Neutral Citation [2016] IEHC 682

THE HIGH COURT

[2014 No. 6374 P.]

BETWEEN

FRANCIS LANIGAN

PLAINTIFF

AND

CENTRAL AUTHORITY, MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND ATTORNEY GENERAL

DEFENDANTS

AND

HUMAN RIGHTS COMMISSION AND

COMMISSION OF THE EUROPEAN UNION

NOTICE PARTIES

JUDGMENT of Mr. Justice White delivered on the 11th day of November, 2016

1. The Defendants have issued a motion of 21st August, 2015, originally returnable for 19th October, 2015, seeking the following reliefs:-

> (i) An order pursuant to O. 19, r. 28 of the Rules of the Superior Courts dismissing the Plaintiff's claim on the grounds, *inter alia,* that it discloses no reasonable cause of action or that the said claim is frivolous or vexatious.
>
> (ii) Further and in the alternative, an order pursuant to the inherent jurisdiction of the court dismissing the Plaintiff's claim as failing to disclose any cause of action known to law and/or that the said claim is unsustainable and/or bound to fail in law.
>
> (iii) Further and/or, in the alternative to the foregoing, an order pursuant to the inherent jurisdiction of the court dismissing the Plaintiff's claim as being an abuse of the process of this Honourable Court.
>
> (iv) An order providing for all necessary and/or incidental directions in relation to this application.

The motion was grounded on the affidavit of Hugh Dockery, Solicitor.

2. In response, the Plaintiff issued a motion returnable for 16th November, 2015, seeking the following reliefs:-

> (i) Dismiss the Defendants' strike out application on the grounds, *inter alia*, stated in paras. 1 – 7 of the reply to the defence entered therein.
>
> (ii) Liberty to amend the Statement of Claim by adding at para. 20(A) and expanding para. 21(2) in the manner notified to the defendants.
>
> (iii) Fix a deadline for the conclusion of any interlocutory applications that either party may wish to make and on a provisional basis fix as early a trial date as is reasonably possible.

3. This motion was grounded on the affidavit of Padraig O'Donovan, Solicitor, for the applicant, sworn on 13th October, 2015.

4. Before the substantive hearing of the matter commenced in this Court on Thursday, 10th March, 2016, the Plaintiff issued a further motion returnable for 10th March, 2016, seeking further liberty to amend the Statement of Claim by adding paras. 8(A), 8(B), 18(A), 18(B), 18(C), 18(D), 18(E), 18(F) 18(G) and amending paras. 19, 19(A), 20(A) and 21. This motion was grounded on the affidavit of Padraig O'Donovan, Solicitor, sworn on 1st March, 2016.

5. At para. 6, Mr. O'Donovan stated:-

> "I believe the need and desirability for the amendments is readily apparent from the pleadings but, in particular, I beg to refer to the significant development of the publication in November 2015 of the 'Report on Unannounced Inspection of Maghaberry Prison' wherein as highlighted in the proposed amendments, the prison, *inter alia*, was deemed not to be safe."

6. All three motions were heard on 10th, 11th 16th March and 19th April, and judgment was reserved.

7. The proceedings, the subject matter of the application, were issued by Plenary Summons on 23rd July, 2014, seeking the following relief:-

> "The Plaintiff's claim is that insofar as the European Arrest Warrant Act 2003, as amended, has introduced an inquisitorial and *sui generis* procedure that permits departure from fundamental norms of fair procedure, as particularised in para. 21 of the Statement of Claim herein and also unfairly restricts the right of appeal, it is repugnant to the Constitution and contravenes the European Convention on Human Rights and the EU Charter on Fundamental Rights, and that the Plaintiff's surrender to the UK, as sought in related proceedings [2003/1EXT] should not be permitted."

8. The Summons was served with the Statement of Claim on the Defendants on 11th December, 2014.

The History of the European Arrest Warrant Proceedings.

9. John Meehan, a District Judge, (Magistrates Courts of Dungannon, Co. Tyrone, Northern Ireland) issued and signed a warrant pursuant to s. 142 of the Extradition Act 2003, applicable to Northern Ireland and designated as a European Arrest Warrant seeking

the return of the Plaintiff to stand trial in Northern Ireland in respect of two warrants of arrest issued on 17th December, 2012, by a District Judge (Magistrates Courts in Northern Ireland in respect of one offence of murder and one offence of possession of a firearm with intent to endanger life).

10. The warrant certified:-

> (i) That pursuant to s. 142(6)a of the Extradition Act 2003, that the conduct constituting the extradition offence of murder as specified in this warrant falls within the European Framework list, that the conduct constituting the extradition offence of possession of a firearm with intent to endanger life does not fall within the European Framework List.
>
> (ii) Pursuant to s. 142(6)b of the Extradition Act 2003, that the extradition offences specified in this warrant are not extra-territorial offences.
>
> (iii) Pursuant to s. 142(6)c of the Extradition Act 2003, that the maximum punishment which may be imposed on conviction or indictment for murder is imprisonment for life and the maximum punishment which may be imposed on conviction on indictment for possession of a firearm with intent to danger life is imprisonment for life.

11. The charges relate to the murder of John Stephen Knocker who was shot dead in the car park of a Dungannon Hotel, on 31st May, 1998,

12. The European Arrest Warrant was endorsed by the High Court in this jurisdiction on 7th January, 2013, for execution by An Garda Síochána. The Plaintiff was arrested on foot of the European Arrest Warrant on 16th January, 2013, and was brought before the High Court and remanded in custody. He opposed a surrender to the issuing State and filed points of objection for that purpose. Subsequent to arrest, the case was adjourned to the Extradition List in this Court on 29th January, 2013, and a date was fixed for the purposes of a hearing pursuant to s. 16 of the European Arrest Warrant Act 2003, in accordance with s. 13(5)(a) of the Act.

13. The substantive hearing in respect of the application commenced before the High Court on 30th June, 2014, and continued on 3rd and 4th July, 2014. Subsequent to this hearing date, the application was adjourned to 7th October, 2014, and then further adjourned to 17th November, 2014, when the presiding judge, Murphy J. delivered a written preliminary ruling on various procedural evidential issues which arose in the course of the s. 16 hearing. Arising from that judgment, additional information was sought from the issuing State concerning issues which had arisen in light of the preliminary ruling. On 8th December, 2014, additional information from the issuing State was made available to the Court.

14. The Plaintiff then sought a referral of questions of law to the European Court of Justice. The application was adjourned to 15th December, 2014, to allow submissions. On 15th December, 2014, further substantive argument was heard by the High Court. On that date, bail was granted to the Plaintiff on certain terms which were varied by the Court of Appeal in July 2015.

15. On 19th January, 2015, the High Court referred questions to the Court of Justice of the European Union concerning the length of time the proceedings had taken. On 1st July, 2015, the Courts of Justice of the European Union heard the reference and on 16th July, 2015, delivered its ruling. On 20th July, 2015, the High Court conducted a further hearing pursuant to the s. 16 application to consider additional information received from the United Kingdom authorities.

16. On 2nd September, 2015, Murphy J. delivered a written judgment on the s. 16 application and directed that:-

> "the Court being satisfied that the provisions of s. 16 have been complied with and that the court is not required to refuse surrender under either ss. 21(A), 22, 23 or 24 (inserted by ss. 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005), nor is the court prohibited from ordering surrender by Part 3 of the Act, on the basis of the matters set out herein in its earlier rulings. The Court, therefore, considers that the Respondents' surrender should be ordered to the issuing State, in accordance with s. 16 of the European Arrest Warrant Act 2003, as amended, and the court so orders".

17. On 4th September, 2015, an application for leave to appeal to the Court of Appeal pursuant to s. 16(11) of the European Arrest Warrant Act 2003, was refused by the High Court and that court made its final orders pursuant to s. 16.

18. The Plaintiff in these proceedings, the Respondent in the s. 16 proceedings, appealed to the Court of Appeal, who heard a motion to strike out the appeal on the basis that it was uncertified and judgment was delivered on 16th March, 2016. That judgment at para. 22 stated:-

> "This is a motion to strike out the uncertified appeal on the basis that this Court lacks any jurisdiction to hear it given the limited right to appeal to this Court provided by s. 16(11) of the Act, as amended, and given the refusal by the trial judge to give the required certificate. The appellant says that no certificate is required given the fact that the appeal raises issues as to the constitutionality of the procedures under the Act, and in particular, s. 20 and s. 16(11) itself. But I am satisfied that this is incorrect. It is true that the appellant contends, for example, that some of the procedures fall short of being constitutionally fair procedures, but that is not a challenge to the constitutionality of any of the provisions of the Act. It is appeals 'which involves questions as to the validity of any law having regard to the provisions of this Constitution' which are outside the grasp of s. 16(11) of the Act and require no certification. The grounds which I have set forth contain no challenge to the validity of the Act or any of its provisions. It follows inexorably that the appeal sought to be brought by the Notice of Appeal lodged was not a valid Notice of Appeal since the appellant's application for a certificate in respect of identified points of law said to arise in the decision of the trial judge was refused."

19. Subsequent to the order of the High Court of 4th September, 2015, the Plaintiff in these proceedings applied to the High Court for an inquiry pursuant to Article 40 of the Constitution and subsequent to that inquiry, Barrett J. delivered a written judgment on 17th September, 2015. The court has not had adduced before it the grounding affidavit of the Applicant or the affidavit certifying the legality of his detention. Counsel for the Plaintiff in these proceedings argued that Barrett J. exceeded the remit of his jurisdiction by deciding matters that were not before him, but which are subject to challenge in these proceedings. Because of this controversy, this Court will not consider that judgment.

20. The Defendants oppose all proposed amendments to the Statement of Claim. Without prejudice to the objection of the Defendant's the Court will consider the motion to dismiss in the context of the proposed amended Statement of Claim which was delivered on 4th March, 2016.

The Statement of Claim

21. On examining and summarising the Plaintiff's amended Statement of Claim of 4th March, 2016, it can be broken down into a number of strands:-

(i) Paragraphs 8A, 8B and 18A, relate to new material which was not considered by the Court hearing the application pursuant to s. 16 of the Act. The Plaintiff now seeks to have these paragraphs added to the Statement of Claim. They refer to a written report on conditions in Maghaberry Prison in Northern Ireland, published in November 2015, relating to an inspection of the prison between 11th and 22nd May, 2015, which now allegedly cast doubt on the credibility of the contents of a letter of 3rd December, 2014, from Mr. Donaldson Governor S. of Northern Ireland Prison Service to James Bell of UK Central Authority, considered by Murphy J.

(ii) Various complaints about the conduct of the hearing pursuant to s. 16 of the Act conducted by Murphy J. set out at paragraphs 7 to 20 of the amended Statement of Claim. They include the addition of paras 18B, C, E, E, F, G, 19A, 20A and additions to original paragraph. 19, not included in the original Statement of Claim served on 11th December, 2014. The summary of the complaints are,

Complaints about the conduct of the hearing

(i) Judge allowed two communications between this State and the UK to be admitted despite objection.

(ii) Judge allowed letter from some unascertainable individual in Northern Ireland Prison Service to be considered despite objection to admissibility.

(iii) Judge accepted that the proceedings were inquisitorial or not entirely inquisitorial, *sui generis* and based on mutual trust and confidence.

(iv) Allowing the affidavit of Mr. Davis to be considered though not stamped or filed nor served on the plaintiff's solicitor.

(v) Refusing permission to cross examine Mr. Davis on his affidavit and refusing an application for discovery of all communications of any kind with the UK Central Authority relating to perceived threats to the plaintiff's life.

(vi) Tolerating delay, not allowing submissions on right to cross examine, on order for discovery and refusing to make orders, re-cross examination or discovery on 4th July and 17th November.

(vii) Allowing the Defendants on 17th November, 2014, to introduce further information by way of additional evidence.

(viii) On 8th December, 2014, and on numerous occasions thereafter, not acceding to the request to suspend orders pending resolution of the constitutional proceedings.

(ix) Refusing the request for reference to the Court of Justice EU on issues of

(a) EU law requiring adoption of an inquisitorial and/or *sui generis* procedure, when deciding if a person is to be surrendered.

(b) Is the executing judicial authority of its own initiative required or entitled to require the executing Central Authority to adduce evidence that might conceivably refute the evidence given from the person seeking it.

(x) In rejecting concern about the risk to life, the judge placed reliance on a letter of 3rd December, 2014, which was not subject to cross examination, there is an allegation of fraud or breach of requisite mutual trust and confidence and it should be set aside.

(xi) Refusing a certificate of appeal in accordance with s. 16(11) on seven separate grounds.

(xii) Tolerating short notice and delay in service of additional information.

(xiii) Not giving notice of decision to seek additional information in a ruling of 17th November, 2014. Not giving the plaintiff's counsel an opportunity to address this and allowing the defendants to fill an evidential void.

(xiv) Engaging in invidious discrimination against the Plaintiff in allowing unsworn additional information and thus challenging the principle of equality of arms.

(xiv) Refusing bail when making order of September on 4th September, 2015, despite criticism in an EU Court of Justice ruling of 1st July, 2015.

Declarations at paragraph 21 of the Statement of Claim which include declarations not included in the original Statement of Claim

22. The declarations now sought are declarations that:-

1(a) Insofar as the European Arrest Warrant Acts 2003 and 2012, impose an inquisitorial and sui generis procedure on the Courts of Justice, that is not expressly provided for then or in the specific requirements of the framework decision, it is unconstitutional.

1(b) Insofar as this Act and/or the Framework Decision permits outcomes such as are summarised in para. 17 to 19 of the Statement of claim, they are repugnant to the Constitution and/or contravene the EU Charter on Fundamental Rights.

1(bb) Insofar as a contention in requested declaration (a) is rejected, the novelty of this procedure cuts both ways and, inter alia, permits the conduct of the s. 16 application to be revisited in these proceedings, as set out above, that novelty is not only a get out of jail card for the first named defendant.

1(bbb) the refusal to refer the above questions to the C.J.E.U. contravened Article 267 of the T.F.E.U.

1(bbbb) the refusal to certify the above questions for an appeal manifestly contravene the criteria in s. 16(11) of the EAW Act.

1(bbbbb) the refusal to defer making a surrender order, pending the outcome of these proceedings, contravened the plaintiff's right of access to his constitutional objections to the conduct of the s. 16 proceedings properly adjudicated upon, as well as being in breach of s. 37(1)(a) of the EAW Act.

(c) That part of s. 16(11) of this Act, which in practice enables the High Court to veto plainly eligible appeals from itself, is unconstitutional and/or contravenes the EU Charter.

2. Damages including exemplary/aggravated Frankovich damages for unlawful detention.

2(a) An order vacating the surrender order made therein on 4th September, 2014.

3. Further and other relief.

4. Legal Aid Custody Issues Scheme.

Legal principles governing the jurisdiction of the court to dismiss actions on the grounds that they disclose no reasonable cause of action or are frivolous or vexatious or pursuant to the inherent jurisdiction of the court

23. The Defendants and the Plaintiff's written legal submissions helpfully summarise the principles which the court should apply in considering the motion to dismiss the proceedings. The written submissions on behalf of the Defendants state in the following paragraphs:-

> "33. Viewed in that context, it is submitted that the Plaintiff's complaints in his amended Statement of Claim in December 2014, fall within the classic territory of proceedings which are bound to fail in law. Barron J. stated in *Farley v. Ireland* (Unreported, Supreme Court, 1st May, 1997) that:-
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> > 'If a plaintiff has no reasonable chance of succeeding then the law may say that it is frivolous to bring the case. Similarly, it is a hardship on the Defendant to have to take steps to defend something which cannot succeed and the law calls that vexatious.'
>
> …
>
> 37. Arising from the foregoing, it is submitted that this is a case in which this Honourable Court should exercise its jurisdiction to dismiss the proceedings pursuant to the inherent jurisdiction of the Court. It was stated by Costello J. in *Barry v. Buckley* [1981] I.R. 306 that this jurisdiction existed to ensure that an abuse of the process of the Court does not take place and that if the Court is satisfied that the Plaintiff's case must fail then it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to the Defendant. It is acknowledged that the jurisdiction to strike out proceedings pursuant to the inherent jurisdiction of the court must only be exercised in 'clear cases' as was stated by Costello J. in *Barry v. Buckley*. However, it is submitted that this is such a clear case.
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> 38. As outlined by Edwards J. in *Keane v. Considine* [2010] IEHC 267 at para. 5.11, the court is entitled to consider the facts of the case if it is considering its inherent jurisdiction to strike out proceedings. Thus, it is submitted that it is in order for this Honourable Court to consider the matter set out above and the transcripts of the High Court proceedings in the European Arrest Warrant proceedings if necessary.
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> …
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> 42. Furthermore, it is submitted that the proceedings are vexatious in the manner which was outlined by O'Caoimh J. in *Riordan v. Ireland (No. 5)* [2001] 4 I.R. 463 at p. 466, where he outlined a number of factors which were relevant to decide whether proceedings were vexatious as follows:-
>
> > '(a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;
> >
> > (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief;
> >
> > (c) where the action is brought for an improper purpose, including the harassment and oppression of other parties by multi-various proceedings brought for purposes other than the assertion of legitimate rights;
> >
> > (d) where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
> >
> > (e) where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;
> >
> > (f) where the respondent persistently takes unsuccessful appeals from judicial decisions.'
>
> …
>
> 52. Hence it is submitted that the Plaintiff's proceedings are an abuse of the process of this Honourable Court. In *Fay v.*

Tegral Pipes Limited [2005] 2 I.R. 261, McCracken J. stated at p. 266 that:-

> 'Such abuse cannot be permitted for two reasons. Firstly, the Courts are entitled to ensure that the privilege of access to the Courts, which is of considerable constitutional importance in relation to genuine disputes between parties, will only be used for the resolution of genuine disputes and not as a forum for lost causes which, no matter how strongly the party concerned may feel about them, nevertheless have no basis for a complaint in law. The second and equally important purpose of the jurisdiction is to ensure that litigants will not be subjected to the time consuming, expensive and worrying process of being asked to defend a claim which cannot succeed.'"

24. The Plaintiff in his submission relies on the Supreme Court judgment of *Lopes v. Minister for Justice, Equality and Law Reform* [2014] 2 I.R. 301, the relevant extracts from the Plaintiff's written submissions are:-

> "9. The relevant law is authoritatively stated in *Lopes v. Minister for Justice* [2014] 2 I.R. 301, especially at pp. 307-311. See Delaney and McGrath at Chapter 16. As *Lopes* confirms, the issue here is not whether if the cases were fully defended, the State parties would succeed. Rather it is whether it is on the basis of what is asserted in the Statement of Claim and assuming those facts to be correct, is the Plaintiff's claim so hopeless that there is no realistic prospect of success.
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> …
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> 16. As *Lopes* [2014] 2 I.R. at p. 309, para. 18 establishes the jurisdiction to strike out on grounds of inherent jurisdiction/abuse 'should be sparingly exercised' and the court 'should be slow to entertain an application of this kind'. The Plaintiff seeks a proper adjudication of his constitutional claim, which since December 2014, he did his best to advance herein.
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> 17. As *Lopes* [2014] 2 I.R. at p. 309, para. 17 shows, for the State to succeed on this ground of objection, they must show that it cannot possibly succeed where 'as pleaded and assuming that the facts however unlikely they may appear are as asserted.

The Rule in Henderson v. Henderson

25. The Defendants also invoke the rule in *Henderson v. Henderson, as applied in this jurisdiction in Re Vantive Holdings* [2010] 2 I.R. 118 at para. 88 – 89 and *Arklow Holidays Limited v. An Bord Pleanála* [2002] 2 I.R. 99 at paras. 46 - 48 .

26. Wigram V.C. stated at p. 114 – 115 of *Henderson v. Henderson* [1843] 3 Hare 100:-

> "…where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

27. The Plaintiff's submissions on this point state:-

> "13. The State's case on this ground of objection is that the Plaintiff is seeking to re-litigate issues that are already were before Murphy and Barrett JJ. and determined by them. The State do not appear to claim, alternatively, that the statement of facts in the pleadings is so manifestly inaccurate, lacking no credible basis whatsoever that going to trial on them is vexatious.
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> …
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> 15. *Res judiciata* in *Henderson* are based on the principle that it is in the interest and economical administration of justice that where possible, all aspects of a particular dispute should be dealt with in the same proceedings."

Delay

28. Both parties have alleged delay. The Defendants are critical of the Plaintiff for issuing a High Court plenary summons on 23rd July, 2014 and not serving same until 11th December, 2014 and not giving any indication to the Court when the European Arrest Warrant proceedings commenced on 30th June, 2014, that he intended to challenge the constitutionality of the process by way of separate proceedings.

29. The Plaintiff criticises the Defendants for their failure to file a Defence until 17th July, 2015, thus depriving the Plaintiff of an opportunity to apply for an early date for trial of the Plenary Proceedings and then issuing the present motion on 21st August, 2015.

30. The delay is not such that it influenced the Court's decision. The Plaintiff was entitled to issue the Summons, the Defendants are entitled to make the case that the action is bound to fail and should go no further.

The Challenge to Section 16(11) of the European Arrest Warrant Act 2003

31. Section 16(11) states:- An appeal against an order under subsection (1) or (2) or a decision not to make such an order may be brought in the Supreme Court if, and only if, the High Court certifies that the order or decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court. It was formerly referred to as section 16(12).

32. The challenge is set out at paragraphs 20 and 21C of the amended Statement of Claim. Paragraph 20 states, s. 16(11) of this Act is repugnant, incompatible and in breach because, as operated it gives the judge who decides the case an unrestricted veto over whether he or she should be appealed. There are obvious practical objections to this decision being entrusted to another High Court judge. As in most comparable jurisdictions, any such veto should lie with the appellate court in such a manner as procedurally appropriate to that court. Paragraph 21c states:-

> "That part of s. 16(11) of this Act, which in practice enables the High Court to veto plainly eligible appeals from itself, is unconstitutional and/or contravenes the EU Charter."

33. This constitutional issue has been definitively decided by the High Court already in the judgment of McKechnie J. in *O'Sullivan v. Chief Executive of Irish Prison Service* [2010] 4 I.R. 562. The matter is dealt with under the heading "interference with the right to appeal" from paragraphs 45 to paragraph 66. The proceedings related to a direct challenge to s. 16(11) of the Act, s. 16(12) of the Act, as it was then.

34. Paragraph 66 states:-

> "Nonetheless, considering the European arrest warrant regime, I am satisfied that when considered *in toto* it does not unduly infringe the applicant's constitutional right of access to the court; in particular given that:-
>
> (i) the hearing is in the High Court;
>
> (ii) the parties are or may be represented;
>
> (iii) it is in part a supervisory or facilitating judicial hearing;
>
> (iv) despite this, there are express safeguards to ensure that an applicant's rights will not be infringed when surrendered; and furthermore;
>
> (v) some appeal or further judicial scrutiny is possible.
>
> The High Court is therefore in a position to determine all matters relating to the surrender of the applicant. The s. 16 procedure is such as to allow 'all justiciable questions involving the administration of justice [to be] heard and determined" before the High Court. The applicant's right of access to justice, under Bunreacht na hÉireann has thus not been breached.'"

35. Due deference to this judgment would have to be afforded by a High Court Judge determining these plenary proceedings. I do not see any distinguishable features in these proceedings from the judgment in *O'Sullivan*. Section 16(11) was not an issue in the s. 16 hearing and has arisen as a straightforward challenge to its constitutionality.

36. While the cases of *Irish Asphalt v. An Bord Pleanála* [1996] 2 I.R. 179, and *Irish Hardware Association v. South Dublin County Council* [2001] IESC 5 were decided on narrower grounds, that is the right of the High Court alone to certify an appeal on grounds involving a point of law of exceptional public importance which is in the public interest without a right of appeal against that refusal, those judgments uphold the constitutionality of the High Court's right to veto appeals from itself unless a point of law of exceptional public importance which is in the public interest arises.

37. For those reasons, the court has come to the conclusion that that aspect of the claim is bound to fail.

The application to include 8A, 8B and 18A in the amended statement of claim

38. Murphy J. had no opportunity to consider the matters set out at paragraphs. 8A, 8B and 18A of the amended Statement of Claim of 4th March, 2016. The report referred to was published in November 2015, subsequent to the judgment of the court on 2nd September, 2015. No evidence was before the court of the inspection between 11th and 22nd May, 2015. No opportunity was given to the Respondents to consider the information or reply to it. A serious allegation is made that the letter of 3rd December, 2014, considered by the Court was profoundly misleading and could be deemed to be fraudulent. It is not appropriate, that this Court should consider it in the context of the Defendants' motion to dismiss, nor should the Plaintiff be permitted to amend his Statement of Claim to allow it to be included because it was not an issue in the s. 16 proceedings.

The Conduct of the Section 16 Hearing

39. Section16 (1) and (2) of the Act states:-

> "(1) Where a person does not consent to his or her surrender to the issuing state the High Court may, upon such date as is fixed under s.13 or such later date as it considers appropriate, make an order directing that the person be surrendered to such other person as is duly authorised by the issuing state to receive him or her, provided that—
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> (a) the High Court is satisfied that the person before it is the person in respect of whom the European arrest warrant was issued,
>
> (b) the European arrest warrant, or a true copy thereof, has been endorsed in accordance with s.13 for execution of the warrant,
>
> (c) the European arrest warrant states, where appropriate, the matters required by section 45 (inserted by section 23 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012),
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> (d) the High Court is not required, under s.21A, 22, 23 or 24 (inserted by ss.79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005), to refuse to surrender the person under this Act, and
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> (e) the surrender of the person is not prohibited by Part 3.

(2) Where a person does not consent to his or her surrender to the issuing state the High Court may, upon such date as is fixed under section 14 or such later date as it considers appropriate, make an order directing that the person be surrendered to such other person as is duly authorised by the issuing state to receive him or her, provided that—

(a) the European arrest warrant, including, where appropriate, the matters required by section 45 (inserted by section 23 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012), is provided to the court,

(b) the High Court is satisfied that the person before it is the person in respect of whom the European arrest warrant was issued,

(c) the High Court is not required, under s.21A, 22, 23 or 24 (inserted by ss.79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005), to refuse to surrender the person under this Act, and

(d) the surrender of the person is not prohibited by Part 3.

(2A) Where the High Court does not—

(a) make an order under subs.(1) on the date fixed under s.13, or

(b) make an order under subs.(2) on the date fixed under s.14, it may remand the person before it in custody or on bail and, for those purposes, the High Court shall have the same powers in relation to remand as it would have if the person were brought before it charged with an indictable offence."

40. Section 37 states:-

"(1) A person shall not be surrendered under this Act if—

(a) his or her surrender would be incompatible with the State's obligations under—
(i) the Convention, or

(ii) the Protocols to the Convention,

(b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38(1)(b) applies),

(c) there are reasonable grounds for believing that—

(i) the European arrest warrant was issued in respect of the person for the purposes of facilitating his or her prosecution or punishment in the issuing state for reasons connected with his or her sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation, or

(ii) in the prosecution or punishment of the person in the issuing state, he or she will be treated less favourably than a person who—

(I) is not of his or her sex, race, religion, nationality or ethnic origin,

(II) does not hold the same political opinions as him or her,

(III) speaks a different language than he or she does, or

(IV) does not have the same sexual orientation as he or she does,

or

(iii) were the person to be surrendered to the issuing state—

(I) he or she would be sentenced to death, or a death sentence imposed on him or her would be carried out, or

(II) he or she would be tortured or subjected to other inhuman or degrading treatment.

(2) In this section—

'Convention' means the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on the 4th day of November, 1950, as amended by Protocol No. 11 done at Strasbourg on the 11th day of May, 1994; and

'Protocols to the Convention' means the following protocols to the Convention, construed in accordance with Articles 16 to 18 of the Convention:

(a) the Protocol to the Convention done at Paris on the 20th day of March, 1952;

(b) Protocol No. 4 to the Convention securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto done at Strasbourg on the 16th day of

September, 1963;

(c) Protocol No. 6 to the Convention concerning the abolition of the death penalty done at Strasbourg on the 28th day of April, 1983;

(d) Protocol No. 7 to the Convention done at Strasbourg on the 22nd day of November, 1984."

41. As can be seen from the complaints summarised by the court in the amended Statement of Claim, they relate almost entirely to the conduct of the hearing. This Court on hearing the motion, should not try the case on the motion of the Defendant's to dismiss, however, the nature of the Plenary Proceedings has to be defined by the court. If it is an attempt to rehearse, the arguments made in the s. 16 proceedings that is not permissible. The plenary proceedings should have the character of a constitutional challenge to the legislation and mode of trial. In any other form the Plenary Proceedings are in effect, a rehearing of issues determined by Murphy J., and offend the rule in Henderson and Henderson already referred to.

42. The court has to consider the merits of the case and if it cannot succeed, the hardship of a full defence of the proceedings should not be placed on the defendants. On reading both judgments of the court of 17th November, 2014, and 2nd September, 2015, and the transcripts of the hearing, I am satisfied the court gave careful consideration to the submissions of the Plaintiff, the then Respondent. The learned judge had a duty under s. 37 of the Act to refuse surrender, if it would constitute a contravention of any provision of the Constitution and to give consideration to the other matters set out in that section.

43. When one considers the responsibility placed on the Court by s. 16(1) and (2) of the Act and its scope, the courts responsibility pursuant to s.37 of the Act, the proceedings being not determinative of guilt or innocence, and on examination of the amended Statement of Claim as a whole and the court's summary of its provision, it reveals a fundamental misunderstanding of the nature of the s. 16 hearing. It is not an adversarial trial. Its character has been clearly defined by Superior Court judgments. Murphy J. in the preliminary ruling and judgment explained this jurisprudence and followed it.

44. One also has to be mindful of the purpose of the Act which is to implement the European Union Council Framework Decision of 13th June, 2002, regulating surrender procedures between Member States whose duties as members of the European Union are to respect the rule of law, democratic values, the independence of the judiciary and to respect the rights of an accused person charged with a criminal offence. Its purpose was to improve the surrender procedures between member states of those accused of criminal offences.

45. In so far as the subject matter of the amended Statement of Claim is an attack on the conduct of the trial, it offends the rule in *Henderson v. Henderson*. It has already been litigated and in the s. 16 hearing, the court considered the submissions of the Plaintiff which are replicated to a great extent in the amended Statement of Claim. The complaint as to constitutionality which apart from the specific challenge to s. 16(11) is not set out clearly in the Statement of Claim centres around the use of s. 20 of the Act and the non-adversarial character of the proceedings which the court will deal with separately.

The constitutionality of Section 20 of the

European Arrest Warrant Act 2003 as amended

46. The Plaintiff does not seek a declaration that s. 20 of the act is unconstitutional, but the various complaints made about the conduct of the S 16 hearing in the amended Statement of Claim which I have summarised if not an attack on the conduct of the hearing are a challenge to the constitutionality of that section.

47. The Plaintiffs concern is that he was unable to test the veracity of the documentation provided by the requesting jurisdiction, about prison conditions in Northern Ireland, and the ability of the Northern Irish Prison Service to keep him safe if on surrender he was in custody pending trial there. He wished to do so at the s 16 hearing by way of cross examination of officials of the requesting authority, and also by way of discovery, and was concerned that the inquisitorial or sui generis nature of the hearing prevented him from so doing.

48. The Plaintiffs concern is demonstrated by the grounds of appeal submitted to Murphy J. on the 4th September 2015, and her ruling. I refer to an extract from the ruling as follows:-

> "Applying those principles to the questions upon which the Respondent in this case seeks leave to appeal, taking first of all question No. 1 which reads:-
>
> > 'In light of the Supreme Court occasionally describing proceedings under the European Arrest Warrant Act as inquisitorial:-
> >
> > (i) are such proceedings inquisitorial in the universally understood sense; or
> >
> > (ii) is there some uniquely Irish legal meaning of the term that so describes such proceedings;
> >
> > (iii) if the latter what is meant by inquisitorial;
> >
> > (iv) in either of these instances is this inquisitorial procedure compatible with the Constitution being, *inter alia*, due process of law.
> >
> > Now whereas this is a very interesting question, it appears to the Court that it does not arise from the court's decision in this case. The Court made no determination as such would give rise to a need for clarification in relation to the questions described. It appears to the Court that this is very much the type of question which, if should be raised, should be raised in plenary proceedings."

49. Murphy J. went on to state in respect of question 4 as follows:-

> "Has the EAW Act disapplied the entire law on the admissibility of evidence in proceedings under it and, if so is that disapplication in favour of the requesting party only or does it extend to both parties.

> Has the EAW Act overidden the right to cross examine and if so is that override in favour of the requesting party only or does it extend to both parties." It appears to the court that these two questions merely restate the constitutional objection to the process of surrender in a different way. Again, the law is clear; the surrender process empowers the Court to act on uncross-examined information requested or received from either the issuing judicial authority or the issuing State. Section 20 as interpreted in *Sliczynski* confirms this interpretation and again the Act enjoys the presumption of constitutionality. So it appears to the court that that is not an appropriate – neither of those is an appropriate question on which to certify an appeal. Again, it appears to the Court to be questions that are more amenable to plenary proceedings and the kind of reliefs that could be sought on a plenary proceeding."

Section 20 of the Act states,
(1) In proceedings to which this Act applies the High Court may, if of the opinion that the documentation or information provided to it is not sufficient to enable it to perform its functions under this Act, require the issuing judicial authority or the issuing state, as may be appropriate, to provide it with such additional documentation or information as it may specify, within such period as it may specify.

(2) The Central Authority in the State may, if of the opinion that the documentation or information provided to it under this Act is not sufficient to enable it or the High Court to perform functions under this Act, require the issuing judicial authority or the issuing state, as may be appropriate, to provide it with such additional documentation or information as it may specify, within such period as it may specify.

50. "The section follows the relevant Article in the Council Framework Decision of 13th June 2002, on the European Arrest Warrant and the surrender procedures between the Member States of the European Union. Article 15 states

> 1. The executing judicial authority shall decide, within the time-limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.
>
> 2. If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in Article 17.
>
> 3. The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority."

51. The Defendants rely on a judgment of the Supreme Court, *Minister for Justice, Equality and Law Reform v. Sliczynski* [2008] IESC 73, a judgment delivered by Murray CJ on 19th December 2008, to demonstrate to the court that Murphy J., in the s. 16 proceedings applied appropriately the provisions of s. 20 of the Act when seeking further information about the concerns of the Respondent, that if surrendered to the Northern Ireland authorities, there was a substantial risk that he would be murdered. They submit the judgment upholds the constitutionality of the section. The Plaintiff argues that the constitutionality of s. 20 of the Act was never in issue in the *Sliczynski* proceedings, that the Attorney General was not a party and there was no reference to an O. 60 notice being served on the Attorney General. The Plaintiff also sought to distinguish *Sliczynski* from the present proceedings.

52. I have considered the judgment, and wish to rely on appropriate extracts

53. Murray C.J. dealt with an appeal where it was alleged that the High Court had erred in admitting as evidence correspondence from a Polish judicial authority which were exhibited in affidavits where it was alleged that the facts contained in the said correspondence constituted inadmissible hearsay evidence.

54. At p. 4 of his judgment the Chief Justice stated:-

> "In general terms the appellant contends that the Act of 2003, as amended contains several provisions for the admission of documents without formal proof but there is no provision in the Act which specifies or refers to information and letters of the kind referred to above as being admissible without formal proof. It is then submitted that if the Oireachtas had intended that the High Court could rely on such correspondence when considering an application under the Act it would have expressly made provision for such an exception to the hearsay rule. I will refer to the reasons why I consider that these arguments are not well founded after I have set out the reasons why I consider the learned High Court judge was correct in admitting them because it is more convenient to deal with the arguments that way."

55. The Chief Justice went on to state at p. 7 of the judgment:-

> "In my view s. 20(1) and (2) of the Act of 2003, as amended, are provisions by which the Oireachtas sought to give effect to the system of surrender envisaged by the Framework Decision so as to ensure that information could be furnished by the requesting Judicial Authority to the executing Judicial Authority, the High Court. If further information is transmitted by the requesting Judicial Authority either on its own initiative or following a request it is the function of the Central Authority to transmit it to the Executing Judicial Authority, in this country, the High Court. Section 20 must be interpreted in the light of the objectives of the Framework Decision and its provisions. In my view it specifically gives effect to Article 15(2) and (3) of the Directive. In so providing I am satisfied that the Oireachtas intended, consistent with the obligations of the State pursuant to the Framework Decision, that the High Court would have available to it the information provided by the issuing Judicial Authority and would have full regard to that information, in addition to information provided in the European Arrest Warrant itself, for the purpose of deciding whether a person should be surrendered on foot of a European Arrest Warrant. Moreover to interpret the provisions of the Act otherwise would render them meaningless since if direct evidence had to be given of the information concerned every Judge or member of the issuing Judicial Authority providing information would either have to give evidence personally or swear an Affidavit of matters within their own knowledge. If that were the case the provisions referred to would serve no purpose. Clearly in my view they were intended to ensure that the High Court would have, where required, information from the Judicial Authority concerned in addition to that already contained in the arrest warrant itself. Before the High Court can receive and take into account such information it must be established that the information communicated emanates from the Judicial Authority of the requesting State. In this case that has been established by the express averments in the Affidavits lodged on behalf of the applicant in the High Court. In any event the source of the information has not been put in issue.

Since the receipt of such information and the entitlement of the High Court to rely on it is permitted by Statute the rule against hearsay relied upon by the appellant does not apply so as to prevent the Court from exercising its functions in that respect.

So far as the status of the information received by the High Court under the foregoing circumstances is concerned it is in the first instance a matter for the High Court to decide what weight it should attach to it. It is entitled to treat the information as prima facie evidence of the facts set out in the further information supplied by the requesting Judicial Authority.

The admission of such information as evidence does not preclude a respondent in such proceedings from calling evidence to the contrary.

Indeed the status of the information communicated by a requesting Judicial Authority in relation to European Arrest Warrants. should be treated in the same way as information contained in the European Arrest Warrant itself, even though the latter, being the actual originating document for setting any such application in train, is admitted without proof by virtue of another section of the Act. As I pointed out in *Minister for Justice v. Altaravicius* 'Generally speaking extradition arrangements and the like are issued 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. Those considerations apply equally to the system of surrender to the European Arrest Warrant having regard to the provisions, explicit and implicit, of the Framework Decision.'

Accordingly, until there is some reason to believe to the contrary, it is to be assumed that a statement of facts such as those that appear in the letters sent by the requesting Judicial Authority in this case, is a correct statement of the facts of the case in respect of which surrender is sought."

56. Murray J. went on to consider the nature of extradition proceedings. At p. 14, he stated:-

"As I pointed out in Attorney General -v- Park (Unreported) Supreme Court 6th December 2004 which concerned extradition under the Act of 1965, as amended, "The burden of proof of facts which may rest on the applicant in these proceedings is not that of a criminal trial. I hasten to add that the learned High Court Judge did not approach this matter on such a basis and it is just that I consider it appropriate at this point to distinguish between extradition proceedings and other forms of proceedings, criminal and civil. An extradition proceeding pursuant to the relevant Acts has its own special features which in a certain sense makes it *sui generis*. 'Later in the judgment it was stated "The role of the requested State, indeed its duty, is to give effect to a lawful request from a requesting State once it is determined that the request fulfils the criteria laid down by the relevant legislation .... The responsibility for bringing a person named in a warrant before the High Court clearly rests with authorities in the State. Once that is done the task in determining whether all legal requirements for the making of an Order pursuant to s. 47 are fulfilled rests with the High Court Judge. That is an inherently inquisitorial function.' It seems to me that the same considerations apply to applications for surrender pursuant to the Act of 2003 and indeed s. 20 of the Act, as cited above, highlights the inquisitorial dimension of the proceedings. The rules of evidence which apply are not those of a criminal trial. In carrying out its function as aforesaid the Court ensures that no one in this jurisdiction shall be surrendered pursuant to the Act unless the Court is satisfied that all criteria laid down by the Act and, where specified, in the Framework Decision, have been satisfied and that there is no other lawful bar to the making of the Order."

57. Murray C.J. recited with approval *Minister of Justice v. Altaravicius* [2006] 3 I.R. 148. The head note states:-

"3. That extradition arrangements, whatever their form, between this country and other states have been applied by the courts on the presumption that the other states have complied in good faith with their obligations under the relevant treaty or statutory provision. The assertion of non-compliance or the raising of the possibility of non-compliance was not sufficient to dislodge the presumption of compliance. The presumption stood until something to the contrary was shown. The existence of such a presumption of compliance could not be treated as a basis for demanding the production of the underlying domestic warrant. *Wyatt v. McLoughlin* [1974] I.R. 378 and *Ellis v. O'Dea (No. 2)* [1991] I.R. 251 approved.

4. That s. 20 of the Act of 2003 provided that the High Court might require the issuing judicial authority to provide it with additional documentation or information as it might specify, if it was of the opinion that the documentation or information provided to it was not sufficient to enable it to perform its functions. It remained open to the respondent to make such an application pursuant to s. 20 at the s.16 hearing."

Decision on Section 20 issue, and inquisitorial and sui generis nature of European Arrest Warrant procedure

58. The categorisation of the procedures followed pursuant to the Act as *sui generis* i.e. 'of its own kind' or 'in a class of itself' is self evident. They have no need of clarification, once they are considered in the context of the Framework Decision, the Act itself and decided case law of the Superior Courts. These are not adversarial proceedings and are inquisitorial to the extent that a judge hearing a s. 16 application can ask for further information and consider it further to the provisions of s. 20 of the Act.

59. The *Sliczynski* Judgment, did not envisage cross examination of officials from a requesting authority, or discovery, as appropriate procedures in a s.16 hearing.

60. It also follows from the judgment, that information received from the requesting jurisdiction, provided its proper provenance is established, has to be admitted, but it is up to the High Court, to decide what weight should attach to it, and the Respondent is not precluded from calling evidence to the contrary.

61. While Murphy J. declined to consider the grounds on the basis that they were more appropriate to consider in the context of plenary proceedings, I am satisfied that those issues have been definitively decided in the *Sliczynski* case.

62. The Court accepts on the s. 20 issue it has to make a judgment distinct from the challenge to s. 16(11) which has been definitively decided, and the attack on the conduct of the trial which is impermissible.

63. In exercising that judgment the Court wishes to give as fair a wind as possible to the case the Plaintiff makes, by considering the amended Statement of Claim, and letting the action proceed to hearing if there is possibility of success.

64. I am satisfied there is no possibility of success, and therefore must determine the motion to strike out in favour of the Defendant Applicants.