[2017] IEHC 233

THE HIGH COURT

Record No. 2016/18 EXT

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

PATRICK JOSEPH MANGAN

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered this 13th day of March, 2017.

1. The surrender of the respondent is sought by Spain for the purpose of prosecution of a single offence alleging his participation in illicit trafficking of narcotic drugs and psychotropic substances occurring on 29th November, 2010. The European arrest warrant ("EAW") issued on 5th April, 2013 and was endorsed by this Court on 1st February, 2016 pursuant to the provisions of s. 13 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003").

2. The respondent objects to his surrender on a number of grounds. These grounds include:-

a) that the warrant is bad for want of necessary detail;

b) that because of a previous decision of this Court not to exercise functions in respect of this EAW, the respondent has been prejudiced; and,

c) a complaint that his right to privacy under the Constitution and under the European Convention on Human Rights ("ECHR") will be violated if he is surrendered to Spain due in particular to telephone tapping.

The background to the European arrest warrant

3. There is an interesting background to this EAW application arising in circumstances where this respondent was previously sought for surrender by the United Kingdom ("U.K.") in respect of a European arrest warrant. That U.K. EAW was issued on 4th November, 2011 and concerned different offences allegedly committed on 19th June, 2007 and 18th September, 2007. The case came before the High Court on 10th December, 2015 and the Court made an order for the respondent's surrender to the United Kingdom. However, prior to his physical surrender, the U.K. authorities indicated that they no longer required him for surrender and he was released from custody.

4. Shortly before the decision to surrender the respondent to the U.K. was made, this EAW was received from Spain and brought to the attention of the High Court. Although notice was not necessarily required, the respondent was notified and was represented at the application for endorsement of the European arrest warrant. Pursuant to the provisions of s. 29 of the Act of 2003, the Court decided to perform its functions under s. 16 of the Act as regards the U.K. EAW and did not perform functions under s. 13 of the Act with regard to endorsement of this Spanish European arrest warrant. Section 29 of the Act of 2003 provides for the situation where two or more EAWs are received in the State. When such a situation occurs, it is for the High Court to decide in relation to which of those EAWs it shall perform functions under the Act of 2003.

5. Shortly after this respondent's release from custody in respect of the U.K. EAW, the central authority wrote to the issuing judicial authority in Spain stating that the U.K. EAW had been withdrawn and seeking clarification as to whether the Spanish authorities still sought the respondent for surrender. The central authority also sought further information from the Spanish authorities with respect to certain details in the European arrest warrant. These included issues such as the maximum length of the sentence and whether the issuing judicial authority was relying on a designation that this was an offence to which Article 2, para. 2 of the Council (EC) Framework Decision of 13th June, 2002 (2002/584/JHA) on the European arrest warrant and the surrender procedure between Member States ("the 2002 Framework Decision") applies. The Spanish issuing judicial authority confirmed that execution of the EAW was required.

A Member State that has given effect to the 2002 Framework Decision

6. I am satisfied that by the European Arrest Warrant Act 2003 (Designated Members States) Order (S.I. 4 of 2004), the Minister for Foreign Affairs has designated Spain as a member state for the purposes of the Act of 2003.

Section 16(1) of the Act of 2003

Identity

7. I am satisfied on the basis of the affidavit of James Kirwan, member of An Garda Síochána, the affidavit of the respondent and the details set out in the EAW, that the respondent, Patrick Joseph Mangan, who appears before me, is the person in respect of whom the EAW has issued.

Endorsement

8. I am satisfied that the EAW has been endorsed in accordance with s. 13 of the Act of 2003 for execution in this jurisdiction.

Sections 21A, 22, 23 and 24 of the Act of 2003

9. Having scrutinised the documentation before me, I am satisfied that I am not required to refuse the surrender of the respondent under the above provisions of the Act of 2003, as amended.

Part 3 of the Act of 2003

10. Subject to further considerations of s. 37, s. 38, s. 42, s. 44 and s. 45 of the Act of 2003, as amended, and having scrutinised the documentation before me, I am satisfied that I am not required to refuse the surrender of the respondent under any other section contained in Part 3 of the Act of 2003.

The points of objection

11. The respondent put forward a number of points of objection in his written objections. At the hearing of the application, counsel for the respondent initially suggested that there were seven grounds of objection to surrender. Some of these points of objection

were expanded upon during the course of the hearing but, as the hearing progressed, were later abandoned. Nonetheless, the Court will deal with all points where submissions were advanced.

Section 42 of the Act of 2003
12. Section 42 of the Act of 2003 states that:

> "[a] person shall not be surrendered under the Act if (a) the Director of Public Prosecutions or the Attorney General is considering, but has not yet decided, whether to bring proceedings against the person for an offence, or (b) proceedings are pending in the State against the person for an offence consisting of an act or omission of which the offence specified in the European arrest warrant issued in respect of him or her consists in whole or in part."

13. In this case, the respondent did not offer any evidence that the DPP is considering, but has not yet decided, whether to bring proceedings against the respondent. Indeed, the respondent did not raise any evidence to suggest that there was a risk that this might be so. In circumstances where there is no evidence of any factors from which it could be implied that the DPP or the Attorney General are considering whether to bring proceedings against this respondent for an offence, the Court is satisfied that his surrender is not prohibited by s. 42 of the Act of 2003.

Section 44 of the Act of 2003
14. This section provides that a person shall not be surrendered if the offence specified in the EAW was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State. The respondent raised this objection on the basis that the offence was alleged to have been committed in the city of Melilla which the respondent asserted was a Spanish controlled city in Morocco. During the course of the hearing, this point was abandoned. The Court has no doubt that the allegations as set out in the EAW together with the additional information, clearly established that this offence is alleged to have been committed in Spain. Thus, the first condition of s. 44 of the Act of 2003 has not been met. Therefore, the surrender of this respondent is not prohibited on the grounds of s. 44 of the Act of 2003.

Section 45 of the Act of 2003
15. Section 45 of the Act of 2003 states that a person shall not be surrendered under the Act if he or she did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the EAW is issued, unless the EAW indicates the matters required by the new point (d) of the form of EAW set out in the Annex to the 2002 Framework Decision as amended by the Council (EC) Framework Decision of 26th February, 2009 (2009/299/JHA) on the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial ("the 2009 Framework Decision").

16. This is an EAW which has been issued for the purposes of criminal prosecution. In those circumstances, the provisions of s. 45 of the Act of 2003 simply do not apply.

17. The respondent apparently based his objection under s. 45 of the Act of 2003 on a statement in the EAW that the domestic arrest warrant for the purpose of the court appearance concerning custody pending trial issued on 5th April, 2013 "since the defendant has escaped despite being imposed a fine and required to comply with his obligation to show up in court on 12th and 26th of each month". Counsel submitted that there must have been a decision in his absence as a fine had been imposed. In one of the pieces of additional information, the issuing judicial authority referred to the fact that the respondent had been in pre-trial detention from 10th March, 2011 until 5th October, 2012 when he was released on €5,000 bail and was obliged to appear in court every 12th and 24th of each month.

18. It was later clarified by the issuing judicial authority that there had been a translation mistake as to the word "fine" which must now be replaced by the word "bail". There was confirmation that he had not been convicted for failing to appear before the Spanish courts because that conduct was not a crime in Spain. In those circumstances, the point was no longer put in issue on behalf of the respondent. His surrender is not prohibited on the grounds of s. 45 of the Act of 2003.

Section 38 of the Act of 2003
19. Surrender is prohibited under s. 38 of the Act of 2003 unless the offence is either an offence to which Article 2, para. 2 of the 2002 Framework Decision applies and under the law of the issuing state, the offence is punishable by imprisonment for a maximum period of not less than three years, or, the offence corresponds to an offence under the law of the State, and under the law of the issuing state, the offence is punishable by imprisonment or detention for a maximum period of not less than twelve months.

20. In the EAW, the issuing state has ticked the box of "illicit trafficking in narcotic drugs and psychotropic substances". However, they have also filled in point E.II of the EAW which is headed "[f]ull description of offence(s) not covered by s. I above". Prior to endorsement of this EAW, the central authority had written to the issuing judicial authority pointing out that there was a contradiction in what had been stated, as either E.I or E.II of the EAW can be relied upon. It was asked whether completion of E.II was an error. The issuing judicial authority responded that:-

> "The arrest warrant refers to a crime of drug trafficking, although as clarification of the aggravation that this conduct presents, clarification of conduct already presented in section I was included by mistake in section II, therefore this is simply a clarification of the conduct from s. 1, in the absence of another gap in the existing form.".

21. The Court is quite satisfied that the issuing judicial authority have given a clear indication that they are relying on the designation of this offence as an offence to which Article 2, para. 2 of the 2002 Framework Decision applies. As it is obviously an allegation of an offence of drug trafficking and as it carries a maximum sentence of not less than three years, this designation is not manifestly incorrect. Therefore, his surrender is not prohibited by s. 38 of the Act of 2003.

22. Counsel for the respondent submitted that the statement of the issuing judicial authority was not to be accepted as it was unclear. Counsel submitted thereafter that correspondence must be shown and that there was no corresponding offence in this jurisdiction.

23. The EAW sets out that the respondent is sought for: "The alleged participation as the head of an organization dealing with drug trafficking. An alleged British organization which deals with purchasing large amounts of drug[s] from the city of Melilla, obtained by paying a group composed of Spanish individuals. The narcotic drugs were controlled in Melilla on 29 November 2010. It has only been recovered 148 kilograms."

24. Even if it is considered that the above statement regarding the details of the offence is by any manner unclear, which the Court

does not so find, it was put beyond all doubt by the additional information dated 19th January, 2016 which stated, having referred in particular to the 148kgs of hashish which had been intercepted by the judicial police and that there were bags and packages that had contained drugs but were empty when the van was intercepted, that all those drugs were paid for by this respondent who provided money to members of his organisation for their purchase. Those facts would, if committed in this jurisdiction, amount to the criminal offence of possession of a controlled substance with intent to sell or otherwise supply it to another contrary to s. 15 of the Misuse of Drugs Act, 1977, as amended. Furthermore, it would also amount to conspiracy to possess controlled drugs with the requisite intent.

25. Therefore, even if this had not been designated by the issuing judicial authority as a list offence for which double criminality was not required to be demonstrated, the Court is satisfied that the offence is one which corresponds to an offence in this jurisdiction. It is an offence which carries a maximum sentence which complies with the requirement of minimum gravity.

26. Therefore, there is no basis for the contention that the respondent's surrender is prohibited on the basis of s. 38 of the Act of 2003.

The warrant is bad for want of necessary detail
27. Under this heading, the respondent pointed to a number of flaws in either the original EAW or in the translation provided to this Court. These are as follows:-

(1) An absence of the statement in the official translation that the respondent is wanted for criminal prosecution.

(2) The name Magan appears in the translated version.

(3) The arrest warrant refers to custody pending trial.

(4) The EAW states that a fine was imposed.

(5) That there is a doubt about the penalty that the respondent might face in criminal prosecution.

(6) That the respondent is liable to be detained and that this was a decision rendered in absentia, and,

(7) The detail of the offence was inadequate.

28. The respondent's argument in this matter was that it was open to the Spanish authorities to issue a new EAW so that this Court could engage in its function under the Act of 2003. The Court will address each of the details in turn and then discuss the implications for the validity of this European arrest warrant.

Absence of statement
29. It is correct to say that there has been a failure to translate the customary statement that appears on the form of an EAW to the effect that:

> "This warrant has been issued by a competent judicial authority. I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution arrest or executing a custodial sentence or detention order."

At a later point in the proceedings, the High Court requested that the English translation of the statement on p. 1 of the EAW be provided and it was so provided.

The name Magan

30. As regards his name being stated as "Magan" on the English translation, this is correct, there was a failure in the translation to spell his surname correctly. It appears correctly as "Mangan" in the Spanish version but it is stated to be "Magan" in the English translation. The Court views that as a typographical error which has no bearing at all on the issues that the Court has to decide and in particular has no bearing on the issue of identity. All the respondent's details are provided under point (a) of the EAW and his identity has been established. Point (a) included a reference to his driving licence being in the name of Mangan and included a number. It also included his Irish passport number. In light of this, there is no basis for any complaint.

Warrant concerning custody pending trial

31. The fact that the EAW states that this was an arrest warrant concerning custody pending trial, creates no problem for the court. It is clear from the EAW that this refers to the arrest warrant as permitting custody pending trial in circumstances where the respondent escaped.

A fine imposed

32. As regards the fact that a fine was imposed, this Court did seek further information as to why a fine was referred to in the European arrest warrant. As appears from the reply of the issuing judicial authority, this was a translation mistake and it should have been replaced by the word "bail".

The penalty for the offence

33. An issue did arise in respect of the penalty that the respondent might face. In the EAW, it is stated at point (c) which is headed "[i]ndications on the length of the sentence" and the "maximum length of the custodial sentence which may be imposed for the offence(s)" that "The prosecutor has issued his indictment requesting for the defendant four years imprisonment and a fine of €350,000 for an alleged offence of drug trafficking."

34. Prior to endorsement, the central authority had sought confirmation of "the maximum offence (sic) prescribed for the offence under Spanish Law.". The Spanish issuing judicial authority replied by enclosing a copy of the articles of the Spanish Criminal Code applicable to the alleged offences in the European arrest warrant. The reply stated that "it should be clarified that the maximum penalty requested for Patrick Joseph Mangan by the Public Prosecutor's Office at this time is 4 and one-half years of prison and a fine of 350,000 Euros with 6 months of an alternative custodial sentence in the case of non-payment. However, and given that the aforementioned conduct is considered aggravated in article 370 of the Criminal Code, since the aforementioned person is presumably

the head of his organization, and the drugs transported were greater than 148 kilograms, and given that a portion was hidden before the arrival of the police, the final qualifying sentence requested in due course could reach a term of 6 years and 9 months. The aforementioned penalty would prescribe at least 5 years, and if the aggravating circumstances presented are assessed, a term of 10 years would be prescribed."

35. The EAW was subsequently endorsed by this Court for execution. In due course, the respondent filed a notice of objection which contained many and varied points of objection. The minister sent a notice for particulars arising out of the notice of objection as many of the claims had been made in a very general manner. In a partial response to that notice for particulars, the solicitor for the respondent stated that they had been in contact with a Spanish lawyer but, despite their best efforts, they did not receive the level of detail from this lawyer that was necessary to enable them to draft an affidavit which they hoped to file. It is to be noted that no such affidavit was ever filed in this case.

36. The central authority sent a further letter dated 8th July, 2016 to the issuing judicial authority asking the issuing judicial authority to:-

> "Please state unambiguously the maximum length of the custodial sentence or detention order which may be imposed for the offence. This must be the absolute maximum that a Court could impose if the respondent is found guilty of the offence. It is our understanding of the articles of the Criminal code enclosed in your response of 19 January 2016 that the maximum possible sentence of imprisonment is 6 years, that is three years increased by two degrees (1.5 years x 2). Please confirm if this is correct."

37. By letter dated 20th September, 2016 and received by the central authority on 26th September, 2016, the issuing judicial authority replied by stating that "the maximum penalty which may be imposed to (sic) Patrick Joseph Mangan is 6 years imprisonment and a fine, plus 9 more months imprisonment for failure to pay that fine when relevant.". In the course of hearing this application, the Court decided to exercise its powers under s. 20 of the Act of 2003 to seek further information from the issuing judicial authority as to what the maximum penalty was. This was in light of statements provided by the issuing judicial authority dated 19th January, 2016 and 20th September, 2016. There was an unfortunate reference in the letter sent by the central authority on behalf of the High Court, to "four years and nine months" that could be imposed. In fact, the issuing judicial authority had referred to six years and nine months being the maximum term that could be imposed.

38. The issuing judicial authority replied by letter dated 26th October, 2016 stating " [...] it must be said that there is no contradiction as, to present day, the Public Prosecutor requests for Mr. Patrick J. Mangan a sentence of four and a half years of imprisonment and a fine of 350,000 euros with six months imprisonment in case of non-payment. Said indictment issued by the Prosecutor is provisional and not final in accordance with the hearing. During the hearing, the Public Prosecutor could modify the same up to the maximum sentence under the Spanish Criminal Code, namely 6 years 9 months imprisonment." The reply then refers to the mistaken statement of four years and nine months which should be six years and nine months. There is then a final statement that "therefore, the maximum penalty which may be imposed is 6 years 9 months imprisonment, although the Public Prosecutor requested in his provisional conclusions before the hearing, a sentence of four and a half years of imprisonment and a fine of 350,000 euros with six months imprisonment in case of non-payment."

39. This issue of the maximum penalty available for this offence could have been avoided if the EAW had stated in unequivocal terms what it stated in the final piece of additional information, namely that the maximum penalty which may be imposed is six years nine months imprisonment, although the public prosecutor requested in his provisional conclusions before the hearing, a sentence of four and a half years of imprisonment and a fine of €350,000 with six months imprisonment in case of non-payment. Instead, the EAW stated that "the prosecutor has issued his indictment requesting for the defendant 4 years imprisonment and a fine of 350,000€ for an alleged offence of drug trafficking". The Court has noted that the request of the prosecutor has even moved on since the initial statement in the EAW, as he now seeks a sentence of four years and six months imprisonment with an additional six months for non-payment of the fine of €350,000. That appears to be explained by the reference to "the present day" as to what the public prosecutor is seeking.

40. The Court is satisfied that prior to endorsement, the issuing judicial authority had stated that a final qualifying sentence could reach a term of six years and nine months in this case. No doubt arises as to the accuracy of this statement from any of the subsequent information.

41. During the course of the initial hearing, reference was made to the fact that there were references to other terms in the EAW and additional information such as five years and then ten years. The Court is quite satisfied that those references are to prescription terms which actually refer to the limitation periods for the offence. The Court has regard to the following statement in the EAW: "the prescription period for this offence is 10 years from the date of issue of this present".

42. The respondent was not obliged to put forward any evidence regarding the maximum sentence. He has not done so despite having contact with a Spanish lawyer. It is, however, a matter for the Court to be satisfied that the EAW contains a clear description of the maximum length of the custodial sentence or detention order which may be imposed for the offence. For the reasons set out above, the Court has no doubt that the maximum penalty which may be imposed is six years and nine months imprisonment in respect of these offences. That has been demonstrated in the details set out from the EAW and the additional information above.

Decision in absentia

43. The respondent has also relied upon the reference in the EAW at point (d) to this being a decision rendered in absentia. In that regard, it is to be noted that this EAW at point (d) is set out in the form of the original point (d) as contained in the 2002 Framework Decision rather than the new form point (d) contained in the 2009 Framework Decision which amends the 2002 Framework Decision. Under that heading, it states "non-compliance with his obligation to show up in court on the 12th and the 26th of each month although the bond was provided". As the Court has set out above, the Court is quite satisfied that this is not a case where the respondent has already been tried. As he has not yet been tried in respect of this offence, the provisions under point (d) did not require to be completed. The Court is also satisfied that no issue as to the validity of the EAW arises if further information is provided in a section in the EAW than is strictly necessary.

Lack of details of offence

44. The respondent submitted that the detail of the offence was inadequate. In particular, counsel submitted that the detail in the EAW suggested a class of conspiracy or perhaps a membership of a criminal organisation, but did not contain enough detail to show that it involved illicit trafficking in a particular drug. It is correct to say that the details of the particular drug were not set out earlier

in this judgment and, indeed, the central authority sought that information as well as information as to whether it is alleged that the respondent, as part of an organised group, purchased the drugs, or whether he attempted to purchase the drugs of which 148kg were recovered. Some of the details of the reply to that request have been set out and it is noted that the issuing judicial authority confirm "that the aforementioned person is credited with having acquired a minimum of 148 kilograms of hashish intended for trafficking […]".

45. The respondent also raised issues about the reliability of the Spanish statements in the EAW and the additional information because of perceived discrepancies between what the issuing judicial authority stated in writing and the audio recordings the issuing judicial authority sent in support of those statements. In order to understand what is being asserted, it is necessary to give some further detail as set out in the following paragraphs.

46. There is no mention in the original EAW of evidence coming from the tapping of telephones. The first mention of telephone tapping came by way of reply to the query of the central authority dated 23rd December, 2015 in which clarification was sought as to whether it was alleged that the respondent, "as part of an organised group purchased the drugs or whether he attempted to purchase the drugs of which 148 Kilograms was recovered". In reply, the issuing judicial authority stated: "[…] it is apparent, via tapped telephone conversations, that the amount of drugs was much greater since prior to police intervention they were removed from the van."

47. In his affidavit grounding his points of objection, the respondent averred that he believed that in the course of his intended prosecution, the Spanish prosecutor intended to rely upon telephone calls that were "tapped" whilst he was in Ireland.

48. In reply to a further request from the central authority for as much detail as possible in relation to the degree of participation of the respondent with regard to the acts or omissions alleged against him, the issuing judicial authority gave a lengthy reply which was received in the State on 26th September, 2016. This reply included a file which attached various conversations that "have been monitored by a judicial order." These were contained on a disc which has been presented to the Court. The disc was made available to the respondent. Both the minister and the respondent were of the view that it was a matter for the Court as to whether it would examine the information contained on the disc.

49. In its written statement, the issuing judicial authority indicated that certain of those conversations were remarkable. The information stated that the representative of the group in Costa del Sol was Anthony Joseph O'Neill, who received orders from the respondent as well as money to buy the drugs. It is alleged that there were conversations with another defendant in the proceedings who belonged to another organised group in charge of getting the drugs out of Morocco. This was the "Big Fella", Mauricio Alejandro Teutsch Ovalle. It appears that the phones of Mr. O'Neill and Mr. Ovalle were tapped. The remarkable conversations include details of calls allegedly between the respondent and Mr. O'Neill (using certain phones) but also between Mr. O'Neill and other persons.

50. The respondent swore a further affidavit in which he stated that he had listened to these recordings. He averred that what is contained in the letter sent by the issuing judicial authority may be inconsistent with what is actually contained in the documentation. The respondent submitted this as he said that it continued the trend of the Spanish judicial authority sending inadequate or inconsistent information.

51. Much time of the court was taken up with what the respondent later put forward as a "sample transcript". That sample transcript has transpired to be inaccurate in various respects, for example, at Reference 3, the Spanish judicial authority states that there was a call at 19:56:13 on 21st November, 2010 about an appointment in O'Neill's house to deliver the money. The respondent states that there is no call, but in fact there is a brief call to a number (not allegedly the respondent's Irish phone number) and it records a conversation between an English speaking male and a person with a strong Spanish accent. Furthermore, the respondent takes issue with the fact that one of the calls made on 19th November, 2010 at 17.15.10 is stated to be about the respondent going to Malaga at 19:00 to bring the money (deposit) to give it to O'Neill and that O'Neill should give it to the "big fella" who is actually Mauricio. The respondent says in his transcript that he "was not in Malaga as (sic) time, but the Spanish paper says I was on my way with a deposit of money". In reality, this conversation was quite lengthy on the phone and having listened to it, the Court is quite satisfied it is quite consistent with what is stated by the issuing judicial authority; there is reference to going to Malaga by 7.00pm but there is a discussion between the parties about timings.

52. In relation to another call made on that date at 16.26.24, the respondent contests that what is stated was actually what was said in the call. The issuing judicial authority stated that there was a conversation between the respondent and Mr. O'Neill about a consignment of 180kg of hashish that tentatively they intended to acquire and that they needed to pay. Having listened to the call, I agree with the submission of the central authority that what is in the call is not inconsistent with the interpretation placed upon it by the Spanish judicial authority. There are other examples such as a call on the previous day, 18th November 2010 at 10.23.22 which the respondent contests that the interpretation placed upon it by the Spanish authorities, namely that it was a conversation between the respondent and O'Neill about an input of money to acquire the drug through "big fella", is incorrect. In reality, there was a conversation in which references are made to "big fella", "score" and "squidgy" that the central authority submitted was not inconsistent with a conversation about drugs. I also agree with that submission by the central authority having listened to the call.

53. Ultimately, counsel for the minister submitted that it was not for the court to engage with the minutiae of what was said but that these were a matter for the issuing judicial authority. The Court is quite satisfied that it is not the role of this Court to engage in any kind of minute analysis of the information/evidence that has been presented to it with a view to establishing whether it can or does support the guilt of a respondent. Nor is it appropriate for the Court to engage in a detailed analysis for the purpose of nitpicking whether the issuing judicial authority has taken a correct interpretation of evidence.

54. In this case, the issuing judicial authority has sent a great deal of information which is in the nature of trial evidence. The Court was surprised that the Spanish authorities sent this kind of detail in answer to the reasonable request from the central authority for an indication as to the degree of participation of the respondent in the alleged offence. It was not necessary that all of the evidence be set out which forms the basis for the prosecution of a person. All that is needed to be set out is sufficient detail to satisfy the criteria under point (e) of the European arrest warrant. The fact that further detail has been sent is not a matter that prevents surrender and it is certainly not an indication of bad faith on the part of the issuing judicial authority. The Court merely observes that the EAW procedure under the 2002 Framework Decision provides for a form of simplified surrender and that it was not intended that an executing judicial authority would be required to examine the evidence upon which the request is made.

55. The Court does comment, however, that the details that have been provided do form part of the consideration which this Court must now undertake. The Court, therefore, engaged with the material, in particular where the respondent was putting forward the case that there were glaring inconsistencies or inaccuracies. The Court is satisfied that it has not been established that there is any inadequacy, or indeed inconsistency, that would require this Court to refuse surrender. In particular, the Court observes that what

has been submitted in writing by the issuing judicial authority is the interpretation being placed on the context of the call by the Spanish authorities. For example, with regard to the call on 18th November, 2010, at 10:23:22, contrary to the respondent's assertion, it is not inconsistent that the references to "big fella", "squidgy" and "score" relate to a conversation between Mangan and O'Neill about "an input of money to acquire the drug through big fella". Similarly, where the conversation of 30th November, 2010 at 15:30:38 is concerned, the statement by the issuing judicial authority that that is a call between Mr. Mangan and Mr. O'Neill about Mr. O'Neill escaping due to the fact that the police had intercepted the drugs, is not necessarily inconsistent with what is being said. The issuing judicial authority is not saying that all of those facts were mentioned in the call, they are simply saying that it was about Joseph O'Neill escaping. In circumstances where Mr. O'Neill allegedly says "five mins I'll be there" and Mr. Mangan says "your bird keeps ringing the phone" and Mr. O'Neill says "go on mate alright" it is not entirely inconsistent that this is a call relating to escaping after a drugs interception.

56. Overall, the Court is of the view that there is no obvious inconsistency between the recorded material and what the Spanish judicial authority have stated in writing in the additional information. Having carefully considered the information, the Court is satisfied that nothing arising from the evidence on the disc or the documentation forms any basis for refusing surrender.

The requirement for sufficient detail

57. Section 11 of the Act of 2003 states that an EAW shall, insofar as is practicable, be in the form set out in the Annex to the 2002 Framework Decision as amended by the 2009 Framework Decision. Section 11(1A) of the Act of 2003 states that the EAW shall specify certain matters. Section 11(2A) of the Act states that if any of the information to which s. 11(1A) refers is not specified in the EAW, it may be specified in a separate document.

58. If an EAW does not state the matters required by s. 11(1A) of the Act of 2003, it is possible to specify that information in a separate document. That subsection has to be read in accordance with s. 20 of the Act of 2003 which permits either the central authority or the High Court to seek further information as regards certain matters. It may often be the case that the EAWs received in this jurisdiction do not contain all the information which permits this Court or the central authority to exercise their functions under the Act. This was recognised at an early stage by the Supreme Court in the case of *Minister for Justice v. Rodnov* (Ex tempore, Unreported, Supreme Court, 1st June 2006) who made it clear that the central authority should seek to obtain information that would rectify defects in EAWs at an early stage. In the case of *Minister for Justice and Equality v. Sadiku and Gherine* [2016] IECA 65, the Court of Appeal instance lack of detail as to the facts in an EAW as appropriate subject matter of a request to an issuing judicial authority for further information under the provisions of s. 20 of the Act of 2003.

59. In this case, the central authority quite correctly sought further information regarding, *inter alia*, the absence of the maximum penalty prior to the endorsement of this European arrest warrant. The information came back which established that the final qualifying sentence could reach a term of six years and nine months. The EAW was endorsed and after points of objection were received, further information was sought which again confirmed that the maximum sentence was six years and nine months. On further submissions at the hearing of the application, the court, in circumstances where issues of interpretation of what had been sent were being raised, sought further information under s. 20 of the Act of 2003. That information confirmed that the maximum sentence was six years and nine months.

60. In those circumstances, there is no basis for holding either generally, or in the specific context of this case, that the lack of information in the initial EAW that was sent to the State renders this EAW bad on its face or otherwise invalid.

61. Section 45C of the Act of 2003 is also relevant here. Section 45C states:-

> "For the avoidance of doubt, an application for surrender under section 16 shall not be refused if the Court is satisfied that no injustice would be caused to the person even if—
>
> (a) there is a defect in, or an omission of, a non-substantial detail in the European arrest warrant or any accompanying document grounding the application,
>
> (b) there is a variance between any such document and the evidence adduced on the part of the applicant at the hearing of the application, so long as the Court is satisfied that the variance is explained by the evidence, or
>
> (c) there has been a technical failure to comply with a provision of this Act, so long as the Court is satisfied that the failure does not impinge on the merits of the application."

62. In respect of the absence of the translation of the statement that the EAW was issued by a competent judicial authority, the Court is quite satisfied that the failure to translate this does not cause any injustice to this respondent. Therefore, even if it is considered a technical failure to comply with the provisions of the Act of 2003, (namely either a breach of the requirement that the translated version of the Act would include this so as to be in the form of the EAW as provided in the Annex to the 2002 Framework Decision or a defect in an accompanying document to the EAW), the Court is quite satisfied that there is no injustice caused to the respondent. The similar situation arises in respect of his name Mangan. There is no injustice caused to him by the slight defect in the accompanying translation of his name. The Court is satisfied that his identity has been clearly established.

63. There is no difficulty with the statement in the EAW that the national warrant seeks his custody pending trial, as that is simply a statement relating to the nature of the national warrant. Similarly, the Court is satisfied, having set out the matter above, that the reference to "fine" is an error in the translation. Again, that is a defect in a non-substantial detail in the accompanying documentation as it is clear from the rest of the EAW that this was a warrant for prosecution and not a warrant in which he was being sought for service of a custodial sentence. Again, there is no injustice in his surrender in respect of this matter.

64. As regards the detail contained in the statement concerning trial in absentia, the Court is also satisfied that this was a statement that was not required to be put in point (d) of the European arrest warrant. It was a statement that the respondent had failed to comply with his bail obligations to show up in court on various dates. Perhaps it could be considered a defect that point (d) was completed when not required, but if so, it is a non-substantial detail in the European arrest warrant. It was information that was not required under the provisions of the Act of 2003 or the 2002 Framework Decision, as amended. It has no effect on any of the issues to be decided upon with respect to whether surrender should be ordered or refused. There would be no injustice caused by surrendering the respondent in the context of such an insubstantial defect.

65. Finally, as regards the details of the offence being inadequate, it is also the case that prior to endorsement, the central authority sought and were given further details as regards the essence of the offence which is alleged against this respondent. Section 11(2A)

of the Act of 2003 permits such detail to be provided in a separate document and it does not mean that surrender must be prohibited simply because such information is provided in a separate document.

66. The Court has rejected each one of the respondent's claims about the lack of necessary detail in the European arrest warrant. Even though the Court accepts that some of the detail could either have been provided in the original EAW or the translation could have been more carefully carried out, as has been demonstrated, these are matters that do not affect the obligation to surrender this respondent on foot of an otherwise valid European arrest warrant. Even when all those matters are considered together, there is no basis for refusing surrender. There is no lack of clarity, no fundamental defect or other inadequacy in any essential matter that amounts to a basis for refusing surrender. Furthermore, there is no injustice in surrendering this respondent by virtue of any of the matters raised when considered individually or collectively. Therefore, this point of objection of the respondent is rejected.

Section 29 of the Act of 2003
67. It was submitted on behalf of the respondent that, in light of the history of the proceedings, which included the fact that the respondent had been remanded in custody following the order of surrender on foot of the U.K. EAW, he would be unfairly prejudiced by his surrender to Spain. The specific point was made that if the Spanish EAW had been endorsed at the time when he was in custody on the U.K. EAW, he would have been in a position to have had that period of detention deducted from any potential sentence that he may receive in Spain, if surrendered.

68. Counsel for the respondent submitted that his case was different from the usual position with regard to what might occur if there was a second request for surrender from another jurisdiction, because in this case, the U.K. authorities waited until after the surrender order before they withdrew the European arrest warrant. The respondent submitted that the deduction that is available in the 2002 Framework Decision for custody on an EAW does not extend, at least on its face, to the respondent's situation. The respondent claimed that the manner in which he had been proceeded against violated his ECHR and constitutional rights to liberty.

69. Counsel for the minister submitted that the procedure adopted in this case was correct in accordance with s. 29 of the Act of 2003 which implemented Article 16 of the 2002 Framework Decision. In circumstances where it was not at issue that the incorrect procedure had been followed, there was no basis for the argument that the respondent was unfairly prejudiced in the proceedings. In particular, it was submitted that Spain could not be prejudiced by the fact that it had complied with the procedures as set out in the 2002 Framework Decision and which were implemented by the Act of 2003.

70. Both the 2002 Framework Decision and the Act of 2003 provide for the situation where EAWs from different member states are sent to this State for execution. In this particular case, the Court, having considered the request of the U.K. for surrender and the request of Spain for surrender, concluded that it would perform its functions in respect of the EAW from the United Kingdom. In due course, his surrender to the U.K. was ordered. However, in the time-period between the order being made and the surrender being effected, the U.K. authorities decided that the respondent was no longer being sought. Quite correctly, the respondent was immediately released from custody.

71. If the respondent had been surrendered to the U.K., his period of time in custody in this jurisdiction would have been deducted from any sentence that may have been imposed in the United Kingdom. On the other hand, if he had been surrendered to the U.K. and either, had not been proceeded against while in the U.K. or had been acquitted of the offence in the U.K., there was no period of time against which to deduct that period. Provided decisions with respect to his detention were lawfully made, there would be no breach of rights even on subsequent striking out or dismissal of the proceedings. The Court makes this point to illustrate the fact that not every period of pre-trial detention will be made up to a prisoner either in the form of credit as to sentence or in the form of damages. It is an unfortunate reality that where the law is correctly applied and bail is refused, an individual who is in fact innocent will have been held in custody. Indeed, this is one of the reasons why a court, in exercising its powers with respect to bail, must be zealous in guarding the liberty of the individual through respecting the presumption of innocence. The Court observes also that if there has in fact been a breach of U.K. law in the manner in which the respondent was dealt with by the U.K. authorities, it is a matter for him to seek redress before the U.K. courts if he so desires.

72. In the present case, the operation of the law meant that the Spanish EAW could not be proceeded with at the time that the respondent was also being sought on the U.K. European arrest warrant. There was nothing unlawful in the manner in which his surrender was ordered to the U.K. or indeed in the manner in which his release was ordered having heard from the U.K. authorities that he was no longer wanted on the U.K. European arrest warrant. There is no breach of his right to liberty in circumstances where he is now being sought on the Spanish EAW which could not be proceeded with in light of the application from the United Kingdom. In those circumstances, there is no unfair prejudice to this respondent which would prohibit his surrender to Spain on foot of this EAW from Spain. Finally, the Court also observes that the respondent has not demonstrated that the Spanish courts would not or could not take into account his time in custody on the U.K. EAW in the circumstances of this case. If there is any real issue over his right to liberty because of what happened (and the Court is not satisfied that there is any such issue), the appropriate jurisdiction for that to be resolved is in the Spanish courts should he be convicted of this offence if surrendered.

Section 37 of the Act of 2003
73. The main claim of the respondent is that his right to respect for his privacy protected by the Constitution and by the ECHR has been breached by Spain as a result of telephone tapping and that his surrender is therefore prohibited under s. 37 of the Act of 2003. The respondent also claimed that his rights under Article 2 of the ECHR, i.e. his right to life, and his rights under Article 8 of the ECHR, i.e. his right to respect for his private and family life, would be violated if he was surrendered to Spain.

Article 2
74. The claim in respect of Article 2 is based upon the averments made by the respondent in an affidavit that he has "succumbed to diabetes and ill-health" and that he does not wish to be further detained in a Spanish prison. He stated that he previously spent two years there and could not bring himself to eat the food provided and lost a lot of weight. He stated that he believes his life and health would be put in peril if he was returned to a Spanish prison. He said that when he was released from prison after two years, he had no money and nowhere to live and was compelled to return home. In his opinion, the Spanish justice system is very slow moving and he stated that he could be left in prison there awaiting trial for a lot longer than the four years imprisonment suggested by the prosecutor.

75. A further affidavit setting out a number of medical conditions from which the respondent suffers, such as hypertension, depression and diabetes, was filed. The respondent stated that he was diagnosed as suffering from an anti-social personality disorder that causes impulsivity and hyper-arousability. A brief medical report confirming the medication he is on and his active conditions of hypertension, moderate depressive episode and diabetes together with the anti-social personality disorder was filed.

76. Virtually no evidence has been placed before the court as to the particular conditions in Spanish prisons. The respondent in his

second affidavit to the court said he believed he would be incarcerated at a particular prison. He stated that in that event, he did not believe he would be given the medication he requires. He said he believed the prison was overcrowded and was worried his health would suffer and his life would be endangered. He did not give any reason for the basis of his belief and in particular did not refer to his previous experience of detention conditions. There has been no reliance on CPT reports, U.S. State Department reports, reports of the Spanish National Preventive Mechanism under the Optional Protocol to the Prevention Against Torture, NGO reports outlining conditions in Spanish prisons or a report from a commissioned expert. The Court is quite satisfied that what has been presented to the court does not amount to evidence that the respondent will not get appropriate medical treatment in a Spanish prison or that there is a real risk that he will not receive such appropriate treatment.

77. The Court is satisfied that there are no substantial grounds for believing that there is a real risk to his life or indeed his health should he be surrendered to Spain. Therefore, the court rejects this point of objection.

Article 8
78. In respect of his claim that his Article 8 rights will be violated, the respondent relied on the facts concerning his health as set out above and that he is an Irish citizen, 51 years old and living with his daughter and mother-in-law in Ireland. The Supreme Court (O'Donnell J.) has stated in the case of *Minister for Justice and Equality v. J.A.T. (No. 2)* [2016] IESC 17 that:-

> *"It would not […] be necessary to carry out any elaborate factual analysis or weighing of matters unless it is clear that the facts come at least close to a case which can be said to be truly exceptional in its features. Even in such cases, which must be rare, it is important that the considerations raised are scrutinised rigorously." (para. 11, judgment of O'Donnell J.)*

79. In this case, there is no need for the court to dwell on the Article 8 point to any great extent. It is clear that this is a case where there is a high public interest in the surrender to Spain of a person who is sought for the alleged offence of drug trafficking of a considerable amount of drugs, in particular where he is alleged to be the head of that organisation. This public interest is heightened in circumstances where he breached his bail in Spain in that regard. As against that, his private right interests regarding his health and his ties in this jurisdiction are very meagre. There is no disproportionate interference with those rights to surrender him in the circumstances of this particular case. Therefore, the Court rejects this point of objection.

Privacy and telephone tapping
80. The main issue raised on behalf of the respondent in the case is the fact that during the course of the investigation in Spain into the alleged drug trafficking, certain phone calls of the respondent were listened in to by the Spanish authorities. Details of the information about telephone tapping and of conversations recorded have been set out above.

81. The main point of contention was that the Spanish authorities listened in to his telephone, which was Irish registered, it being an 085 number, while he was present in Ireland. There is evidence from Mr. Mangan, supported by documentary evidence, and uncontradicted by evidence from the minister, that he was present in Ireland during the time of most of the telephone recordings. The respondent is silent as to his whereabouts on 30th November, 2010 on which the final recording was made.

82. The argument that was made in court on 16th December, 2016 was that his constitutional rights were being violated and that only the Irish courts could protect those rights. In particular, counsel relied upon the case of *The People (DPP) v. Dillon* [2002] 4 I.R. 501. Counsel submitted that the respondent did not know the basis that the Spanish authority had listened in to his calls, although it was accepted that the EAW stated that there was an authorisation from Spain with regard to telephone tapping. The respondent's argument was that this Court could not surrender where there would be a breach of his constitutional rights and in circumstances where it was only before the Irish courts that he could raise the particular issue of breach of his constitutional rights. Counsel submitted that the telephone tapping material would be the evidence against the respondent and only this Court could protect his constitutional rights.

83. Counsel for the minister submitted that there was no basis for the argument that the telephone tap was illegal as it was stated that it had taken place by the Spanish authorities under judicial authorisation. There was a presumption that his rights would be respected in Spain and there was no evidence, let alone cogent evidence, to show the contrary.

84. At the end of the hearing on 16th December 2016, the Court raised the issue of the case of *Larkin v. O'Dea* [1995] 2 I.R. 485. The Supreme Court in that case held that there was an obligation on all organs of the State and in particular the judicial arm thereof to ensure that in the operation of the provisions of the Extradition Act, 1965, the constitutional rights of persons affected thereby were not violated but defended and vindicated. It was held in that case that the court would be failing to defend and vindicate the personal rights of the applicant to permit his extradition having regard to the fact that at his trial, evidence taken within the State in violation of his constitutional rights would be tendered and might be admitted for the purpose of supporting the case against him.

85. The hearing was adjourned for further written and oral submissions. Counsel for the respondent, in his renewed submissions, pointed to evidence that the respondent's intended prosecution in Spain was exclusively premised upon evidence procured by telephone intervention works (telephone tapping) that were conducted without his consent or his permission, including interventions while he was present in Ireland. It was submitted that in those circumstances, in the absence of any lawful authority, any such intervention was in breach of his rights under the Constitution and under the ECHR and as such his surrender was prohibited by s. 37 of the Act of 2003.

86. At the resumed hearing of the application, counsel for the respondent conceded that his case was based not upon any telephone tapping that may have occurred while his client was present in Spain, but on telephone tapping which occurred while his client was present in Ireland. This was an understandable concession. The respondent could not point to any legal basis for a claim that s. 37 of the Act of 2003 would require surrender to be prohibited merely because an Irish citizen present in another country had his telephone tapped without an authorisation given by an Irish authority. There is a presumption in the Act of 2003 that the Spanish authorities will act in accordance with the requirements of the 2002 Framework Decision and therefore this Court must presume that the Spanish authorities will accord to this respondent all appropriate rights at any trial in Spain. He will be protected by the ECHR as Spain is a signatory thereto. Indeed, in this case, there is no need to rely on a presumption that there was a lawful authority for this telephone tapping because there is an express statement that it was carried out under a judicial authorisation. Any question as to the legality of that authorisation is properly a matter for the Spanish courts.

87. Moreover, as the Supreme Court has stated in the case of *Balmer v.Minister for Justice and Equality* [2016] IESC 25, when considering issues of s. 37(1)(a) of the Act of 2003, i.e. whether a person's surrender would be compatible with the State's obligations under the ECHR:-

> *"The only question, therefore, for the requested court, is whether the requesting state will comply with its own obligations under the Convention. The potential for international friction is further reduced by the existence of institutions which are entitled to report, and in the case of the European Court of Human Rights, to determine, whether or not a regime is compatible with the dictates of the Convention. Furthermore, the Irish court is entitled to apply a presumption that the national court of the requesting state is best placed to make a determination as to compatibility, at least in the first place." (para. 66, O'Donnell J., Balmer).*

In the present case, nothing has been put before the court to undermine that presumption in this particular case.

88. The crux of the issue is that the respondent claims that, because he was in Ireland using his Irish registered telephone at the time these calls were intercepted, there has been an unlawful interference with his right to privacy. He submitted that the Spanish authorities have not shown that they have any authority to intercept a call in this jurisdiction and that the minister has not shown that she had given any authority to intercept a call in this jurisdiction.

89. Both parties agree on a number of matters. Both parties agree that there is a constitutional right to privacy. Both parties agree that this constitutional right is not unlimited and it may be interfered with by lawful authority. It is also agreed that at the time these calls were intercepted, the provisions of the Criminal Justice (Mutual Assistance) Act, 2008, which implements the Convention on Mutual Assistance in Criminal Matters between the member states of the European Union adopted at Brussels on 29th May, 2000 ("the 2000 Convention"), had not yet commenced. Therefore, there were no provisions in being that would have permitted an E.U. member state to intercept telecommunications in this State. It is noteworthy that requests for interception of telecommunications that are made under the 2000 Convention relate to "the use of means of telecommunications by the subject of the interception if this subject is present in…" another member state.

90. Counsel for the respondent made the case that there was a right to privacy, and that it could be encroached upon lawfully, but that it was not sufficient for a Spanish authority to give an authorisation for telephone tapping in this State in the absence of a clear legal basis. He submitted that there was a direct cause and effect in that the telephone tap was the basis for the prosecution. He submitted that it was necessary for the court to distinguish between the circumstances of this case and the circumstances giving rise to the Brennan line of authority (*Minister for Justice, Equality and Law Reform v. Brennan* [2007] 3 IR 732) culminating with the case of *Balmer v. Minister for Justice and Equality*. He submitted that this State was the correct place to intervene to protect the respondent's rights.

91. Counsel for the minister approached the case at the resumed hearing on the basis that the respondent's submissions were not based on any evidence. In particular, she submitted that there was no evidence that interception of his phone had occurred and that there was no suggestion that this interception had occurred in this State. Thus, the respondent's contention that his constitutional rights were at issue because his phone was intercepted here, was not based on evidence and therefore his entire argument must fail.

Analysis and determination on privacy and telephone tapping

92. It is important to consider this matter in light of the evidence before this Court. As referred to above, the first indication that evidence had been gathered by way of a telephone tapping was in the letter dated 19th January, 2016. The reference to telephone tapping was further expanded upon in the reply received in this State on 26th September, 2016. The reply commences as follows:

"During the process of investigation that took place on different organizations involved in drug trafficking, it was found out through the telephone intervention works that took place by a judicial order that a group of people related to a lieutenant of the Spanish Military Police (Guardia Civil) were trying to perform a drug trafficking operation (hashish). The criminal organization got the drug that came from Morocco and, for a price, it was delivered to another organization in Spain comprised of British and Irish people, being there chief Patrick Joseph Mangan, the person that paid for the drug. The representative of the group in Costa del Sol was identified as Anthony Joseph O'Neill, who received orders from Patrick Joseph Mangan, as well as the money to buy the drug. That is the reason why, only after the policy (sic) investigation of the criminal group and after listening to the conversations hold between him and John Anthony Joseph O'Neill, conversations in which John Anthony Joseph O'Neill received orders and the money from Patrick Joseph Mangan, it has been possible to find out the connection of Patrick Joseph Mangan with the facts under investigation. When they both spoke by telephone and spoke about "Big Fella" they might be referring to Mauricio Alejandro Teutsch Ovalle, another defendant in the proceeding that belongs to another organized group in charge of getting the drug from Morocco. Since that person also had his telephone intervened it is been possible to find out about the conversations he used to have with John Anthony Joseph O'Neill and, therefore, the connection of Patrick Joseph Mangan with the facts under investigation.

> In order to clarify the kind of participation that Patrick Joseph Mangan, alias "the general" and alias "the old", has in the facts, a file is attached with the original conversations that have been monitored by a judicial order. In those conversations the telephone number 634167588 is used by O'Neill, and the telephone number 353858402653 is used by Patrick Mangan. The next conversations, amongst others, are remarkable; […]".

93. The conversations set out in the written part of the reply refer in the main to communications as between Mr. O'Neill and the respondent. There are references to it being recorded in later proceedings that Mr. Teutsch Ovalle confirmed certain matters. Most importantly, the disc that has been provided by the issuing judicial authority makes it clear that it pertains to the monitoring (or interception) of the telephone number 634167588 which is that ascribed to Mr. O'Neill and this is for the period the 4th November 2010 at 00:00:01 to the 2nd December 2010 at 23:59:59. The information on the disc refers to a variety of telephone numbers with which Mr. O'Neill's telephone is said to have made contact. One of those numbers is apparently that of the respondent.

94. From the information before the Court, I am satisfied that the respondent only came to the attention of the Spanish authorities through the telephone conversations that were already being tapped. What the Spanish authorities rely upon are the interceptions of the phone of John Anthony Joseph O'Neill. Indeed, it is striking that the respondent maintains vigorously that his prosecution is a direct effect of the tapped telephone conversations, however, the Court is satisfied that, on the evidence before it, the tapping was of Mr. O'Neill's telephone. The Court is satisfied that all of the evidence in the EAW and additional information, points overwhelming in a single direction, i.e. that the alleged involvement of the respondent in this drug trafficking is based upon the telephone tapping of Mr. John Anthony Joseph O'Neill and the recording of conversations between John Anthony Joseph O'Neill and Patrick Joseph Mangan. Indeed, it is noteworthy that the respondent in this case has not sought to put before the court any evidence that might show that, during the course of his detention in Spain on this alleged offence for a period of about two years, it was ever alleged that his phone had been tapped. Thus, while the respondent had every opportunity to contest what has been stated by the issuing judicial authority, he has not made any attempt to do so.

95. The Court is satisfied, therefore, that not only is there no evidence to suggest that the respondent was the subject of the phone tapping by the Spanish authorities but, on the contrary, his involvement was only known because of the phone tap of Mr. O'Neill. All

of the conversations that are referred to must therefore be understood as having been intercepted under the Spanish judicial order permitting the telephone tap of Mr. O'Neill's phone.

96. The finding that it was not Mr. Mangan's phone that was the subject of the telephone tapping authorisation in Spain, leads inexorably to the conclusion that the interception occurred in Spain or, at the very least, did not occur in Ireland (as the Spanish authorities could have obtained lawful authority to tap the telephone of Mr. O'Neill in another country). This is because the Spanish authorities must be presumed to have acted lawfully and must be presumed not to have violated both this respondent's personal rights and the integrity of this State. During the course of the hearing, counsel for the respondent made oblique reference to the absence of evidence to show that this interception had not occurred at a "base station" in this jurisdiction. To accept that submission would be to reverse the approach that the courts in this jurisdiction have taken from an early stage with regard to extradition. As Murray C.J. said in *Minister for Justice, Equality and Law Reform v. Altaravicius* [2006] 3 I.R. 148 at 159:-

> *"[…]it is undoubtedly the case that extradition arrangements, whatever their form, between this country and other states have been applied by the courts on the presumption that those states have complied or will comply in good faith with their obligations under the relevant treaty or statutory provisions governing those arrangements. Generally speaking extradition arrangements and the like are based on recipricocity and mutuality. Each country enters into such arrangements on the presumption that the other country will comply with their requirements and apply them in good faith."*

97. Counsel for the respondent relied upon the decision of the Supreme Court in *Balmer v. Minister for Justice and Equality*, in particular on the judgment of Mr. Justice O'Donnell. Far from assisting the respondent, that case recognises that Article 29 of the Constitution, in which Ireland affirms its "devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality", encapsulates a key principle applicable to cases of surrender and extradition:

> *"Cooperation implies some give and take. It also focuses attention on reciprocity, and the equality of sovereign states. The making of an extradition treaty, adherence to a convention on extradition, the implementation of a framework decision, and adherence to international decisions in areas of family law may all raise issues when surrender or return is sought. It is also necessary to appreciate that those issues arise under the same instrument which permits Ireland to seek the surrender of suspects for trial of offences alleged to have occurred in Ireland in respect of which Ireland has jurisdiction, or for the return of individuals to the jurisdiction of the Irish courts. It is not, therefore, a case of the Irish Constitution controlling events abroad (in which case the only question would be whether the acts alleged amount to a breach of the Constitution); it is, as already observed, rather that the Irish court is observing events abroad. Moreover, those events are observed through the lens of Article 29, requiring friendly cooperation, and Articles 1 and 5, which, in asserting sovereignty, require the respect of the sovereignty of other countries. The events, with which we are concerned here, are not private transactions between individuals. They are, by definition, the application of the criminal law within the territory of a sovereign state (in most cases to, and in respect of, its own citizens), or the execution of sentences imposed by their courts. These are key attributes of sovereignty of foreign friendly states, whose sovereignty we are bound by the Constitution to respect, in the same way as we expect respect for matters within our own jurisdiction. This is why, in my view, it is correct to speak of s. 37 of the EAW Act as applying only to matters of "egregious" breach of fundamental principles of the Constitution or when something is so proximate a consequence of the court's order and so offensive to the Constitution as to require a refusal of surrender or return. It may be that the concept of friendly cooperation may also permit or require steps to be taken which would not have been taken in an earlier age, and not merely because the provisions of the Irish Constitution have been altered, but also because the area and content of international cooperation has extended. Such cooperation is, however, not unlimited. It is, for example, by the terms of the Constitution itself subject to justice and morality. There are also examples of limitations on this principle by consent, or international agreement or otherwise." (As per O'Donnell J. in Balmer, para. 44).*

98. The above dicta is relevant to a number of issues in this case. In the first place, it confirms the importance of friendly co-operation among nations founded on international justice and morality. In the previous paragraph, O'Donnell J. had referred to the comity of courts not merely being a matter of politeness between lawyers or an end in itself, and he stated it was "an aspect of the relationship between sovereign states". As Finlay J. stated in *Wyatt v. McLoughlin* [1974] 1 I.R. 378 at 390-391:-

> *"An extradition Act is necessarily the consequence […] of an agreement between two sovereign States reposing confidence in each other, and that I should not, in the first instance, suppose that the court and the other authorities of the country by which extradition is sought are using a deceit so as to secure the apprehension of the plaintiff".*

99. This Court is satisfied that the presumption of good faith which has long been a feature of extradition law, and which is now heightened by the mutual trust and confidence which this Court must have regard to when applying the surrender procedures of the Act of 2003 which implement the provisions of the 2002 Framework Decision, has not been displaced by any evidence put forward by the respondent or by any matter arising on the face of the EAW or the additional information. In the circumstances, the Court is satisfied that the presumption that the Spanish authority has acted in accordance with law and has not violated the jurisdiction of this country in reliance on the tapped telephone conversations between Mr. O'Neill and the respondent in this case, has not been rebutted.

100. A further argument was put forward by the respondent in reply, that if the court was to conclude that it was another person's phone which was tapped, then it was the case that there was still a violation because an accidental violation of an Irish phone might have been acceptable on one occasion but thereafter it was not lawful. This submission does not address the critical features in the case which are (a) this interception of the phone of Mr. O'Neill was authorised by the Spanish judicial authority and b) the lawfulness of any interceptions fall to be determined by the Spanish judicial authorities.

101. Counsel for the respondent also submitted that the case of *Larkin v. O'Dea* did not appear to have been considered by the Supreme Court in the case of *Balmer* and that this particular case was one which fell within the findings in *Larkin v. O'Dea*.

102. The facts in *Larkin v. O'Dea* were entirely different. In that case, the issue was identified by Hamilton C.J. in the Supreme Court at p. 504 as not whether the applicant would get a fair trial in Northern Ireland "*but rather the violation of and failure to defend and vindicate the constitutional rights of the applicant within the jurisdiction of this State, by the members of the Garda Síochána who arrested the applicant […] on foot of a warrant issued by a judge of the District Court […], which is conceded to be bad for the reasons set forth in this judgment*." It was during that unlawful and unconstitutional detention that he made certain admissions both in writing and verbally with regard to his participation in the offence the subject matter of the warrant. That evidence was made available to the members of the Royal Ulster Constabulary and would be admissible in the prosecution of the applicant for the offence. Hamilton C.J. stated that the court would be failing in its constitutional obligation to defend and vindicate the constitutional rights of

the applicant if it were, in the particular circumstances of that case, to give effect to the extradition provisions. In her judgment at p. 508, Denham J. (as she then was) phrased the question as one of whether "*[…] this Court would be vindicating the constitutional rights of the applicant by allowing him to be extradited in circumstances where evidence is available which was obtained unconstitutionally in this country and which would be inadmissible in this country at trial and which would not on the face of it be inadmissible at trial in the other jurisdiction; whether the fruit of an unconstitutional act in this jurisdiction by servants of this State could be used in another jurisdiction against a citizen of this State as a result of an application for rendition*."

103. At stake in *Larkin v. O'Dea* was whether it would be a failure to vindicate the requested person's rights to extradite him where evidence obtained by unconstitutional acts carried out by the servants of the State could be used in the prosecution against him in the requesting country. However, this case is clearly different in that, first and foremost, there is no evidence that any (purported) breach of the respondent's constitutional rights occurred in this jurisdiction. On its own, that is enough to distinguish the case of *Larkin v. O'Dea* as no breach of the respondent's constitutional rights has been established to have taken place in this jurisdiction. The court does not have to decide whether there would be any difference in outcome arising from the breach being carried out in this jurisdiction by organs of the requesting state, as there is simply no evidence that any such breach has occurred at all.

104. Although counsel for the respondent made his argument on the basis that the interception, i.e. the breach of the respondent's right to privacy, had occurred in this jurisdiction, the Court has also considered whether the respondent's mere presence in this jurisdiction creates an entitlement to privacy no matter where in the globe he may communicate with, that may only be interfered with by an authorisation which is lawfully obtained pursuant to the provisions of Irish law. That is not a tenable proposition. Just as a person must submit to the laws of another jurisdiction when they physically travel from one country to another, so too must their communications be subject to the law of another state once those communications cross into the jurisdiction of that other state. An obvious example is a postal communication. While the package remains or is received in this jurisdiction, it is subject to Irish law but once the package has crossed the border into another jurisdiction or up to the moment it enters this jurisdiction, it is subject to the law applicable in those other jurisdictions. That too is the case with all forms of telecommunications. Once the communication passes into the jurisdiction of another state, it is subject to and liable to the laws that would pertain and do pertain in that state.

105. Counsel for the minister in written submissions briefly referred to the European Court of Human right decision ("ECtHR") in *Liberty and Others v. United Kingdom* (App. No. 58243/00, 1st July, 2008). This concerned the monitoring of telecommunications between Dublin and London and involved the alleged interception of communications at Capenhurst, Cheshire in the U.K. of telephone channels coming from Dublin to London and on to the continent. Ultimately, the ECtHR held that the legislative scheme did not satisfy the requirement of being "in accordance with the law" as required by Article 8, para. 2 of the European Convention on Human Rights. The legal issue that the court has identified was not discussed therein but it does seem to be the case that what was at issue there was cross border communications which were being monitored in the United Kingdom. It was not the fact that the organisations were present or established in different states, instead that presence or establishment provided the evidence that they were potential victims of having their cross border communications violated by the United Kingdom. Thus, where a person in one country has their communications violated by another country, it is clear that they are entitled to claim a violation of their rights by that country. Therefore, while this respondent may be entitled to claim a violation by Spain of his privacy rights, that is a matter to be adjudicated in Spain.

106. This Court is satisfied that the respondent has not established that his constitutional rights or indeed his ECHR rights would be violated by ordering his surrender to Spain as a result of the fact that his telephone contacts with Mr. O'Neill were recorded by virtue of the tapping of Mr. O'Neill's telephone.

Conclusion

107. For the reasons set out in this judgment, the Court rejects all of the points of objection filed on behalf of the respondent. The Court, being otherwise satisfied that the requirements of s. 16(1) of the Act of 2003 have been met, may make an Order for the respondent's surrender to Spain to such other person as is duly authorised to receive him.