

**THE HIGH COURT
EXTRADITION**

[2019] IEHC 952

Record No. 2019/130EXT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003, AS AMENDED

BETWEEN:

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

-AND-

GERARD LAGAN

RESPONDENT

JUDGMENT of Mr. Justice Hunt delivered on the 18th of October 2019

1. This is an application by the Minister for the surrender of Mr Lagan to Northern Ireland on foot of a European arrest warrant ("EAW"/ "the warrant") issued on 8 March 2019 by District Judge G E Conner of the Belfast Magistrates' Court. According to section B of the warrant, it is in turn based on two warrants of arrest issued on 8 March 2019 by a District Judge of the Magistrates' Court in Northern Ireland whereby Mr Lagan stands accused of two offences of murder. It is an accusation or prosecution-type warrant and should be read in conjunction with the summary of facts in relation to the charges against Mr Lagan prepared by the Public Prosecution Service of Northern Ireland (PPSNI) as provided to the Minister by Fiona Chamberlain of the Crown Solicitor's Office by letter dated 29 March 2019.
2. Section E of the warrant states that the subject matter concerns the murders of Edward Burns and Joseph Jones on 12 March 2007. This description is augmented by the contents of the statement of facts referred to above. Section E reads in full as follows: -

"On Monday, 12 March 2007 at approximately 2:45 am a taxi driver travelling citywards was flagged down by a male on the Falls Road, in an area close to Falls Park on the left and the Rossa GAA club on the right. The male had blood on his face and told the driver he had been shot. While in the taxi he used his mobile telephone and told the driver it was a 999 call. He was brought to the Royal Victoria Hospital where he was admitted and treated for two gunshot wounds; one to the right side of his neck and one to his left shoulder. Hospital records show the male was Damien O'Neill (DOB 14.06.1983) of 7 Coolnasilla Drive, Belfast. A download of his Nokia phone was made. The mobile telephone had two sim cards including one for a mobile number ending 183. The download and call data records for this number confirmed 999 calls were made at 02.57am and 02.59am. A .38 calibre bullet was subsequently surgically removed from O'Neill's neck on 11th May 2009. O'Neill is not co-operating with the police investigation and has refused to give evidence.

Edward Burns - murder

At approximately 04.30 hrs on 12/3/07 police were tasked to search the area where Damien O'Neill had flagged down the taxi. At nearby Milltown Row, in a car park beside a GAA pitch, they discovered a body, later identified as the deceased Edward

Burns (DOB 17.04.1970). He had sustained a single gunshot wound to the head. A bullet retrieved upon post-mortem was found to be a .38 calibre lead bullet fired from the same weapon as the bullet retrieved from O'Neill. This murder weapon was never recovered by police. Given the ballistic evidence and the proximity of Burns' remains to the location where O'Neill was picked up, the prosecution case is that there is a close connection between both shootings. The partner of Edward Burns states that he came to her house at 10:30pm on 11th March 2007. He worked as a taxi driver and was driving a silver Skoda belonging to Joe Jones that evening. Between 02.15 hours and 02.30 hours Burns' phone rang and initially he did not answer but when he did he spoke to someone called "Gerard". After the call Burns told her that someone was in trouble, he was going out to help but that he had a bad feeling about it and that if she did not hear from him she should contact Joe Jones. She went to bed and when she woke at 10am she texted Burns but did not hear from him again. Subscriber details and telephone call data show that Burns was called twice at 02.33 hours and 02.34 hours by the accused Gerard Lagan which is consistent with his partners account. The download of Damien O'Neill's phone shows that he attempted to call Burns twice at 02.31 hours. After the second call to Burns from the accused Gerard Lagan there was a five-minute call between Burns and Joe Jones commencing at 02.42 hours. This was Burn's last phone call. The prosecution case is that sometime after the end of this call and before the 999 calls by O'Neill Burns was shot.

Murder of Joseph Jones

Jones' partner, Joanne Wilkinson, confirms Joe Jones was a taxi driver and that on the evening of 11th March 2007 Edward Burns was using his Skoda car to do taxi runs. Telephone call data reveals that the accused Gerard Lagan contacted Jones three times between 02.19 hours and 02.30 hours on 12th March 2007. O'Neill also attempted to call Jones at 02.17 hours. Lagan then made the two calls to Burns which resulted in Burns leaving his partner's address. At approximately 07.45 Jones' severely beaten body was found by police. The Skoda car was found burnt out. Tracking data in a Ford Focus car driven by a co-accused Declan Smith associates Smith as being in the vicinity of the murder and sell site analysis is consistent with Lagan's location at both murder scenes, telephone calls from him to Gerard Smith and both O'Neill and the deceased Jones and Burns at times consistent with the events described above."

3. This was the evidential material before the District Judge when he decided to issue the warrant. I have no further information as to the conduct of that hearing, or as to whether the District Judge was either provided with, or requested other information concerning these allegations. I did not consider it necessary to seek further information in this regard and I am content to dispose of this case on the basis that the contents of section E were effectively the basis upon which the issuing judicial authority decided to issue the warrant.

4. By letter of 12 March 2019, the Minister requested further information as to the description of the degree of participation of the respondent in the two offences, on the basis of the belief that there was no information provided in the description at Section E to the effect that the respondent murdered the two victims. The requesting authority was also asked to confirm where the murder of Mr Jones occurred and where the body was found. In fact, I do not think that there was a shortfall in the information in the warrant concerning the level of complicity alleged against Mr Lagan. I am satisfied that the information set out in this section of the warrant sufficiently communicated the role alleged to have been played by Mr Lagan and the level of complicity and involvement implied by that role. It clearly communicates that the case made against him is based on circumstantial evidence suggesting at least that he was an organiser of these events. Any possible doubt as to the nature and extent of the complicity alleged is allayed by the more detailed and additional material in the statement of facts subsequently prepared in response to the Minister's request, referred to above, which reads in full as follows: -

"Shooting of Damien O'Neill

1. *On Monday, 12 March 2007 at approximately 2:45 am a taxi driver travelling citywards was flagged down by a male on the Falls Road, in an area close to Falls Park on the left and the Rossa GAA club on the right. The male had blood on his face and told the driver he had been shot. While in the taxi he used his mobile telephone and told the driver it was a 999 call. He was brought to the Royal Victoria Hospital where he was admitted and treated for two gunshot wounds; one to the right side of his neck and one to his left shoulder. Hospital records show the male was Damien O'Neill (DOB 14.06. 1983) of 7 Coolnasilla Drive, Belfast. Property belonging to the patient, including a Nokia phone, was provided by hospital staff to police and a download of the phone (RMcI1) was made. The mobile telephone had two sim cards including one for a mobile number ending 183. The download and call data records from this number confirmed 999 calls were made at 02.57am and 02.59am. Blood swabs (BGK1) taken from the passenger door of the taxi produced a full profile matching a buccal swab sample (AD2) attributed to Damien O'Neill. A .38 calibre bullet was subsequently surgically removed from O'Neill's neck (AW34) on 11th May 2009.*
2. *O'Neill is not co-operating with the police investigation and has refused to give evidence.*

Victim - Edward Burns

3. *At approximately 04.30 hrs police were tasked to search the area where Damien O'Neill had flagged down the taxi. At nearby Milltown Row, in a car park beside a GAA pitch, they discovered a body, later identified as the deceased Edward Burns (DOB 17.04.1970). He had sustained a single gunshot wound to the head. An ambulance was tasked at 05.06 hours but he was pronounced dead at the scene. A bullet retrieved upon post-mortem (CCR19) was found to be a .38 calibre lead bullet fired from the same weapon as the bullet retrieved from O'Neill (AW 34).*

This murder weapon was never recovered by police. Given the ballistic evidence and the proximity of Burns' remains to the location where O'Neill was picked up, the prosecution case is that there is a close connection between the shootings.

- 4. The partner of Edward Burns states that he came to her house at 10:30pm on 11th March 2007. He worked as a taxi driver was driving a silver Skoda belonging to Joe Jones that evening. Between 02.15 hours and 02.30 hours Burns' phone rang and initially he did not answer but when he did he spoke to someone called "Gerard". After the call Burns told her that someone was in trouble, he was going out to help but that he had a bad feeling about it and that if she did not hear from him she should contact Joe Jones. She went to bed and when she woke at 10am she texted Burns but did not hear from them again. She also tried to make contact with Jones but got no reply.*
- 5. Subscriber details and telephone call data show that Burns was called twice at 02.33 hours and 02.34 hours by the accused Gerard Lagan which is consistent with his partner's account. The download of Damien O'Neill's phone shows that he attempted to call Burns twice at 02.31 hours. After the second call to Burns from the accused Gerard Lagan there was a five-minute call between Burns and Joe Jones commencing at 02.42 hours. This was Burn's last phone call. The prosecution case is that sometime after the end of this call and before the 999 calls by O'Neill Burns was shot.*

Victim - Joseph Jones

- 6. Jones' partner, Joanne Wilkinson, confirms Joe Jones was a taxi driver and that on the evening of 11th March 2007 Edward Burns was using his Skoda car to do taxi runs. Documentary evidence confirms a Skoda Superb car PKZ 3760 was purchased by Jones on 19.01.2007. Burns drove Wilkinson and Jones to two different bars that evening dropping them at the second bar, McEnaney's on the Glen Road, sometime after 10pm. Wilkinson could not recall how she and Jones got home but when she woke at approximately 6.15am on 12th March 2007 at her address at Torrens Avenue Jones was not there. She never saw him alive again. Witness evidence confirms that Wilkinson and Jones were at McEnaneys until approximately 1.30am on 12th March when they were dropped home by taxi to Torrens Avenue.*
- 7. Telephone call data reveals that the accused Gerard Lagan contacted Jones three times between 02.19 hours and 02.30 hours on 12th March 2007. O'Neill also attempted to call Jones at 02.17 hours. Lagan then made the two calls to Burns which resulted in Burns leaving his partner's address. Three further calls were made by Gerard Lagan to Jones at 04.10 hours, 04.17 hours and 04.23 hours. As a result of these calls Jones left his partner's address at Torrens Avenue, North Belfast. CCTV footage from Oldpark police station shows a male leaving Torrens Avenue around this time. At approximately 07.45 hours Jones' severely beaten body was found by civilian witnesses in an alleyway at the rear of Elmfield Street,*

north Belfast. Police were contacted on 999 at 07.51 hours. A cordon was set up and a search of the area took place. Jones' mobile phone was on his person and near his body a bank card belonging to Cairiona Lagan (now deceased), the sister of Gerard Lagan, was found. In a lay-by at the front of the houses at Elmfield Street, coins and blood spots were found as well as a house key for his partner's Torrens Avenue home. It is believed that Jones was overcome in Elmfield Avenue before being further attacked and killed in the alleyway behind it. His body was identified by fingerprint evidence.

8. Residents of Elmfield Avenue confirm hearing banging, digging and thumping noises in the alleyway around 4.30am.
9. Later that day a witness notified police of the presence of the burnt remains of a spade in the alleyway of nearby Ladbrooke Drive. This item was seized and examined and found to be a physical match to strike marks on Jones's skull.

Skoda Superb

10. An eye witness saw a car alight at approximately 04.45 hours on 12th March 2007 on the Ballyhill Road. The Ligonell Road becomes the Ballyhill Road as one travels north out of Belfast. A number of other witnesses confirm seeing a burnt out vehicle at the same location between 07.45 and 08.45 hours. At 09.00 hours a witness saw a burnt out vehicle being towed away. Despite extensive enquiries the tow company involved was never identified. Police searched this area and debris from the burnt vehicle was located. Expert examination found that these parts emanated from a silver Skoda Superb 2002-2007 vehicle. Jones' Skoda car was never recovered by police. It is the prosecution case that after Burns' murder the Skoda was driven to the Ballyhill Road area and set alight.

Ford Focus

11. Between 03.10 hours and 03.26 hours the accused Gerard Lagan made three phone calls to a mobile telephone used by Declan Smith (DOB 25.02.1982) of 169 Cliftonville Rd, Belfast. Smith worked as an accounts collector for a company which provided him with a car, namely a Ford Focus estate FE52SHJ. This vehicle was fitted with a GPS tracking system. It is the prosecution case that Smith's help was needed to assist in the disposal of Jones' Skoda car. Shortly before the third call from Gerard Lagan to Declan Smith, the Ford Focus car started up at 03.23 hours and left the Cliftonville Road in a north-west direction. At 03.54 hours it was located proximate to the Ballyhill Road burn site. Analysis of the tracker data shows that the Ford Focus passed the point where the Skoda Superb was set on fire, travelled a short distance, turned around and headed back in the direction of north Belfast.
12. The Ford Focus vehicle parked up at 04.02 hours for approximately 9 minutes in Brookfield Walk which is a short distance from Elmfield Street before moving off at

04.12 hours and coming to a rest (ignition off) at Elmfield Street. It remained there for twenty-two minutes. The first of three calls by the accused Gerard Lagan to Jones took place at 04.10 hours. It is believed the murder of Joe Jones occurred around 4.30am.

- 13. At 4.35am the Ford focus car moved off again and at 4.49am it was parked back at Cliftonville Road (Smith's address) where it remained until 7.53am. At 09.39 hours the Ford Focus was at Days hotel, Sandy Row. CCTV footage shows a male believed to be Declan Smith entering the hotel. He did not return to work or stay at his home address again. On 14.03.2007 at approximately 15.56 hours police encountered Smith at Allworthy Avenue where he abandoned the Ford Focus and made good his escape. The vehicle was recovered by police and a search by a police dog resulted in the discovery of a baseball cap pushed out of sight under the vertical section of the back seat.*
- 14. An examination of that cap yielded DNA from the victim Joe Jones.*

Cell Site Data

- 15. Cell site data is consistent with Gerard Lagan's location at both murder scenes at the relevant times and with his movements from and to significant locations including to the vicinity of his own address before and after the Jones' murder. Cell site data shows that a telephone call made by Gerard Lagan at 02.59 hours, which used a telephone mast at Turf Lodge, is consistent with him being in the vicinity of the Rossa GAA club, Falls Road where Edward Burns body was found. This call is just before Damien O'Neill made his final 999 call at 03.00 hours.*
- 16. Further data shows that a text message sent from the mobile telephone (believed to be associated with a Gerard Mackin) to Gerard Lagan at 03.43 hours used the Ballyutoag Cell Site which is consistent with that phone being in the vicinity of the Ballyhill Road at that time, ie the burn site of Jones' Skoda car.*
- 17. Further data shows that Lagan's calls to Jones between 04.10 and 04.23 hours were handled by the Shankill Cell Site which is consistent with Lagan being in the vicinity of Brookfield Walk and Elmfield Street at those times.*

CCTV

- 18. CCTV footage provides some evidence to show that the accused Gerard Lagan, Gerard Mackin and Damien O'Neill were in the Glenowen Inn, Glen Road on the evening of 11th March 2007 and in the Devenish Bar, Finaghy Road up until approximately 11.30pm that night.*

Associations

- 19. Gerard Lagan, Declan Smith and Gerard Mackin (who was convicted for the murder of Edward Burns by Dublin Special Criminal Court but whose conviction was*

quashed on appeal) moved to Dublin shortly after these murders leaving behind their families, partners, children and work. All three ceased using their mobile telephones on 12 March 2007. The prosecution case is that only something of the most serious gravity would have led them to leave everything behind.

20. *Gerard Lagan was stopped a number of times by Garda officers in the company of Smith and Mackin and for a period of time Lagan and Smith lived together. None of the men have returned to NI.*
21. *Smith was murdered in Donaghmede, Co. Dublin in March 2014.*

Conclusion

22. *It is considered that on the basis of the available evidence the test for prosecution is met against Gerard Lagan (DOB 15.05.1984) for the murders of Edward Burns and Joseph Jones on 12th March 2007. It is the prosecution's case that Lagan made telephone calls to both men on the morning of the 12th of March 2007 with the intention of luring them from their homes so that they would be attacked and killed and that he was present in Elmfield Street at the time of the attack on Jones and that he enlisted the assistance of Smith after the murder of Edward Burns had taken place."*
5. The warrant was endorsed for execution in the State by the High Court and Mr Lagan was brought before the High Court. The section 16 hearing was fixed for and commenced on 23 September 2019. Mr Lagan delivered Points of Objection to his requested surrender. At that hearing, having read the booklet of papers, I decided that delay or passage of time was likely to be an obvious issue in this application, and requested the issuing authority to explain developments during the time period between the alleged events in 2007 and the issue of the warrant on 8 March 2019. The hearing was adjourned to and concluded on 7 October 2019, following receipt of a response to my request for further information.
6. Fiona Chamberlain, Crown Solicitor, took instructions from PSNI (the Police Service of Northern Ireland) and PPSNI and responded to that request for further information as follows: -

"The murders described in the EAW took place on 12th March 2007. Gerard Lagan and two other suspects, Gerard Mackin and Declan Smith, left Northern Ireland soon after the murders. The PSNI elected to use powers under the Criminal Law (Jurisdiction) Act 1976 and the case was further investigated by AGS (An Garda Siochana) and a file submitted to the DPP (Director of Public Prosecutions) in the Republic of Ireland.

A file was also submitted by PSNI to PPSNI. However, the PPSNI considered it appropriate to allow the process in the ROI to run its course before taking any decision.

A decision was taken by the DPP in the ROI not to prosecute Lagan or Smith. A decision was taken to prosecute Gerard Mackin. His trial took place in Dublin during October 2008 and he was convicted on 28th November 2008. However, he appealed and a re-trial was ordered. The re-trial took place in December 2010. At the re-trial an essential prosecution witness refused to give evidence. The re-trial therefore did not proceed. Following the conclusion of the proceedings in the ROI the case was considered by the PPSNI. In March 2012 it was considered that the test for prosecution was not met. The victim's families and police were notified.

In October 2013 PSNI asked for the case to be considered again. PPSNI reviewed the case and requested that additional enquiries be conducted. Between May 2015 and June 2018 PSNI continued to investigate the offences and submitted additional evidence, including expert cell site evidence. A decision to prosecute Gerard Lagan was taken on 17th January 2019."

7. The Notice of Objection (undated in the booklet of papers) sets out that Mr Lagan objected to the making of a surrender order, based upon the following points: -
 1. The Respondent awaits proof of the said European Arrest Warrant and any/every fact rendering it lawful to surrender the Respondent.
 2. The surrender of the Respondent is potentially in breach of section 42 of the European Arrest Warrant act, 2003, as amended. A person mentioned in the additional information, Mr Gerard Mackin, was tried for the offences described in the warrant in the Special Criminal Court. In about 2011, a *nolle prosequi* was entered by the Director of Public Prosecutions in that prosecution. The Director of Public Prosecutions has not indicated whether any prosecution against the Respondent is currently being considered.
 3. The evidence disclosed in the European Arrest Warrant and the additional information show that considerable emphasis is placed on information relating to the making of telephone calls. The regime for the storage of this information, largely predicated on Directive 2006/24/EC, has been the subject of repeated litigation and the Directive has been condemned as incompatible with the Treaty of the European Union and the Charter of Fundamental Rights. Where there is a real risk that the issuing state will leave the European Union in the immediate future, the Respondent faces a real and probable risk that he will be tried in a criminal system where he will be unable to challenge the retention of such information or rely on its incompatibility with the shared standards which underpin the European Arrest Warrant Framework.
 4. Regardless of the outcome of the Article 50 process initiated by the United Kingdom, surrender itself would amount to a breach of the respondent's fundamental personal rights under the Treaty and the Charter since it appears from the Warrant and Additional Information that the only basis for the formation of an intention to prosecute the Respondent is to be found in an analysis of personal data

unlawfully retained, accessed and analysed by the Police Service of the requesting State.

5. The surrender of the Respondent is in breach of section 37 of the European Arrest Warrant Act, 2003, as amended in that it interferes with his right to respect for his private and family life as guaranteed by Article 8 of the European Convention on Human Rights and to return him to Northern Ireland for trial for an offence allegedly committed 12 years ago would constitute a disproportionate interference with those rights.
6. The surrender of the Respondent is prohibited as there has been a complete failure to guard his due process rights arising from culpable and blameworthy prosecutorial delay where the offence occurred in 2007. The Respondent has been denied his right to an expeditious trial as guaranteed by both Article 38.1 of the Constitution and Article 5 of the European Convention on Human Rights (ECHR). This failure is compounded by the lack of any explanation as to how it was possible to try a co-accused within a reasonable timeframe.
8. The evidence supporting these objections is found in the averments in the grounding affidavit delivered by Mr Lagan in response to the Minister's application. I am not bound to accept every averment and assertion in this affidavit, and am entitled to weigh the evidence furnished therein, bearing in mind that there was no cross-examination on the affidavit, and also the evidence furnished in a further affidavit offered by Mr Lagan in support of a proposed bail application in this matter.
9. Ms Lawlor, senior counsel for the Minister, suggested that there were inconsistencies between the grounding affidavit and the bail affidavit. The bail affidavit states that Mr Lagan previously resided in Belfast but moved to Louth in 2006 as he was working in Dublin. The grounding affidavit, which is more detailed, states that Mr Lagan was employed by his father's cousin in a company owned and operated in Belfast, and that in 2006 and 2007 the vast majority of the work that he did for this company was in Dublin. Initially he frequently stayed in hotels in the Dublin area, returning to Belfast at weekends. He states that this employment was fully registered with the appropriate tax authorities in Northern Ireland. The affidavit then relates that in 2006/7, due to the intensive nature of the work in Dublin, he regularly stayed and lived in a number of different addresses in the Tallaght area. He mainly stayed with friends during this time and did not have formal leases. This was due to his long working hours in Dublin. It also states that in late 2007/2008 Mr Lagan and his partner moved to Dundalk. Mr Guerin, senior counsel for the respondent, responded that there was no conflict within the contents of these documents.
10. I agree with counsel for the Minister that there is a material conflict between the averments in the respective affidavits. The bail affidavit clearly states that Mr Lagan was resident in Louth in this jurisdiction while he was working in Dublin in 2006, prior to the date of the events referred to in the warrant. On the other hand, the affidavit grounding the Notice of Objection makes no reference to residence in County Louth but suggests

that at that time he was based in various places around Dublin during the week and returned to Belfast at weekends. This conflict might not be significant in itself at this remove in time, were it not for the fact that neither affidavit engages with the assertion in the statement of facts that Mr Lagan was in Belfast on the dates mentioned in March 2007, and departed from Northern Ireland suddenly, never to return. At the very least, both affidavits appear to be in conflict with the statement of facts in this regard. This conflict is relevant in weighing the remainder of the content of the grounding affidavit and leads me to treat that remaining content with considerable caution.

11. Having weighed and considered the contents of both affidavits, I am prepared only to accept the following factual matters for the purpose of this application. Mr Lagan has at least two children who are settled in schools in this jurisdiction. He now resides with his partner in County Louth, and is the registered carer for his partner, as she suffers from a significant medical condition. This condition was diagnosed in 2008/09, and Mr Lagan has not been in employment since that time for this reason. He was arrested by An Garda Síochana in late 2007 and questioned for two days in relation to the offences described in the warrant. His presence and whereabouts in this jurisdiction since 2007 have been known to members of An Garda Síochana. By reason of the conflict between the two affidavits, I do not accept that any other facts have been established as a matter of probability by these affidavits, particularly in relation to Mr Lagan's movements or whereabouts in 2006, 2007 or 2008.
12. The starting point of the analysis is that Mr Lagan must be surrendered under the 2003 Act so long as the provisions of the Act have been complied with. This includes the requirement in section 37 that the proposed surrender is not incompatible with the State's obligations under the European Convention of Human Rights, or in contravention of the Constitution. In this case, as noted above, the objections to surrender are based, at least in part, based on a combination of delay and interference with family and other rights. They are also based on the two previous decisions in each relevant jurisdiction not to prosecute the respondent in relation to these matters, on the fact that the material grounding the subsequent decision to prosecute is related to the use of mobile telephone handsets, antennae and analysis of associated retained electronic data, and on alleged deficiencies in the approach of the issuing judicial authority in or about the issue of the warrant.
13. The objection set out at point 2 above does not arise now, since it was indicated by counsel on behalf of the Minister during the hearing that the Director of Public Prosecutions in this jurisdiction has decided not to prosecute Mr Lagan in relation to these matters. Accordingly, the prohibition on surrender set out in section 42 of the 2003 Act is no longer capable of application to this case.
14. In dealing with the objections set out at points 3 and 4 above, which are best read together, the information in the warrant as set out above clearly expresses or implies that the decision to prosecute taken in January 2019 relies wholly upon mobile phone and cell site data that emerged due to the fresh investigation carried out by the PSNI, and that

this data was accessed and analysed by PSNI investigators between 2015 and 2018. I summarise Mr Guerin's arguments on these points as follows: -

1. no information has been provided as to why this data was first analysed so long after the events in question,
 2. no information has been provided to suggest that the issuing judicial authority considered whether access to or analysis of this information involved a breach of Mr Lagan's Charter rights, having regard to the judgments of the Court of Justice of the European Union (CJEU) in the *Digital Rights Ireland* case, and in subsequent and associated decisions,
 3. in those circumstances, there was evidence that the issuing judicial authority did not pay sufficient respect to Mr Lagan's procedural and fundamental rights in the process of deciding whether or not to issue the warrant, as the material analysed touched on the private life of the individual concerned,
 4. as a consequence, this was a factor which ought either to result in a refusal of surrender or, alternatively, weighed significantly against his surrender in any balancing exercise arising in that regard.
15. In relation to this issue, in addition to the *Digital Rights Ireland* case, Mr Guerin referred to but did not open any particular part of the decision of the High Court (O'Connor J.) in *Dwyer v. Commissioner of An Garda Siochana and others* [2018] IEHC 685. That judgment establishes that certain of the statutory provisions relating to the retention and access to such data in this jurisdiction were general and indiscriminate, and therefore inconsistent with EU law. Obviously, this judgment has no binding force in the jurisdiction where the warrant was issued, and I have no information as to the nature and extent of the Northern Ireland statutory provisions (if any) that permitted access to and analysis of data in this case, or as to any relevant case law in that jurisdiction. Consequently, I am not in a position to assess whether there is, in fact, any equivalent infirmity in Northern Ireland law, such as was identified in this jurisdiction by the judgment of O'Connor J. by reason of the effect of judgments of the CJEU on domestic Irish law.
16. Furthermore, so far as criminal trials conducted in this jurisdiction are concerned, O'Connor J. expressed no opinion as to whether the legal infirmity identified by him in the domestic statutory provisions affected the admissibility of evidence obtained by means of those provisions. Specifically, he noted that the plaintiff in *Dwyer* had not established in his case that the actual operation of the provisions in this jurisdiction from retention in November 2011 to the date of disclosure in October 2013 for telephony data of a number said to be associated with that plaintiff was inappropriate, unnecessary or disproportionate, and also noted that in subsequent criminal cases, trial courts in this jurisdiction have considered the facts of each case in the course of trial before determining the admissibility of such evidence.

17. Mr Lagan's argument is that as the District Judge made no apparent reference to the relevant European case law, and to the possible effect of that case law upon the new evidential material set out in the warrant, the issuing authority in this case engaged in an unfair procedure, which was disrespectful of Mr Lagan's rights. Mr Guerin argued that as it must be considered by an issuing authority that it is proportionate to issue a EAW, the issuing authority in this case did not perform the necessary gatekeeping role or a proper assessment of proportionality, owing to the absence of consideration of the propriety of retention of and access to the telephone data. In this regard, Mr Guerin also relied on the previous decisions in two separate jurisdictions not to prosecute in this case. He referred to and opened portions of the judgments of the CJEU on the preliminary references from the Supreme Court in this jurisdiction in O.G. (C-508/18) and P.I. (C-82/19 PPU).
18. Mr Guerin rightly conceded that his reliance on these judgments was by way of analogy or logical extension, because the defect identified in those cases does not apply to the issuing authority in this case. Those cases decide that a prosecution authority which is potentially subject to instruction or control by the executive is not properly within the concept of a competent "issuing judicial authority" for the purposes of the issuance of a EAW. It is not alleged that the issuing District Judge in this case was not competent to issue the warrant by reason of the possibility of such external instruction or control.
19. These judgements state clearly that it must be borne in mind that the relevant EU Council Framework Decision (2002/584/JHA) aims to introduce a simplified system of surrender directly between judicial authorities designed to replace a traditional system of cooperation between sovereign states, which involves the intervention and assessment of the executive, in order to ensure the free circulation of court decisions in criminal matters, within an area of freedom, security and justice. The EAW system entails a dual level of protection of procedural rights and fundamental rights which must be enjoyed by the requested person.
20. At the level relevant to this case, at which the EAW is issued, the CJEU noted that in taking such a measure, which is capable of impinging on the right to liberty of the person concerned as enshrined in Article 6 of the Charter of Fundamental Rights of the European Union, a decision meeting the requirements inherent in effective judicial protection should be adopted. Where those requirements of effective judicial protection are met by the issuing authority, including the absence of executive direction or influence, the executing judicial authority will then be satisfied that the decision to issue a EAW for the purpose of criminal prosecution is based on a national procedure that is subject to review by a court, and that the person in respect of whom that national arrest warrant was issued has thereby had the benefit of all safeguards appropriate to the adoption of that type of decision including, *inter alia*, those derived from the fundamental rights and fundamental legal principles referred to in Article 1(3) of the Framework Decision.
21. A judicial authority competent to issue a European arrest warrant by virtue of domestic law must review, in particular, observance of the conditions necessary for the issuing of the European arrest warrant and examine whether, in the light of the particular

circumstances of each case, it is proportionate to issue that warrant. Specifically, the CJEU has held that the issuing judicial authority must be capable of exercising its responsibilities objectively, considering all incriminatory and exculpatory evidence, without exposure to the risk that its decision-making power is subject to external directions or instructions. This protection is secured by the requirement that the decision on issuing a EAW be taken by a judicial authority, so as to ensure that the entire surrender procedure between member states provided for by the Framework Decision is carried out under judicial supervision.

22. The fundamental principles underlying this simplified system of surrender are those of mutual trust between the member states and of mutual recognition. The principle of mutual trust requires member states, save in exceptional circumstances, to consider that all other member states have complied with EU law and had particular regard to fundamental rights recognised by EU law, particularly in the areas of freedom, security and justice. The principle of mutual recognition, which is the cornerstone of judicial co-operation, means that pursuant to the Framework Decision, by Article 1(2) states are in principle obliged to give effect to a EAW. An executing judicial authority may refuse to execute such a warrant only in the cases of obligatory non-execution exhaustively laid down in Article 3, or in the cases of optional non-execution laid down in Articles 4 and 4a. The execution of a EAW may be made subject to only one of the conditions exhaustively laid down in Article 5. These principles are embodied in section 4A of the 2003 Act, which provides that it shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown. I am satisfied that these principles and provisions exhaust the possibilities for refusal of surrender by an executing judicial authority under this system of surrender.
23. In circumstances where I am satisfied that the warrant has been issued by an independent judicial authority of the type required by EU law, surrender can only be refused where it has been demonstrated that there is a bar to surrender either by reference to the provisions of the Framework Decision referred to above, or to the provisions of 2003 Act, as amended. In particular, I am of the opinion that the mutual respect underpinning the operation of this system precludes a detailed examination or judicial review of the decision of the independent judicial issuing authority by the executing authority, over and above being satisfied that none of the bars to surrender stipulated by either the Framework Decision or the 2003 Act are applicable to the individual case.
24. Having considered the matter in the light of these principles, I do not find that there are grounds to impeach the judicial decision to issue the warrant on the basis suggested by Mr Guerin. In the first case, the fact that there was no apparent reference by the issuing authority to consider the two previous decisions not to prosecute is not a significant or material omission in the context of the principles set out above, which primarily require an independent assessment of the evidence, both inculpatory and exculpatory. The previous decisions not to prosecute were superseded by the fresh investigation carried out by the PSNI after the earlier decisions were taken, and the emergence of the

telephone evidence in relation to Mr Lagan between 2015 and 2018. I have no doubt that the District Judge, as he was required to do, considered and weighed the evidence set out in the warrant before deciding to issue it, and I am satisfied that the information in section E of the warrant demonstrates a fair, rational and reasonable basis for that decision.

25. Secondly, I am also not persuaded that any failure on his part to consider a possible breach of rights arising from the CJEU case law referred to above constitutes a basis for refusal of surrender. The question of a potential breach of Mr Lagan's Charter rights by virtue of the effect of the *Digital Rights Ireland* and associated decisions is at this stage an arguable or possible proposition to be resolved at any future trial. There is a bare assertion in the points of objection that personal data was unlawfully accessed, an assertion unsupported by any evidential material or detail in the replying affidavit. There has been no assertion or evidence that the actual process of retention, disclosure or examination of the data in question was inappropriate, unnecessary or disproportionate in the instant case. In the absence of an assertion or evidence to that effect, I cannot hold in retrospect that the decision to issue the warrant without considering such matters was disproportionate or improper. At this point in time, it appears that Mr Lagan may have the basis of a challenge to the admissibility of the telephone evidence, and there is no doubt that he will have an opportunity to advance an argument to that effect at his trial. The mere existence of an arguable evidential issue is insufficient to engage any of the relevant provisions of the Framework Decision or the 2003 Act so as to provide a basis for refusal of surrender.
26. If there was a breach of Mr Lagan's Charter rights between 2015 and 2018, and in the absence of an exposition of the relevant Northern Ireland statutory provisions it is not immediately clear that there was such a breach, that would still have to be considered in the context of the competing and significant public interest in the prosecution of a suspect for two murders, where a stateable case is clearly apparent on the information considered by the judicial authority as set out in the warrant. The proper context for consideration of these matters is in a debate as to the admissibility of the evidence within the trial context, which necessarily brings a far greater degree of legal and factual focus to such issues than is possible within the European arrest warrant procedure as currently constituted.
27. As to the point that it is probable that at some point in the near future the requesting jurisdiction will no longer be a member of the European Union, that does not change the application at this time of the fundamental principles outlined above. Even if Northern Ireland departs from the European Union, as is now envisaged, that would not change the fact that at the relevant time both Mr Lagan and the requesting state were subject to the laws of the European Union. I therefore fully expect that if the Northern Ireland authorities and courts are currently prepared to invoke obligations and avail of facilities arising under EU law to obtain the surrender of Mr Lagan for prosecution, those courts and authorities thereby explicitly accept that there will be a mutual and corresponding

obligation in the course of that prosecution to consider, uphold and apply such personal rights as may have accrued to Mr Lagan under the same body of law.

28. The principles of comity and mutual respect involved in this procedure must continue through to the conclusion of the trial process. If they did not, future surrender or extradition arrangements with an offending jurisdiction would be brought into serious question. It must therefore be open to Mr Lagan to rely on the potential applicability of EU law and Charter rights to the facts of his case should he seek to exclude the telephone data evidence in a subsequent trial. At this stage, I cannot say whether or not Articles 6 or 7 of the Charter in fact have any application or effect in this case. That is a matter solely for the determination of the trial court after a detailed exposition and consideration of the relevant facts, circumstances and applicable law. In this case, the existence of this issue is not a matter that weighs heavily or at all in the exercise of my functions of the executing authority in the system of surrender as contemplated by the Framework Decision.
29. It is not for the issuing or requested judicial authorities judge to decide legal or factual matters in the course of the surrender process that properly belong to the court of subsequent trial. It would be entirely inappropriate for a judicial authority in the requested jurisdiction to engage in predicting or speculating on the outcome of such matters. It seems to me that the reality of this submission is that the trial of these charges should be prohibited in advance by a refusal of surrender simply because a legal issue of admissibility has been identified prior to the trial, but not assessed at the time of the issue of the warrant. I doubt whether Mr Lagan could successfully prohibit a trial on that basis if it were due to take place in this jurisdiction, and I am satisfied that the EAW mechanism does not entitle him to a refusal of surrender on an equivalent basis simply because he is to be prosecuted elsewhere. Perhaps surrender could be refused if it could be concluded that the admissibility argument was so strong or clear that it is obvious that fundamental rights were not respected, so that surrender would be rendered a disproportionate measure. I can reach no such clear conclusion or finding on the admissibility issue presented in this case.
30. I do not consider that the mere existence of an unresolved or arguable legal issue prevents the issue of a warrant where a stateable case is clearly apparent on consideration of all of the exculpatory and inculpatory material as set out in the warrant. As noted above, the trial process is the appropriate context for the discussion and resolution of such issues, having regard to the facts and circumstances of the individual case. I see no error, omission or impropriety attaching to the decision by the independent judicial authority to issue the warrant in this case that demonstrates that there was or will be non-compliance with the requirements of the Framework Decision, or that indicates any lack of proportionality in that judicial decision. I do not find that this situation renders surrender a disproportionate measure at this stage of the process in this instance, nor do I conclude that the decision of the independent judicial issuing authority was disproportionate or tainted by omission or impropriety. Accordingly, I do not uphold the objections contained in points 3 and 4 of the Notice of Objection.

31. I will now deal with points 5 and 6 in the Notice of Objection. Where resistance is offered to surrender by virtue of a Convention or constitutional right, the court must conduct a fact-specific inquiry into all relevant matters so that a fair balance can be struck between the rights of the public and those of the person in question. Such an exercise is not governed by any pre-determined approach or pre-set formula. Each of the competing interests must be measured and balanced. In this context, the interests of the public, underpinned by weighty considerations such as freedom and security, will virtually always merit significant value; the weight of individual interests will have greater variability. Consequences inherent in the surrender process, without more, attract a much lower value than consequences with a real and substantial effect on the individual concerned. The other relevant and well-established principle in this context is that in applications for surrender on foot of a EAW delay or the passage of time does not, of itself, operate as a bar to surrender.
32. The first part of the inquiry is to measure the public interest. An application for surrender by means of an EAW arises pursuant to membership of a detailed collective structure, creating mutual rights and obligations which, in themselves, create a high level of public interest in the implementation of the EAW process. This case also engages the specific public interests that those accused of crimes, particularly serious crimes, should be brought to trial. This is a basic precept of any system of administration of justice, whether domestic or international. The conclusion of a surrender arrangement within the binding provisions of the law of the European Union means that there is a corresponding public interest in ensuring that persons accused of crimes in other member states or in states with whom Ireland has entered into an extradition agreement are also brought to trial.
33. There is also an important and weighty interest in ensuring that the State honours its treaty obligations, with particular weight attaching to performance of obligations entailed by membership of the European Union. There is a reciprocal benefit to this state by discharge of those obligations, in the form of the return to Ireland for trial of persons accused of crimes here, or the return of sentenced offenders, and corresponding public interests that such persons should not enjoy sanctuary or immunity, and in awareness of the State's commitment to honour reciprocal international obligations. The weight of the public interest in the individual case may be adjusted in either direction by reference to case-specific factors.
34. I am satisfied that factors affecting the weight of public interest in this jurisdiction include the actions or inactions of the requesting State, and the particular history and purpose of the request for surrender in the individual case. It is well-established that there is a significant and weighty public interest where surrender is sought for the purpose of ensuring the prosecution of a suspect where criminal allegations of more than minimum gravity arise. In that regard, the allegations in this case are clearly towards the top end of any applicable scale of gravity. I am satisfied that the requesting authorities have adequately explained most aspects of the passage of time between 2007 and 2019. The only aspect that remains unclear is as to why the telephone evidence now relied upon was

not either available or not analysed prior to the period between 2015 and 2018. On the other hand, this category of evidence does not generally decrease in reliability or increase in fallibility with the passage of time. No specific prejudice has been alleged to arise in this respect.

35. Indeed, in one sense it might be said that Mr Lagan's legal position has improved with time, in that he may now have arguments for the exclusion of this evidence at a trial which were not open to him had such evidence been accessed, analysed or led at a trial prior to 2014. In any event, I am satisfied that this type of delay and any consequences thereof that matters that can be fully canvassed by Mr Lagan at subsequent trial, and that the delay arising here is not a bar to surrender on the facts of the case. Accordingly, I find no material diminution in the strong public interest in prosecution of these very serious allegations, either by reason of delay or the passage of time, or by the fact that there were previous decisions not to prosecute, which have been overtaken by the subsequent emergence of the telephone data evidence.
36. The material provisions of section 37 of the Act of 2003 prevent the surrender of a person under the Act if this would be incompatible with the State's obligations under the European Convention of Human Rights or under the Constitution. Mr Lagan claims that his surrender is prohibited by reason of culpable and blameworthy prosecutorial delay in issuing the warrant in this case. The test and approach to be applied to such a claim has now been clearly enunciated by the Supreme Court decision in *Minister for Justice, Equality and Law Reform v. Ostrowski* [2013] IESC 24, which plainly stipulates that a refusal to surrender based on such personal and family rights will be an exception to the normal requirement to surrender in a EAW matter.
37. In almost all cases of surrender, the family rights protected by Article 8 of the Convention will be affected. It is only in an exceptional case that Article 8 rights will outweigh the requirement to surrender. The facts must demonstrate the likely existence of harmful consequences, peculiar to Mr Lagan, which are of such significance as to outweigh the strong public interest in ordering his return. Surrender is not precluded by matters falling within the expected consequences which might flow from, and which are inherent to the operation of the surrender process itself. In almost every case where a person is surrendered or extradited, the exercise of ordinary family or personal rights will inevitably be compromised by the usual or inherent consequences of that course of action. Consequently, in broad terms, surrender must take place unless there is some exceptional feature relating either to the public or private interests in a case which renders surrender disproportionate. Lack of proportion does not arise where the public interest remains strong and the private interests are not extraordinary.
38. The final issue is as to whether the strong public interest in prosecution and surrender for that purpose has been counterbalanced and outweighed by the private rights asserted by Mr Lagan. In this regard, the focus of the enquiry is on assessing the severity of the consequences of a proposed surrender measure for the potentially affected person, rather than on the circumstances giving rise to those consequences. Loss of family contact, the

potential loss of employment and/or housing, and adverse economic or social effects on the family unit are not normally factors that weigh heavily against surrender, as such features are generally inherent in the process.

39. The most relevant feature of this case is the material placed before the court by Mr Lagan relating to his partner. I have alluded above to the basic facts established in this regard. There is no doubt that this individual circumstance is certainly deserving of respect, and without going into unnecessary detail, there will undoubtedly be significant adverse consequences in the care regime referred to in the replying affidavit. I fully accept that this consequence is more serious than might apply to most other family units facing surrender of a carer. However, I do not consider that the facts relating to family and personal matters relied upon in this case disclose sufficiently severe, unusual, disproportionate or unwarranted consequences of surrender on the Article 8 or constitutional rights of potentially affected persons so as to outweigh the strong public interest in surrender in this case. I do not conclude that refusal of surrender would be a proportionate and reasonable response to the established facts in this case.
40. In these circumstances, I do not uphold any of the objections set out in the Points of Objection, and as a consequence, there will be an order for the surrender of Mr Lagan on foot of the warrant of 8 March 2019 to such representative of the Northern Ireland authorities as may be authorised to receive him. For the avoidance of doubt, I should repeat that surrender is ordered in this case on the basis of the subsisting provisions underpinning the European arrest warrant surrender mechanism, which is part of the broader corpus of European union law which still applies to both jurisdictions and was invoked by the requesting authority in this case. This is founded on the principle of mutuality arising from membership of the European Union. In those circumstances, I expect that, whatever may be the position in the future, where the prosecution authorities have chosen to rely upon EU law in order to secure surrender of the respondent for the purpose of trial, that they will equally ensure that rights, obligations and liabilities arising under subsisting and applicable EU law will continue to be considered, respected and applied if relevant in the course of any subsequent trial.
41. It follows from this observation that I do not find substance in Mr Lagan's supposition that the issue of the warrant was part of an exercise carried out in advance of the likely departure of the requesting state from membership of the European Union, so as to raise an inference that there is no real intention to prosecute Mr Lagan in relation to these matters. Even if applications for this or other such warrants were expedited with that impending departure in mind, I would not find that either surprising or improper in any way. On the contrary, I am satisfied that the evidential details set out in the warrant and in the subsequent statement of facts betokens a firm and settled intention on the part of the requesting authority to try to Mr Lagan on these charges on the basis of the disclosed evidence. If that intention ceases in the future, I expect that the requesting authorities would deal appropriately with Mr Lagan in that event.

42. Finally, Mr Guerin suggested that this was a case where I should consider making a preliminary reference to the CJEU pursuant to Article 234 of the Treaty establishing the European Union. Such a reference may be made by a court of first instance where it is considered that a question arises involving validity or interpretation of the type specified in that Article, the resolution of which is necessary to enable a national court to give judgment. I do not propose to exercise my discretion to refer under this Article, as I do not consider that any question of the type contemplated by it arises in this case. The relevant Community and national law is sufficiently clear and well-established to enable me to conclude this matter without a preliminary reference.