

## THE HIGH COURT

## JUDICIAL REVIEW

[RECORD NO. 2017 618 JR]

BETWEEN

SEAN PAUL FARRELL

APPLICANT

AND

THE SUPERINTENDENT OF MILFORD GARDA STATION

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

**JUDGMENT of Ms. Justice Donnelly delivered on the 11th day of February, 2019**

1. The applicant in these judicial review proceedings has been arrested on foot of a European Arrest Warrant ("EAW") issued by an issuing judicial authority of the United Kingdom of Great Britain and Northern Ireland. He is sought by the Northern Ireland authorities for the purpose of prosecuting him in respect of two offences. These are alleged offences of attempted murder of a serving member of the Police Service of Northern Ireland on the 18th June, 2015 and possession of explosive substances with intent to endanger life on the same date.

2. In the EAW, it is alleged that the perpetrators of those offences were disturbed at the scene and that the police in Northern Ireland observed two vehicles travelling in convoy at high speed away from the location of the incident. It is alleged that those vehicles crossed into Co. Donegal. It is further alleged that two vehicles were later stopped in this jurisdiction by members of An Garda Síochána. This applicant was an occupant of one of the vehicles which were stopped, namely a Volkswagen Passat. It is alleged that this was one of the vehicles that was pursued by the police in Northern Ireland.

3. It is stated in the EAW that the applicant was arrested under s. 30 of the offences Against the State, Act, 1939 ("the Act of 1939") on suspicion of membership of an illegal organisation and taken to Milford Garda Station in Co. Donegal. There, his clothing was seized and photographs, fingerprints and buccal swabs were taken. The applicant was interviewed by members of An Garda Síochána after they were cautioned. He was subsequently released from this detention without charge. Various items are alleged to have been found in the cars. A low amount of RDX, an explosive compound, was found on the passenger front well mats of both cars. This applicant is alleged to have had in his possession a Toyota car key which unlocked and operated the vehicle other than the vehicle in which he had been found.

4. The present judicial review proceedings have been brought because the applicant seeks a variety of information arising from his detention in Milford Garda Station on the 18th and 19th June, 2015. It is the applicant's case that the prosecution in Northern Ireland is predicated, at least in part, upon evidence gleaned while he was in Garda custody at Milford, Co. Donegal in June of 2015. The applicant's solicitor had written four letters seeking disclosure of information, *inter alia*, custody record, details of any samples taken or items seized, copies of statements made or taken in the course of the investigation and any audio or video recordings made in the course of detention.

5. The applicant seeks the information prior to the hearing of the proceedings concerning the EAW in order to advance his opposition to that request for surrender. He relies upon fair procedures and the right to due process. He also relies upon the provisions of the EU Directive 13/2012 ("the EU Directive"), which he submits grants him a right to this information.

**Reliefs sought**

6. The applicant sought the following reliefs in his amended statement grounding the application for judicial review:

- (i) An order of *mandamus* requiring the first respondent to reply to the applicant's request for information in relation to and arising from his detention in Milford Garda Station on 18th/19th June, 2015 and to furnish him with information to which he is entitled.
- (ii) An order of *mandamus* requiring the first respondent to provide the information requested by the applicant pursuant to the provisions of EU Directive 13/2012.

**Grounds upon which relief is sought**

7. In relation to the custody record, the applicant relied upon the statutory regulations which require a person to be provided with a custody record upon request within twelve months of ceasing to be in custody. The custody record was in fact provided to the applicant prior to the hearing of this application.

8. In relation to the other matters of which he sought information, the applicant asserted that fair procedures and the right to due process dictated that he was entitled to advance his case against surrender on the European arrest warrant. The applicant claimed an entitlement to access all information that may be relevant.

9. The applicant also pleaded that withholding from him information and evidence relating to the extremely serious allegations against him involved a breach of Article 6 of the EU Directive. It was pleaded that there was a failure to provide information in sufficient detail so as to safeguard the fairness of the proceedings and the effective exercise of his rights including the right to informed legal advice in preparing for the EAW process. The applicant pleaded that if surrendered in the absence of information, he could not enforce the disclosure of such information if being prosecuted in Northern Ireland. The applicant pleaded he would be deprived of factual matters relevant to his defence.

10. The applicant pleaded that this conduct amounted to a significant breach of fair procedures and was prohibited by the EU Directive and by Article 6 of the European Convention on Human Rights. The applicant also pleaded that the equality of arms principle required that he be granted access to the information requested. The applicant also relied upon Article 7(1) of the said Directive.

11. The applicant pleaded that in light of the potential consequences arising from an order of surrender, the failure to disclose requested information represented a potential interference with the applicant's fundamental rights as guaranteed by Bunreacht na hÉireann and it may also impact upon the rights under the European Convention on Human Rights and Fundamental Freedoms.

#### **Affidavit of the applicant**

12. The applicant swore an affidavit saying that he was arrested by members of An Garda Síochána near the village of Killygordon in the Lifford area of Co. Donegal on the 18th June, 2015. He said that following his arrest he was detained in custody at Milford Garda Station where he was interviewed and obliged to provide forensic samples. He says that his intended prosecution in Northern Ireland is predicated on evidence that was procured while he was in Garda custody in Co. Donegal. He says that is apparent from the contents of the European Arrest Warrant. He says that he requires sight of the evidence gathered in the course of his arrest and detention in order to ground an objection to his surrender.

13. The applicant referred to the efforts he had made through his solicitor to procure information from An Garda Síochána through correspondence with the superintendent at Milford Garda Station. He said he sought a copy of the custody record that was opened in his case, together with a précis of the case against him, details of any samples taken or items seized, copies of any statements taken in the course of the investigation there and copy of any audio or video recordings made during the course of his detention.

14. The letter of the 5th July, 2017 was exhibited in which his solicitor sought these items (save for a précis of the evidence). He also exhibits a number of replies which he received which were in essence holding replies. He wrote to the DPP in respect of certain matters, and the DPP had replied that the release of relevant documentation was a matter for the superintendent rather than the DPP's office.

#### **Statement of opposition**

15. The respondents' statement of opposition made a preliminary objection that the applicant did not have the appropriate or requisite *locus standi* to bring or litigate the within proceedings. They pleaded that the requirements of Article 6 and/or 7 of the EU Directive were not justiciable by the High Court in the context of the EAW proceedings against the applicant and that the said articles did not give rise to any entitlements to the respondents. They relied upon a decision of the High Court in *Minister for Justice v. E.P.* [2015] IEHC 662. The respondents also pleaded that the applicant's claims were speculative and illusory and should be dismissed on that basis. It was pleaded that no case had been made out as to why the information was relevant or necessary and/or required for adjudication on the European Arrest Warrant. It was pleaded that the proceedings were an impermissible and collateral attempt by the applicant to seek discovery of documentation, information and/or materials where the applicant had not brought an application for discovery pursuant to the Rules of the Superior Courts and in accordance with the requirements of the Rules themselves.

16. The respondents also objected on the basis that the appropriate forum to raise the issues concerning the materials was before the courts of the issuing state if the applicant was surrendered. It was also pleaded that the applicant did not point to any flagrant denial of justice as regards issues of disclosure or such matters in the issuing state.

17. Without prejudice to the foregoing, the respondents said they were strangers as to whether any documents, items and/or materials obtained during his custody would form part of the evidence in the criminal proceedings in the United Kingdom. Notwithstanding that, it was admitted that a number of items had been transmitted by An Garda Síochána to the Police Service of Northern Ireland pursuant to a request under the European Convention on Mutual Assistance in Criminal Matters, 1959.

18. They denied that the applicant had an entitlement to any documentation, either for the purpose of the EAW proceedings and/or the EU Directive 13/2012. It was denied that the said Directive applied to the EAW proceedings in the manner alleged or at all. The requirement to provide information to a respondent in European Arrest Warrant proceedings is prescribed pursuant to the provisions of the European Arrest Warrant Act 2003, and are not amplified, altered, changed or transformed in any manner whatsoever by the EU Directive.

19. A further objection was that the applicant had made no substantive case whatsoever as to the breach of his rights in these proceedings or in the EAW proceedings. The statement of opposition also contained general denials of the other grounds set out in the statement of grounds and in particular that there had not been any breach of his fair procedures or his right to due process. The grounds of objection also included a denial that the said articles of the said Directive required that the said requested materials be provided to the applicant during the currency of the EAW proceedings or at all. It was expressly stated that the Directive itself referred to the rights of a person in criminal proceedings and in European Arrest Warrant proceedings and therefore different rights applied according to the express provisions of the Directive itself in relation to those proceedings. It was also pleaded that the applicant had obtained all appropriate information in relation to the EAW proceedings.

20. It was also stated that if considered appropriate by the High Court in the discharge of its functions under the Act of 2003, additional information could be sought by the High Court from the issuing state pursuant to s. 20 of the European Arrest Warrant Act, 2003. It was submitted that, in the circumstances, the applicant's proceedings were premature and misconceived and in the nature of a moot. It was specifically denied that the applicant had been refused any information which the respondents were required to provide to him to ensure fairness of proceedings and the effective exercise of the rights of the applicant or to allow him engage in informed legal advice. It was also denied that he had been deprived of materials or that the principle of equality of arms required that he had access to the information requested. It was denied that there were any potential consequences for his rights under the Constitution and/or the European Convention on Human Rights arising from any alleged failure to disclose the requested documentation, item, information or materials. No case had been made out by the applicant as to which if any constitutional rights had allegedly been violated by the respondent and the applicant's claims were in the circumstances illusory and speculative and without any substance whatsoever.

#### **The evidence on behalf of the respondents**

21. Detective Inspector Pat O'Donnell of An Garda Síochána swore an affidavit on behalf of the respondents. He stated that the applicant was arrested in respect of the EAW on the 23rd March, 2017. He said that the applicant was provided with a copy of the EAW at the time and was brought before the High Court pursuant to s. 13 of the European Arrest Warrant Act 2003. He referred to the affidavit of Sgt. Matthew Murphy made in the European Arrest Warrant proceedings when produced.

22. Regarding the queries which were directed by the respondents' solicitors in the correspondence issued to An Garda Síochána, he said he believed it was not appropriate for An Garda Síochána to provide any of the requested materials and for that reason, An Garda

Síochána did not do so. He said that a file relating to the applicant was under consideration by the DPP during some of the period concerned. However, even when the DPP directed that she would not institute criminal proceedings against the applicant, he said he believed and was advised that the respondent was not entitled to the information sought during the currency of the European Arrest Warrant proceedings which are before the honourable court.

23. Detective Inspector O'Donnell said that he was advised and believed that the applicant had been provided with the information required under the European Arrest Warrant Act, 2003. He said he was advised and believed that the provisions of the EU Directive did not apply to the applicant who was not charged with offences which would come on for trial before the courts in this jurisdiction.

24. Detective Inspector O'Donnell noted that the respondent was legally represented during the course of his detention in Letterkenny Garda Station (sic) and in that regard he referred to a copy of the relevant custody record for his detention. He said that no substantive assertions had been made about an illegality and/or an unconstitutionality in any of the procedures carried out by An Garda Síochána at that time in these judicial review proceedings. It had not been identified how the applicant is at a deficit to make out a case that there had been some breach of his rights.

25. The Detective Inspector said and believed that the applicant's requests for the documentation items and materials which are sought on his behalf are speculative. The applicant has not explained why he cannot formulate any arguments he wishes to make from information within his knowledge or the knowledge of his legal representatives. The applicant has been provided with a copy of the custody record and has that at his disposal.

26. On five separate occasions, according to Detective Inspector O'Donnell, items were transmitted by An Garda Síochána to the Police Service of Northern Ireland pursuant to requests under the European Convention on Mutual Assistance in Criminal Matters, 1959. Those dates were 18th August 2017, 6th September 2017, 26th September 2017 (x 2), and 15th November 2017. He set out signed and receipted schedules comprising a list of the items that had been transferred. He said he is advised and believed that the applicant can raise whatever issues both factual and legal in respect of those items and materials in the issuing state if he is surrendered in due course. He has not made out any claim that he is precluded from doing so in the issuing state nor has he outlined any basis for arguing that he would be subject to a flagrant denial of justice.

27. Detective Inspector O'Donnell said that he was advised and believed that the applicant had not raised any issue at this stage as to how there may be such a breach of his rights arising from his surrender to the issuing state, and the applicant was not entitled to engage in a fishing expedition to seek materials on an unfocused and vague manner as pleaded by him. He stated that the applicant has engaged in correspondence seeking items and materials that he was not entitled to pursuant to the EU Directive and where he has set out no evidential basis either in these proceedings or in the EAW proceedings to support his contentions that these materials are relevant and/or necessary and/or required for the fair disposal and adjudication of the EAW proceedings. He said he believed that the applicant's application is in the nature of a discovery application which had not been brought pursuant to the Rules of the Superior Courts.

#### **Reply of the applicant**

28. The applicant filed an affidavit in reply stating that he takes issue with the statement of opposition made on behalf of the respondents in which it is stated that he was detained at Letterkenny Garda Station whereas he was in fact detained at Milford Garda Station. It is clear to the Court, that the information contained in the EAW supports the contention that the respondent was held at Milford Garda Station. It is also apparent from the contents of the custody record exhibited by Detective Inspector O'Donnell that this applicant was held at Milford Garda Station.

29. The applicant also takes issue with the fact that the affidavit has set out that on five separate occasions, items were transferred to the Police Service of Northern Ireland by An Garda Síochána. He says those items are described in the affidavit and contain some of the items that he had sought. He says that he sought a copy of the custody record, details of samples, copies of statements made and any audio and video recordings. He says that after leave was granted in judicial review, the respondent furnished the documents to the requesting state despite having denied him access to the documents. He says that the respondent has undermined the utility of such documents with regard to formulating objections to surrender under the extant European Arrest Warrant. He said that it pre-empted the determination of the High Court with regard to making documentation and other material available to him for the purpose of reinforcing his objections to surrender.

30. He said that the materials furnished to the requesting state were obtained from him in the course of an arrest, pursuant to s. 30 of the Offences Against the State Act, 1939, as amended and subsequent detention at Milford Garda Station. He says that access to that material may permit him to raise issues concerning his s. 30 arrest and detention in the EAW proceedings. He says he is now curtailed in his challenge to the EAW vis-a-vis his arrest and detention his constitutional right to liberty and fair procedures. He says that insofar as they give a reason for not furnishing the materials all that is stated that it is not appropriate for the Gardaí to do so.

31. The applicant says that the Gardaí are not relying upon a legal impediment to refuse to furnish him with the materials but are relying on it on the basis that it was inappropriate. He says that since the materials requested by him have been furnished simultaneously to the authorities in the requesting state where he may be unable to rely on any challenge to the arrest procedure and criminal proceedings brought against me in the requesting state, he says he is very concerned about being able to challenge the constitutionality or legality of his arrest under the provisions of s. 30 of the Offences Against the State Act in a court in Northern Ireland and in that regard he is being deprived of an opportunity to raise such issues in his notice of objection.

#### **Fair procedures and preparation for European Arrest Warrant**

##### ***The custody record***

32. The request for the custody record had been met prior to the hearing of the application for leave to appeal. It is unnecessary to consider that point any further.

##### ***The recordings of interview***

33. A discrete argument arose in connection with the videotapes of interview. Section 56 of the Criminal Justice Act, 2007 provides as follows: -

*"(1) Where a person is before a court charged with an offence, a copy of any recording of the questioning of the person by a member of the Garda Síochána while he or she was detained in a Garda Síochána station, or such questioning elsewhere, in connection with the investigation of the offence shall be given to the person or his or her legal representative only if the court so directs and subject to such conditions (if any) as the court may specify.*

(2) A recording referred to in subsection (1) of the questioning of a person shall not be given to the person by the Garda Síochána except in accordance with a direction or order of a court made under that subsection or otherwise and Regulation 16 of the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997 (S.I. No. 74 of 1997) is hereby revoked."

34. Counsel for the Gardaí and the Minister submitted, correctly in the view of this Court, that access to the videotapes could only be granted in accordance with this section. In the circumstances, there is no legal basis for holding that the Gardaí were required on request to furnish the videotapes of the interview. Indeed, the Gardaí would have been acting contrary to law if they had provided these videotapes. The provisions of subsection 2 of s.56, expressly state that An Garda Síochána shall not give any recording of questioning to a person unless there is a court order pursuant to s.56 (1) or otherwise. In the absence of such a court order, An Garda Síochána may not hand over the video tapes.

35. Furthermore, this Court is satisfied that the provisions of subs. 1 of s.56 only apply to persons before a court charged with an offence. This applicant is not charged with an offence before this Court or any court in this jurisdiction. Therefore, pursuant to s. 56 (1), this Court is not empowered, either in these proceedings or in the EAW proceedings, to provide him with the recordings.

36. Apart from a person being before a court charged with an offence, it appears that subsection 2 of s. 56 leaves open the possibility of a court other than the criminal court dealing with the person charged to make an order for the recording of the interview to be given to a person. That is because of the reference in sub-section 2 to a direction or order of a court otherwise than under subs. 1 of section 56. In the present case, the proceedings have been brought by the applicant, claiming that he has an entitlement to be provided with the recordings by An Garda Síochána and the Minister as of right. What is clear is that he has no entitlement as of right to demand those recordings from An Garda Síochána.. If a request is made in the course of the EAW proceedings, his entitlement, if any, to those recordings could be determined. For present purposes, he is not entitled to an order of *mandamus* for access to those recordings as there was no duty on the respondents to provide these recordings.

#### **Access to other information**

37. The applicant's claim is that he is entitled to receive all the information he has sought in order to use it for the purpose of advancing his case in opposing his surrender under the European arrest warrant. Underpinning his claim to entitlement is his essential claim that if there has been a breach of his constitutional rights only the courts in this jurisdiction can protect them. It is important to recall that the applicant has not pointed to any specific breach of his constitutional rights that he claims occurred in the Garda station.

38. The applicant points to the mere fact of being detained under s. 30 of the Act of 1939 and describes such a detention as being a more serious infringement of liberty of the individual than those associated with most other powers of arrest. In his written submissions he refers to the Supreme Court decision in *DPP v. Quilligan* [1993] 2 IR 305. He refers to the protections to rights provided for under s. 30 that were set out therein by the Supreme Court. The applicant made the point that the arrest in this jurisdiction was clearly connected to the alleged offence in Northern Ireland and was for the purpose of gathering information in respect of that alleged offence. He submits that, in order to vindicate his rights to fair procedures, he should be entitled to the information sought in order properly to consider his objections to the European Arrest Warrant with reference to the detention and arrest under s. 30 of the Act of 1939.

39. During the course of his detention under s. 30, the applicant requested that he be represented by a particular solicitor. That solicitor is his solicitor in the present proceedings. His request to be so represented by this solicitor was facilitated. There is no complaint made in the present proceedings about lack of access to the solicitor of his choice.

40. The principal argument on behalf of the applicant is that the trial in Northern Ireland will, at least in part, be dependent upon the evidence obtained while he was in custody in this jurisdiction. The applicant submits that the only courts that can protect his constitutional rights are courts established in this State.

41. In that regard, he relies strongly on the case of *Larkin v. O'Dea* [1995] 2 IR 485. In that case, the requested person had been sought for prosecution for murder in Northern Ireland. He challenged his extradition by way of habeas corpus application on the basis that a statement which had been obtained from him in this jurisdiction would be admissible at his trial in Northern Ireland. It was accepted in the High Court that the statement had been obtained from him that the order of the District Court authorising the arrest of the applicant for the purpose of investigation had been invalid. The High Court ruled that his detention on foot of that order was in consequence unconstitutional and that the evidence gathered during his detention would be inadmissible at any trial of the applicant within the State. The High Court, and on appeal the Supreme Court, held that for a court to permit the applicant to be extradited to a jurisdiction where evidence taken in violation of his constitutional rights would be tendered against him at his trial and might be admitted would constitute a failure on the part of the court to vindicate the applicant's constitutional rights.

42. Relying on the above decision, the applicant's claim in the present case is that he requires the information that he has sought in order to establish whether or not his constitutional rights in this jurisdiction have been violated. If they have been violated, and evidence obtained contrary to that violation would be tendered in evidence against him in Northern Ireland, then it is a violation of his constitutional rights to surrender him.

43. In this way the applicant claims that his case is not about a failure of due process in the courts of Northern Ireland. He submits that this is therefore not a case covered by the decision in *Minister for Justice and Equality v. Brennan* [2007] IESC 21, which prohibits surrender where there would be an egregious breach of due process rights in the requesting state. Instead, the applicant submits that the present case concerns the jurisdiction of the Irish courts to determine the constitutionality or otherwise of state action during the course of his detention in this jurisdiction. It is on that basis he says that he does not have to provide any evidence as regards how his rights may be protected or not in Northern Ireland. His claim rests starkly on the proposition that it is only an Irish court that can protect rights under the Irish Constitution.

44. The applicant raises a particular objection to the use of the phrase "*not appropriate for An Garda Síochána to provide any of the requested materials*" as referred to in the affidavit of Detective Inspector O'Donnell. He submits this was an insufficient answer to the applicant's legal claims to the information. Furthermore, the applicant submits that it was no answer to the applicant's claims that the applicant would be entitled to ventilate complaints with his detention before the courts of Northern Ireland. The Northern Irish courts could not make any orders in respect of the vindication of his constitutional rights in this jurisdiction.

#### **Decision on fair procedures and right to information**

45. Counsel for the respondents correctly submits that this Court must apply the general principles applicable where an order of *mandamus* has been sought in judicial review proceedings. As stated in *Civil Proceedings and the State* (2nd Ed. Thompson Round

Hall, Collins & O'Reilly 2004) at para. 438 "*mandamus* lies to command the performance by a public body of a legal duty of a public nature". The authors went on to state that "an applicant must show that there was an explicit and unambiguous duty imposed upon the body against whom the order is sought."

46. The case of *Larkin v. O'Dea*, upon which the applicant so heavily relies, is not authority for establishing an explicit and unambiguous duty to receive the type of information at issue in these proceedings. *Larkin v. O'Dea* is authority for the proposition that there is a duty on the courts to protect and vindicate constitutional rights by refusing extradition where extradition would violate those rights (or at least there is a real risk that extradition would violate those rights). The extent of the claim made by this applicant is strikingly different from the facts set out in *Larkin v. O'Dea*. In *Larkin v. O'Dea*, the requested person made and established a very particular point regarding the fact of a breach of his constitutional rights. He made, and established, the case that the order for his arrest issued by the District Court was invalid. It was as a consequence of that invalidity that the High Court could be satisfied that his detention was unconstitutional and that any subsequent extradition was also unconstitutional.

47. In the present application, unlike *Larkin v. O'Dea*, there is no claim that specific constitutional rights have been violated. The claim is that he seeks this information in order to ensure that his constitutional rights have not been violated. The absence of any claim of a breach of his legal or constitutional rights is particularly stark. This applicant was legally represented by his present solicitor throughout his detention under s. 30. No evidence has been presented that at any stage during the course of his detention under s. 30 he had a complaint arising from his arrest and detention therein. It is also striking that in the almost two years after his s. 30 arrest and before his arrest on the European Arrest Warrant there is no evidence that he made a complaint in respect of his arrest and detention in June 2015. It also appears that there was no request since his arrest and detention for information for the purpose of bringing any relevant proceedings to claim a violation of legal or constitutional rights during the course of his arrest and detention.

48. Moreover, despite having received the custody record, the applicant has not referred to any matter which gives rise to a concern about a breach of his rights pursuant to information now available to him. Perhaps most fundamentally, the applicant himself is the best person to give information as to whether there is a claim that his rights have been violated. No reason has been put forward why this applicant would not be able, or was not able in the past, to give instructions to his solicitor as regards any oppression or ill-treatment that he may have received on arrest or in the course of his detention. It is notable that no complaint has been made in that regard.

49. In respect of his interviews, it is apparent from the custody record that his solicitor was present during the course of interviews. The applicant has objected to information in the custody record being used in the course of these proceedings as evidence as to the truth of its contents. This Court is however entitled to rely upon the fact that since the decision of the Supreme Court in *People (DPP) v Gormley* [2014] IESC 17 arrested persons now have the right to have their solicitors attend interviews. The Court is also entitled to take into account that neither the applicant nor his solicitor has made any complaint that this particular right was violated. The Court is also entitled to take into account that since the custody record has been supplied to him, the applicant has not referred to any interview referred to therein at which his solicitor was not present.

50. From the foregoing, it is apparent that the applicant's claim is entirely speculative. He has laid no groundwork for claiming that there is, at a minimum, a real risk that his constitutional rights would be violated if he was surrendered. Instead, he is seeking information in the nature of a discovery and/or a disclosure application in respect of material that may be presented in his trial in Northern Ireland.

51. European arrest warrant proceedings are designed, under the terms of the Framework Decision on the European arrest warrant to be a simplified form of extradition between Member States of the European Union. The 2003 Act sets out a list of grounds upon which surrender may be refused. Included in those grounds under s. 37 are where the surrender would constitute a contravention of any provision of the Constitution. Surrender has been prohibited where to do so would place a person at real risk of a breach of a provision of the European Convention and Human Rights or indeed of the Constitution. Examples of these arise where claims of violations of rights under Article 3 of the Convention or Article 40 of the Constitution with regard to the right not to be subjected to inhuman or degrading treatment. A requested person is entitled to submit in the course of the EAW proceedings that there is such a real risk. The rules of Superior Courts provide for discovery to be made in the course of the European Arrest Warrant case. In an appropriate case, discovery could be ordered. It is striking that in the present EAW proceedings, the respondent has not even pleaded any particular or specific breach of s. 37 concerning a real risk that his extradition would violate a provision of the Constitution arising from his arrest and detention in this jurisdiction in June, 2015.

52. Section 37 therefore provides a basis for this applicant to claim that his surrender is violated on the basis that to do so would violate a provision of the Constitution. The Supreme Court dealt with the proofs required by, and the procedural implications of, the provisions of s. 37 of the Act of 2003 in the case of *Minister for Justice v Rettinger* [2010] IESC 45. The Supreme Court (Denham J as she then was) set out a number of principles in the assessment of whether such a breach has occurred. Of particular relevance are the following: that the courts should examine whether there is a real risk in a rigorous fashion, that a burden rests with the applicant to adduce evidence capable of proving that there are substantial grounds for believing that if he or she were returned to the requesting country, he or she would be exposed to the real risk of being subjected to treatment in breach of the Convention, that the mere possibility of (a breach of a right) is not sufficient to establish a case. Those principles have been applied in cases where breaches of constitutional rights are claimed (see *A.G. v Marques* [2015] IEHC 798).

53. If the applicant's contention that he must have this information in advance of formulating points of objection to the EAW proceedings is correct, this would mean that he is not bound by the provisions of s. 37 of the European Arrest Warrant Act of 2003 as amended in advancing his case against surrender. Thus the principles for the testing of s. 37 claims as set out in *Rettinger* would no longer apply to him, merely because he claimed that information might be forthcoming to assist him in formulating such a claim. That would mean that there would no longer be an onus on him as a requested person to adduce cogent evidence that would raise a real risk of a breach of fundamental rights. This Court does not accept that is the law.

54. On the contrary, this Court is satisfied that the applicant's claim as to a breach of his rights is entirely speculative and indeed is entirely unrelated to any particular claim that his surrender is prohibited in accordance with the Act of 2003. This claim of entitlement to be given information for the purpose of advancing a case he might possibly be able to make after considering that information is one that has no basis in the provisions of the Act of 2003. Given that these judicial proceedings are directed towards gaining information for the apparently purpose of defending the application for surrender in accordance with the provisions of the Act of 2003, the said Act of 2003 provides no legal foundation for such a claim. His claims of breach of due process or equality of arms have been advanced in a legal vacuum, which takes no account of the requirements (and indeed protections) of the procedures set out for the determination of applications for surrender under the provisions of the Act of 2003.

55. Leaving aside his claims under the EU Directive 13/2012, the Court can find no explicit and unambiguous duty on the respondents

to provide him with that material in advance of arguing his EAW case. To hold that there is an entitlement to obtain information about potential evidence obtained in this jurisdiction, outside of and prior to the surrender proceedings taking their course, would amount to an unwarranted interference with the simplified procedures set out in the European Arrest Warrant Act, 2003. It would also permit a requested person to delay and obstruct the EAW proceedings without putting forward any legal or factual basis as to why his surrender should be prohibited. He has an entitlement to object to surrender on the grounds set out in the Act, but he must bring himself within the parameters of the prohibited grounds. His claims, if any, of breach of rights can be dealt with procedurally and substantively within the context of the surrender proceedings.

56. In the circumstances, this Court concludes that the applicant has not established that there is an explicit and unambiguous duty imposed upon the respondents to provide him with the information which he has sought in these proceedings on the grounds of fair procedures. I therefore reject these arguments of the applicant.

### **EU Directive 13/2012**

57. The applicant also relied on Directive 2012/13/EU of 22nd May, 2012 on the right to information in criminal proceedings. The applicant claimed that the failure to provide him with the information he sought amounted to a breach of Article 6 of the said Directive and in particular Article 7 of the said Directive.

58. Article 1 of the Directive, which relates to the subject matter of the Directive, states that the Directive lays down "*rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. It also lays down rules concerning the right to information of persons subject to European Arrest Warrant relating to their rights*".

59. This Court, in the case of *Minister for Justice, Equality & Law Reform v. E.P.* [2015] IEHC 662, dealt with the extent to which the said Directive applies in the case of arrest under a European Arrest Warrant. This Court concluded that the provisions of Article 7, relating to accessed documents, do not apply to a person who has been arrested on a European Arrest Warrant.

60. Counsel for the applicant submitted that the present case could be distinguished from the case of *E.P.*, in that the requested material in the present proceedings were in the possession of this State rather than the requesting State. It was not submitted that the decision in *E.P.* had been wrongly decided and no attempt was made to present such an argument to this Court. It was argued that the Directive does have effect in this State and that there was a difference between his arrest here and his arrest for the purpose of the European Arrest Warrant.

61. In the view of this Court such an argument must be rejected. The provisions of the Directive must apply to all arrests under European Arrest Warrants. They cannot be dependent upon a consideration such as whether there is a link to the offence in the requesting state. The Framework Decision on European arrests warrants contemplate the possibility of extraterritorial offences and therefore the possibility that a person may be wanted by a requesting Member State for an offence physically committed in the requested Member State. Or, as here, where there is an alleged offence in the requesting Member State but a subsequent arrest and detention in the issuing Member State. The Directive itself makes no distinction between an arrest on an EAW for an alleged offence for which the requested person had already been arrested and questioned in the executing State. There is therefore no basis for distinguishing the case of *Minister for Justice v E.P.*

62. Furthermore, it is clear that there are no criminal proceedings in being in this jurisdiction. In his grounds upon which relief is sought the applicant stated that he could not enforce disclosure of the information he sought in Northern Ireland and will thus be deprived of factual matters related to his defence. The applicant has not put any evidence before the Court to substantiate that ground. Indeed, at oral hearing it was conceded that his case was not about the lack of due process in Northern Ireland, but only about the courts being able to protect his constitutional rights in this jurisdiction. Furthermore, the fact that the items of evidence about which information was sought were handed to the Northern Ireland police pursuant to a mutual assistance request, would also appear to have changed the factual position i.e. they would be present in Northern Ireland and by that fact would be physically available there for examination. In the circumstances, there is no evidence before this Court that his rights under the Directive will not be available to him in the requesting State should he be surrendered on foot of the European Arrest Warrant.

63. In this jurisdiction, on his arrest on the EAW, the applicant received his rights to information which included, *inter alia*, a copy of s. 15 of the European Arrest Warrant Act, 2015. The applicant has made no specific complaints about the lack of information provided to him on arrest under the European Arrest Warrant, his complaint in this regard has been directed towards the information concerning matters arising from his arrest in June, 2015.

64. In all the circumstances, this Court rejects the claim made that the information must be provided to him under the provisions of the EU 13/2012 Directive.

### **Interference with the proceedings**

65. A sizable proportion of the oral hearing was taken up with the applicant's submission that the transfer of evidence pursuant to the mutual assistance requests, to the Police Service of Northern Ireland amounted to an unconstitutional interference with these proceedings. The applicant complained in particular of the timing of the sending of the material to Northern Ireland. It was pointed out that this was subsequent to these proceedings commencing and prior to the statement of opposition and affidavit being furnished. It was submitted that it was an interference with the supervisory jurisdiction of this Court to transfer the material to Northern Ireland.

66. On inquiry from this Court, it appeared that original material had been sent to the Northern Ireland authorities in the form of real items of evidence including samples of DNA. The original memos of interview appear also to have been sent but copies of those have been kept. According to the applicant, this prevented him from examining in this jurisdiction these original items of evidence.

67. The applicants submits this is a situation where the goalposts had moved. The applicant relies upon the case of *Buckley v. Attorney General* [1950] I.R. 67 ("*the Sinn Féin funds case*").

68. The facts of the *Sinn Féin funds* case are entirely different to the facts in the present case. In that well known case, certain funds belonging to the Sinn Féin organisation were lodged in the High Court under the provision of the Trustee Act 1893, there being a dispute in the organisation as to the persons entitled to the money. Almost 20 years after the funds were lodged, the plaintiffs, acting on behalf of themselves and other members of the organisation, brought proceedings seeking declarations that the money was the property of the organisation and an order directing payment out of the money. Defences were filed on behalf of the defendants and while the actions pending in the High Court the Sinn Féin Funds Act, 1947 was passed by the Oireachtas. That Act directed that all further proceedings of the action should by virtue of the section be stayed. It also mandated that if an *ex parte* application is made on behalf of the Attorney General, the High Court should make an order dismissing the section and should also direct that the

funds be disposed of in the manner specifically laid down by the Act.

69. The Supreme Court declared the relevant provisions of the Act repugnant to the Constitution on the grounds that they interfered with the rights to private property set out in the constitution, and of relevance to the present case, that they were “*an unwarranted interference by the Oireachtas with the operations of the court in a purely judicial domain.*”

70. There is no comparable interference with the supervisory jurisdiction of this Court in the present proceedings. The *Sinn Féin funds* case represents a direct total interference with ongoing proceedings. The change in the law brought to an end the proceedings before the court and the outcome of those proceedings was therefore determined by the legislative branch of government rather than by the judicial branch.

71. Even by analogy, where it may be possible to argue that executive actors have by the actions predetermined the result, there is no sufficient similarity. That type of analogy was relied upon by the applicant when he referred to the case of *State (Quinn) v. Ryan* [1965] I.R. In that case, the applicant had succeeded in a *habeas corpus* application concerning an extradition warrant against him. Despite his success, he was re-arrested almost immediately and taken directly by the police across the border with Northern Ireland. In those circumstances, the court held that the relevant provision of the Petty Sessions (Ireland) Act, 1851 which authorised the backing of British warrants in Ireland and the immediate removal from the jurisdiction of the Irish courts of a person who had been arrested and detained under such a warrant, was repugnant to the provisions of the Constitution and was void and ineffective. The Supreme Court further held that it was contempt of court for police officers to arrange to remove a prisoner out of the jurisdiction of the Irish courts and an English warrant which such speed that he had no opportunity to apply to the courts to question the validity of such warrant or to apply to the court for an order of *habeas corpus*.

72. In the present case, the transfer of the items to the Police Service of Northern Ireland was carried out purportedly in accordance with existing legislation. The Criminal Justice (Mutual Assistance) Act, 2008 as amended provides for, *inter alia*, material already in the custody of An Garda Síochána to be transmitted to a requesting authority of a designated state on request and provided certain conditions are met. The transfers have not been challenged in these or other proceedings as being unlawful or invalid. The Court is entitled to accept the evidence of the Inspector that the transfer was made pursuant to the provisions of s. 75 of the said Act of 2008.

73. Knowledge of the existence of those mutual assistance provisions is imputed to the population at large. In particular, however, the Court is entitled to have regard to the fact that the applicant’s solicitor practices within the field of criminal law and would be expected to have knowledge of the existence of those provisions. Despite the existence of these provisions, no application was made for any interim or interlocutory order which would prevent any of this material from being sent abroad pursuant to that legislation or otherwise.

74. In the absence of any injunction against either the Minister or the Gardaí, those public bodies are entitled to proceed to carry out their functions in accordance with law. It is not accepted, that the mere fact that proceedings are in being is sufficient to interfere with the right, and indeed the duty, of the state authorities to abide by their commitments under international agreements and/or national legislation. If it were otherwise, the mere issuing of proceedings and in the context of judicial review proceedings such as the present, the fact that one has persuaded a judge of the High Court that there is an arguable case, would amount of itself to a stay on the carrying out of other duties in accordance with law. No authority was provided by the applicant to substantiate such an argument. In light of the provision in law, including in respect of judicial review proceedings, for the granting of interim/interlocutory injunctions, I am satisfied that there is no such legal provision.

75. Moreover, in the present case, the nature and extent of the interference with the supervisory jurisdiction of this Court that is complained of, has not been clearly articulated. In particular, there has been no real attempt to explain how the information that was required, *namely* the copy of the custody record, copies of statements made, details of any samples taken or items seized and any video or audio recordings, would be affected by the transfer to Northern Ireland.

76. In effect, what this applicant actually sought was information about these items, to allow him construct some sort of opposition to the European Arrest Warrant proceedings. Even if it could be construed that what he had sought was examination of those items, it is not clear how examination of those items would demonstrate that a constitutional right had been violated. It is not a *res ipsa loquitor* situation, there must be at least some basis for showing that the alleged interference, i.e. actual loss of the opportunity for physical examination could demonstrate a breach of a constitutional right. Examination of that kind of material is much more likely to be required for the purpose of defending a criminal trial rather than for the purpose of articulating a constitutional argument. Suffice to say that no such constitutional argument was identified and/or substantiated.

77. The Court is satisfied that this submission on behalf of the applicant is not grounded in the facts of this case and also has no basis in law.

## **Conclusion**

78. In all the circumstances of the case and for the reasons set out above, the Court refuses the reliefs sought by the applicant.