THE HIGH COURT

[2006 No. 3340 P]

BETWEEN

NOEL O'CONNOR

PLAINTIFF

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

NO. 2

Judgment of Ms. Justice Baker delivered on the 27th day of April, 2018

1. This judgment concerns the application by the plaintiff to be released from his implied undertaking regarding documents discovered by the defendants in the course of the proceedings and/or that that undertaking be modified insofar as to permit the discovered documents to be referred to, exhibited, or otherwise relied upon in the European Arrest Warrant ("EAW") proceedings currently before the City of Westminster Magistrates' Court and listed for hearing on 25 June 2018.

Background

2. The plaintiff claims damages against the defendants for negligence, breach of duty, breach of contract, in quasi-contract, misrepresentation and for breach of constitutional rights, and under the European Convention on Human Rights. The claim arises from the role engaged by the plaintiff at the material times as a Garda informant. The plaintiff claims that he entered into an agreement with the first defendant in July 1999 that he would so act as informant in relation to the activities of certain persons thought to be engaged in drug trafficking activities believed to be criminal in nature. The plaintiff claims that it was an express term of the agreement and/or that it was represented to him that the first defendant would take all necessary steps to safeguard his safety, keep his identity confidential and protect him from criminal prosecution in the State, or abroad.

3. The events in respect of which these proceedings are brought arose following the detention in custody of the plaintiff in France on 7 August 2000 and his conviction and sentence in the courts of France for drug trafficking offences. The plaintiff claims that the first defendant failed to take such steps as were agreed, or which were reasonably to be expected, to protect his rights including direct intervention with state authorities in France.

4. It is not denied by the first defendant that the plaintiff did perform some surveillance role or role as a person providing information, nor is it denied that payments were made to him in consideration of information that he provided to the first defendant.

5. The plaintiff was detained in custody in France until his release in November 2000 following a Rogatory Commission between the French and Irish authorities.

6. The plaintiff was tried in his absence in France in June 2002 and was convicted and sentenced to a term of five years' imprisonment subsequently reduced to a term of four years after two appeals.

7. The plaintiff has not served any of the sentence imposed by the French Court, and the present application arises following his arrest in the jurisdiction of England and Wales in January 2018 on foot of an EAW issued on 3 January 2008 by the Head of Prosecution Department at the Court of Appeal of Lyon, the hearing whereof stands adjourned before the City of Westminster Magistrates' Court in London.

The present motion

8. The plaintiff seeks to be released from the implied undertaking and/or that that undertaking be modified in regard to the use of documents discovered in the course of the proceedings, some of which were the subject of a judgment delivered by me on 9 November 2016, *O'Connor v. Commissioner of An Garda Síochána (No. 1)* [2016] IEHC 634, following a claim by the defendants of public interest privilege over certain of those documents.

9. Discovery has since been made and the precise documents and the course of the discovery process are not relevant to this judgment.

10. The defendants resist the application their opposition is both principled and practical.

The implied undertaking

11. The law that governs the use of documents discovered in the course of litigation derives entirely from judicial decisions. It has been accepted in the authorities that such documents are disclosed subject to an implied undertaking that the documents not be used other than for the purposes of the litigation concerned. In some cases, a court will require an express undertaking where it considers that greater precision is required regarding the uses to which discovered information may be put: see for example *House of Spring Gardens Ltd. v. Point Blank Ltd*. [1984] 1 IR 611.

12. The law was reviewed in this jurisdiction by Clarke J. in *Cork Plastics (Manufacturing) v. Ineos Compounds UK Ltd* [2007] IEHC 247, [2011] 1 IR 492 and the common law position operative in this jurisdiction is broadly similar to that found in the English Civil Procedure Rules, which replaced former practice in the jurisdiction of England and Wales.

The power to modify the restriction

13. The prohibition on the use of disclosed documents is capable of being modified and regulated by the court which may, in the exercise of its inherent jurisdiction, grant permission for the use of documents where there exists "special circumstances" to justify the release of the undertaking, whether in whole or in part, as explained by Kelly J. in *Roussel v. Farchepro Ltd*. [1999] 3 IR 567, at p. 574.

14. Kelly J. rejected the contention that as a matter of law he was "devoid of jurisdiction to modify or vary the implied undertaking which exists concerning the documents which have been disclosed on discovery" and considered the argument that no such jurisdiction existed to have "little to recommend it either in law, logic or commonsense". He rejected "an absolutist approach" as not justified, as it was likely to give rise to injustice and was not always necessary to provide protection for the rights of the parties. He expressly approved the judgment of the House of Lords in *Crest Homes Plc. v. Marks* [1987] 1 AC 829. He accepted too that, as a matter of practice, the High Court had made orders of the type sought.

15. The circumstances in which the court may make an order to modify or release the implied undertaking depend on the case at issue, and at p. 574 Kelly J. quoted with approval Oliver L.J. in *Crest Homes Plc. v. Marks*, at p. 860:

> "[…] the court will not release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery."

16. The test thus identified is a two-part test: special circumstances have to be shown, and it has to be established that the making of the order would not occasion injustice to the person who had made discovery. The principles engaged are discretionary and must, in the words of Kelly J. at p. 574, involve the court looking:

> "[…] at all of the circumstances, including, if necessary, the circumstances of the original disclosure, the nature and the strength of the evidence, the type of wrongdoing which is alleged to be involved and the interests of both the applicant and the party providing discovery as well as any public interest which may be involved."

17. When Kelly J. came to apply the second limb of the test he took the view that the risk that confidentiality which might otherwise be afforded to the documents might be lost was a relevant factor. He held that no urgency could be shown for disclosure of the documents, and for that reason refused to permit disclosure of documents to the Swiss Court.

18. I would add to these factors the proposition that as the jurisdiction is discretionary, the guiding principles must be the interests of justice and the court must balance in a proportionate way the competing interests of the parties.

The issues of law arising in the English proceedings

19. Messrs. Sternberg Reed Solicitors, who act for the plaintiff in the English extradition proceedings, have exhibited in an affidavit of Richard Cooper, a solicitor and partner in that firm, an opinion of counsel, Ms. Rachel Barnes, who acts for Mr. O'Connor. She describes the relevant principles of law relating to the doctrine of abuse of process in English law which are broadly familiar to Irish lawyers and quotes from the judgment of Diplock L.J. in *Hunter v. Chief Constable of West Midlands Police* [1982] AC 529, at p. 536, regarding the inherent power of a court "to prevent misuse of its procedures" in a way that might "be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people."

20. Ms. Barnes states that surrender of Mr. O'Connor on foot of an otherwise valid EAW may be refused as an abuse of process by reference to the decision of the UK Supreme Court in *Zakrzewski v. Regional Court in Lodz* [2013] UKSC 2, [2013] 1 WLR 324, where the Court, having accepted that whilst the underlying purpose of the EU Framework Decision and Part 1 of the UK Extradition Act 2003, created "a simplified and accelerated procedure based on the mutual recognition by the requested State of the antecedent decision to issue the warrant by the judicial authority in the requesting State", this purpose did not oust the court's abuse of process jurisdiction generally as "an inherent right of an English court".

21. Ms. Barnes expresses the view that, as a matter of domestic law, a subsequent prosecution after a promise of immunity from prosecution could be an abuse of court process and quotes authorities for that proposition.

22. She identified from her researches one reported English extradition case in which a requested person had claimed to have entered into an agreement with the police in one State to provide information and other assistance regarding international drug trafficking in exchange for immunity for prosecution but was then subjected to an extradition request from a second State in respect of the same broad criminal enterprise. In *R. (Fouad Abbes Abdullah) v. Secretary of State to the Home Department* [2001] EWHC Admin 263, a judicial review of the Secretary of State's decision to order extradition grounded on the offence of the rule of double jeopardy was rejected as the High Court for England and Wales found that the alleged promise of immunity from prosecution did not include a promise of immunity from prosecution in another jurisdiction and thus could not afford a defence to the extradition proceedings. Ms. Barnes distinguishes that judgment as Mr. O'Connor seeks to defend his extradition to France *inter alia* on the ground that he did have the benefit of a promise of immunity from prosecution in another jurisdiction, albeit this is not admitted. She also noted that the promise of immunity in *Fouad Abbes Abdullah* was entered into after the criminal conduct had been committed, and considers that also a relevant distinguishing feature.

23. She notes that one basis on which Mr. O'Connor intends to defend the EAW is that the French authorities "were misled by the Irish police officers in their evidence to the Rogatory Commission".

24. She draws an analogy with the case of *Zakrzewski* and notes that the scheme of operation of the EAW does not include a mechanism for the assessment of the probity of the issue of the EAW except in very limited circumstances. She notes that it is not alleged that the French authorities behaved in bad faith, but that it would be consistent with fundamental guarantees of fairness that the English Court could consider whether surrender pursuant to the EAW would result in an unfair extradition having regard to what Mr. O'Connor says was a wrongful action by the Irish State.

25. Accordingly, her evidence is that the documents the subject matter of the present application may be useful to assist in the presentation of an argument on behalf of Mr. O'Connor that the execution of the EAW could be unfair and an abuse of process.

Procedure in the EAW hearing in the English Court

26. Ms. Barnes describes the process to be engaged by the English Court hearing an application to execute an EAW as a two stage process, the first stage of which is for the court to determine whether as she puts it "the factual situation as alleged by NOC [she refers throughout her opinion to Mr. O'Connor by his initials] would render surrender to France under the EAW an abuse of the courts' process. In other words, operating on the basis of assumed facts would extradition amount to an abuse of process".

27. Paragraph 22 of the opinion of Ms. Barnes is central to one of the arguments made by defendants regarding the modification of the undertaking, and I purpose quoting from it in full:

> "If the English Court concludes on the basis of the assumed facts, that [Mr. O'Connor's] surrender pursuant to the EAW may be an abuse of process, the second step in its inquiry will be to determine whether those facts may pertain. As noted above, key points of fact are in dispute. There can be no full enquiry into the facts without reference to the Disclosed Material."

28. The test at the second stage is to determine whether there are "reasonable grounds for believing the alleged conduct may have occurred".

29. Ms. Barnes expresses a view that the material in respect of which the present order is sought is "important evidence to which the

English Court would have a regard in determining the abuse issue, in particular, *in the second step of its inquiry.*" (Emphasis added).

30. In the light of the evidence of Ms Barnes regarding the sequence of the hearing in the jurisdiction of England and Wales, the defendants make the submission that the present application is premature.

Is the application premature?
31. Counsel for the defendants argues that I ought to approach the application on the basis that the English Court hearing the EAW application will act on the basis of "assumed facts", the language used by Ms Barnes, and that Mr. O'Connor may safely proceed to argue his opposition to being returned to France in reliance on the information that he now has, the factual matters which he will put before the English Court, which will be accepted or "assumed" to be correct, and in the light of the pleadings from which it is apparent certain factual matters are admitted by the defendants.

32. As the second step in the consideration by the English Court is whether there are reasonable grounds for believing that surrender could amount to an abuse of process, the defendants argue that this application is premature and that Mr. O'Connor ought to wait to bring an application regarding the material until the English Court has determined the first step, which on Ms. Barnes' evidence would be determined on the basis of what she describes as "assumed facts". It is argued by counsel on behalf of the defendants that the application should either be refused at this juncture or adjourned generally and re-entered if Mr. O'Connor is found by the English Court to have satisfied the first step.

33. With regard to the pleadings, certain matters are acknowledged and accepted in the defence served by the defendants on 10 September 2009 and these may conveniently be summarised as follows:

> (a) it is admitted that the plaintiff was an informant;
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> (b) it is admitted that he was paid by An Garda Síochána after he had provided information in regard to illegal drug trafficking;
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> (c) it is admitted that the plaintiff was provisionally released from the custody of the French authorities on 17 November 2000 after he had been detained in prison in France for approximately four and a half months;
>
> (d) what is not admitted and remains an issue in the Irish proceedings is whether an agreement was reached between the plaintiff and the first defendant that he would be protected from prosecution for activities outside the jurisdiction.
>
> (e) it is admitted that following the arrest of the plaintiff in France representations were made though the Rogatory Commission on foot of which the plaintiff was released from custody in France. The defendants deny that any guarantee was given to the plaintiff regarding the basis of his release, and whether it was unconditional.

34. I accept the argument made by counsel for the defendants that the plaintiff may with the assistance of certain matters admitted in the defence to the plenary proceedings seek to present a set of facts to the English Court which are capable of leading to a determination that the first stage of the two stages process envisaged by Ms. Barnes is met. I also accept her argument that the evidence of counsel who represents Mr. O'Connor in the English proceedings is to be accepted and that in the light of her evidence regarding the process to be engaged in the English Court the documents in respect of which the present application is made may not require to be presented until the second stage has been reached.

35. Counsel for the defendants argues in those circumstances that the making of an order has not been shown to be necessary and that until such time as either the English Court indicates that it requires a release of Mr. O'Connor or his lawyers from the implied undertaking, or otherwise a request is made for the documentation through the English authorities that I ought not to make the order. It is argued therefore that no "special circumstances" exist to justify the making of the order.

Decision on the prematurity argument
36. I cannot agree that the approach for which the defendants contend is an appropriate or efficient means to deal with the application. This is for a number of reasons.

37. First, at this juncture, I cannot safely assume that Mr. O'Connor will get past the first stage of the two stages identified by Ms. Barnes, and because what is in issue are the fundamental rights of freedom and liberty of Mr. O'Connor, I consider the correct approach must be for the Irish Court to facilitate his argument before the English Court at the earliest possible stage of the process.

38. Second, it is not for me to guess how the English Court will approach the matter and whether it will approach the two stages of the process on the same day or over a number of days in sequence, and therefore it would be unsafe for me to assume that the English Court would accede to a request for an adjournment to enable the plaintiff to return to my court.

39. Third, I consider it would be wrong as a matter of principle for me to make an order which would limit in any way the approach that the English Court takes to the matter and how it manages its own process.

40. Fourth, I must proceed on the basis that the material the subject matter of the present application is important for the conduct of the EAW hearing in the English Court, as this is the uncontroverted evidence of Ms Barnes, albeit she considers the material is more likely to be relevant to the second stage of the process.

41. Finally, Recital 5 of the Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States ("the Framework Decision") identifies one of its objectives as being the introduction of a "new simplified system of surrender" and if possible to "remove the complexity and potential for delay inherent in the [then relevant] extradition procedures." It therefore seems to me not to be consistent with the underlying policy reason of the Framework Decision that I would add a further layer of complexity or procedural delay to the application before the English Court.

42. Therefore, I consider it appropriate that the relevant material be made available at the earliest possible opportunity to the English Court to enable it to determine the matter by whatever means and in whatever sequence it chooses.

43. But the matter is not one of mere efficiency and a more difficult and fundamental argument was made in the course of the hearing that requires analysis.

44. The defendants argue that the existing mechanisms available to the English Court are sufficient to enable that Court to obtain the

documents that Mr. O'Connor seeks, and that the order sought is therefore unnecessary.

Existing mechanisms to obtain the documents
45. The second argument of the defendants is dealt with by Ms. Barnes in her opinion at para. 24. As she points out, Article 15(2) of the Framework Decision which governs the operation of the EAW provides that supplementary information may be supplied to the executing judicial authority at its request. She takes the view that such request may be made of the requesting judicial authority and not of a third State, and that the scheme of the EAW does not "provide a mechanism by which the English court can request that the Irish High Court provide a copy of the Disclosed Material to enable it to decide on surrender."

46. In order to more fully consider the argument made by counsel it is necessary to briefly analyse the European Arrest Warrant process and procedures.

The scheme of the Framework Decision
47. The process engaged by the executing court is inquisitorial and the Supreme Court made it clear in *The Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45, [2010] 3 IR 783 that the court could of its motion request material from the issuing judicial authority.

48. The European Arrest Warrant procedure was introduced pursuant to Council Framework Decision and subsequently amended by the Council Framework Decision 2009/299/JHA of 26 February 2009.

49. The Framework Decision was implemented in Ireland by the European Arrest Warrant Act 2003 ("the 2003 Act"), which transposed the Decision's provisions.

50. The Framework Decision established a system of surrender between judicial authorities in Member States and it is central to the argument in the present case that the procedures permit judicial authorities in one State to communicate with those in another for the purpose of implementing judicial decisions. A warrant issued under the procedure (an EAW) is regarded as a judicial decision enforceable and entitled to mutual recognition within the European Union by all Member States. The principle of mutual recognition contained in Article 1(2) of the Framework Decision is a fundamental and first principle of the operation of the procedure.

51. It is clear however, that the principles of mutual recognition and enforceability do not mean that an EAW will automatically be executed in all cases and the executing judicial authority has a discretion to refuse to execute the warrant in certain circumstances. The leading case remains the judgment of the CJEU in *Lopes da Siva George*, Case C-42/11 ECLI:EU:C:2012:517.

52. All parties to the present proceedings accept that a Member State must respect fundamental rights and fundamental legal principles as enshrined in European law, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Charter of Fundamental Rights of the European Union, as the CJEU recently affirmed the importance of these principles in the joint cases of *Aranyosi* and *Caldararu*, Case C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198 on a request for a preliminary ruling by the Higher Regional Court of Bremen, Germany, where it described those rights as "absolute". At para. 88, the CJEU considered that an executing judicial authority was bound to assess the existence of a real risk of a person being subjected to inhuman or degrading treatment in the issuing State, once it was "in possession of evidence of a real risk" of such treatment and that it was bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State.

53. At para. 89, the CJEU described the nature of the evidence on which the executing judicial authority was entitled to rely as being "objective, reliable, specific and properly updated". At para. 92, the Court considered that the executing judicial authority had to make "specific and precise" assessment of whether there are "substantial grounds to believe that the individual concerned will be exposed to that risk".

54. The approach mandated by the CJEU is for the executing judicial authority to make a judicial determination in the particular circumstances of the case and in the light of the evidence that it had received, and it must in those circumstances request the judicial authority of the issuing Member State to furnish supplementary information that it requires.

Request for information from a third State?
55. What is not clear from the judgment of the CJEU is whether the executing judicial authority may seek information from a third Member State. Thus, while the judgment of the CJEU is a strong authority that might be relied on by Mr. O'Connor in the English Court to argue that the French judicial authorities may have an obligation to provide information to that Court, there is no guidance in that judgment as to whether the English Court may require the assistance of the Irish courts or other Irish authority, or may require that the French Court to in turn seek assistance or documentation from Ireland.

56. Further, Article 15(2) of the Framework Decision permits the executing judicial authority to request information from the issuing authority, and Art 15(3) of the Framework Decision in turn permits that issuing judicial authority to at any time forward any additional useful information to the executing judicial authority. The Framework Decision is silent therefore with regard to any possible role for a third party State.

57. Counsel for the defendants argue that because both the executing and issuing judicial authorities must consider the EAW in a manner compatible with fundamental rights provisions, and to that end the executing judicial authority must request that supplementary information be provided by the issuing authority, that Mr. O'Connor is sufficiently protected in that the English executing authority can make request of the French issuing authority for further information or documentation, including information or documentation in Ireland.

58. Counsel for the defendants also points to the fact that the decision of the CJEU in *Aranyosi* has been applied in a number of decision in the Courts of England and Wales and gives by way of example the judgment of *Vasilev v. Regional Prosecutors Office Silistar Bulgaria* [2016] EWHC 1401 (Admin), and from my reading of the opinion of Ms. Barnes this proposition is correct. Counsel argues that the established mechanisms which are acknowledged as being operative within the jurisdiction of England and Wales accordingly offer sufficient protection to the plaintiff and that he may make argument before the English Court without the assistance of the further documents or, if necessary, argue that the English Court should request of the French authority that it in turn obtain the evidence from the Irish authorities.

59. I accept that some of the matters in respect of which the plaintiff seeks to make argument are matters peculiarly within the knowledge or the procurement of the French authorities, including the documents that may support the argument of the plaintiff that representation may have been given by the Irish authorities to the French authorities that the release from custody of the plaintiff in

November 2000 was unconditional and he would not face further prosecution.

60. I accept also the argument made by counsel for the defendant in reliance on the opinion of Ms Barnes that one of the matters likely to be important for the English Court will be the availability of redress if the plaintiff is surrendered to France, and that information regarding the French process, including the opportunity to appeal or challenge the conviction or sentence in France is information which is peculiarly available from the French authorities and may, indeed must, be requested by the English Court from France.

61. However, the issue seems to me to be somewhat broader, and is whether it is safe for me to assume that the French authorities will have all of the relevant documentation, or more crucially whether the only matter that the plaintiff will seek to argue before the English Court is the basis on which he was released from custody in November 2000, and the nature of French criminal law procedures.

62. Counsel for the plaintiff makes the argument that the existing case law concerning the cooperation between the issuing authority and the executing authority suggests that the obligation to seek material or assistance arises after a proposed respondent to an EAW has discharged an evidential burden on foot of clear and coherent evidence. Counsel argues that in proceedings before the Irish courts, Irish State authorities have on occasion argued that the obligation to seek additional information or other form of assistance has not become exercisable because a respondent has not placed sufficient evidence before the court. Such an approach can readily be understood in the context of the principles of mutual trust, assistance, and confidence between Member States.

63. Reliance is placed on the decision of the Supreme Court in The Minister for Justice v. Rettinger which held that the burden falls on the respondent to a EAW (or, "requested person" in the language of the Framework Decision) to adduce evidence on foot of which an objection to surrender is made. At para. 31, Denham J. stated eight relevant and mandatory principles of which a number are particularly relevant:

> "(i) a court should consider all the material before it, and if necessary material obtained of its own motion;
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> (ii) a court should examine whether there is a real risk, in a rigorous examination;
>
> (iii) the burden rests upon a respondent, such as the respondent in this case, 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;
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> (iv) it is open to a requesting state to dispel any doubts by evidence. This does not mean that the burden has shifted. Thus, if there is information from a respondent as to conditions in the prisons of a requesting state with no replying information, a court may have sufficient evidence to find that there are substantial grounds for believing that if the respondent were returned to the requesting state he would be exposed to a real risk of being subjected to treatment contrary to article 3 of the Convention. On the other hand, the requesting state may present evidence which would, or would not, dispel the view of the court;
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> (v) the court should examine the foreseeable consequences of sending a person to the requesting state;
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> (vi) the court may attach importance to reports of independent international human rights organisations, such as Amnesty International, and to governmental sources, such as the State Department of the United States of America.
>
> (vii) the mere possibility of ill-treatment is not sufficient to establish a respondent's case;
>
> (viii) the relevant time to consider the conditions in the requesting state is at the time of the hearing in the High Court. Although, of course, on an appeal to this court an application could be made, under the rules of court, seeking to admit additional evidence, if necessary".

64. It is clear from these principles that the burden rests on a respondent, that the evidential threshold is high, and "substantial grounds" of what is described as "a real risk" must be established. The ECtHR, applied a similar test in *Saadi v. Italy* (2009) 49 EHRR 30 and *Soering v. United Kingdom* (1989) 11 EHRR 439.

65. The burden on the respondent to an EAW therefore is evidential and substantial. In the present case the extent and nature of the burden requires that I make an analysis of the precise stage at which the CJEU in *Aranyosi* said the obligation, as opposed to the right, to seek additional information arose. The Court was answering the question whether, where solid evidence existed that detention conditions in the issuing Member State are incompatible with fundamental rights, the executing authority may or must refuse to execute an EAW, and whether in that case information may or must be required from the issuing judicial authority. At paras. 88 to 90 the Court made it clear that once the executing judicial authority was in possession of evidence, which must in my view be understood to be more than "assumed facts", of a real risk of inhuman or degrading treatment, then that authority is bound for the purpose of assessing the existence of that risk, seek information or assistance from the issuing judicial authority. Before that happens therefore the executing judicial authority must have before it evidence that is "objective, reliable and specific and properly updated" and will if necessary raise further questions for the purposes of assessing or interrogating that information.

66. Counsel for the plaintiff also relies on the judgment of the Supreme Court of *The Minister for Justice, Equality and Law Reform v. Brennan* [2007] IESC 21, [2007] 3 IR732, where Murray C.J. said the following at para. 20:

> "That initial premise of the respondent is not well founded. In my view there is no evidence to support that assertion. Indeed it is simply described as an "assertion" in the written submissions of the respondent. In the alternative, it was submitted that there was at least an ambiguity on the point. Neither do I think there is any such ambiguity for the reasons set out below, and in any event the onus is on a respondent to establish that there are cogent grounds for refusing to make an order for surrender where the trial judge is otherwise satisfied that he should make an order for surrender".

67. The principles thus explained by Murray C.J. and indeed those identified by the Irish Courts in *The Minister for Justice v. Rettinger* show the approach of the domestic court. The evidence of Ms. Barnes is that the English Court, in the second stage of its inquiry, will assess whether there are what she described as "reasonable ground for believing that such abuse of conduct may have occurred, and if so, whether the judge can satisfy him or herself that such abuse has not occurred".

Decision on availability of alternative means to obtain documents
68. I consider that at least in the light of Irish authorities which interpret the European principles and rules, and in the light of the evidence of Ms. Barnes, that it is not safe for me to assume that the documents discovered in the present proceedings will be or can be made available to the English Court through the EAW information gathering process, whether under Article 15 of the Framework Decision or under the processes and procedures operative regarding mutual co-operation as explained in *Aranyosi* and *Caldararu*. I consider that for the purpose of the present application I ought to take a narrow view as to the current state of the law and that at present the jurisprudence suggests that the obligation, and possible even the right, to seek further information or documentation exists in the executing judicial authority against the issuing judicial authority but not against third parties.

69. Again because matters of liberty are in issue I consider that Mr. O'Connor is entitled that I would take a cautious approach to the interpretation of the current jurisprudence regarding the EAW procedure. I consider that the correct approach is not to infer that the English Court might have a right to seek information from Irish authorities by an implication from the authorities or from Article 15. The correct approach is to determine the matter in the light of the established law and not to assume that certain principles or rules may in the future be judicially determined to derive from the authorities or can be implied.

Concerns regarding the sensitive nature of documentation
70. In the light of the requirement of proportionality and reasonableness I have regard to the well founded concerns expressed by the defendants with regard to the dissemination of the material. Counsel for the defendants suggest that I adopt the approach suggested by Clarke J. in *Cork Plastics* and modify the undertaking so as to permit the release of the documents to the English Court and not to the lawyers who act for the plaintiff in England. Counsel for the plaintiff informs me that his instructions are that the lawyers who act for the plaintiff in London are prepared to give an undertaking with regard to their use of the documents but as that undertaking for practical reasons could be given personally only to the English Court, I consider that it is both practical and correct in principle that the documents should be released to the English Court which may then give directions with regard to the dissemination of the documentation and receive such undertakings and give such directions as it considers proper regarding the use of the documents.

71. Having regard to the fact that the English statutory provisions are broadly in line with those derived from common law in this jurisdiction, I can be satisfied that the release of the documentations to the English Court is likely to afford sufficient protection for the confidential and sensitive nature of the documents, and to restrict the use to which the documents may be put in a manner sufficient to meet with the concerns of the defendants that because they derive from internal documentation of the Department of Justice and of the Department of Foreign Affairs, from An Garda Síochána and from private consular communications, the documents are sensitive.

72. I have regard too to the approach of Kelly J. in *Roussel v. Farchepro* who directed that the documents be delivered into the custody of the Spanish Court and thereafter the court in Spain would consider whether the documents were admissible or relevant.

73. It is not appropriate that I should make directions or recommendations to the English Court regarding how it should deal with the documentation, and the principles of mutual respect between this jurisdiction and the jurisdiction of England and Wales would suggest that I exercise the utmost restraint in that regard.

74. For completeness, this judgement does not propose to interpret the principles and rules underlying the operation of the EAW scheme save and insofar as it is necessary for an analysis of where the interest of justice might lie in the present application. The approach I have identified to the caselaw and the operation of Article 15 of the Framework Decision is relevant to that issue and not to the operation of the Decision in an application for surrender on foot of an EAW. For that reason and because the matter is one of domestic law I do not consider that circumstances give rise to a need to make a reference to the CJEU under Article 267 of the Treaty on the Functioning of the European Union.

75. In summary, I consider that special circumstances do exist to justify the modification in the manner proposed, that the interest of justice require that the undertaking be modified, and I am not satisfied that the application is either unnecessary or premature.

76. I therefore propose making an order in the following terms:

> An order modifying the implied undertaking of the plaintiff and his legal representatives attaching to those documents discovered in the affidavits of discovery sworn on behalf of the defendants in the present proceedings as are set out in the schedule to a notice of motion dated 5 March 2018, and returnable to before the High Court on 27 March 2018, by permitting the legal representatives of the plaintiff to transmit such of those documents as they consider necessary to the City of Westminster Magistrates' Court and subject to such further directions by that Court in the proceedings commenced against the plaintiff as respondent to an application by the French authorities for the execution of a European Arrest Warrant issued against him on 3 January 2008.