporary surrender and the Court will of course be entitled to refuse allow temporary surrender if not satisfied with the undertakings provided, should the same have been requested.

16. In addition, although this matter is more properly to be resolved at any s19 hearing, it would appear that a great degree of certainty would likely flow from the making of a s16 order followed by a s19 temporary surrender.

17. This ground of objection is therefore dismissed.

***Correspondence***

18. The Respondent submits that the offences set out in the TCAW do not correspond to offences under the laws of this State.

19. The TCAW is a Warrant issued in accordance with Article LAW.SURR.112 of the Trade and Co-Operation Agreement. It is therefore necessary to demonstrate correspondence in accordance with s38 of the 2003 Act.

20. Section 5 of the 2003 Act provides:-

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

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

22. I am satisfied that the acts or omissions that constitute offences 1,2,6 and 7 as set out in the TCAW correspond with the offence of conspiracy to possess a firearm contrary to Section 2(1) of the Firearms Act, 1925 (as amended). Apart from the issue of extra territoriality and the submission that surrender was barred by the operation of Section 44 of the Act, no other issue was taken in that regard on these offences. The issue of extra territoriality and section 44 is dealt with separately below.

23. I am further satisfied that the acts or omissions that constitute offences 3, 4, 8 and 9 as set out in the TCAW correspond with the offence of conspiracy to possess a prohibited weapon (or ammunition) contrary to Section 2(C)(2) of the Firearms Act, 1925 (as amended). Once again part from the issue of extra territoriality and the submission that surrender was barred by the operation of Section 44 of the Act, no other issue was taken in that regard on these offences. The issue of extra territoriality and section 44 is dealt with separately below.

24. I am also satisfied that the acts or omissions that constitute offence 5 as set out in the TCAW correspond with the offence of conspiracy to pervert the course of justice under Irish Law.

25. In *Minister for Justice v Lown* [2021] IEHC 831, Burns J considered the nature of this offence and made the following observations at paragraph 15:-

*'I am satisfied that there is no closed list of acts which may give rise to the offence of perverting the course of justice, but a positive act is required and mere inaction is insufficient. In the current case, the respondent is alleged to have carried out a positive act in throwing the computer into the pond. Such action had a tendency to, and was intended to, pervert the course of justice in that it had a tendency to, and was intended to, frustrate the police in the exercise of search powers, the collection of evidence, the investigation of offences and ultimately the prosecution of offences. I am satisfied that if similar action was taken in similar circumstances in this jurisdiction, same would constitute the offence of attempting to pervert the course of justice. I dismiss the respondents objection that correspondence cannot be established with the offence in the EAW of perverting the course of justice.'*

26. In *Minister for Justice v Hill* [2009] IEHC 159, Mr Justice Peart rejected a claim that s44 was engaged in circumstances where the allegation was that the Respondent had posted a package with a DVD from Ireland to the Presiding Judge and Foreman of the Jury during a trial in London, intending to influence or affect that trial. He concluded that the locus of the perversion of justice is where the process sought to be interfered with is taking place. At page 12 of the Judgment, he concluded:

*'In the present case the respondent posted his packages from Ireland with the intention that they have an effect in England by the intended recipients receiving them in England, namely that the course of justice be perverted. While the authorities to which I have referred have involved offences of a different kind, they are similar in principle to that for which the Respondent is charged in the United Kingdom. That offence can be seen as a 'result offence' where the intended result was to be achieved in the United Kingdom though the act which commenced the offence was done abroad (i.e. Ireland). It is a continuing offence, since the intention behind the posting of the packages was that they be received in England by those intended to be affected in some way by their receipt. I see no reason why as a matter of principle that common law offence should not be considered as triable in the jurisdiction were that result or effect was intended to be achieved.*

*It follows in my view that as such the offence with which the respondent is charged in the issuing state is not one for which his surrender is prohibited by s.44 of the Act, since it is not an offence which by virtue of having been committed outside the issuing state would not be triable in this jurisdiction if it had been committed here'*

27. Here the allegation is that this Respondent, together with his co-conspirators including Thomas Kavanagh, conspired to obtain and conceal firearms and ammunition with the intention of Thomas Kavanagh thereafter revealing their whereabouts as part of a 'cache' with the intention of enabling or assisting Thomas Kavanagh to receive a reduced sentence in the requesting State. I have no doubt that his acts as part of this conspiracy had a tendency to and were intended to have a tendency to pervert the course of justice in the issuing state.

28. On the facts alleged against the Respondent, the locus of where it was intended the alleged perversion of justice would take place was the locus of the process which it was intended to pervert. The intention of this Respondent and his co-conspirators was to interfere with the trial and sentencing process in the courts of England and Wales. The result, which was intended as a result of this conspiracy, the reduction of sentence, was one intended to be achieved in England and Wales. There is no reason in principle why such a common law offence should not be considered to be triable in the jurisdiction where the result of the offence was intended to be achieved, namely England and Wales. That being so, the issue of extra territoriality simply does not arise and s44 is not engaged in relation to this offence.

***Extra Territoriality***

29. At paragraph 2 of his Supplementary Submissions, the Respondent summarises his argument in this regard as follows:-

*'Firstly, it is submitted (by a process of deduction from the time-frame of the alleged relevant offending in the TCA warrant, combined with the dates of incarceration of the Respondent), that the Respondent was outside the jurisdiction of the issuing state for at least a significant part of the alleged offending. Second, though arguably both the issuing state and the executing state could each exercise jurisdiction for the relevant offences on an extra-territorial basis, it is clear that the legal basis of the respective exercises of extra-territorial jurisdiction is markedly different.* ***Inter alia,*** *as a result, there is no compliance with section 44'*

30. The Respondent has therefore made two separate, though interlinked, grounds of objection on the basis of s44 of the 2003 Act:-

    a. He says there is a lack of clarity as to where the Respondent was physically located when he took part in the conspiracy which is alleged against him and it cannot therefore be said with the requisite degree of certainty that he took part in the conspiracy whilst physically present in the issuing state and, as a result, surrender is barred by operation of s44 of the Act; and
    b. If this state would exercise extra territorial jurisdiction on the facts as alleged in the TCAW, such jurisdiction would not be asserted on the same legal basis as in the issuing state and surrender must therefore be refused under s44 of the Act.

31. At paragraph (e) of the TCAW it was alleged that the Respondent was '*based'* in the United Kingdom during the period of the alleged offending, being between the 9th of January 2020 and the 3rd of June 2021. The evidence suggests that Mr Keating was in fact in prison in Ireland for the final year of the time covered there i.e. from 1st July 2020 until the 3rd of June 2021.

32. The circumstances in which the offences were allegedly committed is set out in Paragraph (e) of the TCAW. The offences arise from a conspiracy between Peter Keating and others to procure firearms and ammunition to be hidden in Northern Ireland so that a fellow conspirator, Thomas Kavanagh, could purport to assist the police by revealing to them the whereabout of this 'hidden cache' of firearms and ammunition and thereby obtain assist Thomas Kavanagh to obtain a reduced sentence.

33. The evidence in relation to the Respondents alleged involvement comes from communications between Peter Keating and others to source the ammunition and firearms. The method of communication is by messages on an encrypted messaging service known as '*Encro*' and his identity or '*handle'* is *'short-texture'.* Seven distinct acts of communication by the Respondent as part of this conspiracy are alleged to have taken place prior to his detention in Ireland being on 8th April 2020, 12th April 2020, 16th April 2020, 18th April 2020, May 2020, 27th May 2020 and 1st June 2020. The only event that post-dates his incarceration in Ireland is the finding of the 'hidden cache' on the 20th of May 2021.

34. It was submitted by the Respondent in the course of the hearing that an unacceptable ambiguity of significance arose from the wording used in the TCAW as to the meaning of the assertion therein that Mr Keating *'was based'* in the issuing state at the time of the communications he is alleged to have made as part of the conspiracy. A section 20 request issued, and the issuing state confirmed that Mr Keating was indeed physically present in the issuing state when he allegedly made these communications and part of the conspiracy.

35. The Respondent further submits as follows:-

    a. The assessment required for section 44 of the 2003 Act is to engage in a hypothetical exercise to assess whether jurisdiction exists in the executing and issuing state to prosecute the offences alleged in the TCA warrant, in reciprocal circumstances; and

b. If the jurisdiction exists, it must be exercised on the same basis. Identity or jurisdiction is not enough but there must also be identity of the basis of jurisdiction.

36. The Respondent in his submissions refers to the 'basis of jurisdiction' as claimed by the issuing State, namely the United Kingdom, in this case. At Paragraph F of the TCAW the UK authorities set out the basis for the application of extra-territoriality for offences 6 to 9 under Section 1A of the Criminal Law Act, 1977. A report was obtained by the Respondent's lawyers, dated the 18th of January 2024, and this does not differ with what is in Part F on this issue. The following is set out in Part F:

*'Section 1A of the Criminal Law Act 1977 relates to agreements formed (at least in part) within England and Wales but where the envisaged criminality is due to take place in a foreign territory, for example Ireland or Northern Ireland.*

*The Encro chat messages include for example reference to obtaining firearms in other countries, for example Ireland the Netherlands. In which case, at the time of the agreement(s) the envisaged criminality included outside of England and Wales.*

*Extra territoriality applies in Keatings case for charges 6,7,8 and 9 because the following conditions are satisfied:*

*i. The pursuit of the agreed course of conduct would at one stage involve an act by one or more party, or the happening of some other event, intended to take place in a country or territory outside England or Wales*

*ii. The act or other event constitutes an offence under the law in force in that territory or territory*

*iii. Had the act or other event taken place in England and Wales there are offences (possession of firearms and ammunition) which could be tried in England and Wales*

*iv. A party to the agreement became a party in England and Wales (by joining either in person or through an agent)'*

37. The Respondent then submits that the Irish extra territorial jurisdiction in relation to conspiracies committed abroad is asserted on a different basis, under Section 71 of the Criminal Justice Act, 2006. Section 71 provides as follows:

*'71 – (1) Subject to subsections (2) and (3), a person who conspires, whether in the state or elsewhere, with one or more persons to do an act –*

*(a) In the state that constitutes a serious offence, or*

*(b) In a place outside the state that constitutes a serious offence under the law of that place and which would, if done in the State, constitute a serious offence,*

*is guilty of an offence irrespective of whether such act takes place or not*

*(2) Subsection (1) applies to a conspiracy committed outside the State if*

*(a) the offence, the subject of the conspiracy, or was intended to be committed, in the State or against a citizen of Ireland*

*(b) the conspiracy is committed on board an Irish ship,*

*(c) the conspiracy is committed on an aircraft registered in the State, or*

*(d) the conspiracy is committed by an Irish citizen or a person ordinarily resident in the State '*

38. Against that factual background the Applicant firstly submits that s. 44 of the 2003 Act is not engaged at all by this warrant. All of the engagements where Mr Keating is

alleged to have participated in this Conspiracy are said to have taken place whilst he was in the United Kingdom. It is submitted by the Minister that the offences specified in the TCAW are not therefore committed in a place other than the issuing state.

39. As already noted above, the issuing judicial authority states in the TCAW that '*extra territoriality applies in [the respondents] case*'. It is submitted that the application of extra territoriality is simply invoked in that warrant to demonstrate that the offences are indeed prosecutable in the issuing state. I agree with this submission.

40. It is the primary submission of the Minister that s.44 simply does not arise for consideration in this case. She states that from the wording of the warrant itself, as made clear beyond any doubt by the answer received to the s20 request, the English authorities allege that Mr Keating joined the conspiracy and did the participating acts alleged against him in furtherance of the conspiracy, at a time when he was in the issuing state. The offences are conspiracy offences, the essence of which is entering into the agreement, and this was done by him whilst in the issuing state.

41. The Applicant further submits that if, contrary to her primary argument, the Court finds that extra-territoriality does arise on the facts of this case, this is a case where surrender would be permitted as Ireland would exercise jurisdiction in similar circumstances.

***Discussion on Extra Territoriality***

***A. Is the offence Extra Territorial?***

42. The offences with which the Respondent is charged are inchoate offences of conspiracy. It is the act of entering into or participating in an agreed plan or arrangement that is the essence of a conspiracy and the offence of conspiracy is made out once the agreement is entered into or hatched. It is alleged that Mr Keating became a party to this conspiracy when he agreed to take part in this plan to arrange for the obtaining of the arms and ammunition and their importation into the issuing state and / or when he did acts participating in the carrying into effect of this plan. The allegations are that, on various dates and always at times when he was physically situate in the issuing state, he did various acts (the Encro communications) in furtherance of the plan. It is also clear from Part F of the TCAW, as now specifically clarified by the response received to the s20 request, that it is alleged that he became a party to this agreement (the conspiracy) whilst in England and Wales.

43. The following are the alleged relevant facts:-

- Mr. Keating is a non-national of the issuing state;
- His various communications in furtherance of the alleged conspiracy took place whilst he was physically present in the issuing state;
- The conspiracy involved obtaining firearms and ammunition from inter alia third countries including Holland;
- The discovery of the relevant cache of arms by the police in Northern Ireland took place at a time when he was in custody in this state;

- He joined the conspiracy in England and Wales but some of the acts done in furtherance of the conspiracy took place in third countries;
- At paragraph (e) 4 of the TCAW there is the following:

  *'It is stated the alleged offences are said to have taken place whilst Keating was based in the UK'.* It is now clarified that it is alleged he was physically present in the United Kingdom when the took part in the Conspiracy via the Encro chat messages.

44. Section 44 of the Act of 2003 provides as follows:-

*"44. — A person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State."*

45. It is well-established that s. 44 of the Act of 2003 sets out a two-part test for determining whether surrender is prohibited by virtue of that section. Firstly, it must be established that the offence specified in the EAW was committed or is alleged to have been committed in a place other than the issuing state. If it is so established, the Court must then go on to consider whether the act or omission of which the offence consists of does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State. It is only where both these conditions are met that s44 operates as a bar to surrender. As stated by Denham C.J. in *Minister for Justice and Equality v. Egharevba* [2015] IESC 55, at para. 15 of her judgment: - *"15. The*

*requirements set out in s. 44 of the Act of 2003, as amended, are conjunctive. Thus, both conditions are required to be met for the appellant to succeed."*

46. It is here alleged that the respondent was part of a criminal conspiracy to procure or obtain firearms and / or ammunition outside of the issuing state, with a view to bringing them unlawfully into the United Kingdom where those weapons were to be hidden as part of a cache of weapons and ammunition which Mr Kavanagh could then disclose to the Police in an attempt to have his sentence reduced. The result of this conspiracy was to be achieved in the issuing state.

47. It is clear that the offences referred to in the TCAW, and carried out as part of the conspiracy, are alleged to have been committed partly in Holland (where the ammunition and firearms were procured) and partly in the issuing state. The completion or result of the criminal plan was to take place in the United Kingdom with the hiding of the cache in that State and the attempt to mislead or deceive the police officers investigating Mr Kavanagh. The offences set out in the TCAW are described in terms of the final objective of the conspiracy being in the United Kingdom. As Burns J stated in in ***Minister for Justice v Jelecutean*** [2021] IEHC 375 at para 22:

> *'Conspiracy may transcend national borders. Acts taken in furtherance of the conspiracy may occur in a number of different locations but, notwithstanding such matters, each conspirator will be taken to have carried out such act wherever it was carried out by one of the other conspirators'*

48. It is clear from the facts as alleged in part E of the TCAW that it is alleged that significant acts and, in particular, the planting of the cache of arms and the attempt to mislead the police and the courts took place in the issuing state. It is also clear that this respondent's participation in this criminal plan took place whilst he was located in the issuing state. In such circumstances, I am therefore satisfied that it can be said these

offences were committed in the issuing state. As Burns J noted in ***Jelecutean*** such a conclusion in a case involving a conspiracy that transcends national borders '*is consistent with the reasoning of the Irish Courts in Minister for Justice and Equality v. D.F. [2016] IEHC 82; Minister for Justice and Equality v. S.F. [2016] IEHC 81 and Minister for Justice and Equality v. Egharevba [2015] IESC 55. 23.'*

49. It follows that the respondent has failed to satisfy the first requirement of s. 44 of the Act of 2003 and, as the two requirements of the section are conjunctive, the respondent has failed to meet the conditions set out in s. 44 of the Act of 2003. In such circumstances, this ground of objection is dismissed.

50. In other words, the issue of extra-territoriality simply does not arise for consideration in the circumstances of this case for the reasons set out above and s44 is not engaged in this case.

***B. Even if extra territorial, would Ireland exercise Jurisdiction in such circumstances and on what basis?***

51. Even if, contrary to my primary conclusion, the offences alleged are extraterritorial, I am nonetheless satisfied that the offences are of a kind and committed in circumstances where Ireland would in similar circumstances exercise extra territorial jurisdiction. I am further satisfied that, for the reasons submitted by the Minister, that the exercise of extra territorial jurisdiction by Ireland and the United Kingdom in the circumstances of this case would be of a similar kind and surrender would not be barred by the operation of s44 of the Act of 2003.

52. In the course of his Judgment in *Minister for Justice v Bailey (No 3)* [2020] IEHC 528, Burns J reviewed the decisions of the respective justices in *Minister for Justice v Bailey (No 1)* [2012] 4 I.R. 1 and appeared to favour the minority view of O'Donnell J therein which was that s44 of the Act simply required that the executing state consider whether the issuing state and the executing state both exercised extra territorial jurisdiction over a category of offences. He did however accept that the majority of that court took a somewhat more restrictive view which required a reciprocal basis of jurisdiction in respect of extraterritorial offences.

53. In *Minister for Justice v Pal* [2022] IESC 22 O'Donnell CJ sought to distil the *ratio decidendi* of the judgements in *Bailey (No 1)* and, in this regard, referred with approval to the judgment of Donnelly J in the Court of Appeal in *Pal* [2021] IACA 165 where she had categorised the three different approaches to approaching the question of extra territorial jurisdiction. The first category is *'shared basis jurisdiction'* (which appears to be the one which the Respondent submits ought to be applied in this case), the second is *'factual reciprocity'* and the third is *'category reciprocity'.* At paragraphs 34 to 37, he continued:-

*' 34. A further issue of principle to be decided is as to whether, if surrender was properly sought for the purposes of prosecution, s. 44 amounted to a bar on surrender. The different approaches to this issue in the judgements of the Supreme Court* [in Bailey No 1] *were helpfully analysed in the judgment of Donnelly J in the Court of Appeal, and I will adopt the description she proposed and which has already been touched on above.*

*35. First there was 'shared basis jurisdiction'. This is the approach set out in the judgment of Hardiman J. On this approach, a member state would only surrender a*

*person if the requesting state and the executing state both exercised extra-territorial jurisdiction on the same legal basis. This involves a consideration merely of the law of the executing state and an appreciation of the legal basis upon which the extra-territorial jurisdiction was sought to be exercised by the issuing state, Since Ireland and France both exercised extra territorial jurisdiction in respect of murder, but on a different legal basis (France on the basis of nationality of the victim, Ireland on the basis of the nationality of the alleged perpetrator), this approach led to a refusal of surrender. While this is the narrowest of the approaches advanced in the case, it is at least easy to apply. It involves an inquiry merely as to the basis upon which the requesting state is purporting to exercise extra-territorial jurisdiction and then consideration of whether the executing state exercises jurisdiction on the same basis*

*36. It is accepted that the judgments of Denham C.J. Murray and Fennelly JJ form the majority judgments and, although there is some difference of emphasis, they can properly be described as adopting an approach of 'factual reciprocity'. This too requires a hypothetical exercise, but in this case focused on the facts of the case. The question posed is: if the situation were reversed, would the executing state exercise extra-territorial jurisdiction 'in the same circumstances The majority were agreed, however, that, on the application of this test, surrender in Bailey No. 1 should be refused.*

*37. I delivered a judgment which dissented on this point, and Donnelly J. described the approach taken in that judgment as "category reciprocity". On this basis, when in receipt of a warrant based upon the exercise of extra-territorial jurisdiction of the issuing state, the executing state should inquire merely whether it exercises its extra-*

*territorial jurisdiction in respect of the offence for which surrender is sought, and in that case murder. The basis of the exercise of extra-territorial jurisdiction by the issuing state was not determinative or indeed relevant. On this basis, surrender would have been ordered. It is clear that this was a minority judgment but, as Donnelly J. observed in the Court of Appeal, it may have some benefit in casting some light on what was decided by the majority.*

*38. A consideration of the judgments in Bailey (No. 1) demonstrates that the appellant in this case would be surrendered if either a shared basis jurisdiction or category reciprocity approach were taken. Romania exercises extra-territorial jurisdiction on the basis of the citizenship of the person alleged to have committed the offence, as does Ireland (shared basis jurisdiction), and Ireland exercises extra-territorial jurisdiction for the offence of murder (category reciprocity). It is only if factual reciprocity involves an entirely different test that the applicant in this case can successfully resist surrender. Indeed, as discussed, it is only if Art. 4.7(b) of the Framework Decision and s. 44 of the 2003 Act are to be interpreted as requiring the transposition of the issuing state (Ireland for Romania) and the location of the alleged offence (Romania for Ireland), but without transposing or altering the nationality either of the alleged perpetrator or the victim (still both Romanian), that the argument can succeed. It is certainly clear that Ireland would not exercise extra-territorial jurisdiction in respect of a murder alleged to have been committed by a Romanian national in Romania. But is this the test?*

*39. It is argued by the applicant that this is the outcome required because the Court must consider if Ireland would exercise extra-territorial jurisdiction "in the same*

*circumstances". The argument is that the section does not ask if the executing state (in this case, Ireland) would exercise extra-territorial jurisdiction in respect of the actual offence itself. It follows that a hypothetical question is posed by both Art. 4.7(b) and s. 44. The law plainly requires some transposition, and accordingly the consideration of some hypothetical circumstance. The executing state (in this case, Ireland) is not the prosecuting state; nevertheless, the test under s. 44 and Art. 4.7(b) invites a consideration of the law of the executing state in respect of prosecution. Again, this must mean a consideration not of the actual offence alleged to have been committed, but of some hypothetical offence. As Fennelly J. observed in Bailey, the words of Art. 4.7(b) "the law of the executing member state does not allow prosecution" can properly be read as "would not allow prosecution". So far, the parties are agreed. However, the appellant here contends that the only transposition contemplated by the section is one of location which it is said follows from the use of the words "by virtue of being committed in a place other than the State" in s. 44. Similarly, it is said that this follows from the terms of Art. 4.7(b) "and the law of the executing member state does not allow prosecution for the same offence <u>when committed outside its territory</u>" (emphasis added).*

*40. Looked at from the broadest perspective, I do not think that the judgments in Bailey (No. 1) can be read in this way – particularly when the majority judgments are read together with the concurring judgment of Hardiman J. and my judgment dissenting on this point. I think it is correct to look at all the judgments together, since they are addressed to the same set of circumstances, and the application of the law to it, and the manner in which they disagree or diverge is helpful in understanding the majority judgments. The judgments are best viewed as proceeding from the narrowest basis*

*(shared basis jurisdiction) to the broadest (category reciprocity) with factual reciprocity somewhere between, and perhaps closer to shared basis jurisdiction. It is clear, in my view, that they operate in the same register (or, as Collins J. put it in the Court of Appeal, on the same spectrum) and that factual reciprocity does not involve some separate and distinctive approach or analysis. In mathematical terms, shared basis jurisdiction can be seen as a subset of factual reciprocity, in that all cases of shared basis jurisdiction would satisfy factual reciprocity, but there are some circumstances which would satisfy factual reciprocity but not come within shared basis jurisdiction. All cases which satisfy factual reciprocity would in turn also satisfy category reciprocity although that category, being broader, would cover some circumstances in which factual reciprocity would not permit surrender. In the Venn diagram of this aspect of the law, shared basis jurisdiction is entirely within the somewhat broader category of factual reciprocity, and both are entirely within category reciprocity. If that understanding of the judgments is correct, then it is fatal to the appellant's case, at least as far as Irish law is concerned, since it is clear that this case satisfies the narrowest basis on which surrender could be permitted, i.e., the shared basis jurisdiction approach set out in the judgment of Hardiman J. and must therefore also satisfy factual reciprocity (and indeed category reciprocity). Just as the differing approaches of Hardiman J. and the majority led to the same outcome in Bailey (No. 1) – in that case refusal of surrender – both approaches would lead to the same outcome in this case: surrender.*

*41. The majority judgments' test of factual reciprocity can be understood by comparing that approach with the approach in the concurring judgment of Hardiman J. In every case where shared basis jurisdiction is established, and both the requesting and*

*executing state exercise extra-territorial jurisdiction on the same basis, then factual reciprocity will also be satisfied. The point of distinction between the two approaches can be illustrated by considering circumstances only slightly different to those which occur here. If, as in Bailey No. 1, the two states involved had laws on extra-territoriality which were the converse of each other, so that country A exercised extra-territorial jurisdiction on the basis of the nationality of the victim, and country B exercised extra-territorial jurisdiction on the basis of nationality of the alleged perpetrator, then, in all possible circumstances, there would not be shared basis jurisdiction. In most cases, factual reciprocity would also lead to refusal of surrender, since if the facts are transposed, the executing state would not have jurisdiction. If, however, as in this case, both the alleged perpetrator and the victim are nationals of state A, then, while shared basis jurisdiction would refuse surrender, factual reciprocity would permit it, because on the facts, if transposed, state B would exercise jurisdiction and prosecute, albeit on a different jurisdictional basis to that of the requesting state, i.e., the nationality of the alleged offender, as opposed to the nationality of the victim. If the facts of Bailey are changed so that both the victim and the alleged perpetrator are assumed to be French, then the difference in outcome becomes clear. Shared basis jurisdiction would not exist: France would be asserting jurisdiction on the basis of the nationality of the victim and Irish law does not exercise jurisdiction on that basis. However, factual reciprocity would lead to surrender since both states would exercise extra-territorial jurisdiction, albeit on a different legal basis – France on the basis of the French nationality of the victim and, if the situation were reversed and both victim and alleged perpetrator are assumed to be Irish, Ireland would exercise jurisdiction but on the basis of the nationality of the alleged perpetrator,*

*and accordingly surrender could be ordered notwithstanding the difference in the legal basis on which such jurisdiction would be exercised.'*

54. The Respondent in the course of the hearing argued for the application of what was described above as the narrowest approach to s44 i.e., the so called 'shared basis reciprocity' as set out in the Judgement of Hardiman J in *Bailey (No. 1)* and summarised by *O'Donnell CJ* at paragraph 35 of his Judgment in *Pal.* As noted by O'Donnell CJ in that judgment Hardiman J's opinion on this issue was a minority opinion (as indeed was that of O'Donnell CJ himself who opted for the broadest jurisdiction i.e. 'category reciprocity'). As explained by O'Donnell CJ in *Pal* the majority (Fennelly, Murray JJ and Denham CJ) opted for so called 'factual reciprocity'. At paragraphs 40 and 41 of *Pal,* which I have set out above, O'Donnell CJ described the interaction between the various bases of reciprocity and further explained the operation of 'factual reciprocity' (which he accepted as the correct test).

55. If, consistent with the approach of the majority in *Bailey (No 1)* and O'Donnell CJ delivering the judgment of the Court in *Pal,* an exercise in reciprocity is applied to the facts of the case then extraterritorial jurisdiction is established.

56. For these purposes Section (F) of the TCAW may be paraphrased in terms of s. 4(5) of the UK Criminal Law Act 1977 as follows:

*'The Respondent agreed to commit an agreed course of conduct that would involve the commission of offences, including offences outside the UK in Holland, and those offences in Holland would be offences in both Holland and the UK, and he was situated in the UK when he done acts as a party to that agreement'*

57. The factual narrative in the TCAW can be summarised in terms of s. 71 of the Irish Criminal Justice Act 2006 as follows:-

*'The Respondent conspired in the United Kingdom with one or more persons to commit offences, including offences in Holland, which were serious offences in both Holland and the United Kingdom'*

58. It is a mistake, as the Respondent appears to imply, to suggest that the Court must go on to consider s.71(2) of the 2006 Act to establish the commission of an offence. Section 71(2) is only engaged if the conspiracy, as opposed to the criminal acts done in furtherance of the agreement, is committed outside the State.

59. If the hypothetical exercise discussed at paragraph 45 of O'Donnell CJ's judgement in *Pal* is performed and Ireland is substituted for the United Kingdom then the offence, as described in the TCAW, would read as follows for the purposes of s.4(5) of the Criminal Law Act, 1976:

*'The Respondent agreed to commit an agreed course of conduct that would involve the commission of offences, including offences outside the UK in Holland, and those offences in Holland would be offences in both Holland and the UK, and he was situated in the UK when he done acts as a party to that agreement'*

60. Doing the same hypothetical exercise for the purposes of s.71 of the 2006 Act, the offence would read:-

*'The Respondent conspired in the United Kingdom with one or more persons to commit offences, including offences in Holland, which were serious offences in both Holland and the United Kingdom'*

61. There is therefore reciprocity between both formulations and the Irish State would or could prosecute in the circumstances outlined.

62. In conclusion therefore on the s 44 issue:-

(i) In the circumstances of this case s44 is not engaged because, were the Respondent to have done what he did in Ireland as party to a conspiracy to obtain and import weapons and ammunition from a third country to Ireland, this would not be considered an extra territorial offence as a matter of Irish law; and

(ii) Even if, contrary to my primary conclusion on the facts, these circumstances would be considered to give rise to a question of extra-territoriality, then applying the test of the majority in *Bailey No1* (as clarified by O'Donnell CJ in *Pal*), namely the application of a test of 'factual reciprocity' to the circumstances here, then Ireland would in similar circumstances exercise extra territorial jurisdiction.

63. The objection on the grounds of s44 of the 2003 Act is therefore dismissed.

***Breach of Articles 3 and 8 of European Convention on Human Rights***

64. In *Minister for Justice v Rettinger* [2010] IESC 45, the Supreme Court accepted that prison conditions in the requesting state could give rise to a refusal to surrender under section 37 of the 2003 Act but stressed that where such an objection is raised:

*'the burden rests upon the [respondent] to adduce evidence capable of proving that there are substantial grounds for believing that if he (or she) were returned to the requesting country he, or she, would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention'*

65. A summary of the principles which have emerged from the case law in this regard was provided by Burns J in *Minister for Justice v Angel* [2020] IEHC 699 where the court said as follows:

*'(a) the cornerstone of the Framework Decision is that member states, save in exceptional circumstances, are required to execute any European arrest warrant on the basis of the principles of mutual recognition and trust;*

*(b) a refusal to execute a European arrest warrant is intended to be an exception;*

*(c) one of the exceptions arises when there is a real or substantial risk of inhuman or degrading treatment contrary to Article 3 ECHR or Article 4 of the Charter of Fundamental Rights of the European Union ('the Charter');*

*(d) the prohibition on surrender where there is a real or substantia risk of inhuman or degrading treatment is mandatory. The objectives of the Framework Decision cannot defeat an established risk of ill-treatment;*

*(e) the burden rests upon a respondent to adduce evidence capable of proving that there are substantial / reasonable grounds for believing that if he or she were returned to the requesting country, he or she will be exposed to a real risk of being subjected to treatment contrary to article 3 ECHR;*

*(f) the threshold which a respondent must meet in order to prevent extradition is not a low one. There is a default presumption that the requesting country will act in good faith and will respect the requested person's fundamental rights;*

*(g) in examining whether there is a real risk, the Court should consider all of the material before it and if necessary, material obtained of its own motion;*

*(h) the Court may attach importance to reports of independent international human rights organisations or reports from government sources;*

*(i) the relevant time to consider the conditions in the requesting state is at the time of the hearing;*

*(j) ...*

*(k) a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of confinement in the issuing member state cannot lead, in itself, to the refusal to execute a European arrest warrant. Whenever the existence of such a risk is identified, it is then necessary for the executing judicial authority to make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk;*

*(l) an assurance provided by the competent authorities of the issuing state that, irrespective or where he is detained, the person will not suffer inhumane degrading treatment is something which the executing state cannot disregard and the executing judicial authority, in view of the mutual trust which must exist between the members states on which the European arrest warrant is based, must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of article 3 ECHR or article 4 of the Charter; and*

*(m) It is only in exceptional circumstances, and on the basis of precise information, that the executing judicial authority can find that, notwithstanding such an assurance, there is a real risk of the person concerned being subjected to inhuman or degrading*

*treatment because of the conditions of that person's detention in the issuing member state'*

66. In an affidavit filed on behalf of the Respondent, Mr John Hardy KC refers to a number of reports and other documents which are critical of conditions in prisons in the United Kingdom, namely:-

    (i) The CPT Report published on the 7th of July 2022 following on from a periodic visit to prisons in the issuing state between the 8th and 21st of June 2021;

    (ii) A decision of a German Court in Karlsruhe in March 2023 releasing a person sought for surrender to the UK on the grounds that sufficient assurances had not been received from that state as to concerns it had in relation to prison conditions;

    (iii) A recent report from the Chief Inspector of Prisons, Mr Charles Taylor

67. The Respondent submits that he has raised sufficient concerns in relation to the state of prisons in the United Kingdom as to put this court on inquiry as to whether there is a risk that he might be subjected to inhuman or degrading treatment. He submits that, having considered all of the material put before the Court in this regard, inquiries should be made of, and assurances sought from the authorities of the United Kingdom on these matters.

68. The main issue of concern raised on behalf of the respondent concerns overcrowding in UK prisons. The respondent also refers to a risk of inter prisoner violence and more generally to a system which fails to achieve the aims of imprisonment – retribution, reform and rehabilitation – within the currently managed and resourced prison estate.

69. From the CPT report of 2021, it is the position that overcrowding does remain a concern to the Committee. The Committee however did note that at the time of its visit, overcrowding was less severe and stated that this may have been due to actions taken as a result of the management of prisons during the COVID pandemic. The Committee also referred to the plans of the authorities to significantly invest in the building of more prisons and the increase in prison places (see paragraphs 28 to 32 of Report).

70. In the report the Committee also noted that there were no reports of ill treatment by staff in the male prison estate (para 34) and furthermore referred to a reduction in the overall level of inter prisoner violence (para 35) but recommended that the authorities intensify their efforts to reduce such violence (para 38). The committee also recommended that the recording of such incidents be improved (para 40). There was also a criticism of a general lack of activities in prison though it seems that some of this could have been attributed to COVID.

71. The so-called ***Karlsruhe*** decision was a decision of a court in Karlshruhe, Germany. No translation or approved report was provided to the Court. According to Mr Hardy KC that court held that the extradition request was *'currently inadmissible'* and that it *'cannot be assumed with sufficient certainty that the prosecuted person would receive humane conditions of detention there in the case of his extradition to the United Kingdom'*

72. Mr Hardy KC goes on to say that the UK authorities had been asked for details of the prison in which the requested person would be kept if surrendered and for an assurance he would be kept in convention compliant conditions. An email was received in reply from a police station in Manchester saying that he would be probably incarcerated in a

prison in London and that the government were building 20,000 new prison places. The German court then concluded that it was likely that the requested person would be held in Wandsworth Prison, a prison which he said had recently described by the HM Inspectorate as overcrowded, crumbling and vermin infested. In the absence of guarantees the Court discharged the requested person.

73. Reference was also made to a recent report of Mr Charles Taylor, HM Inspector or Prisons who forecast that prisons would run out of space in two or three years and that it may be that the authorities had already run out of space in the northwest and had to transfer prisoners to other parts of the UK.

74. Whilst there is reference to overcrowding there is no suggestion in the reports that there are any instances in the prison system where it has reached such a level as to give rise to a breach of the Convention e.g. there is no suggestion that prisoners will be held in conditions where they have less than 3m squared of space each (a level of space per prisoner seen as effectively a minimum below which there is overcrowding of a kind such as to lead to a concern of inhumane and degrading treatment). In addition, there is no doubt that the government of the United Kingdom has extensive plans for the provision of additional prison spaces and funding is to be set aside for the same.

75. Insofar as inter prisoner violence is concerned, the CPT report does raise continuing concerns but does acknowledge improvements in this regard but recommends intensification of efforts in this regard and better reporting of incidents.

76. The report of HM Prison Inspectorate refers to a possible future risk of overcrowding and to some moving of prisoners to other parts of the country at present to prevent the same.

77. I am not persuaded by the reports provided to the Court in relation to the ***Karlsruhe*** decision that, for the reasons advanced in this case, that that decision is persuasive as to the necessity to seek assurances in this instance.

78. Having considered all of the material submitted by the Respondent and the submissions thereon, I do not consider that he has shown even a generalised risk of ill treatment such that might raise issues under Article 3 of the Convention.

***Conclusion***

79. For the above reasons I have rejected the grounds of objection made by the Respondent and I therefore propose to make an order for his surrender pursuant to s16 of the 2003 Act.