THE COURT OF APPEAL

Birmingham J.
Mahon J.
Hedigan J.

Neutral Citation Number: [2018] IECA 40

[2017 13]

BETWEEN

Francis Lanigan

Applicant/Appellant

-And-

Central Authority, Minister for Justice and Equality, Ireland and the Attorney General

Defendants/Respondents

-And-

The Human Rights Commission and Commission of the European Union

Notice parties

[2016 560]

BETWEEN

Francis Lanigan

Applicant/Appellant

-And-

Governor of Cloverhill Prison, Minister for Justice and Equality, Ireland and the Attorney General

Defendants/Respondents

JUDGMENT of Mr. Justice Birmingham delivered on the 8th day of February 2018

1. The Court has dealt with these two linked appeals together. The appeals are described as linked appeals in that they arise from a shared general background and context. The starting point for both appeals is to be found in the fact that the Magistrates' court in Dungannon, Co. Tyrone, on 17th December, 2012 issued a European Arrest Warrant in respect of Francis Lanigan (hereinafter referred to as "the appellant"), in order that he could be tried for murder and possession of a firearm with intent to endanger life, which crimes are alleged to have been committed on 31st May, 1998 in Dungannon. The appeal to which the Central Authority is a party is an appeal against a decision and order of White J. in what are described as plenary proceedings. In general terms those proceedings had raised issues about the constitutionality of s. 16(1) and s. 20 of the European Arrest Warrant Acts 2003 – 2012, on the grounds that the proceedings are regarded as inquisitorial. The second appeal is from Humphreys J. and relates to a *habeas corpus* matter/Art. 40 enquiry.

2. The procedural background to the two appeals is an extremely complex one. The background was set out by Humphreys J in *Lanigan v. Governor of Cloverhill Prison & ors* [2017] IEHC 23. Humphreys J. pointed out that by that time the case had been before at least nine High Court judges, it had been before the Court of Appeal and the Supreme Court on multiple occasions as well as before the Court of Justice of the European Union on one occasion. For ease of reference it is convenient to set out a summary of the narrative provided by Humphreys J.:

> "**EAW proceedings commence**
>
> 2. The UK authorities allege that the applicant committed murder and was in possession of a firearm with intent to endanger life on 31st May, 1998, in Dungannon, Co. Tyrone. The UK authorities have stated that it was not until 2011 that they gathered sufficient evidence to charge the defendant. Charges were directed by the Public Prosecution Service for Northern Ireland on 4th May, 2012.
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> 3. The Magistrates' court in Dungannon issued a European Arrest Warrant for this offence on 17th December, 2012.
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> 4. The High Court (MacEochaidh J.) endorsed the EAW for execution by the Gardaí on 7th January, 2013. The applicant was arrested on 16th January, 2013.
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> 5. EAW proceedings [2013 EXT 1] then came before the High Court, initially before Murphy J. Bail was refused by Edwards J. on 26th February, 2013. Legal aid was applied for on 3rd July, 2013, and also refused. The applicant subsequently re-applied for legal aid before Peart J. which was granted on 26th July, 2013.
>
> 6. Points of objection to surrender were put forward on 26th November, 2013. The hearing of the surrender application commenced on 30th June, 2014.

Constitutional proceedings commence – EAW process continues

7. On 23rd July, 2014, the applicant began constitutional proceedings seeking a declaration that the European Arrest Warrant Act 2003 was invalid by reference to its inquisitorial and *sui generis* procedure that allegedly permitted departure from fundamental norms of fair procedures.

8. On 17th December, 2014, Murphy J. delivered judgment on preliminary issues in the EAW proceedings.

9. On 1st December, 2014, by virtue of the commencement of legal provision to that effect, the option of referring a question to the CJEU became available in EAW proceedings generally.

10. On the same date, the applicant made a fresh bail application. On 8th December, 2014, the applicant applied to dismiss the surrender application, which was refused on the grounds that it related to the preliminary issues on which the court had already ruled. On the latter date, a further ground of objection to surrender was raised.

11. On 19th December, 2014, Murphy J. granted bail on certain conditions which the applicant could not at that point meet.

12. On 18th January, 2015, Murphy J. decided to refer a number of questions to the CJEU relating to delay in addressing the EAW request outside the time limits set out in art. 17 of the framework decision. At the same time she refused to refer a question relating to the sui generis or adversarial nature of EAW proceedings to the Luxembourg court.

13. On 9th February, 2015, the High Court dismissed an application to vary the monetary terms of bail set by the court on 19th December, 2014.

14. The reference to Luxembourg was not in fact sent until 19th May, 2015. The Advocate General commented on this at para. 94 of his opinion as part of overall "excessive lapse of time" and "unjustified delays in the procedure" which amounted to provisional detention of 30 months, ten times longer than the maximum period authorised by Art. 17 of the framework decision, including successive adjournments of the preliminary issues, and the "repeated periods of inactivity on the part of the executing judicial authority, including 4 and a half months between hearing and delivering judgment on the preliminary issues and four months between the decision to make a reference to the court for a preliminary ruling and the actual order for reference".

15. Meanwhile the applicant had appealed to the Court of Appeal in relation to bail. That court allowed the appeal on 6th July, 2015, and relaxed the bail conditions.

16. The Court of Justice gave judgment answering the referred questions, on 6th July, 2015, (Case C-237/15 *Minister for Justice and Equality v. Lanigan* [2016] Q.B. 252).

17. On 4th September, 2015, the High Court (Murphy J.) directed the surrender of the applicant to the UK under the Act of 2003 and his detention in Cloverhill pending surrender. She refused leave to appeal. An appeal was in fact brought without leave (2015/482) but the Court of Appeal refused that appeal (*Minister for Justice and Equality v. Lanigan* [2016] IECA 91 (Unreported, Court of Appeal (Peart J. (Irvine and Mahon JJ. concurring)), 16th March, 2016). The Supreme Court refused leave to appeal on 27th June, 2016 (*Minister for Justice and Equality v. Lanigan* [2016] IESCDET 85 (Unreported, Supreme Court (Clarke, MacMenamin and Laffoy JJ.)). That decision appears to be the final decision on the execution of the EAW as far as domestic law is concerned. The 60 day period is meant to cover that between arrest (January, 2013) and final decision on execution. If the latter date was June, 2016 then the period involved was around 20 times that provided for by EU law.

18. Mr. Barron [senior counsel for the Authority] has raised the question as to whether the CJEU requires the State to also complete any consequent Article 40 applications during the period of 60 days specified for the final decision on execution of the EAW as set out in art. 17(3) of the framework decision. That would appear to be correct in that art. 23 which provides a 10 day provision for execution, would naturally only run from the date at which the legal process is at an end and the execution is free to proceed. Independently of that there is an overall obligation of urgency in relation to the execution of the warrant (art. 17(1)).

19. On 9th November, 2015, the applicant was apparently again granted bail by the Court of Appeal (2015/496) (Kelly, Irvine and Hogan JJ.) in the s. 16 proceedings [2013 EXT 1]. A fresh order for bail appeared to be required following the determination of the substantive EAW proceedings by the High Court.

The first habeas corpus application

20. On 9th September, 2015, the applicant made a first Art 40.4 application [2015 No. 1415 SS] before White J., who directed that the application for an inquiry be made on notice. That was done before Hunt J. on 10th September, 2015, who ordered an inquiry which took place before Barrett J. on 14th September, 2015. The order drawn up on that date states that the matter was adjourned, to 17th September, 2015, not adjourned for judgment. However Barrett J. in fact delivered judgment on 17th September, 2015. At the conclusion of that Article 40.4 application the applicant applied for bail and was refused. The order of Barrett J. was appealed to the Court of Appeal (2015/488).

21. On 15th September, 2015, Butler J. ordered a stay on the order for surrender on the application of the state in the light of the proceedings before Barrett J. The order is in an unusual form in that it is entitled in both the extradition proceedings [2013 No 1 EXT] and in the first habeas corpus [2014 No. 1415SS, although the Court of Appeal record number 2015/488 is also cited]. Mr. Barron submits that the correct proceedings in which the order should be granted is within the 2013 extradition proceedings. He was not in a position to explain why the order was also granted in the first habeas corpus application."

The second habeas corpus application

22. A second article 40 application (the present case) was launched arising from the stay application. On 15th October,

2015, an *ex parte* application made to Noonan J. was refused.

23. An appeal was lodged to the Court of Appeal (2015/527) which overturned the refusal of the second habeas corpus inquiry by Noonan J., in a decision delivered by Peart J. on 19th October, 2016. At the same time the court upheld the order of Barrett J. refusing relief in the first article 40. The court also admitted the applicant to bail …"

3. To complete the picture it is now necessary to say that the Supreme Court was requested to deal with both of the matters that are now before this Court on a leapfrog basis. The Supreme Court issued a determination on the 26th July, 2017 which refused to permit this. That determination was longer and set out the background in far greater detail than would be normal in the course of a determination, but explained that this had been necessary, in the context of the labyrinthine nature of the litigation. While recognising that this was a determination and not a judgment on a substantial appeal, the decision section merits quotation:

"**Decision**

56. It has been necessary to set out the history of the case in far greater detail than would normally be desirable in a determination, because the labyrinthine nature of the litigation is not sufficiently summarised in the application. Having carried out that exercise, however, it is at least clear that the entire history has its root in the decision of Murphy J. to request, receive and act upon information obtained pursuant to the power conferred by s.20 of the Act. No other point sought to be raised in these applications could in fact benefit the applicant, since this was the matter that went to the heart of the decision to order his surrender and to the heart of his challenge to the result. The applications for his release under Article 40.4 could only have succeeded if he had demonstrated a fundamental flaw or denial of justice in reaching that decision. Similarly, the challenge to the requirement for a certificate for leave to appeal could be of relevance only if he could show a possibility of success on an appeal on that point.

57. In acting as she did, Murphy J. was clearly seeking to vindicate the rights of the applicant and was proceeding in accordance with the principles discussed by this Court in *Rettinger.* She relied upon the procedure set out in s.20 of the Act (as amended) and upon the analysis of that section by this Court in *Sliczynski*. The applicant does not assert that the decision in that case was wrong, but only says that it is being used to justify "far-fetched" propositions of law. No challenge has been mounted to the constitutionality of the section, but only to its interpretation.

58. Having regard to the analysis of the judgment in *Sliczynski,* it is entirely clear that this Court has considered and endorsed as lawful the use of the s.20 procedure as part of the *sui generis* inquisitorial EAW process. Further, it is clear that as part of that process information may be received otherwise than by way of sworn affidavit. The concern is for the provenance and authenticity of the information and for its relevance to whatever question is in issue. As Murphy J. pointed out, it is not intended that there should be cross-examination on its accuracy. There is nothing in the application to support a contention that Murphy J. went beyond the parameters of either the statute or the binding precedent.

59. Other matters complained of relate, for the most part, to case management decisions of the judges dealing with the Article 40.4 applications. These do not raise points of law of general public importance. In the circumstances of the case the applicant has not shown that leave is necessary in the interests of justice.

60. The complaint that his application under Article 40.4 was dealt with by Barrett J. when he only wanted an adjournment on bail pending determination of the plenary proceedings is manifestly ill-founded. Article 40.4 is not to be used simply as a convenient mechanism for getting bail. It imposes a duty on the High Court to carry out the constitutional inquiry. In any event, this matter was the subject of an appeal to the Court of Appeal and there is no ground for a further appeal.

61. The applicant has not shown any arguable grounds tending to show that a "leapfrog" appeal would be necessary in relation to the dismissal of the plenary proceedings by White J.

62. In these circumstances leave to appeal to this court will be refused in all three applications."

4. In the course of his oral presentation, counsel on behalf of Mr Lanigan dealt first with what has been described as the "twenty five day point" in shorthand, which arises in the appeal from Humphreys J., then turned to the appeal from White J. before returning to the appeal from Humphreys J. This Court will follow the same sequence.

5. This so-called "twenty five day point" is raised in the following circumstances. The procedures, including time stipulations, relating to committal of persons pursuant to European Arrest Warrants are dealt with in s. 16 of the European Arrest Warrant Act 2003 as amended. The provisions that would appear to be in issue are these:

"16(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.

(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…

[…]

(4) Where the High Court makes an order under subs. (1) or (2), it shall, unless it orders postponement of surrender under s. 18 –

(a) inform the person to whom the order relates of his or her right to make a complaint under Article 40.4.2 of the Constitution at any time before his or her surrender to the issuing state.

(b) order that the person be detained in a prison (or, if the person is not more than 21 years of age, in a remand institution) for a period not exceeding 25 days pending the carrying out of the terms of the order, and

(c) direct that the person be again brought before the High Court –

(i) if he or she is not surrendered before the expiration of the time for surrender under subs. (3(a)) as soon as practical after that expiration, or

(ii) if it appears to the central authority in the state that, because of circumstances beyond the control of the state or the issuing state concerned, that person will not be surrendered on the expiration referred to in subpara. (i) before that expiration.

(5) Where a person is brought before the High Court pursuant to subs. (4)(c) the High Court shall –

(a) f satisfied that because of circumstances beyond the control of the state or the issuing state concerned, the person was not surrendered within the time for surrender under subs. (3A) or, as the case may be, will not be so surrendered –

(i) with the agreement of the issuing judicial authority, fix a new date for the surrender of the person,

(ii) order that the person be detained in a prison or if the person is not more than 21 years of age, in a remand institution for a period not exceeding 10 days after the date fixed under subpara. (1) pending the surrender, and

(b) in any other case, order that the person be discharged.

(5B) Where a person is ordered, under subs. (4)(b) to be detained in a prison (or, if the person is not more than 21 years of age, in a remand institution) and is brought before the High Court pursuant to subs. (4)(c) the person shall be deemed to be in lawful custody at all times beginning at the time of the making of the order under subs. (4)(b) and ending when he or she is brought before the Court.

(6) Where a person –

(a) lodges an appeal pursuant to subs. (11) or

(b) makes a complaint under Art. 40.4.2 of the Constitution, he or she shall not be surrendered to the issuing state while proceedings relating to the appeal or complaint are pending.

[Highlighted sections are those most in issue].

6. The issue raised in this case arises from the fact that on 15th September, 2015 Butler J., following an application to him, ordered a stay on the order for surrender in a situation where the applicant had brought proceedings under Art. 40.4, having brought the matter before White J. on 9th September, 2015 who directed that the application for an enquiry be on notice. That occurred before Hunt J. on 10th September, 2015 and an enquiry followed before Barrett J. on 14th September, 2015 and an oral judgment given on 17th September, 2015 which decision was appealed to the Court of Appeal.

The approach of the High Court judge

7. Humphreys J. dealt with the matter by indicating that it seemed to him that the correct procedure and sequence of events was as follows: That firstly the court makes an order for the surrender of the person under either subs. (1) (endorsement of an EAW) or subs. (2) [Schengen Alert] of s. 16. On making the order for surrender, the court informs the person of their rights and directs that the person be brought back to the court if the person is not surrendered before the expiration of the time for surrender under subs. (3A). The order for surrender generally takes effect 15 days after it is made (subs. (3)) unless habeas corpus or appeal proceedings are brought, the taking effect of the order for surrender triggers the start of a 10-day period in which the surrender needs to be effected. If the person is not surrendered within that 10-day period, the person should be brought back to the High Court (subs. (4)(c)) and the court may on certain conditions fix a new date for surrender (subs. (5)) or may discharge the person.

8. Significantly, Humphreys J. then goes on to observe that the time at which the person needs to be brought back to the High Court by reason of the expiry of the 10-day period under subs. (3A) is not ten days after the surrender order takes effect, but ten days after the order takes effect (subject to subs. … (6)) in other words, he said, ten days after any appeal or Art. 40 application is concluded. He further observed that subs. (6) reflects recital 12 which reserves for each member state the right to apply its own constitutional rules as to fundamental rights. The right to apply for habeas corpus, he notes, is reflected in Art. 5(4) of the ECHR and Art. 47 of the EU Charter.

9. On the basis of that analysis he concluded:

> "On that logic, there was never any need to apply to Butler J. for a stay, because the 10 day period never got rolling for the simple reason that that period was subject to sub-s. (6) and therefore subject to the possibility of applying pursuant to Article 40.4."

10. Having expressed the firm view that the application for a stay to Butler J. was unnecessary, he then addressed the approach of his colleague McDermott J. in *Myerscough v. Governor of Arbour Hill* [2016] IEHC 333 and the approach of the Court of Appeal in that case, taking the position that his assessment of the authorities reinforces his view that the stay application was unnecessary. However, the stay application being unnecessary did not mean that it infringed any rights of the applicant, as it merely duplicated the stay that would arise statutorily from the fact that the time for surrender under the 2003 Act had not arrived. Therefore, he said that even if the stay was over-cautious, it was not unlawful.

11. For my part I find the analysis engaged in by Humphreys J. cogent, to the point of compelling. However, whether one takes the view that the application to Butler J. was unnecessary, as I would be inclined to do, or the view that it was an appropriate intervention and it is this intervention which validated Mr Lanigan's ongoing detention, one way or another the challenge has to fail.

12. I turn next to the decision of White J. The proceedings the subject matter of that decision were commenced by issue of a plenary

summons dated 23rd July, 2014 which was served along with the statement of claim on 11th December, 2014. The summons indicated that the relief sought was as follows:

> "For an order that insofar as the European Arrest Warrant 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 and also unfairly restricts the right of appeal, it is repugnant to the Constitution and contravenes the European Convention on Human Rights, the EU Charter on Fundamental Rights, and for an order that the Plaintiff surrender as sought in related proceedings [2003/1EXT] should not be permitted."

13. In response, the defendants issued a notice of motion seeking the following orders:

> (i) An order pursuant to O. 19, r. 28 of the Rules of the Superior Courts dismissing the plaintiff's claim on the grounds 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 claim as failing to disclose any cause of action known to law and on the basis that the claim is unsustainable and/or bound to fail in law.
>
> (iii) Further and in the alternative, an order pursuant to the inherent jurisdiction of the court dismissing the plaintiff's claim as being an abuse of the process."

14. It is important to appreciate that White J.'s decision (*Lanigan v. Central Authority and others* [2016] IEHC 682) was given in the context of an application brought by the defendants to dismiss the plaintiff's claim rather than at the conclusion of a substantive hearing. Counsel for the appellant is therefore correct in stating that at this stage the issue is one of arguability and the onus on the State, if it is to succeed in having the proceedings dismissed without a full hearing is a heavy one. Counsel has summarised the proceedings as raising both constitutional and non-constitutional issues. In summary, the constitutional issues are

> (i) the inquisitorial/sui generis nature of the proceedings;
>
> (ii) associated with that, the restriction on the opportunity and ability to cross examine; and
>
> (iii) the restrictions on the right to appeal to cases where the trial judge issues a certificate for that purpose.

The non-constitutional points sought to be raised were:

> (i) that the original High Court judge, Murphy J., had been misled by reason of having been given false or misleading information;
>
> (ii) a claim for damages pursuant to the decision of the ECJ in Francovich, this relates to the fact that an application for bail by Mr Lanigan was opposed; and
>
> (iii) a claim for damages under Kobler decision on the basis that an application for a reference was wrongly refused.

15. The respondents, for their part, say that the arguments advanced by the appellant are based on a number of assumptions, these being:

> a. That Murphy J. at the s. 16 hearing was obliged to advise the appellant in relation to the provisions of s. 20 of the European Arrest Warrant Act 2003 and invite submissions.
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> b. That Mr Lanigan had some basis for objecting to the High Court judge seeking further information from the Northern Ireland authorities that he had been unable to pursue.
>
> c. That the appellant had contested the information provided by the Northern Ireland Prison Service and the police authority.
>
> d. That the Maghaberry Prison Report was inconsistent with the information provided by the Northern Ireland authorities.
>
> e. That the appellant was in personal danger – his life was under threat.
>
> f. That the appellant was prevented from arguing the alleged unconstitutionality of the European Arrest Warrant Act 2003 before the High Court in the s. 16 proceedings.

However the respondents say that each of these assumptions are wrong. The respondents say that there was no obligation on the trial judge to advise the appellant that she was considering exercising her entitlement to seek further information under s. 20 of the Act. On this aspect, I am in agreement with the State respondents. There were a number of references to s. 20 in the course of submissions by counsel for the Minister, so even someone not well versed in the European Arrest Warrant procedure would have become aware of the existence of the entitlement to seek information. However, as it happens in this case the appellant was represented by a very experienced legal team who undoubtedly were aware of the provisions of s.20. The question of seeking information pursuant to s. 20 was an issue in the High Court proceedings that were ongoing in July, 2014. At the end of July, 2014 the appellant issued plenary proceedings, the proceedings which are now at the centre of this appeal. However the proceedings were not served until 11th December, 2014, which of course was after the High Court gave its first judgment on 17th November, 2014 and after further information had been provided by the Northern Ireland authorities. It would seem that an issue having arisen in the context of the s. 16 hearing and Mr Lanigan decided to keep his constitutional arguments for another day. This practice of keeping points back to be run later and separately was not an acceptable one and raises issues as to whether what is happening amounts to an abuse of process. In *Minister for Justice v. O'Connor* [2017] IESC 21, O'Donnell J. commented:

> "There is no substance to the argument that the appellant was entitled to make objection in a piecemeal fashion."

I would respectfully echo those remarks. Indeed I would go further and say that it is incumbent on courts to be aware of the possibility of tactics designed to buy time or postpone the evil day. In this case, the appellant did not seek to refute the information that was provided by the Northern Irish authorities in the course of the s. 16 hearing. However, he now says that because of a report on conditions in Maghaberry Prison that he has accessed, that the information provided to the High Court judge was false and

misleading. That report postdates the s. 16 hearing, and an erroneous assertion to the contrary in the statement of claim has now been corrected. In any event, on the key issues of whether there is a threat to life in the case of prisoners, the report does not support the contentions of the appellant, Mr Lanigan, indeed the respondents say that the report undermines the assertions made by the appellant. In any event, the respondents say that there is an unreality to suggestions of threats from the INLA and loyalist sources from which the appellant would not or could not be protected by the authorities, in a situation where he has been living openly in Dublin while on bail.

16. The approach of the High Court judge was to recall the established jurisprudence in relation to striking out and dismissing proceedings and the rule in *Henderson v. Henderson*. He did so in terms that are largely noncontroversial and indeed I do not understand there to be any real dispute between the parties as to what the law is in this area. The dispute is as to whether this is an appropriate case to exercise a jurisdiction the extent of which is well established.

17. Having touched on the issue of delay, he concluded that such delay as there had been had not influenced the Court's decision and that the plaintiff was entitled to issue the summons and that the defendant was entitled to make the case that the action was bound to fail and should not go further, he then turned to the issues raised by the proceedings. So far as s. 16(11) and the restrictions on the right to appeal are concerned, he took the view that this had been definitely decided in the judgment of McKechnie J. of *O'Sullivan v. The Chief Executive of the Irish Prison Service* [2010] 4 IR 562. To this the appellant responds with some acerbity and says that if cases can be definitely decided as a result of a High Court decision, why does one need a Supreme Court or a Court of Appeal? In truth, there might be some justification for this response if it were not for the fact that the requirement for a certificate to appeal in the EAW regime does not stand alone, and mirrors similar provisions in other areas, such as planning, immigration and NAMA, to name but a few and indeed the system of certification can be traced right back to the Courts of Justice Act 1924 and s. 29 thereof. Thus the nature of the procedure has been considered in cases such as Irish Asphalt v. An Bord Pleanála [1996] 2 IR 179 and *Irish Hardware Association v. South Dublin County Council* [2001] IESC 5. Thus he felt able to conclude that that aspect of the applicant's claim was bound to fail. I believe he was entitled to reach that view and I regard it as relevant that the applicant must have known the statutory architecture that existed from the 16th January, 2013 when he was first arrested on foot of the European Arrest Warrant.

18. In relation to the invocation of s. 20, the respondents in the High Court relied on the case of *The Minister for Justice Equality & Law Reform v. Sliczynski* [2008] IESC 73. While the plaintiff in the High Court sought to distinguish *Sliczynski* and to downplay its significance, the High Court however considered the decision in considerable detail and placed considerable emphasis on it. The High Court felt that the categorisation of the proceedings as *sui generis*, i.e. of its own kind, was self-evident. I agree with that remark and indeed with the fact that it is now well established that the proceedings are inquisitorial, however, inquisitorial only in one sense. Generally speaking, the parties present their evidence in the way they would in any other form of proceedings. Section 20, which is the section which is in issue here does represent a departure from the situation that generally applies. However, to suggest that as proceedings are in a sense inquisitorial, the right to cross examine is set at nought is without foundation. The point was made with some force in exchanges between bench and bar by one member of the court that while it is the case that a majority of member states of both the Council of Europe and the European Union have legal systems which are at least partly inquisitorial, there is no basis for concluding that cross examination is excluded, on the contrary, searching cross examination is a feature of legal proceedings in many member states.

19. I am of the view therefore that the three constitutional issues raised, the *sui generis*/inquisitorial issue, the restriction on cross examination arising from s. 20 and the arrangements for appeal were properly considered by the trial judge and his conclusion that the case should not be permitted to proceed on that aspect was one that was open to him and his conclusions are not ones which should be interfered with.

20. I turn now, briefly, to the non-constitutional issues. There is, first of all, the complaint that the trial judge was misled to the extent that it is said that the order for the surrender of Mr Lanigan was obtained by fraud. I have already referred to the emergence of a report on conditions in Maghaberry Prison. The task facing those that would suggest that the publication of a report that postdates the High Court judgment establishes that information put before the High Court was false, misleading or fraudulent is a difficult one. The respondents have contended, and I myself would accept, that the report offers no additional support whatever to Mr Lanigan.

21. Turning then to what might be described as the *Francovich* and *Kobler* point, I do not think it is unfair to describe them as "make weights". I do not see them as points of any real substance, and as much was more or less conceded by counsel for the applicant who emphasises that at this stage he merely has to establish that it has not been established that the points are unarguable. For my part I would see their inclusion at this stage as a contrivance and without merit.

22. So in summary I would uphold the approach taken by the High Court judge, White J. and would simply add this observation: that where it is sought to spin a labyrinthine web, and where elements of the challenge to surrender are fed out in a piecemeal basis, it is likely that those doing so will have the proceedings subjected to strict, indeed rigorous scrutiny.

Appeal from Humphreys J.

23. Before the High Court, counsel for Mr Lanigan summarised his challenge to the detention under four headings:

- *Res judicata* and *Henderson v. Henderson* jurisprudence do not apply in habeas corpus applications and therefore the court was invited to revisit previous determinations under existing accepted law. It was submitted that for reasons which were advanced but rejected at earlier stages that the determination was unlawful.

- Article 40.4 must be interpreted in a manner consistent with EU law and by extension with UN General Assembly Working Group on Arbitrary Detention Reports on Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court. On this basis it was submitted that the Constitution had to be construed as meaning that a court hearing an Article 40 application had jurisdiction to revisit previous determinations.

- The third point is that the granting of a stay was not appropriate, having been ousted by legislation. This point has already been considered in the course of this judgment under the heading of the so-called 25 day point and has already been rejected.

- Fourthly, the extravagant delays, which Mr Lanigan described as egregious, and which he puts down to the State's litigation strategy was such as to render the detention unlawful per se.

24. Humphreys J. pointed out that by reference to the suggested entitlement to reopen issues, that he was being asked to revisit

decisions of three High Court colleagues, Murphy, Barrett and White JJ., as well as a decision of the Court of Appeal on appeal from Barrett J. The High Court judge then went on to refer to extracts from "*The Law of habeas corpus in Ireland"* by Kevin Costelloe and to the authorities there referred to, in support of the proposition that an applicant will not be permitted to challenge on a secondary application grounds which had previously been rejected in a previous hearing, citing *Re Charles Wilson (No. 1)* (unreported, Supreme Court, 11 July 1968) and *Junior v. Clifford* (unreported, High Court, 17 December 1993). Humphreys J. went on in the same context to refer to the decision of Hogan J. in *Joyce v. The Governor of the Dóchas Centre* [2012] 2 IR 666.

25. Having set out what he saw as the ground rules, Humphreys J. then addressed the criticisms that were advanced of the earlier decisions. He points out that so far as Murphy J. was concerned, the criticism against her is that she did not defer making the orders sought in the light of the constitutional action and also that counsel had gone through her judgment and had identified possible appeal points. He points out that the approach being taken would authorise a form of appeal to a judge of coordinate jurisdiction which he said was impermissible in our system. He says that this is doubly so when there is an EU obligation of expedition, and where the legislature has seen fit to restrict the right of appeal.

26. With those comments of the High Court judge I find myself in complete agreement. Indeed, I would add that having regard to our international obligations, and our obligations arising from our membership of the EU, the delays that have bedevilled this application are completely unacceptable. In that regard I should say that I do not at all accept that the delays that have occurred are attributable to the State's litigation strategy but rather it seems to me that the delays have to be laid firmly at the door of Mr Lanigan and the strategy that he has pursued.

27. The error attributable to Barrett J. was in deciding the merits of the first Art. 40 application when what was being sought on behalf of Mr Lanigan was that the inquiry should be deferred. He then pointed out that the decision of Barrett J. was the subject of an appeal to the Court of Appeal. Humphreys J. was entirely correct to take the view that the decision of the Court of Appeal was binding on him. Insofar as the present appeal in effect invites this Court to revisit the decision of a differently constituted Court of Appeal, I would decline to do so.

28. White J. is criticised for misunderstanding the applicant's case and then wrongfully concluding that the proceedings were bound to fail. Again, the difficulty about an appeal to a judge of the same jurisdiction arises.

29. The approach taken by Humphreys J. was one that might be categorised as indulgent, but tolerant, flexible and indulgent as he was undoubtedly was, he was nevertheless firm in rejecting the application. In my view he was perfectly correct to do so.

30. It seems that the intent to initiate serial proceedings and to reopen what had already been decided is prompted by the fact that it is well established that even where there has been an unsuccessful application for surrender, this does not necessarily preclude a further application. It is said that if regard is had to the concept of "equality of arms" that serial or multiple challenges to surrender should likewise be permitted. In my view this argument is quite misconceived. There is no reason why the requesting state or the Central Authority should not wish to put its best foot forward from day one. However, on the other side, there must be some temptation for an individual whose surrender is sought to postpone the evil day, whether by deliberately holding points back or by seeking to raise a point late in the day which did not seem to have been worth arguing the first time round.

31. I am also in complete agreement with Humphreys J. that EU law does not require a reinterpretation of the Constitution. The trial judge quotes counsel for Mr Lanigan as submitting that EU law incorporates ECHR and UN standards and so has priority over judicial interpretations of the Constitution and that the latter has to be adjusted to accommodate the former. In that regard the High Court judge commented:

> "At the level of high generality that is a fair point but at the level of detail, that proposition does not 'bite' in any meaningful way in the present case."

I would echo those observations and indeed I regard the contrary proposition to be unarguable.

32. In summary then I would uphold the decision of Humphreys J. to dismiss the Art. 40 application and would dismiss the appeal. I have already indicated that I would also uphold the decision of White J., so in the event I would dismiss both appeals. I would simply add that I do not regard a reference to the Court of Justice of the European Union which has been canvassed as appropriate or necessary in either case.