Neutral Citation Number: [2007] IEHC 443

THE HIGH COURT

RECORD NUMBER 2007 NUMBER 59 EXT

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
M M

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 19th day of December 2007:

1. The surrender of the respondent is sought by a judicial authority in the United Kingdom pursuant to a European arrest warrant which issued on the 23rd of March 2007. That warrant was duly endorsed by the High Court for execution on the 4th April 2007, and the respondent was duly arrested on foot of same on the 11th April 2007 and was brought before the High Court as required by the provisions of section 13 of the European Arrest Warrant Act, 2003, as amended. He was remanded in custody pending the hearing of the present application under section 16 of the Act for an order for his surrender to the issuing state.

2. His surrender is sought so that he can continue to be detained in the United Kingdom pursuant to what is described in the warrant as a "Hospital Order" and a restrictions order made in 1994 following his conviction in respect of a rape offence, and an offence of assault occasioning actual bodily harm. It will be necessary to deal in due course with the nature of that order made in 1994 following the respondent's conviction on these offences. I will come to that in due course when considering the points of objection which have been raised by the respondent in opposition to the present application.

3. No issue is taken by the respondent as to his identity and the court is satisfied in any event that the respondent who is before the court, having been arrested here on the 11th of April 2007, is the person in respect of whom this European arrest warrant was issued.

4. The court is also satisfied that the offence of assault causing grievous bodily harm would, if committed in this state, give rise to an offence here under section 3 of the Offences against the Person Act 1997. In relation to the offence of rape, this is an offence in respect of which double criminality does not require to be verified, as provided for in Article 2.2 of the Framework Decision. The minimum gravity requirement under the framework decision is satisfied in respect of each of these offences.

5. Subject to dealing with the points of objection raised on behalf of the respondent, there is no reason to refuse a surrender under sections 21 a, 22, 23 or 24 of the Act, and I am also satisfied that his surrender is not prohibited by Part III of the Act or the Framework Decision.

6. The European arrest warrant states in paragraph (c) that on the first of August 1994, in respect of the rape offence, the respondent was made the subject of "hospital order under section 37 of the Mental Health Act 1983 with indefinite special restrictions under section 41 of the Mental Health Act 1983 imposed at the Central Criminal Court, London on 1 August 1994".

7. The warrant states in respect of the assault offence that the respondent was also made the subject of "Hospital Order under section 37 of the Mental Health Act 1983 with indefinite special restrictions under section 41 of the Mental Health Act 1983 imposed at the Central Criminal Court London on 1 August 1994". Under the heading "Remaining sentence to be served", it has indicated that "the defendant is to be detained indefinitely".

8. In Points of Objection, the respondent submits that the Hospital Order made against him in respect of these offences is not a sentence of imprisonment or a sentence of detention, and that therefore the respondent is not a person who comes within the meaning of Section 10 (de) of the European arrest warrant act 2003 as amended, and that accordingly no European arrest warrant has been duly issued. The point is made also raised that although the respondent was convicted of the offence of rape and the offence of assault occasioning actual bodily harm, he was not the subject of a finding of 'guilty but insane' or some other diminished responsibility verdict, but was subjected to what amounts to indefinite detention pursuant to section 37 of the Mental Health Act 1983 and that this order and the restriction order made pursuant to Section 41 of that act does not constitute a penal sanction and is therefore outside the provisions of the framework decision and the Act.

9. It is a fact that following his conviction and the making of that Hospital Order and restrictions the respondent has already, prior to his absconding, been detained for some 12 years equating to some 16 years detention if normal remission is taken into account. According to the warrant, the respondent escaped from the place of detention where he had been since August 1994 and made his way to this country.

10. It is also a fact that is the respondent has been arrested in this jurisdiction on a charge of rape, and is currently in custody here awaiting trial next year.

11. The essential question which this court is now asked to determine by the respondent is whether the Hospital Order and Restriction Order already referred to is a *punishment* following conviction which comes within the meaning of the European Arrest Warrant Act 2003 and the Framework Decision, and therefore, whether this type of detention is one for which a surrender order can be made.

12. Aileen Donnelly S. C. on Behalf of the Respondent Has Referred to an Affidavit from an English Barrister, Jason Elliott B.L. who expresses his opinion on the nature of a Hospital Order and restrictions, such as were imposed upon the respondent. He notes first of all that the Mental Health Act 1983 is couched in essentially therapeutic language and contains powers which can only operate where the commission of a criminal offence has been demonstrated. He proceeds to set out the relevant provisions of that Act. For example, he sets out the provisions of section 37 (1) as follows:

> "Where a person is convicted before the Crown Court of an offence punishable with imprisonment other than an offence the sentence for which is fixed by law, or is convicted by a magistrates' court of an offence punishable on summary conviction with imprisonment and the conditions mentioned in subsection (2) below are satisfied, the court may by order authorise his admission to and detention in such hospital as may be specified in the order or, as the case may be, place him under the guardianship of a local social services authority or of such other person approved by a local social services authority as may be so specified."

13. He sets out section 37 (8) as follows:

"Where an order is made under this section, the court shall not (a) pass sentence of imprisonment or impose a fine or make a community Order (within the meaning of Part 12 of the Criminal Justice Act 2003) in respect of the offence,

(b) if the order under this section is a Hospital Order, make a referral (within the meaning of the Powers of Criminal Courts (Sentencing) Act 2000) in respect of the offence,

(c) make in respect of the offender is supervision order (within the meaning of the Act) or an order under section 150 of that Act (binding over of parent or guardian),

but the court may make any other order which it has power to make apart from this section; and for the purposes of this section 'sentence of imprisonment' includes any sentence or order for detention."

14. Mr Elliott sets out the provisions of section 41 as follows:

"(1) where a hospital order is made in respect of an offender by the Crown Court, and it appears to the court, having regard to the nature of the offence, the antecedents of the offender and the risks of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm so to do, the court may, subject to the provisions of this section, further order that the defendant shall be subject to the special restrictions set out in this section, either without limit of time or during such period as may be specified in the order; and an order under this section shall be known as a 'restriction order';

(2) a restriction order shall not be made in the case of any person unless at least one of the registered medical practitioners whose evidence is taken into account by the court under section 30 (7)(2)(a) above has given evidence orally before the court;

(3) the special restrictions applicable to a patient in respect of whom a restriction order is in force are as follows

(a) none of the provisions of Part II of this Act relating to the duration, renewal and expiration of authority for the detention of patients shall apply, and the patient shall continue to be liable to be detained by virtue of the relevant hospital order until he is duly discharged under the said Part II or absolutely discharged under sections 42, 73, 74, 75 below;

(b) no application shall be made to a Mental Health Review Tribunal in respect of a patient under sections of 66 or 69 (1) below;

(c) the following powers shall be exercisable only with the consent of the Secretary of State, namely

(i) power to grant leave of absence to the patient under section 17 above;

(ii) power to transfer the patient in pursuance of regulations under section 19 above or in pursuance of subsection (3) of that section; and

(iii) power to order the discharge of the patient under section 23 above; and if leave of absence is granted under the said section 17 power to recall the patient under that section shall vest in the Secretary of State as well as the responsible medical officer;

and

(d) the power of the Secretary of State to recall the patient under the said section 18 may be exercised at any time; and in relation to any such patient section 40 (4) above shall have effect as if it referred to Part II Schedule 1 of this Act instead of Part I of that schedule.

(4) a hospital order shall not cease to have effect under section 14 (5) above if a restriction order in respect of the patient is in force at the material time.

(5) where a restriction order in respect of a patient ceases to have effect while the relevant hospital order continues in force, the provisions of section 40 above and Part I of Schedule 1 to this Act shall apply to the patient as if he had been admitted to the hospital in pursuance of a Hospital Order (without a restriction order) made on the date on which the restriction order ceased to have effect.

(6) while a person is subject to a restriction order the RMO (Responsible Medical Officer) shall at such intervals (not exceeding one year) as the Secretary of State may direct examine and report to the Secretary of State on that person; and every report shall contain such particulars as the Secretary of State may require."

15. Mr Elliott goes on in his affidavit to refer to a number of decided cases in England touching upon the question whether a hospital order amounts to a penal order. The cases to which he has referred have decided that it is wrong in principle to impose a life sentence in order to prevent a person's premature release by order of a Mental Health Review Tribunal; that restriction orders should generally be made for an unlimited duration except in cases where doctors can confidently assert that recovery will take place within a fixed period; that there is no analagy to be drawn between a restriction order and a determinate sentence of imprisonment; and that the responsibility for assessing the risk represented by the offender lies with the court and that the court is not bound to follow the advice of the medical witnesses. Mr Elliott proceeds to state that in determining whether to make a restriction order the sentencing judge must choose between making an order without restrictions which might lead to the offender being released in a few months, and an order with restrictions which might lead to the offender being detained for a long time, possibly longer than he would have spent in prison had he been sentenced to imprisonment. He states also that "in circumstances where the criteria for a discretionary life sentence are met and the criteria for a hospital order under section 37 are also met, and a hospital place is available, the court is still bound to consider having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender" whether an order under section 37 is "the most suitable method of disposing of the case"

before it could make such an order; and for the purposes of deciding what is more suitable, a court could give appropriate weight to the different release regimes - the parole board being perceived as taking a wider view of risk than the Mental Health Review Tribunal, which is perceived as focusing on the existence of, or potential risk of recurrence of, any mental impairment.

16. Mr Elliott then proceeds to state that there is jurisprudence from the European Court of Human Rights (*Erkalo v. Netherlands* (1999) 28 EHRR 509) to the effect that Hospital Orders with restrictions and without limit of time are purely preventative orders, made only after certain procedural requirements have been fulfilled and where it is held necessary in order to protect the public from serious harm from the offender. He refers also to the fact that in 1983 the Mental Health Act 1983 was passed in response to a decision of the Court of Human Rights in *X v. United Kingdom* (1982) 4 EHRR 188 where in the United Kingdom was found to be in breach of Article 5 (4) of the European Convention on Human Rights since a decision to release an offender could be made only by the Home Secretary and there was no means of testing the lawfulness of detention before a court. The Mental Health Review Tribunal (chaired by a judge) is, he states, now regarded as a court for the purpose of testing the lawfulness of detention and that the tribunal has a duty to discharge a patient in certain circumstances.

17. On the subject of restrictions orders Mr Elliott explains the effect of a restriction order by reference to the judgment of Mustill L. J. in *R v. Birch* (1989) 11Cr APP R (S) 202 (CA), where he stated:

> "No longer is the offender regarded as a patient whose interests are paramount... Instead, the interests of public safety are regarded by transferring the responsibility of the discharge from the Responsible Medical Officer (RMO) and the hospital... to the Secretary Of State and the Mental Health Review Tribunal. A patient who has been subjected to a restriction order is likely to be detained in hospital for much longer than one who is not, and will have fewer opportunities for leave of absence."

18. Mr Elliott then describes what he calls "the mechanics of restriction orders". He states that a restriction order is not a free standing order bust but must be attached to an order made under section 37 (a hospital order), and that, accordingly such an order is a prerequisite to the making of a restriction order. In addition, he states, a restrictions order can be made only where the court is of the view, given the nature of the offence, the history and antecedents of the offender and the risk of re-offending, that it is necessary for the protection of the public from serious harm, which is not restricted to personal injury or to the public in general. He states that the condition may be met whether it is a risk of serious harm to a category of persons or even to a single person, but that the potential harm must be serious and a high possibility of a recurrence of minor offences will not suffice. Harm in this context can include psychological harm. He refers to a number of cases where these matters have been the subject of decision in England.

19. As to the effect on a patient detained under the restriction order regime, he refers to section 41 (3)(a) which provides that "none of the provisions of Part to of this Act relating to the duration, renewal and expiration of authority for the determination of patients shall apply." He refers also to the fact that restricted patients are subject to ongoing monitoring by the mental health unit of the Home Office by way of mandatory annual reports that must be made to the mental health unit by the patient's Responsible Medical Officer, and that, generally speaking, the effects of a restriction order will continue after release from hospital because virtually all restricted patients are, in the first instance, discharged conditionally and, unless and until the discharge is made absolute, are liable to recall to hospital. He goes on to say that the restricted patient regime generally results in long periods being spent in hospital prior to being considered for release and he gives some statistics in relation to periods that restricted patients have been detained for.

20. Mr Elliott then sets out the powers of discharge in respect of patients detained under Hospital orders. There is no need to set out everything he says in that regard. He then sets out certain conclusions by reference to a number of specific questions which he was asked to address for the purposes of expressing his opinion in his affidavit. With reference to whether there is a power to issue a warrant of arrest under section 138 of the Mental Health Act 1983, he states that the answer is "yes" and he refers to section 26 of the Police and Criminal Evidence Act 1984 which repealed certain pre-existing powers of arrest, save those preserved by Schedule 2, and that amongst those preserved powers of arrest are sections 18, 35 (10), 36 (8), 38 (7), 136 (1), and 138 of the Mental Health Act 1983.

21. In answer to the question whether the order passed on the respondent in this case (a hospital order) is both in fact and in law a sentence of imprisonment or a sentence of detention, he states:

> "The order provides for an indefinite period of detention pursuant to the The Mental Health Act 1983. It is not a sentence of imprisonment. A person cannot be subject to a referral order, a supervision order nor can they be bound over while subject to the order. It differs from a sentence of imprisonment in terms of (1) the body responsible for ensuring the well-being of those subjected to the order, (2) the body responsible for issuing rules and ensuring compliance with rules governing the individual's period of incarceration, (3) rules governing release, and (4) the body determining eligibility for release."

22. In answer to the question "which is it -- imprisonment or detention?", he states:

> "This is answered in (b) above. I should, however, add that although such an order does not equate to a sentence of imprisonment it will be recorded on an offender's antecedents."

23. He was also asked whether there was any case law concerning preventive detention which might be of assistance, to which he responded by reference to earlier parts of his affidavit at paragraph 4 and paragraph 5 thereof.

24. He was then asked whether anything arose from paragraph (h.) of the European arrest warrant. In that paragraph, under the heading "the following offences on the basis of which this warrant has been issued is (are) punishable by/has (have) led to a custodial life sentence or lifetime detention order", the applicant has inserted at the words "not applicable". Ms. Donnelly places some reliance on this answer and I will come to that in due course.

25. Before turning to the legal submissions made on behalf of the respondent, I should set out some more detail of what is stated by the applicant in paragraph (e) of the warrant. That paragraph states, *inter alia*, the following:

> "The person in respect of whom this warrant is issued is alleged to be unlawfully at large after conviction for the extradition of offences of rape and assault occasioning actual bodily harm detailed in the warrant. The warrant is issued with a view to his arrest and extradition to the United Kingdom for the purpose of serving a sentence of imprisonment *or another form of detention imposed in respect of the offences*." (my emphasis)
>
> "I am satisfied that a Crown Prosecutor in the Crown Prosecution Service, whose function is to decide whether or not to

prosecute an individual for the alleged commission of criminal offences, he is satisfied that the defendant is unlawfully at large and that the warrant should be issued for his arrest."

" On 20 December 1993 [the respondent] was on his own confession convicted at the Central Criminal Court London of an offence of rape and an offence of assault occasioning actual bodily harm. On 1 August 1994 [the respondent] was sentenced to a Hospital Order under Section 37 of the Mental Health Act 1983 and ordered to be detained in Rampton Hospital and to be subject to a Restriction Order without limit of time -- psychopathic disorder under Section 41 of the Mental Health Act 1983. In 2005 he was transferred to the Edenfield Unit, Prestwich Hospital, Greater Manchester. The last annual review in 2006 concluded that [the respondent] was still suffering from a psychopathic disorder and could not be released.

On 9 November 2006 [is the respondent] feigned illness in front of a member of staff while in the canteen at the Edenfield Unit and escaped via an open door at the side of the canteen. At the time of his escape he was wearing three sets of clothing and was in possession of at least £500. He also had two mobile telephones. Together with a woman he had befriended while in the unit he travelled to Leeds. He then travelled to London and it is believed that he travelled to Ireland on 21 December 2006, where he is believed to be residing in Dublin. It is understood he was arrested on 21 March 2007 in Dublin on suspicion of an offence of rape. No further information is known in relation to this allegation."

26. The warrant also states that the maximum penalty for rape under the relevant provisions of United Kingdom law is imprisonment for life. It is further stated that under the relevant provisions of United Kingdom law, the offence of assault occasioning actual bodily harm is punishable by a maximum term of imprisonment of five years.

27. In making her submissions, Ms Donnelly has referred to paragraph (c) of the warrant where under the heading "length of the custodial sentence or detention order imposed" it is stated that the Hospital Order with indefinite special restrictions was imposed at the Central Criminal Court London on 1 August 1994, in respect of the rape offence, and in respect of the assault charge, and to the fact that under the heading "remaining a sentence to be served" it is stated that the respondent is to be "detained indefinitely". She refers also to certain contents of paragraph "E." which make it clear that the respondent was made the subject of a Hospital Order and that no sentence of imprisonment was imposed. She highlights also the fact that on page 5 of the warrant it is stated that the offence of assault occasioning actual bodily harm is punishable by a maximum term of imprisonment of five years and she points also to the contents of paragraph (h) of the warrant to which I have referred which, she states, makes it clear that neither a custodial life sentence or lifetime detention order was imposed, since the applicant inserted the words "not applicable" when the warrant was being completed.

28. Ms Donnelly has placed reliance on section 37 (8) of the Mental Health Act 1983 which provides that where an order is made under that section, "the court shall not pass sentence of imprisonment or impose a fine or make a community order...". She emphasises also that under the Mental Health Act 1983 a restriction order can be made only where the court is satisfied that this is necessary for the protection of the public, and she seeks to characterise this as a preventative element, as opposed to a punishment. She points also to the fact that the respondent has, as a matter of undisputed fact, already spent the equivalent of about 16 years in detention under the Hospital Order and the special restrictions imposed under section 41 of the Act, and submits that this fact also tends to confirm that the regime under which he was so detained is not a regime of punishment, since the period of time in question is longer than a person would be in prison following a conviction even for rape, and certainly longer than a person could be imprisoned in respect of a conviction for assault occasioning actual bodily harm.

29. Ms Donnelly has submitted also that a restriction order cannot be equated to an order for a determinative sentence of imprisonment and has referred to the decision in *R v. Birch* already referred to. She has referred to the judgment of Mustill L. J. at Page 209 et seq. where the statutory framework of the Mental Health Act 1983 is considered, and while the learned judge states that there are certain differences between the positions of an offender and of a civil patient under that regime which relates to early access to the Review Tribunal and to discharge by the patient's nearest relative, he goes on to state at p. 210:

"... a hospital order is not a punishment. Questions of retribution and deterrence, whether personal or general, are immaterial. The offender who has become a patient is not kept on any kind of leash by the court, as he is when he consents to a probation order with a condition of in patient treatment. The sole purpose of the order is to ensure that the offender receives the medical care and attention which he needs in the hope and expectation of course that the result will be to avoid the commission by the offender of further criminal acts.

In marked contrast with the regime under an ordinary hospital order, is in order coupled with a restriction on discharge pursuant to section 41. A restriction order has no existence independently of the hospital order to which it relates, it is not a separate means of disposal. Nevertheless, it fundamentally affects the circumstances in which the patient is detained. No longer is the offender regarded simply as a patient whose interests are paramount. No longer is the control of him handed over unconditionally to the hospital authorities. Instead the interests of public safety are regarded by transferring the responsibility of the discharge from the responsible medical officer in the hospital to the Secretary of State alone (before September 30, 1983) and now to the Secretary of State and the Mental Health Review Tribunal. A patient who has been subject to a restriction order is likely to be detained for much longer in hospital than one who is not, and will have fewer opportunities for leave of absence."

30. The learned judge goes on at p. 211:

"The effect of a restriction order was essentially that the responsibility for the return of the patient to the community was transferred from the hospital authorities to the Secretary of State. He alone could consent to leave of absence, and decide to recall the patient from such leave. If the patient went absent without leave, the automatic discharge for prolonged absences did not apply. Neither did the provisions for expiry and renewal of the authority to detain, so that the patient could not be discharged while the restriction order remained in force, and the power to lift the restriction was vested in the Secretary of State. The nearest relative could not procure the discharge of the patient. The Review Tribunal could advise the Secretary of State, but could not procure the release of the patient.

Although the regime created by section 65 of the 1959 Act was often regarded as a merciful alternative to imprisonment, it was not always so regarded by the patient, and as a result of criticisms and the decision of the European Court of Human Rights in *X v. United Kingdom* it was modified by the 1983 Act in two fundamental respects, designed to make a restriction order less readily available, and to enlarge the opportunities of the patient to obtain his discharge."

31. At p.212, the learned judge then distinguishes the position of a prisoner who has received a sentence of imprisonment but who is

transferred to hospital from prison. In the present case, of course, no sentence of imprisonment was imposed on the respondent. Rather, he was immediately upon conviction made the subject of a Hospital Order and restrictions order.

32. At p. 215, Mustill L.J. states:

> "For present purposes it is, we believe, sufficient to note that the choice of prison as an alternative to hospital may arise in two quite different ways: (1) if the offender is dangerous and no suitable secure hospital accommodation is available. Here the judge will be driven to impose a prison sentence... (2) where the sentencer considers that notwithstanding the offender's mental disorder there is an element of culpability in the offence which merits punishment. This may happen where there is no connection between the mental disorder and the offence, or where the defendant's responsibility for the offence is "diminished" but not wholly extinguished..... In the absence of any question of culpability and punishment, the judge should not impose a sentence of imprisonment simply to ensure that if the Review Tribunal finds that the conditions under section 73 are satisfied, and is therefore constrained to order a discharge, the offender will return to prison rather than be set free....
>
> Finally we would make two further points on section 41. First, the sentencer should not impose a restriction order simply to mark the gravity of the offence (although this is an element in the assessment of risk), nor as a means of punishment: for a restriction order merely qualifies a hospital order, and a hospital order is not a mode of punishment...".

33. I have quoted this extensive extract from the judgment of Mustill L. J. because it gives a helpful characterisation of the Hospital Order and restrictions order regime under the Mental Health Act 1983 in the United Kingdom. The passages to which I have referred are some of those upon which Ms Donnelly relied when making her submissions to this Court.

34. Ms Donnelly submits therefore that the affidavit evidence of Mr Elliott and the case-law to which he has referred make it clear that the type of detention imposed upon the respondent after he was convicted of these offences was not a punishment since a Hospital Order and restriction order made following that order cannot be seen as punishment but rather as a means of protecting both the patient and the public. She has emphasised the use of the word "patient" in the statutory regime provided in that regard. She has referred also to a judgment of the Supreme Court in the United States of America in the case of *Kansas v. Leroy Hendricks* 521 US 346 where that court also held that there was a clear distinction between a 'criminal custody' and what is described in the case as 'civil commitment'. She has referred to p. 362 of that judgment where it is stated:

> "As a threshold matter, commitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence. The Act's purpose is not retributive because it does not affix culpability for prior criminal conduct. Instead, such conduct is used solely for evidentiary purposes, either to demonstrate that a 'mental abnormality' exists, or to support a finding of future dangerousness. We have previously concluded that an Illinois statute was non-punitive even though it was triggered by the commission of a sexual assault, explaining that evidence of the prior criminal conduct was "received not to punish past misdeeds, but primarily to show the accused's mental condition and to predict future behaviour".

35. Ms Donnelly has referred to Article 1 of the Framework Decision which provides as follows:

> "The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a request of the person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or a detention order."

36. She has referred also to Article 2 which provides:

> "1. A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence *or a detention order* for a maximum period of at least 12 months or, where a sentence has been passed *or a detention order has been made*, for sentences of at least four months." (my emphasis)

37. She submits that the wording used in these articles demonstrates that a detention order referred to therein must be a detention order which is in the nature of a sentence, and not one, as in the present case, where detention is on the basis of mental health, and where the patient must be released if the mental ill-health is no longer applicable. She has stated by way of example of a penal detention order one which could be made in this jurisdiction under section 13 of the Criminal Justice Act 1960 which states that where a person is not less than 17 nor more than 21 years of age is convicted of an offence for which he is liable to be sentenced to a term of penal servitude or imprisonment, he may, in lieu of so being sentenced, be sentenced to be *detained* in St Patrick's Institution for a period not exceeding the term for which he might have been sentenced to penal servitude or imprisonment as the case may be. She submits that it is clear from the Framework Decision that the form of detention which can come within the framework decision and therefore be the subject of an application for surrender pursuant to a European arrest warrant must be confined to a detention in the form of a punishment.

38. In aid of this submission she has referred also to Article 25 of the European Convention on Extradition 1957 which provides that for the purposes of the Convention the expression "a detention order" means any order involving deprivation of liberty which has been made by a criminal court in addition to or instead of a prison sentence. She has referred also to Article 2 of that Convention which states that extradition shall be granted in respect of offences punishable under the laws of the requesting party and of the requested party by deprivation of liberty under a detention order for a maximum period of at least one year or by a more severe penalty. That article goes on to provide that where a conviction and prison sentence have occurred *or a detention order* has been made in the territory of the requesting party, "*the punishment* ordered must have been for a period of at least four months" (my emphasis).

39. She submits that even though the Framework Decision is stated to replace existing extradition arrangements, nevertheless it would be appropriate for this Court to refer to these provisions when deciding what interpretation is to be given to the reference to "detention" in the present case.

40. She relies also on the fact that in the European arrest warrant in the present case, the United Kingdom authorities do not attempt to say that the order which has been imposed on the respondent (i.e. the Hospital Order) is either a custodial life sentence or a lifetime detention order and she refers to paragraph (a) of the warrant. She submits therefore that since the order in question is neither a life sentence nor a lifetime detention order, it cannot be made the subject of a surrender order and that accordingly surrender must be refused by this Court.

41. Ms Donnelly has referred also to certain provisions of section 10 of the European Arrest Warrant Act 2003 as amended and which

provides, as relevant to this submission:

> "where a judicial authority in an issuing state duly issues a European arrest warrant in respect of a person --
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) on whom a sentence of imprisonment or detention has been imposed in respect of an offence to which the European arrest warrant relates, and who fled from the issuing state before he or she --
>
> (i) commenced to serving that sentence, or
>
> (ii) completed serving a sentence,
>
> that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision, be arrested and surrendered to the issuing state."

42. Ms Donnelly submits that the use of the word "sentence" in this section makes it clear that the imprisonment or a detention must be in the nature of a sentence, and that in the present case it is clear from the warrant itself that no such "sentence" has been imposed on the respondent, given the nature of the Hospital Order and restrictions already referred to.

43. The court has been referred to the judgment of Murray C.J. in *Minister for Justice Equality and Law Reform v. Altaravicius* [2006] 3 IR 148 wherein it was made clear that this Court must interpret the provisions of the Act in the light of the Framework Decision unless to do so would be *contra legem*, and has referred to the following extract from that judgment:

> " when applying and interpreting national provisions giving effect to a framework decision the court must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues (see criminal proceedings against the *Pupino*....) The principle of conforming interpretation is limited, as the Court of Justice has pointed out in *Pupino* and other cases, to the extent that it is possible to give such an interpretation. It does not require a national Court to interpret national legislation *contra legem*. If the national legislation, having been interpreted as far as possible in conformity with community legislation to which it purports to give effect, but still falls short of what is required by the latter, a national Court must, as a general principle, apply that legislation as interpreted although there may be other consequences for a member state which has failed to fully implement the directive or framework decision."

44. Ms Donnelly has referred also to the judgment of Murray C.J. in *Minister for Justice Equality and Law Reform v. Brennan* [2007] IESC 21 in which, she submits, there is an implicit recognition that surrender under the European Arrest Warrant Act 2003, involves the imposition of punishment by the issuing state. In that regard she has noted the following statement by the learned Chief Justice:

> "The effect of such an argument is that an order for surrender under the Act of 2003, and indeed any order for extradition, are to be refused if the manner in which a trial in the requesting state including the manner in which the penal sanction is imposed, does not conform to the exigencies of our Constitution if such a trial or sentence were to take place in this country. That can hardly have been the intention of the Oireachtas when it adopted s. 37(1) of the Act of 2003 since it would inevitably have the effect of ensuring that most requests for surrender or extradition would have to be refused. And indeed if that were the intent of the Framework Decision which the Act of 2003 implements, and other countries applied such a test from their own perspective, few, if any, would extradite to this country".

45. Ms Donnelly submits therefore that the 2003 Act when interpreted in the light of the Framework Decision prohibits the surrender of the respondent for the purpose of the continuation of a hospital order with a restriction order which, although of indefinite duration, is, according to what is contained in the warrant itself, neither a custodial life sentence nor a lifetime detention order and which on the basis of the law as submitted by her, is not a punishment but is in the nature of a civil confinement of mentally ill persons.

Preventive detention

46. Ms Donnelly has then proceeded to address the situation which would arise if the submissions which she has made regarding the meaning to be attached to sentence and detention is wrong, and has submitted that if the hospital order with restrictions attached is in fact to be seen as a sentence of imprisonment or detention for the purpose of section 10 of the Act, then since this is for an indefinite period of detention, the effect is to have provided for an indefinite period of preventative detention, and that this is impermissible here under the Constitution. In that regard she relies upon the judgment of O'Dalaigh CJ in *Attorney General v. O'Callaghan* [1966] 1 IR 501 wherein he stated:

> "Counsel for the Attorney General, however, went on to support the view that the applicant, whom he concedes is likely to stand his trial, should nevertheless be refused bail because the offences in respect of which he was seeking bail were alleged to have been committed while he was on bail in respect of earlier charges. I understood him to submit that the applicant should be held as a preventive measure. This I take to mean that he should be detained in custody because, if granted bail, it is feared he may commit other offences.
>
> The reasoning underlying this submission is, in my opinion, a denial of the whole basis of our system of law. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty and seeks to punish in respect of offences neither completed nor attempted. I say 'punish' for deprivation of liberty must be considered a punishment unless it can be required to ensure that an accused person will stand his trial when called upon."

47. Ms Donnelly has referred also to the statement by Walsh J. the same case to the effect that the purpose of bail was neither punitive nor preventative, and she referred to the following passage in his judgment:

> "Ground number 4 of the learned judge, that is to say, the likelihood of the commission of further offences while on bail, is a matter which is in my view quite inadmissible. This is a form of preventative justice which has no place in our legal system and is quite alien to the purposes of bail. It is true that in recent years a number of decisions in England on the

question of bail appear to have admitted this concept of preventative justice being applied by the refusal of bail. It has also been stated in English cases that a professional criminal, knowing that he is guilty and the probability of conviction, may be tempted to commit some more offences before imprisonment in the belief that it would probably make little difference to his ultimate sentence having regard to his record, and the meanwhile may offer some present profit.

In this country it would be quite contrary to the concept of personal liberty as enshrined in the Constitution that any person should be punished in respect of any matter upon which he has not been convicted, or that in any circumstances he should be deprived of his liberty upon only the belief that he will commit offences if left at liberty, save in the most extraordinary circumstances carefully spelled out by the Oireachtas and then only to secure the preservation of public peace and order, or the public safety and the preservation of the State in a time of national emergency, or in some situation akin to that."

48. Ms Donnelly has referred to a number of other authorities to the effect that measures amounting to preventive detention would be impermissible here, including the judgment of the Supreme Court in *Re the Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 IR 360 p. 407 wherein it is stated:

> "It has been a long established principle of our constitutional jurisprudence that the courts would not uphold as constitutional what is known as "preventive detention..."

49. She has submitted therefore that the detention of the respondent would only be permissible here if its true purpose was that of mental health and not as part of a criminal process. She has submitted that if it is part of the applicant's case that its purpose in the case of the respondent is part of the criminal process, this would be an impermissible preventive detention measure, and that if it is detention under the mental health regime, then it is not such as permits of an order for surrender under the warrant in this case.

Deduction of time spent in custody

50. Ms. Donnelly has referred to Article 26 of the Framework Decision which provides that when a person is surrendered to another jurisdiction any period of detention arising from the execution of a European arrest warrant shall be deducted from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed. She submits that in such circumstances, where an order is of an indefinite duration and where the release mechanism bears no relation to time in custody, it will be impossible to comply with that obligation. She submits that this is indicative of the fact that this type of hospital order and restrictions order attached is not one envisaged by the Framework Decision. The respondent in the present case will never be able to avail of his right to have his period of detention here deducted from his remaining period detention in the United Kingdom.

51. In addition Ms. Donnelly has submitted that the English court is now '*functus officio*' and that it can have no input into when, if ever, this respondent may be released from the hospital order detention, and that this is further evidence that this is not a situation in which a judicial authority in the United Kingdom can seek the surrender of the respondent.

52. For all these reasons it is submitted on behalf of the respondents that the form of detention for which his surrender is sought on this application is not one in respect of which this court may order surrender.

53. On behalf of the Applicant, Robert Barron S.C. has submitted that the respondent is a person who is a convicted mentally-ill patient who has escaped from lawful custody, and that following conviction he was in effect sentenced in respect of the two offences in respect of which he was found guilty

54. He submits that since the respondent was convicted and dealt with following conviction by the imposition of a hospital order and an indefinite special restrictions order, that this must be seen in a penal context and not simply in a mental health context. Referring to the affidavit of Jason Elliott BL filed on behalf of the respondent, Mr Barron refers to the fact that nowhere in his affidavit does he refer to the fact that the relevant provisions of the Mental Health Act 1983 in the United Kingdom are incompatible with the European Convention on Human Rights, nor to a detention pursuant to a hospital order with special restrictions not being a form of detention coming within the terms of the Framework Decision or the United Kingdom legislation which implements it. He submits that what this court is being asked to do is to conclude by reference to Mr Elliott's affidavit and English jurisprudence to which the Court has been referred that such detention is not a punishment. He suggests that, given the fact that the judicial authority in the issuing state is clearly of the view that such detention does fall within the meaning of detention in the Framework Decision, there must be a presumption that it does so. He submits that this court must reach its own conclusions as to whether the hospital order with special restrictions attached is or is not a penal measure, and that this should not be done by reference to United Kingdom law, and in particular by reference to the judgment of Mustill L. J. in *R v. Birch* to which Ms. Donnelly referred.

55. Mr Barron has submitted that it is clear that where a person has been convicted by the Central Criminal Court in England, the trial judge makes a choice as to what is the appropriate manner of depriving that person of his liberty because there has been a conviction, and that section 37 of the Mental Health Act 1983 applies only where a person has been convicted and that therefore anything done by virtue of that section must be seen as having been done in a penal context albeit that the judge is satisfied that it is appropriate that detention occurs by the imposition of a hospital order and restrictions. He characterises the hospital order and restrictions as being both penal and protective in nature, rather than preventative. He went on to refer to the judgment of Morris J. (as he then was) in *Vagra v. O'Toole*, unreported, High Court, 31st of July 1998 in which certain provisions of the Mental Health Act 1983 were considered in the context of an application for surrender under Part III of the Extradition Act 1965, and in which arguments were made regarding the preventative nature of the detention of that plaintiff who had been incarcerated for a period of 28 years. When dealing with the contention that the surrender of the plaintiff would be "unjust, oppressive or invidious", the learned judge stated:

> "In my view there is no doubt but that the plaintiff remains subject to a sentence of life imprisonment and I accept the submissions of the defendant's counsel, Miss Kennedy, that the plaintiff's continued detention is part of his original sentence of life imprisonment whether the detention be in a mental hospital or a prison. I accept that the sentence remains in force until such time as the English Secretary of State may order that the plaintiff be released on licence."

56. He submits that this is authority for the proposition that hospital orders with indefinite restrictions are not of their nature oppressive, unjust or invidious, and that accordingly they cannot be said to constitute an unjustifiable interference with the liberty of the person affected so as to render them unconstitutional. While he accepts that in this jurisdiction there is no legal provision that permits a sentence to include both punitive and protective elements, he submits that there is nothing inherently wrong, and nothing unconstitutional, about indefinite detention subject to safeguards, and that if there was legislation in place in this jurisdiction which would equate to the provisions of the Mental Health Act 1983 referred to, same would not be unconstitutional. He goes further and submits that even if the imposition of a sentencing regime here involving both punitive and protective elements was to be deemed

unconstitutional in this jurisdiction, this would not of itself render the surrender of the respondent to the United Kingdom unconstitutional, since it would not constitute eggregious circumstances as envisaged by Murray C. J. in *Minister for Justice Equality and Law Reform v. Brennan* (supra) thereby requiring a refusal of surrender.

57. Mr Barron has also relied to some extent on the distinction between the provisions of section 38 of the Mental Health Act 1983 in England, and the regime in this country prior to the introduction of the Criminal Law Insanity Act, 2006, whereby a defendant who was found to be insane in the legal sense based on the 'M'Naghten rules' at the time the act was committed was entitled to a special verdict of "guilty but insane". Such a special verdict was technically an acquittal, but automatically triggered a committal procedure whereby the trial judge was obliged to order the committal of the defendant to the Central Mental Hospital or some similar institution, to remain there until the executive branch of government decided to release him. He points to the fact that in such an instance, even where there was no conviction imposed (i.e. an acquittal) such a person could be detained indefinitely. Such a person remained in lawful detention until further order of the court, and this was justified on the basis that it was in the public and private interest. He submits that such a regime here did not fall foul of the Constitution, and that therefore this Court ought not to consider the indefinite detention of this respondent under the hospital order and special restrictions in England to be an unconstitutional deprivation of liberty.

58. In addition to those submissions, Mr Barron has referred to the recent judgments of the Supreme Court in *Minister for Justice Equality and Law Reform v Stapleton* [2007]IESC 30, and *Minister for Justice Equality and Law Reform v. Brennan* [2007] 2 ILRM 241. In the light of these decisions, he submits that simply because the system in this jurisdiction is different from that which operates in the United Kingdom does not render the latter so egregious or lacking in respect the human rights as to render the surrender of the respondent unconstitutional.

59. Mr Barron has also referred to an affidavit sworn on behalf of the applicant by Bryan Frederick Boulter, who is a qualified solicitor working for the Crown Prosecution Service in England. He goes into further detail as to the regime there under section 37 and section 41 of the Mental Health Act, 1983. He states that restricted patients are patients who are detained by the Crown Court under a hospital order, sometimes for a specified period or, more usually and in this case, without limit of time. He states that a restrictions order under section 41 may be made where it appears to the court, having made a hospital order, that having regard to the nature of the offence, the antecedents of the offender and the risk of his committing offences if set at large, it is necessary for the protection of the public from serious harm so to do. He describes the mechanism whereby restricted patients may be discharged only by the Home Secretary or by the Mental Health Review Tribunal. He goes on to state that a restricted patient can apply to a tribunal during the second six months of the duration of a hospital order and also at yearly intervals thereafter, and that a restricted patient who has been conditionally discharged and not recalled, can apply to a tribunal between twelve months and two years from the date of his discharge and at two-yearly intervals thereafter. His affidavit concludes with a statement of his view that the provisions of sections 37 and 41 of the Mental Health Act 1983 are in compliance with the European Convention on Human Rights.

60. Mr Barron has referred also to the case of *X v. United Kingdom* [1981] 4 EHRR 188 where the European Court of Human Rights considered the predecessor of sections 37 and 41 of the Mental Health Act 1983, and found that there was a breach of Article 5(4) of the Convention in so far as the release of the person detained was in the hands only of the Home Secretary and that there was no means of testing the lawfulness of the detention of the person before a court. In that judgment, as referred to by Mr Barron, the court found that the detention itself was lawful under the earlier legislation, but that the manner of review before the Mental Health Tribunal was not in compliance with Article 5 (4) of the Convention because the tribunal had the power only to make a recommendation to the Home Secretary and had no power to release. Furthermore, he states, the habeas corpus procedures in place were found to be inadequate as they did not enable the applicant to make a challenge to his detention on medical grounds. Mr Barron has referred to the fact that the relevant provisions of the Mental Health Act, 1983 were introduced in order to meet these issues. He submits that this court cannot in such circumstances conclude that the relevant provisions of the Act in England are not Convention compliant, and in those circumstances the surrender of the respondent should not be considered to constitute a breach of Convention rights.

61. In his submission that the detention of the respondent under the hospital order with special restrictions attached is a detention that comes within the meaning of the Framework Decision, Mr Barron has referred to Article 1.1 of the Framework Decision which, as I have already set forth, provides:

> "The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence *or detention order*." (my emphasis)

62. He refers also to section 10(d) of the European Arrest Warrant Act 2003, as amended, the provisions of which I have already set forth above. He has submitted that this Court is entitled, when interpreting the Framework Decision and the Act, to have regard to a document entitled "Proposal for a Council Framework Decision on the European Arrest Warrant and surrender procedures between the Member States" which was presented by the European Commission on the 25th September 2001, in which the Commission set out in an Explanatory Memorandum what was proposed to be introduced in the Framework Decision and in which there was included a commentary on each individual article of the proposed Framework Decision. In asserting that this Court is entitled to have regard to this document when interpreting the provisions of the Act and the Framework Decision, he calls in aid the judgment of the Supreme Court in *Bourke v. AG* [1972] 36 in which the Supreme Court (per O'Dalaigh CJ and Fitzgerald J) held that it was a valid and proper approach to look at the *travaux preparatoires* of the European Convention on Extradition 1957 when interpreting the Extradition Act 1965 as that Act had been based on the Convention. He refers also in this respect to the judgment of Murray C. J. in *Minister of Justice Equality and Law Reform v. Altaravicius*, unreported, Supreme Court, 5 April 2006 regarding the manner in which the Framework Decision and the 2003 Act are to be interpreted (as set out by the Court of Justice in the *Pupino* case) in the light of the terms of the Framework Decision and in particular with regard to the objectives to be achieved.

63. Mr Barron has referred to the section of the Proposal document presented by the European Commission which relates to Article 3 of the proposed Framework Decision wherein the Commission stated, *inter alia*, "the definition of the detention order is taken from the 1957 Convention". It is worth noting that the proposed Framework Decision attached to this Proposal document contained a definition section in Article 3 as then drafted. There is no definition section in the Framework Decision has adopted eventually. Nevertheless Mr Barron submits that it is appropriate for this court to have regard to these *travaux preparatoires* in order to discern from that document what was intended to be covered by the term "detention order". He submits therefore that it is quite clear that when "a detention order" is referred to in Articles 1 and 2 of the Framework Decision and in the Act, this is intended to include an order of the kind made in respect of the respondent following his conviction for the offences referred to. He submits that it is quite clear that these orders were imposed "instead of a prison sentence", and is something which comes within the definition of "detention order" in Article 25 of the 1957 Convention, and by reference thereto, within the meaning of "detention order" contained in Articles 1 and 2 of the Framework Decision, and therefore within the meaning of that phrase as contained in section 10 (d) of the Act.

Conclusions
64. In deference to the comprehensive submissions made by both Mr Barron and Ms Donnelly, I have set these out above in as much detail as possible. However, the essential issue on which the court must decide is whether by reference to the intent and objectives of the Framework Decision, and the Act by which effect is given to it in this jurisdiction, the Hospital Order with restrictions attached, and which is for an indefinite duration, subject to powers of review by the Mental Health Tribunal is or is not a "detention order" within the meaning of section 10 of the Act.

65. I am satisfied, and there is no room for a controversy in this respect at least, that the Hospital Order and restrictions is not regarded as a sentence of imprisonment under the law of the United Kingdom. That much is clear. Equally clear in my view is that it constitutes an order for the detention of the respondent, if one adopts a literal meaning of the word "detention". However, as Ms Donnelly has stated, it cannot be the case that every form of detention or deprivation of liberty comes within the meaning of a detention order under the Framework Decision and the Act. By way of a simple example, a person who has been made the subject of a detention order solely in a mental health context, and who escapes from that detention, could not be sought to be surrendered by means of a European arrest warrant. That would seem to be clear, and that only a detention imposed or capable of being imposed following a conviction for a criminal offence has the capacity to be a detention for the purpose of the Framework Decision and the Act.

66. Before addressing this issue by way of conclusion, it is appropriate that I express a view on how the court may arrive at the correct interpretation to be given to section 10 of the Act, and Articles 1 and 2 of the Framework Decision. It is by now generally accepted that the Act must be read in conjunction with and by reference to the provisions of the Framework Decision, particularly given the fact that the Oireachtas has annexed the Framework Decision to the Act. In addition, however, I am satisfied that in order to find the correct meaning, in case of ambiguity within the Framework Decision annexed to the Act, the Court is entitled to have regard to the document referred to by Mr Barron, namely what has been referred to as is the "*travaux preparatoires*" and which is in the form of an Explanatory Memorandum, and which has explained that the definition of "detention order" for the purpose of the Framework Decision has been taken from the 1957 Convention. In addition to that, it is also appropriate when necessary to seek assistance by reference to other language texts of the Framework Decision. In the past, for example in my judgment in *Minister for Justice Equality and Law Reform v. Tobin*, unreported, High Court, 12 January 2007, I have had regard to, *inter alia*, the French, German and Italian texts. In the present case it has been useful also to refer to these texts in order to discover the correct meaning of "detention order", and I will explain why in due course. Finally, it is important to reiterate that where it is possible to do so without arriving at an interpretation which is *contra legem*, the Court must interpret national legislation in a manner which conforms to the clear objective and intent of the Framework Decision.

67. I have already referred to Ms Donnelly's submission in relation to Article 1 of the Framework Decision which provides that a European arrest warrant is a judicial decision "for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order". It is necessary for her submission that a hospital order is not such a detention order, that the adjective "custodial" covers both "sentence" and "detention order". It must be by reference to this that she contends that only a detention order imposed as a penal measure is covered by this Article, and that accordingly, since it is clear that under United Kingdom law the trial judge must make a choice between imposing a prison sentence or making a hospital order, the latter is not a penal measure upon the respondent. It is however noticeable, if one looks at the provisions of Article 2, that it provides that a European arrest warrant may be issued for acts punishable by "a custodial sentence or a detention order" (my emphasis). In this Article, the word "custodial" applies only to sentence, since it is followed by the words "or a detention order". The adjective "custodial" is absent in respect of a detention order. It is in my view relevant to consider this when looking at the wording used in section 10 (d) of the Act requiring that a person the subject of a European arrest warrant be surrendered when that person is one "on whom a sentence of imprisonment or detention has been imposed". In my view this supports an interpretation to the effect that the intention of the Framework Decision is that it covers, firstly, a person on whom a sentence of imprisonment has been imposed, and also a person who, following a conviction, and thus in a penal context, has been ordered to be detained as opposed to imprisoned. In so far as there may be a perceived ambiguity between the precise language used in the English text of the Framework Decision in Article 1 compared to that used in Article 2, clarification is assisted by referring to the French, German, and Italian texts of the same Articles.

68. In the French text, the following are the relevant extracts:

> Article 1 :
>
> > "…. pour l'exercice de poursuites pénales ou pour l'exécution d'une peine ou d'une mesure de sûreté privatives de liberté …"
>
> Article 2 :
>
> > …. pour des faits punis par la loi de l'État membre d'émission d'une peine ou d'une mesure de sûreté privatives de liberté…

69. The German text provides:

> Article 1 :
>
> > "....Strafverfolgung oder zur Vollstreckung einer Freiheitsstrafe oder einer freiheitsentziehenden Maßregel der Sicherung bezweckt."
>
> Article 2 :
>
> > "....mit einer Freiheitsstrafe oder einer freiheitsentziehenden Maßregel der Sicherung"

70. The Italian text provides:

> Article 1 :
>
> > ".... dell'esercizio di un'azione penale o dell'esecuzione di una pena o una misura di sicurezza privative della libertà."
>
> Article 2 :

"... con una pena privativa della libertà o con una misura di sicurezza privative della libertà"

71. I have underlined the use of the indefinite article before the words used in respect of a detention order in each text.

72. This confirms for me that the intention of the Framework Decision is that the phrase "detention order" is not to be confined to a detention order imposed as a form of sentence, such as where in this jurisdiction a young person can be ordered to be detained in St Patrick's Institution as a form of sentence of imprisonment. If one removes the adjective "custodial" from the "detention order" it is clear that its meaning is wider than a custodial detention order, and can embrace a detention order such as the hospital order with restrictions which was imposed upon the respondent following his conviction after a trial.

73. It is therefore possible for this court to give an interpretation to the provisions of section 10 (d) of the Act which is in conformity with the objectives and intent of the Framework Decision, and which he is not *contra legem*. It is that interpretation which must be given in those circumstances, rather than one which would exclude the respondent from being a person in respect of whom a European arrest warrant may be issued, thereby preventing his surrender.

74. As I have already set forth, the second point of objection made by the respondent is that if the hospital order with restrictions, which is expressed to be for an indefinite period, is a detention order which comes within the Framework Decision, the surrender of the respondent on foot of the present application would constitute a breach of his constitutional and Convention rights on the basis that his continued detention by the authorities in the United Kingdom constitutes preventative detention such as would-be impermissible in this jurisdiction on the basis of the case law to which Ms Donnelly has referred.

75. First of all, I am satisfied that the cases to which I have been referred from the European Court of Human Rights indicate that the regime under which patients may be detained under the Mental Health Act 1983 in the United Kingdom are such as do not breach Convention rights, now that procedures are in place which permit and require appropriate review, and where necessary release by the Mental Health Tribunal.

76. As regards constitutional rights, Ms Donnelly, as I have already set forth, and is relied upon the O'Callaghan decision. First of all it must be remembered that this decision was in the context of an application for bail by a prisoner who had been returned for trial on charges. In that case the Attorney General had submitted that the applicant ought to be refused bail so that he could be held in prison as a preventive measure since it was feared that if released on bail he might commit further offences. It is that purpose which was held to be impermissible under the Constitution. It was stated by Walsh J. that "the object of bail is neither punitive nor preventative". That is the context in which the concept of preventative detention was stated to be impermissible. That case in my view he is easily distinguishable from the context in which the respondent has been held in indefinite detention, and that this detention cannot be seen as "preventative" in the same sense. I prefer to adopt Mr Barron's characterisation of the respondents detention as being protective rather than preventative. It can be seen as being protective both of the respondent in his own interests, and the general public at large, for as long as may be deemed necessary from a mental health point of view. There is nothing in my view which is constitutionally impermissible in this jurisdiction about such a detention order provided that appropriate reviews of the need for that detention provided for. It is incorrect in my view to equate the respondent's detention in the United Kingdom under a hospital order and restrictions with the sort of preventative detention regarded by Walsh J. as constitutionally impermissible where its purpose was solely to prevent the commission of further crimes by an accused person while on bail.

77. I have therefore arrived at the conclusion that there is no reason under Part III of the Act or the Framework Decision to prohibit the surrender of the respondent. I have already concluded that all the other requirements of section 16 of the Act have been complied with, and the court is therefore required to make the order sought.