Neutral Citation Number: [2010] IEHC 301

THE HIGH COURT

2010 323 SS

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2° BUNREACHT NA HÉIREANN 1937

Between:

STEPHEN O'SULLIVAN

Applicant

-and-

THE CHIEF EXECUTIVE OF THE IRISH PRISON SERVICE,

IRELAND AND THE ATTORNEY GENERAL

Respondents

JUDGMENT of Justice William M. McKechnie delivered on the 25th May 2010:

1. This judgment is given in respect of an *habeas corpus* application moved under Article 40.4.2° of Bunreacht na hÉireann. In the broadest terms, the applicant challenges the lawfulness of an amendment to s. 16(12) of the European Arrest Warrant Act 2003 ("EAWA 2003"), as created by s. 12(f) of the Criminal Justice (Miscellaneous Provisions) Act 2009 ("CJ(MP)A 2009"), which permits an appeal to the Supreme Court, in respect of a s. 16 order, only if, in accordance with the amendment, the High Court so certifies. It is said that such restriction is unconstitutional, or contrary to the European Convention on Human Rights ("ECHR") and/or the EU Charter on Fundamental Rights ("CFR"), as being an unwarranted and unjustified interference with, *inter alia*, his right to appeal.

2. The background to this case is as follows. The applicant was tried before a judge and jury in Luton, England, between January 2009 and March 2009. Having previously attended the trial on all necessary occasions, he failed to appear on the 13th March 2009; the first day of the jury's deliberations. He was subsequently convicted in his absence on the 17th March 2009 and on the 24th April 2009 was sentenced to 6½ years imprisonment. His convictions relate to three categories of offence:

> i) Conspiracy to lend or to let be used certain documents, *inter alia*, in breach of s. 38(2) of the Goods Vehicles (Licensing of Operators) Act 1993;
>
> ii) Conspiracy to defraud at common law;
>
> iii) Money laundering, in particular concealing profits from the above offences.

After the conclusion of the sentencing process, the trial judge invited an application for an European arrest warrant ("EAW"), which was subsequently issued on the same day, the 24th April 2009, by a judge of the Magistrates' Court; he being a judicial authority for that purpose. Having been transmitted to this jurisdiction, the EAW was endorsed for execution on the 3rd July 2009 and the applicant was arrested in Bettystown, County Meath, on the 8th September 2009. He appeared in the High Court before Peart J. on the 28th October 2009 where bail was refused.

3. As the applicant did not consent to his surrender, proceedings continued under s. 16 EAWA 2003. On the 9th February 2010, Peart J. rejected his submissions and ordered his surrender to the requesting State. On the 23rd February 2010 the applicant applied under s. 16(12) EAWA 2003 for leave to appeal that order on a number of grounds; these will be set out in detail later in the judgment. The trial judge, Peart J., refused to so certify. Immediately after such refusal, these *habeas corpus* proceedings were commenced. The matter first appeared before me on the 11th March 2010, when it was deferred for the preparation of submissions and the exchange of materials. On a later date, a second bail application was also refused. The within hearing commenced on the 5th May 2010 and submissions were heard over the course of several days, ending on the 11th May 2010. It is in relation to this application that I now give judgment.

Submissions:

The Applicant:-

4. Before outlining these submissions, it is useful to set out the impugned provision. Section 16(12), as originally contained in the EAWA 2003, stated:

> *"An appeal against an order under this section or a decision not to make such an order may be brought in the Supreme Court on a point of law only."*

This was amended by s. 12 CJ(MP)A 2009 which states:

> *"Section 16 (as amended by section 76 of the Criminal Justice (Terrorist Offences) Act 2005) of the Act of 2003 is hereby amended—*
>
> *…*
>
> *(f) in subsection (12) by the substitution for 'on a point of law only.' of '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 is therefore the case that following the 2009 amendment, an appeal against a s. 16 order may only be brought where 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 the Supreme Court should decide the point. It is the applicant's case that the section as amended is unconstitutional and contrary to the ECHR and CFR.

5. The application to certify and the accompanying Notice of Appeal, to be used if successful, contained the matters in respect of which the certificate was sought. Whilst it is agreed that the Court can avoid discussion as to the merits of the application, and can forbear from considering the adequacy of the grounds so raised, nonetheless, for completeness the same should be recorded:

i) Specialty of Offences – the principle offence for which he was convicted is not in fact a crime in this jurisdiction;

ii) "Conspiracy" offences are not included under the EAWA 2003 – there can therefore be no legitimate surrender in relation to these offences;

iii) The conviction for laundering the proceeds of the conspiracy charge is contrary to the CFR as amounting to double punishment – thereby breaching the principle of *non bis in idem*;

iv) The failure of the State to make a Declaration under former-Article 35(2) of the Treaty on European Union ("TEU") allowing for preliminary reference to the Court of Justice ("CoJ") on matters relating to EAWs – thereby denying him a right of access.

6. The applicant contends, *inter alia*, that this amendment is unconstitutional or unconventional because:

i) The threshold is far too high for a case concerning personal liberty and extradition to a foreign State;

ii) There is unfair discrimination when this restriction is compared with many indigenous types of case that may freely be appealed, with the comparable process in being in other Member States regarding the EAW, and, even more so, with the right of appeal in extradition cases involving other comparable common law jurisdictions;

iii) The fact that the judge who makes the s. 16 order is generally, if not invariably, the judge who also makes the decision on whether to grant the appeal certificate, contravenes fundamental fair procedures; and,

iv) In the present instance, that unfairness is exacerbated by the fact that two major points in the applicant's case were not addressed at all or not properly addressed in the judgment of the 9th February 2010 – being those raised in relation to the money laundering conviction and the failure of the State to make a Declaration under the former-Article 35(2) TEU (hereon in an "Article 35(2) TEU Declaration" or "Declaration under Article 35(2) TEU").

7. The applicant originally also took issue with the lack of a specific saver in the section for challenges to the constitutionality of legislation. However, for reasons later explained, this matter is not at issue presently (see para. 64 *infra*.). A second point was also raised at the outset relating to the burden of proof. The applicant contends that, by reference to the nature of the proceedings, the onus rests on the State to show that his detention is lawful, which includes justifying any restriction upon his rights; in this case his right to appeal. If the State cannot defend the amendment to s. 16(12) he must succeed; the State having failed to satisfy the burden of proving that the detention is lawful. In the same breath, he calls for evidence to be adduced by the Minister as to why the particular subsection was adopted; no evidence of this nature has been tendered, and even if a consideration of Dáil debates was permissible the same, regretfully, would be unenlightening. In this regard he refers to Article 40.4.2° of the Constitution which states, *inter alia*, that:

"the High Court shall, upon the body of such person being produced before that Court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with the law."

Although accepting that there is a presumption of constitutionality, when it comes to matters of evidence where the Court has to choose between one set of facts and another, this provision clearly places an onus, at least as far as matters of fact are concerned, on the respondents. This onus has not been discharged.

8. The relevant constitutional and conventional provisions which the applicant seeks to rely upon are:

i) Bunreacht na hÉireann:-

Article 34.4.3°:

"The Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court."

Article 40.1:

"All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

Article 40.3:

"1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen. …"

ii) ECHR:-

Article 6(1):

"In the determination of civil rights…, everyone is entitled to a fair and public hearing … by an independent and impartial tribunal established by law."

Article 13:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Article 14:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

iii) CFR:-

Article 47:

"Right to an effective remedy and a fair trial.

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has a right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing … by an independent and impartial tribunal previously established by law. …"

9. With regards to his alleged right to appeal, the applicant accepts that he should not have an unrestricted right; in fact he has no complaint about the original sub-section (12) of s. 16, which permitted an appeal only on a point of law. However he argues that the way in which the right is now circumscribed is invalid. Features of this restriction are unconstitutional and unconventional. Firstly the threshold is too high; exceptional public importance is too high in a case involving personal liberty. It does not matter how weak or strong the appeal might be, the test has no bearing on the merits; instead it is based upon the impact on the general public. He contends that the current restrictions impact him because he has more than an arguable ground of appeal, and therefore would have a good chance of success. In particular he asserts that there were major legal points at issue in the refused certificate application. In addition to the matters listed at para. 5 *supra*. other questions arise such as:

i) Is the EAW system a system of extradition? If so should it be construed in light of previous extradition practice?

ii) What presumptions arise and how can they be dealt with in the context of specialty? The EAWA 2003 provides for a variety of presumptions in favour of the requesting authority, however it does not indicate what is needed to rebut these presumptions.

Thus, notwithstanding the substantial nature of these grounds of appeal, the same were still not sufficient to meet the threshold. It is therefore difficult, the applicant contends, to envisage how exceptionally public important an issue must be, in order to be certified.

10. He furthermore relies upon the fact, as alleged by him, that two matters were entirely omitted from the judgment of Peart J., or at most were obliquely dealt with; these were the money laundering point and the Article 35(2) TEU Declaration point. He should therefore, at a minimum, be entitled to a right to appeal where his arguments were not truly considered. In circumstances where he cannot appeal from these omissions, he is effectively being denied access to the Courts, in the sense that on those points no tribunal has given judgment either accepting or rejecting them. This is in breach of both the Constitution and European law; in the latter case in particular, the requirement of effective legal protection; Article 19.1 TEU stating:

"Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

11. The applicant accepts that Article 34.4.3° Bunreacht na hÉireann would appear *ex facie* against him; given that it provides for such exceptions and regulations as may be prescribed by law. However, in aid of interpreting this provision, he refers to two other Constitutions with provisions comparable to Article 34.4.3°, namely the US and Australian constitutions. Article III, § 2, clause 2 of the US Constitution states*, inter alia*, that "*the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make*." Considering, although not reciting, this article, the Supreme Court *In Re: The Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360 referred to a seminal US case in relation to the power of Congress to remove or limit the appellate jurisdiction of the Supreme Court: *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868). In particular where that Court stated;

"We are not at liberty to enquire into the motives of the legislature. We can only examine into its powers under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words." (reproduced in [2000] 2 IR 360 at 400)

In adopting this passage the Supreme Court noted:

"This aptly summarises the position under Article 34.4.3° of the Constitution. Since the legislature has an express power, to be exercised for policy reasons within its own area of discretion, the principle of proportionality has no application." (ibid. at 400)

The applicants answer to this is to say that *McCardle* no longer represents the law in the US. Particularly, it was delivered, in an historical context, immediately following the American Civil War and concerned reconstruction legislation; there was therefore very serious internal conflict in the US at the time. There has been significant legal debate on this case. It should be noted that it is not accepted in the US as authority for the proposition, that any kind of restriction or exception on the right of appeal to the Supreme

Court is acceptable; the legislature is not "at large".

12. The relevant provision of the Australian Constitution, Section 73, states, *inter alia*:

> *"The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders and sentences …"*

The applicant referred the Court to an extract from Blackshield and Williams, "*Australian Constitutional Law and Theory (4th Ed.)*", which states at pp. 587-588:

> *"All of the appellate jurisdiction conferred by s 73 is subject to such 'exceptions' and 'regulations' as the Parliament may prescribe. However, as to appeals from State Supreme Courts, the legislative power to prescribe exceptions or regulations is limited. As to any matter in which, in 1901, an appeal lay from a State Supreme Court to the Privy Council, no statutory enactment can prevent the High Court from hearing and determining such an appeal. …*
>
> *As to appeals in federal jurisdiction, the Parliament's power to prescribe 'exceptions' or 'regulations' has no such limits. … Thus, Commonwealth statutes may contain particular provisions excluding or limiting the possibility of appeal to the High Court, or allowing it only on specified conditions …."*

13. With regard to the *Illegal Immigrants (Trafficking) Bill* case, it is suggested that this is distinguishable because, firstly, the present case deals with European entitlements and procedures, and secondly, that legislative scheme involved a decision of an administrative tribunal prior to any hearing before the High Court; there may thus be a greater justification in that case for restricting the right of appeal.

14. On a more general front, the applicant advanced a couple of rationales behind the right to appeal. Firstly, to ensure a degree of fairness and to protect individuals from judicial error, howsoever caused; it is therefore a form of insurance against judicial mistake and is principally in aid of the litigant. Secondly, in systems with multiple judicial tears and where there are many individual courts, appeals ensure that there is consistency in the application of the law. Appeals are thus also in aid of the judicial system, providing uniformity and flexibility.

15. The discrimination argument was made by reference to diverse indigenous cases, to EAW cases in a number of Member States, and to extradition cases. For example in actions involving the Employment Appeals Tribunal ("EAT"), an applicant can go from the Rights Commissioner, to the EAT, to the Circuit Court, to the High Court, and to the Supreme Court; despite personal liberty not being at issue. In civil cases there is, in general, a right under the Courts (Supplemental Provisions) Act 1961 allowing for adjudications of the High Court to be appealed to the Supreme Court, unless there is an express stipulation to the contrary. Whilst acknowledging the existence of comparable provisions in respect of several other diverse matters, in *e.g.* The National Asset Management Agency Act 2009, the Planning and Development Acts 2000 – 2006 *etc*., none of these involve personal liberty. The only provision where such liberty is involved, which is comparable, is the Illegal Immigrants (Trafficking) Act 2000, but this contains provision for an automatic right of appeal where the case involves the constitutional validity of any law. However, should issue be found with s. 16(12) EAWA 2003, the immediate knock-on effect would, the applicant contends, be in relation to the "leave to land" provisions in s. 16(6) of the Immigration Act 2004, amending s. 5 of the Illegal Immigrants (Trafficking) Act 2000.

16. Reference is also made to the provisions of the Criminal Justice Mutual Assistance Act 2008. This legislation, *inter alia*, gives effect to EU Framework Decisions and Conventions in relation to the enforcement of confiscation orders within the EU. Section 31 of the Act *et sequens* set out the procedure for such confiscation and there is no reference whatsoever to a right of appeal; the normal rules therefore apply under s. 7 of the Courts (Supplemental Provisions) Act 1961 and the Constitution.

17. Further, when one compares the right of appeal from decisions relating to EAWs in other Member States it can be seen that Ireland is unique in having no right of appeal and in having not signed an Article 35(2) TEU Declaration. It is said that in England the position is that there is a right to appeal from the extradition EAW Court to the High Court, and thereafter if that Court or the Supreme Court gives leave, a further appeal is possible. In England therefore there are effectively three potential hearings and, in respect of the third, leave to appeal may be granted by either the High Court or the Supreme Court. The situation with regards to extradition in the US is also considered, but need not be opened; similarly with Australia and Canada. The applicant thus argues that importantly it is the appeal court that ultimately determines whether an applicant gets "*the second bite of the cherry*".

18. In other EU States there is a right of appeal in all countries using EAWs with two exceptions: Spain and the Netherlands; although both have signed the Article 35(2) Declaration. Thus whilst the individual is not entitled to appeal the decision, if any question arises as to the proper interpretation of the Framework Decision, it can be referred to the Court of Justice. The only other countries apart from Ireland which have not made Declarations are the UK and Denmark, but in both of those jurisdictions there is a right of appeal. However in Ireland neither an appeal nor a reference is available. Particularly, in light of the fact that in four years time, once the transitional provisions of the Lisbon Treaty have run (see in particular Protocol (No. 36) TFEU, Article 10 with regards to Article 35(2)), this reference jurisdiction will automatically come into operation, it is difficult to understand why the State has failed to make such Declaration. Indeed no explanation or justification has been offered for such failure. Since this is the only piece of legislation which implements European policy and law, under which no reference to the Court of Justice is possible, the reason therefor calls for explanation.

19. Even, however, if the State refuses to explain its failure, that should not insulate it from consequences under national law. In particular, the applicant claims that in circumstances where it is not possible to refer the matter to the Court of Justice, even in case of serious ambiguity in the Framework Decision grounding the EAWA 2003 and incorporated thereunder, any uncertainty should be construed in his favour. This follows because it would be within the power of the State to make the Declaration and so facilitate a reference to resolve such ambiguity. By not so doing, the State should not be able to benefit from a failure on its part, nor should the applicant suffer disadvantage because of it.

20. The third way in which it is alleged discrimination occurs is by reference to those extradited to friendly countries, such as the US, Australia, and Canada under the Extradition Acts 1965 – 2001. In the latter cases there is an automatic right to appeal to the Supreme Court on a point of law. Although the EAW system may be different, the question is whether the difference is sufficiently fundamental to matter in the circumstances.

21. Finally, the applicant claims that the way in which leave is applied for, breaches fair procedures and due process, since it is the Judge who determines the case, who also has the say as to whether or not there should be an appeal. This constitutes a breach of *audi alteram partem* and/or *nemo iudex in causa sua*; or more simply or accurately put – there is the appearance of bias or the

perception that the decision-maker is or can be protecting his own decision. The applicant admits that the section does not specifically designate, as the judge, the trial judge; however by reason of universal practice heretofore, this is the only judge who hears such an application. The test to be applied is that of the average person, reasonably knowledgeable about such matters; would such person feel that there is something wrong or inappropriate with the judge who decided the case being the one who determines whether there is an appeal or not, or put another way, could a reasonable observer objectively come to the view that the judge might find it difficult to maintain complete objectivity and impartiality? (see *Kenny v. Trinity College* [2007] IESC 42; *Orange Communications Ltd. v. Director of Telecoms (No. 2)* [2000] 4 IR 159)

The Respondents:-

22. The respondents' major and most significant argument rest on the decision of the Supreme Court in *In Re: Illegal Immigrants (Trafficking) Bill* [2000] 2 IR 360, and in particular the passages at p. 399 of the report, quoted *infra.* In essence, since the Constitution permits the Oireachtas, by law, to limit the appellate jurisdiction of the Supreme Court, it was, when so doing, implementing House policy. Unless, therefore, some constitutional defect exists in the exercise of this power, the same is beyond judicial reach.

23. Paraphrasing counsel's submissions in that reference, the Supreme Court noted at p. 399 of the report:

> *"However, counsel submitted that if an exception or a limitation is to be imposed on the appellate jurisdiction of the Supreme Court, the limitation must be objectively justified and reflect some significant or compelling State interest such as to warrant the interference with the constitutional right of access to the court. That justification, it is said, is absent in the present circumstances."*

The Court continued:

> *"As regards the constitutional right of access to the courts, it is sufficient to say in this context that such a right means the right to have all justiciable questions involving the administration of justice heard and determined by a court established by or in accordance with the Constitution. Questions as to the constitutional validity of any law apart, it does not require that in every case a party has the right to bring the issues on appeal to the Supreme Court. Furthermore, in providing that the appellate jurisdiction of the Supreme Court may be restricted or regulated by law, Article 34.4.3° does not impose any preconditions or qualifications on the right of legislature so to do, (apart from the saver referred to above). The Article in question, however, falls to be interpreted in the light of the objects and provisions of the Constitution as a whole and any such limitation would have to be consistent with them.*
>
> *In giving express power to the legislature to restrict the right of appeal from the High Court to the Supreme Court, Article 34.4.3° grants a wide power of discretion according to which such a restriction may be imposed for a range of policy reasons. This may include a desire on the part of the legislature that certain issues or matters which fall to be determined by the courts should be determined with finality at the stage of first instance. This might be particularly likely to arise in cases where administrative decisions have been heard and determined on their merits, not by a court but by duly authorised administrative bodies. In short, the constitutional provision allows the legislature in the exercise of its discretion to restrict appeals from the High Court to the Supreme Court and unless some constitutional defect is established as to the manner in which the legislature uses that power, it is not a matter for the courts to review the policy grounds upon which the legislature so decided."*

24. These passages are also relevant when dealing with the suggestion that the respondents should introduce evidence regarding the policy which might subtend or support s. 16(12) EAWA 2003; the Supreme Court has indicated that this is not a matter the courts need be concerned with. Thus it is the assessment of the Supreme Court that the words of the Constitution were clear: the power to restrict appeals is one confided in the control of the Oireachtas and, in those circumstances, the Court acknowledged that the Oireachtas is given a very wide measure of discretion.

25. The respondents point out that there is in fact legislation where no appeal lies at all from the High Court. For example the Freedom of Information Act 1997 provided at s. 42(8):

> *"The decision of the High Court on an appeal or reference under this section shall be final and conclusive."*

However this is no longer the law as the subsection was deleted by s. 27 of the Freedom of Information Act 2003. Reference was also made to the Garda (Compensation Act) 1941, which provides in s. 7(1)(f) that an application to the High Court under this Act:

> *"… shall be heard and determined by one judge of the High Court whose decision shall be final and unappealable, save as is otherwise provided by this Act …"*

That Act also contains section 9, which provides that:

> *"The judge hearing an application to the High Court for compensation under this Act may, if he so thinks proper on his own motion or at the request of the applicant or of the Minister for Finance, state a case for the opinion of the Supreme Court on any question of law arising during the hearing of such application."*

This latter section would therefore seem to grant an exceptional power to the High Court to state a point of law to the Supreme Court. Another piece of legislation was the Central Bank Act 1989 which provides at s. 86(6) that:

> *"An appeal against a decision of the Court under this section shall not lie to the Supreme Court."*

This relates to a refusal by the Central Bank to allow a proposed acquiring transaction under s. 85 of that Act.

26. There are also several pieces of legislation that have a similar or the same mechanism as s. 16(12) EAWA 2003, *inter alia*, the National Asset Management Agency Act 2009 (s. 194(1)), the Prisons Act 2007 (s. 27(5)), the Water Services Act 2007 (s. 92(10)), the Planning and Development Act 2000 (ss. 47A(2), 50A(3)), the Fisheries (Amendment) Act 2003 (s. 19(3)), the Official Languages Act 2003 (s. 28(3)), and the Commission to Inquire into Child Abuse Act 2000 (s. 26A(4)). It is asserted by the respondents that this type of legislative regime, effectively has a judicially supervised process of certification, whereby the person affected by this limitation, is a person who can bring his application, and have the specified criteria applied by a judge of the High Court; namely the

existence of a point of law of exceptional public importance and public interest. Moreover, these are matters which the Court can assess independently and decide in the context of a hearing in which the applicant is entitled to be represented and make his case. What amounts to a point which is of exceptional importance and in the public interest, was considered by McKechnie J. in *Kenny v. An Bord Pleanála (No. 2)* [2001] 1 IR 704 and by Clarke J. in *Arklow Holiday Ltd v. An Bord Pleanála* [2007] 4 IR 112, both cases in the context of the Planning and Development Acts.

27. This type of certification goes back at least to s. 29 of the Courts of Justice Act 1924 which regulates the capacity to bring a point from the Court of Criminal Appeal to the Supreme Court; there are numerous examples of successful applications in that regard where points of a wider nature were raised and where those points were ultimately considered by the Supreme Court. The standard is therefore not impossibly high.

28. In general, the only right of appeal recognised internationally is that stated in Article 2.1 of the Seventh Protocol of the ECHR which provides that:

> *"Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law."*

The respondents submit that it is well settled that neither surrender nor extradition proceedings are regarded as criminal trial proceedings. Neither of course are they civil; instead, the concept of surrender, is a unique statutory process which was enacted to give effect to international obligations which the State has taken on board in the context of the Framework Decision.

29. When looking at the Framework Decision one can see that it is wholly silent on the issue of appeals. Article 14 says:

> *"Where the arrested person does not consent to his or her surrender as referred to in Article 13, he or she shall be entitled to be heard by the executing judicial authority in accordance with the law of the executing Member State."*

Thus, far from elevating any right of appeal as a mater of judicial or legal philosophy, or political objective, to a great level of importance, the Framework Decision does not speak on the matter. It leaves to the Member State the execution of this particular obligation in relation to surrender, which is to be dealt with in accordance with the law of that Member State.

30. Thus, given the foregoing, the respondents contend that the Court must analyse the arguments of the applicant and decide whether the amendment represents a violation of a right vested in him, or in some way undermines the totality of the legal order upheld by the Constitution; is it effectively alien to or at variance with the fundamental principles enshrined in that legal order? In this particular case, s. 16(12) uses a form of language which the Supreme Court considered *In Re: The Illegal Immigrants (Trafficking) Bill*, and has been found to pass constitutional muster.

31. Responding to the discrimination argument, the respondents contend that the applicant's complaint in this regard is not well founded: s. 16(12) EAWA 2003 applies to the applicant, it applies to the respondents, it applies to persons of all nationalities who may be enjoined by this particular legislation. There is no limitation with regards to citizenship; it applies equally to Irish as well as foreign nationals. It is location driven, not nationality driven. There is no invidious discrimination. Ultimately it is directed towards the objective of facilitating a request made for the surrender of a person to face prosecution or serve a sentence in the requesting State. The fact that the requirements of the Framework Decision have been implemented differently in the various Member States is not evidence of discrimination. Article 14 thereof indicates that where the person does not consent to their surrender, the hearing and the process, is to be effectively conducted in accordance with the law of the executing Member State. Indeed, it is acknowledged by the applicant that in both Spain and the Netherlands there is no form of appeal; in both cases there is a judicial assessment and the decision is final. In Denmark and Germany where the decision to execute is taken by a non-judicial person, the appeal from that decision to a Court is regarded as being final. But regardless, the fact that there are different procedures in no way shows that the legislation is discriminatory.

32. With regards to the applicant's comparison of the right to appeal under the EAWA 2003 and that relating to extradition, the respondents note recital 5 of the Framework Decision which states:

> *"The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice."*

A radical change and departure from previous practice was therefore envisaged. Thus despite similarity of result, the two systems are materially different. Therefore it could not be said that the EAWA 2003 is discriminatory by not applying the same provisions as between persons being extradited and those being surrendered. There is nothing in the scheme of the Act which indicates that some form of invidious treatment of persons, who are otherwise in equal positions, is envisaged or provided for. Any comparison with other legislative schemes, for example involving the EAT or planning matters are simply not relevant. Persons covered by those acts cannot be said to be in an equivalent position to a person whose surrender is sought under the EAWA 2003.

33. When dealing with the burden of proof, the respondents contend that although it is accepted that there is an onus to prove that the applicant is lawfully detained, this has been done. He was validly arrested and detained in accordance with law; indeed the applicant would not seem to dispute that this is the case. Once the applicant can be shown to be lawfully detained, if he wishes to challenge the constitutionality of a provision, such will benefit from a presumption of constitutionality. The onus therefore falls upon the applicant to rebut that presumption and show that the section is unconstitutional.

34. The respondents emphasise that it is fundamental for this Court to remember that this is an application pursuant Article 40.4.2° of the Constitution. The critical issue for assessment is therefore the lawfulness of the applicant's detention. On his first appearance, the grounds of his detention were certified, and that certificate was lodged in Court. The certificate indicates that he is being held pursuant to a High Court committal warrant dated the 9th February 2010, and the certificate exhibits the relevant orders. The applicant acknowledges that those orders were made. The fundamental document that is being presented thus demonstrates on its face that the impugned detention is lawful. This applicant now seeks to urge the Court to accept that his constitutional challenge somehow vitiates, undermines and completely sets aside the legality of the committal warrant and makes his continued detention

unlawful and unconstitutional. This approach is misguided, since it is clear that the respondents can and have certified that a valid order was made by a court of competent jurisdiction.

35. When searching for reasons for the adoption of the section, the applicant, in vain, accessed the parliamentary debate: it offered no clue. However, if it did he would have wished to utilise it. The respondents strongly object to any consideration of such debates. They refer to the decision of the Supreme Court in *Controller of Patents, Design and Trademarks v. Ireland and the Attorney General* [2001] 4 IR 229 at 246 in this regard. It is therefore patently clear that the intention of the Oireachtas, or the debates or the methodology of the Oireachtas or its motives or reasons for the CJ(MP)A 2009, and its amendment to s. 16(12) EAWA 2003, is not a matter which the Court need enquire into; it is wholly irrelevant in determining the constitutionality or otherwise of that amendment. What the Court has to do is analyse the challenge made by the applicant and then decide whether that challenge is well founded. It is therefore clear that where a person challenges the constitutionality of an act of the Oireachtas the onus of proof on this issue must rest with the applicant.

Decision:

Onus of Proof:-
36. Before deciding on the more substantive parts of this application, the relevant onus and burden of proof must be looked at. As stated, the applicant contends that because this an *habeas corpus* application the onus lies on the respondents, whereas the respondents argue that in any challenge to the constitutionality of an Act of the Oireachtas, the burden is on the applicant to overcome the presumption of constitutionality, which such enjoys.

37. There is no question but that Article 40.4.2° requires that the State demonstrate the legality of the detention of any person held. If, having been given the opportunity, it is unable to so do, the High Court, subject to Article 40.4.3° must release the person. However, the requirement on the State is to show that the person is detained "*in accordance with law*". Once that is done, the State can properly be said to have satisfied the burden upon it. It is not necessary for the State to prove the constitutionality of the laws under which an applicant is detained; were this the case a person could merely plead unconstitutionality in an *habeas corpus* application and instantly, by that plea alone, overcome the presumption of constitutionality. This presumption, reflecting judicial respect for the legislature, serves a major role in the consideration of legislation. It ensures that the State is not overburdened with ethereal challenges to the constitutionality of Acts of the Oireachtas. The double construction rule also operates as a corollary of the presumption, so that where there is more than one interpretation of a piece of legislation, one constitutional the other not, the constitutional construction is to be preferred (*East Donegal Co-operative* [1970] IR 317 and *In Re the Adoption (No. 2) Bill, 1987* [1989] IR 656).

38. It therefore seems to me that once the respondents have shown that the detention of the applicant is in accordance with law, which they have so done and which is not disputed, their evidential burden does not require them to prove the constitutionality of the statute; such is presumed to be constitutional. If the applicant wishes to constitutionally challenge such Act he is undoubtedly entitled to so do, but he must carry the burden of proving that the legislation in question unduly infringes his rights. I am therefore satisfied that the onus rests on the applicant to overcome this presumption, which attaches to s. 16(12) EAWA 2003, and otherwise to prove that the section is unconstitutional.

39. The applicant originally contended that should he be successful in this application he must be released. In this regard he relied on the Supreme Court decision in *Adebayo v. Commissioner of An Garda Síochána* [2006] 2 IR 298 which he contended provides that the only order which the Court can make upon a successful *habeas corpus* application is one for release. However, he later relocated his position; instead arguing that should he be successful he is entitled to bail, in particular by reference to Article 40.4.3° of the Constitution which states that if the law is deemed invalid:

> *"… the High Court shall refer the question of the validity of such law to the Supreme Court by way of case stated and may, at the time of such reference or at any time thereafter, allow the said person to be at liberty on such bail and subject to such conditions as the High Court shall fix until the Supreme Court has determined the question so referred to it."*

The respondent notes the use of the word "*may*", and thus contends that any power to grant bail is discretionary at most. However, in light of the decision herein reached, I ultimately find it unnecessary to determine what, if any relief, the applicant would have been entitled to had he been successful. I therefore expressly reserve my view on this point.

The Article 35(2) TEU Declaration:-
40. The applicant has sought reasons as to why no Declaration has been made by the State under this Article, and has urged the Court, in any event, to draw negative inferences therefrom. There cannot be any question of this Court, even enquiring about the reasons for the State's decision not to make the Declaration under Article 35(2) TEU. To make such, or not, is solely and exclusively a matter for the Executive. As was noted by Kearns J., as he then was, in *Horgan v. An Taoiseach* [2003] 2 IR 468, when considering the legal position of Irish "neutrality":

> *"Article 15 provides that the sole and exclusive power of making laws for the State is vested in the Oireachtas, and that no other legislative authority has power to make laws for the State. Article 28 provides that the executive power of the State shall, subject to the provisions of the Constitution, be exercised by or on the authority of the government. Under 4.1 of that Article, the Government is responsible to Dáil Éireann. Article 29.5.1 provides that 'every international agreement to which the State becomes a party shall be laid before Dáil Éireann' and Section 6 of that Article provides 'no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.'*
>
> *These Articles demonstrate that the Government, and the Government alone, can exercise the executive power of government. Its freedom and discretion is limited only by those exceptions as provided for in the Constitution.*
>
> *The extent of restraints on Executive power, and the role of the courts in relation thereto, were comprehensively addressed by Walsh J. in the course of his judgment in Crotty v. An Taoiseach [1987] I.R. 713. [at pp. 777 – 778]"*

Although there can thus be no question but that the Executive was entitled not to make the Declaration, this Court, nonetheless must treat the situation as it is: it being undoubtedly true that if a Declaration under Article 35(2) TEU had been made a reference

would be possible, whereas in its absence it is not. Consequently, to that extent, it is relevant in the context of the judicial process as a whole.

Consideration of Dáil Debates:-

41. In relation to a consideration of Dáil debates in general, for the purposes of ascertaining the objectives of the legislation or interpreting provisions thereof, it has long been the case that such is impermissible. Such consideration would inevitably blur the lines between the role of the legislature in enacting laws, and the role of the judiciary in interpreting them (*Crilly v. Farrington* [2001] 3 IR 251). With regards to interpretation, Finlay C.J. in *Howard and Others v Commissioner of Public Works* [1994] 1 IR 101 stated at p. 140:

> *"I am satisfied that it would not be permissible to interpret a statute upon the basis of either speculation, or indeed, even of actual information obtained with regard to the belief of individuals who either drafted the Statute or took part as legislators in its enactment with regard to the question of the appropriate legal principles applicable to matters being dealt with in the statute."*

42. Similarly, but in the context of motives underscoring legislation, Keane C.J., in *Controller of Patent, Designs & Trademarks v. Ireland* [2001] 4 IR 229 at 246, noted:

> *"Either the Act as passed by the Oireachtas and as signed by the President is unconstitutional for the reasons being advanced by the plaintiff or it is not. What was said or may have been said or may have been written by the Minister to advisors, to Dáil deputies or senators as to what motives were prompting the initiation of the Bill could not in the slightest degree assist the plaintiff in his claim that the Act was unconstitutional. This court has recently said in Crilly v. T & J Farrington Ltd. [2001] 3 IR 251 that it will not even entertain the citation of passage from debates in the Oireachtas with a view to ascertaining what the intention of the Government or the executive was in introducing particular legislation. It would indeed be quite remarkable if, notwithstanding that decision, the court was possessed of some power to consider discussion and interviews, all part of the political process, which Ministers may have with Dáil deputies or senators before piloting legislation through either house of the Oireachtas. That, in my view, is a wholly unsustainable claim."*

43. The above situation seems clear; so also is the fact that the courts can have regard to the legislative history of any enactment for these purposes. Separately it should be noted that the Court may have regard to the *traveaux preparatoires* for international conventions, when legislation has given them the force of law in the State (*Bourke v. A.G.* [1972] IR 36). However, treaties have special rules of construction, recognised in international law by the Vienna Convention on the Law of Treaties (1969) (*Crilly v. Farrington* [2001] 3 IR 251 at 307).

44. In any event, as noted above, nothing of relevance could in fact be found in the Dáil debates regarding the subject amendment. My comments in relation to their admissibility are thus admittedly *obiter*. However, even if relevant commentary on the reasons for the amendment could be found in the debates I would be extremely reluctant to utilise any such comments in considering the constitutionality of a section. Either the section is constitutional or not, the debates ultimately can have no effect upon this by virtue of their indicating the intention of the Oireachtas in so legislating.

Interference with the Right to Appeal:-

45. The applicant contends that by virtue of the very high threshold required to be met for an appeal under s. 16(12) EAWA 2003, the section is an unconstitutional interference with his right to appeal. This he says is evidenced in his case by, *inter alia*, the numerous and substantive grounds of appeal which he advanced before Peart J., and the fact that two issues were not dealt with at all in the s. 16 judgment. In those circumstances, he claims, it is difficult to see how the threshold could be overcome; in fact it must be viewed as being virtually tantamount to a general ban on appeals. Before continuing, I should say that I have read the judgment of Peart J. and I am satisfied that he did address the two points on which issue was taken (para. 6 (iv) *supra.*). Whether as extensively as the applicant would like is not the point. What is, is the fact that he got a judicial determination on them. I therefore proceed on that basis, although my finding in this regard is neither determinative nor of particular significance to the application herein.

46. Firstly, I propose to give some consideration to the international jurisprudence in relation to constitutional restrictions on rights of appeal. The US, Canada and Australia all have written constitutions which contain a provision equivalent to Article 34.4.3°. Article III, § 2 cl. 2 of the US Constitution states:

> *"… the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."*

Tribe, "*American Constitutional Law, Vol. 1 (3rd Ed.)*" (2000), in an extract handed up to the Court, noted, that despite the Federal Courts upholding a number of jurisdictional regulations, e.g. the Portal-to-Portal Act 1947 (29 U.S.C. §§ 251-62), the Emergency Price Control Act 1942 (56 Stat. 23), Voting Rights Act 1965 (42 U.S.C. § 1973 et seq.), the Selective Training and Service Act 1940 (54 Stat. 885), the Antiterrorism and Effective Death Penalty Statute 1996 (Pub. L. No. 104-132, 110 Stat. 1217):

> *"[I]t would be a mistake to infer that there are no constitutional limits on congressional power to restrict federal judicial jurisdiction. … [F]ederal courts clearly have jurisdiction to determine whether such withdrawals comport with the commands of the Constitution." (pp. 271 – 272)*

He continues:

> *"The question of whether a federal court has jurisdiction to review the constitutionality of a congressional withdrawal of jurisdiction is distinct from the question of what limitations the Constitution in fact imposes upon such legislation. Plainly, the usual limitation of the Bill of Rights and of Article 1, § 9, apply: the paradigmatic example of an external constitutional limitation would be the undisputed prohibitions imposed by the Due Process and Free Speech Clauses on legislation that would, say, restrict access to the federal courts on the basis of a litigant's race, religion, gender or political affiliation or viewpoint. Moreover, law designed to hinder the exercise of constitutional rights are, to that degree, unconstitutional. Likewise, even those jurisdictional statutes which unintentionally burden the exercise of such rights warrant strict scrutiny…" (pp. 272 – 273)*

In Tribe's opinion "*the limitations imposed by Article III on the extent of permissible congressional jurisdictional regulation operate as a corollary of the separation of powers.*" (p. 274).

47. Another extract handed up was from Bator, Meltzer, Mishkin & Shapiro, "*The Federal Courts and the Federal System (3rd Ed.)*" (1988). It unnecessary to set out any of its contents, suffice to say that it enters into a detailed discussion of the Supreme Court decision in *McCardle,* 74 U.S. (7 Well.) 506 (1868) (see para. 11 *supra*.). It is clear that there is much debate as to the continuing extent and validity of that Court's approach to congressional jurisdictional regulation. Many commentators would seem to locate the decision very much in its historical context, and feel that the extent of its ruling was overstated. It could not, in their opinion, be the case that Congress was wholly free to prescribe restrictions on the court's appellate jurisdiction.

48. To a large extent I agree with the conclusion that *McCardle* is not a particularly safe precedent for this Court in deciding the issue at hand. It must be viewed in light of the significant political upheaval which followed the American Civil War; the country itself was hanging in the balance. This judgment was given only 3 years after the conclusion of the war. I would also fundamentally disagree, from first principles, with the ultimate conclusion in *McCardle.* There is no doubt in my mind that, had a similar case come before the courts of Ireland, it would have been struck down, in the same way as was the Sinn Fein Funds Act 1947 in *Buckley v. A.G.* [1950] IR 67, for retroactivity. Thus, to the extent that the case has any bearing it does so by virtue of its citation *In Re: The Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360 at 400.

49. In Australia the equivalent provision is found at s. 73 of the Australian Constitution (see para. 12 *supra*.). The extent to which derogations can be made from the jurisdiction of the High Court has been considered in a number of cases. Two cases are worthy of mention in this regard; *Cockle v. Isaksen* [1957] HCA 85; (1957) 99 CLR 155, and *Smith Kline & French Laboratories (Aust) Ltd v. Commonwealth* [1991] HCA 43; (1991) 173 CLR 194.

50. In *Cockle v. Isaksen* [1957] HCA 85; (1957) 99 CLR 155 the High Court considered the constitutionality of s. 113(3) of the Conciliation and Arbitration Acts 1903 – 1955, which provided that an appeal "*does not lie*" to the High Court from a judgment, decree, order or sentence from which an appeal may be brought to the Court under subs. (1) of that section. It is unnecessary, for our purposes, to detail the exact scope of this section, suffice to say that it removed appellate jurisdiction from the High Court, completely, in a specified category of cases. No appeal could be brought as of right or by way of special leave. Considering the concept of an exception under s. 73 of the Constitution, the Court stated that:

> *"An exception assumes a general rule or proposition and specifies a particular case or description of case which would be subsumed under the rule or proposition but which, because it possesses special features or characteristics, is to be excluded from the application of the rule or proposition. It is not a conception that can be defined in the abstract with exactness or applied with precision; it must depend very much upon context."*

The Court, *per* Dixon C.J. and McTiernan and Kitto JJ., considered the basis for operation of the impugned section. The court noted that the grounds of operation of the section related directly to the judgment "*as something either actually inherent in it or alleged by the appellant to be inherent in it*". Although its operation related to the judgment's legal, rather than operative, effect, this was not fatal to the section's constitutionality. Ultimately, the Court noted:

> *"It is enough to say that it fixes upon a description of judgment decree order or sentence of State courts exercising federal jurisdiction, it does not eat up or destroy the general rule laid down by the Constitution that appeals shall lie to this Court from judgments decrees orders and sentences of courts of a State exercising federal jurisdiction, and the description which it fixes, though it relates to the 'matter' involved in the appeal, goes to the basis or alleged basis of the judgment decree order or sentence and forms a ground of exception within the power of prescribing exception which the Parliament obtains under s. 73." (ibid. at para. 4)*

51. Williams J. summarised the position as he saw it:

> *"The validity of sub-s. (3) depends upon whether it is an 'exception' within the meaning of s. 73 of the Constitution."*

He noted that s. 73 also provides that no exception or regulation shall prevent the High Court from hearing appeals from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lay from such Supreme Court to the Queen in Council. He continued:

> *The words 'subject to such regulations as the Parliament prescribes' are not apt to deprive this Court of any jurisdiction to hear appeals from the judgments, decrees, orders and sentences mentioned in s. 73 but only to regulate the procedure by which such appeals may be brought to this Court. But the jurisdiction is also granted 'with such exceptions as the Parliament prescribes and an 'exception' in the words of Buckley J. in Savill Bros. Ltd. v. Bethell (1902) 2 Ch 523 'is taking out, a subtraction from, that which has previously been expressed to be granted of some part of the thing granted' (19020 2 Ch, at p. 532. It is a particular thing or things excepted out of the general thing granted." (para. 2)*

He ultimately found that although Parliament could no doubt regulate appeals in such a way that an appeal could no longer be brought as of right, for example by way of time limits, it could not destroy such appeals altogether (*ibid*. at paras. 3 – 4)

52. Webb J., reviewing the jurisprudence in relation to exceptions, took a stronger view of the Parliament's power to except jurisdiction under s. 73, "*the exceptions are not limited to judgments or orders according to their characteristics as distinct from their subject matter, but extend also to their subject matter."*

53. The second Australian case I would refer to is *Smith Kline & French Laboratories* [1991] HCA 43; (1991) 173 CLR 194. In that case the Court considered the constitutionality of s. 35(2) of the Judiciary Act 1903 and s. 33(3) of the Federal Court of Australia Act 1976, which provided that no appeal shall be brought to the High Court from a judgment of the Full Court of the Federal Court or a judgment of the Supreme Court of a State unless the High Court grants special leave to appeal. Interestingly, considering and rejecting the view that the High Court was established as an alternative court of appeal to the Privy Council, the Court outlined certain statements made during the Australasian Federal Convention Debates (1898), which attempted to explain s. 73 in historical context. The Court noted, per Mason C.J., and Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ., that:

> *"The concern of the delegates was not that the High Court might decline to hear appeals by refusing to grant leave or special leave in the exercise of power to do so conferred upon the Court by Parliament; the concern was that Parliament might itself by prescribing 'exceptions' directly exclude appeals."*

The Court considered whether the requirement of special leave was a restriction or exclusion of appellate jurisdiction. It stated at para. 27:

> *"Upon the Court's construction of s.73, a requirement of special leave came within 'regulation' and not 'exception' or 'prevention'. Indeed, in speaking of the earlier practice as to appeals to the Privy Council, their Honours said: [in Parkin and Cowper v. James (1905) 2 CLR 315], at p 333*
>
> *'In one sense, and we think the truer sense, every appeal lay as of right. In some cases it lay as of course upon compliance with conditions prescribed in advance by a general Order in Council, in others only on compliance with the condition of obtaining special leave. But every suitor was entitled as of right to ask the aid of the Sovereign in Council, which might be granted or withheld.'"*

54. From the above cases, in my opinion, a distinction might be drawn between exceptions, which exclude a particular group from the operation of a general rule, and regulations, which add additional requirements to the established rule. It would seem to me that there must be an inherent difference in the way the Court should approach the two. Regulations are a common part of the operation of the Courts and litigation, and a necessary part of facilitating different procedures for different types of case. On the other hand, exceptions remove matters completely from the normal rules. Such exceptions must, I feel, be more closely scrutinised in the context of the right to access, and whether they are a disproportionate or unconstitutional interference with that right. Nonetheless I would note that, in light of my findings herein, my comments in this regard are *obiter*.

55. In this jurisdiction, the right to appeal, similarly, is a right which is expressly exceptable and restrictable under the Constitution. It is clear that the Oireachtas may pass laws restricting such a right. The question must therefore be to what extent may that right be restricted? This issue was considered by the Supreme Court *In Re: Illegal Immigrants (Trafficking) Bill* [2000] 2 IR 360. The Supreme Court indicated, in the context of time limits, a form of regulation, rather than exception, that:

> *"As already mentioned, procedures of the courts may be regulated by law. It is a matter of policy and discretion for the legislature to choose the appropriate limitation period. The legislature is not obliged to choose the longest possible period that might be thought consistent with the policy objective concerned. However, in exercising that discretion the legislature must not undermine or compromise a substantive right guaranteed by the Constitution such as the right of access to the courts. Where a limitation period is so restrictive as to render access to the courts impossible or excessively difficult it may be considered unreasonable in the sense that Costello J. found the rigid rule in Brady v. Donegal County Council [1989] I.L.R.M. 282 to be unreasonable, and therefore unconstitutional." (ibid. at 393)*

56. As can be seen from this passage, the Supreme Court considered the right to appeal as part of the overall right of access to the courts. In that context it felt that:

> *"[S]uch a right means the right to have all justiciable questions involving the administration of justice heard and determined by a court established by or in accordance with the Constitution." (ibid. at 399)*

It did not require that parties have unfettered access to the Supreme Court in every case, nor did Article 34.4.3° impose any preconditions on the exercise of restrictions thereunder. Any restriction must be assessed "*in light of the objects and provisions of the Constitution as a whole*". However, in coming to these conclusions the Court noted that it was not for it to excogitate about the policy considerations for such a restriction.

57. Nonetheless, the brevity of the Supreme Court's description of the right is apt to mislead as to its prodigious importance. No governance based on the rule of law can exist without meaningful and purposeful access. It is clear from the *Illegal Immigrants* case that the right to appeal cannot be viewed in isolation. It should not be considered, from a constitutional point of view, as a stand-alone right *per se*. An appeal is part of the process of access to the Courts and therefore any regulation of, or restriction thereto, must be assessed in light of the overall procedures and safeguards which surround an applicant's access to the Courts in the particular case. Thus in coming to a conclusion on whether the restriction on the right to appeal in this case is constitutional, the statutory process under the EAWA 2003 must be considered as a whole. If the procedure *in toto* is such that it is so restrictive of that right of access that the same is rendered wholly illusory or ineffective, it could not be constitutional.

58. The statement of the Supreme Court that *"[s]ince the legislature has an express power, to be exercised for policy reasons within its own area of discretion, the principle of proportionality has no application*" applies to this case. Although the overall objectives and policies for the EAW regime are set out in the Framework Decision, the practical and administrative implementation is a matter for the Member States. The Oireachtas is afforded a wide degree of discretion in this implementation, and provided that the adopted measures do not negate the objectives of the Framework Decision there could be no complaint in this regard. Similarly so, this level of discretion also means that there may be many potential ways for a Member State to implement the Decision. Much of that implementation will therefore be based on policy *e.g.* with regards to time limits, the executing national judicial authority *etc.* That is not to say that any policy would be permissible. If the Framework Decision was implemented in such a way as to "*undermine or compromise a substantial right guaranteed by the Constitution*" (*e.g.* equality, right to bodily integrity, interference with property rights), the fact that it was ultimately a matter of policy would not insulate it; policy too must be constitutional. Nonetheless as an exercise of wide legislative discretion, which it undoubtedly is, proportionality can have little if any role where the provisions in question breach no substantive rights. The applicant essentially argues that the current regime compromises two substantive rights: his right of access to justice, and his right to equal treatment. These shall each now be considered.

59. In relation to the right of access, it should immediately be said that the amendment in dispute cannot be classified as an "exception" to appellate jurisdiction, as understood by reference to Article 34.4.3°. I would respectfully agree with the respective characterisations of exclusions and regulations in *Smith Kline & French Laboratories* (para. 52 *supra.*), and in particular the characterisation of a requirement of special leave as a regulation, rather than an exclusion. It does not remove an appeal, in all forms, from the Supreme Court; it regulates, by condition, the right of appeal.

60. The impugned threshold under s. 16(12) EAWA 2003 is that of "*exceptional public importance*" and "*in the public interest*". This threshold was considered by McKechnie J. in *Kenny v. An Bord Pleanála (No. 2)* [2001] 1 IR 704 and by Clarke J. in *Arklow Holiday Ltd v. An Bord Pleanála* [2007] 4 IR 112. In the latter, the learned judge said:

> *"In a number of decisions of this court the requirements of the section [s. 50(4)(f) of the Planning and Development Act 2000] have been analysed in some detail and it is clear that a number of tests must be met*
>
> *(i) There must be an uncertainty as to the law in respect of a point which has to be of exceptional importance; see for*

example Lancefort v. An Bord Pleanála [1998] 2 I.R. 511.

(ii) The importance of the point must be public in nature and must, therefore, transcend well beyond the individual facts and parties of a given case. Kenny v. An Bord Pleanála (No. 2) [2001] 2 I.R. 704. It is the case that every point of law arising in every case is a point of law of importance. Fallon v. An Bord Pleanala [1992] 2 I.R. 308. That, of itself, is insufficient for the point of law concerned to be properly described as of 'exceptional public importance'.

(iii) The requirement that the court be satisfied 'that it is desirable in the public interest that an appeal should be taken to the Supreme Court' is a separate and independent requirement from the requirement that the point of law be one of exceptional public importance. See Kenny (No. 2). On that basis, even if it can be argued that the law in a particular area is uncertain, the court may not, on the basis, inter alia, of time or costs, consider that it is appropriate to certify the case for the Supreme Court. Arklow Holidays Limited v. Wicklow County Council and Others (Unreported, High Court, Murphy J., 4th February, 2004)." (ibid. at 115)

61. It is thus clear from the above decisions that this is a substantial threshold. However it is not of course insurmountable; as evidenced by the fact that Clarke J. ultimately allowed a certificate of appeal in *Arklow Holiday Ltd v. An Bord Pleanála* [2008] IEHC 2, notwithstanding having decided previously (*Arklow Holiday Ltd v. An Bord Pleanála* [2007] 4 IR 112) that despite raising a point of law of exceptional public importance, it would not have been in the public interest to grant the certificate.

62. In the case at hand a number of points must be borne in mind when considering the alleged infringement. It must be remembered that surrender proceedings are not determinative of guilt or innocence – that is a matter for the requesting State. The High Court in this jurisdiction, as executing authority, ensures compliance in respect of that part of the process, which it has authority over. This includes being satisfied that the documentation is Framework-compliant, and that the established safeguards have or can be met. When this jurisdiction is performed it must surrender the person (s. 10); it has no discretion in this matter. The rationale for this comes directly from the Framework Decision and is based on mutual co-operation and trust between the judiciary of the Member States. It must be presumed that once surrendered a detainee will be accorded the protection of his substantive rights in a manner equivalent or similar to that in this jurisdiction. Nonetheless, this is a presumption, and if an applicant can show that, should he be surrendered, certain of his rights will be infringed, this may prevent his surrender (s. 37 EAWA 2003). At the s. 16 hearing, the applicant is entitled to be heard before the Court with the aid of counsel, should such be desired, and he is given the fullest opportunity to challenge the EAW and his surrender thereunder. This has successfully been done in many cases. It should also be noted that, although there is potentially only one hearing, it is before the High Court. Previously matters relating to extradition would have been dealt with by the District Court initially. A hearing before the High Court therefore shows the serious and substantial nature of proceedings under s. 16 EAWA 2003, and a desire by the legislature that they be dealt with in a weighty and authoritative manner.

63. Undoubtedly it must be acknowledged that when considering the statutory regime in this case there are some distinguishing features between it and the *Illegal Immigrants (Trafficking) Bill*. For example, there is no non-judicial administrative body from whose decision an appeal may be brought before the High Court. In this case the High Court is the first body, judicial or otherwise, to consider the matter. Further, the EAWA 2003, as noted, implements European legislation. However, as stated little turns on that fact in this case.

64. It should also be noted that notwithstanding the express wording of s. 16(12), even in the absence of a certificate, judicial challenge may still be brought by an applicant. Sections 15 and 16 EAWA 2003 contain an explicit requirement that a party against whom surrender has been ordered must be informed of their right to bring proceedings under Article 40.4.2° of the Constitution; indeed that is what has happened in this case. Whilst such an action is pending surrender may not be made (ss. 15(6) and 16(6)).

65. The other circumstance where an appeal may be allowed without certificate would be where the matter involved the constitutionality of, in this case, the EAWA 2003, or amending legislation. The applicant originally contended that the failure of s. 16(12) to contain a saver for challenges to the constitutionality of such Act also rendered that section invalid. However, since he did not raise any constitutional issue in his s. 16 application, his argument in this regard would be a *ius tertii*; a point he ultimately admitted when abandoning this submission. In any event, I would note that any statutory restriction or regulation of appellate jurisdiction is subject to Article 34.4.4°:

"No law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases which involve questions as to the validity of any law having regard to the provisions of this Constitution."

Whilst section 16 has no saver, neither does it seek to disallow an appeal. It must therefore be presumed that, absent any express words seeking to remove such jurisdiction, such was not intended. If such words were inserted, they would have to be struck down. In my view the prohibition of Article 34.4.4° must be read into all legislation, so that there is in reality no question of the appellate jurisdiction of the Supreme Court, concerning the constitutionality of, in this case, the EAWA 2003 or amending legislation, being ousted by s. 16 or any section of that Act. I would therefore be of the opinion that, if the constitutionality of an Act legitimately arose in the course of a s. 16 application, no certificate would be needed to appeal such to the Supreme Court. However, given the nature of a s. 16 application, the circumstances in which this might arise would, to my mind, be limited and rare. Finally, I would note that if this be a correct view of Article 34.4.4°, it is unclear why a saver provision in that regard is ever present in most legislation.

66. Nonetheless, considering the EAW 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 safegaurds 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.

Discrimination:-
67. It should be noted at the outset that I can see no invidious discrimination between the applicant and any other individual by virtue of s. 16(12) EAWA 2003. It applies equally to both parties, and is not based on nationality or race, or any other classical ground of discrimination. Nonetheless, the applicant alleges that the procedure adopted in relation to appeals under s. 16 EAWA 2003 discriminates against him when compared to:

i) extradition;

ii) other national legislative schemes; and,

iii) other Member States' implementing measures.

The latter point is particularly so when considered in light of the State's failure to make a Declaration under Article 35(2) TEU, thus excluding any reference to the Court of Justice for a preliminary ruling.

68. In order for the legislation to be considered discriminatory, it is clear that such must treat the applicant less favourably than another person in a suitably similar position, without justification (see *e.g. In Re: The Employment Equality Bill, 1996* [1997] 2 IR 321). It must therefore be the case that the applicant must initially show that he is in the same position as some other person who is treated more favourably.

69. Firstly, dealing with extradition: the applicant claims that he is being treated less favourably in his surrender to the UK than he would be, was he being extradited to a non-EU country, for example the US or Australia. There is no doubt but that he is being treated differently: to test for discrimination however one must consider the differences between extradition and surrender.

70. Despite superficial similarities between extradition and surrender, namely that both can result in the forcible departure, by compulsion of law, of a person from this State, the EAW regime must be considered as a regime different, separate and distinct from extradition. The principles upon which each rests are materially different: one driven by executive motivation, the other by mutual judicial trust and respect. The EAW regime was developed to solve many notable and renowned problems, which developed with the extradition system which existed previously. The former regime, and indeed the one which still regulates our relationship with the vast majority of States worldwide, was technical, slow, and lacked reciprocal judicial trust and respect. Without the latter it is incumbent on both the State and its Courts to apply a heightened level of scrutiny in relation to those being extradited; many of the world's legal systems do not uphold the same principles or rule of law or democracy which we enjoy here, the risk of wrongful conviction or *mala fides* prosecution are therefore much greater outside of the EU. Even with our more developed neighbours, procedural safeguards and concepts of justice and punishment may be at significant variance with our own. A more thorough investigative procedure is therefore both justified and required, so as to safeguard the rights of those whose extradition is sought.

71. In relation to the system of EAWs and surrender, the relevant legislative provisions stem from the Council's Framework Decision 'of the 13th June 2002, on the European arrest warrant and the surrender procedures between Member States'. As stated in the preamble to the Decision, the new system was intended to repeal in its entirely, and replace with a new system, the old regime of extradition between the Member States:

> *"[T]he introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures."*

The aims and objectives of that Decision can further be seen from its recitals. These involve and/or include the following:-

(i) The existing multilateral extradition arrangements between Member States are to be replaced by a system of surrender between judicial authorities: this, unlike the existing regime, should be simple, speedy and effective. It is based on the free movement of judicial decisions in criminal matters and applies to all persons wanted in connection with criminal charges, or to serve the whole or the residue of an imposed sentence.

(ii) Such arrangements are based on and implement the principle of mutual recognition which is the cornerstone of judicial co-operation.

(iii)The mechanism to achieve this is the European arrest warrant which is also based on a high level of confidence between Member States. And,

(iv)Fundamental rights must be respected as well as the constitutional rules of Member States.

72. When this model of co-operation was introduced in January 2004, it heralded a completely new regime. As stated, the surrender system was designed to overcome two principal issues which had arisen, and continue to arise, in the context of extradition proceedings; namely complexity of procedure and delay. It forms part of the greater co-operation between Member States in the field of judicial co-operation and the enforcement of criminal matters across the Union. It is posited on concepts of mutual recognition and respect for the legal systems of other Member States (see *Minister for Justice, Equality and Law Reform -v- Altaravicius* [2006] IESC 23). Nonetheless it contains safeguards to ensure, *inter alia*, that a person will not be surrendered to a State where they are likely to have their constitutional rights infringed.

73. The EAW regime and the Framework Decision upon which it is based are the result of ever-increasing cooperation in criminal and judicial matters, particularly with regards to extradition, since the 1970s, within the Union, which was necessitated by the opening up of the free market (for a succinct synopsis see Blekxtoon & van Ballegooij, *"Handbook on the European Arrest Warrant"* (2005), Ch. 2). This has meant the removal of a number of traditional exceptions for extradition, for example with regards to the political offence exception and the non-extradition of nationals. The Commission noted in its proposal for the Framework Decision, COM (2001) 522, p. 26:

> *"Since the European arrest warrant is based on the idea of citizenship of the Union as provided in Articles 17 to 22 TCE, the exception for a country's nationals, which existed under traditional extradition arrangements, should not apply within the Common Area of Freedom, Security and Justice. A Citizen of the Union should face being prosecuted and sentenced wherever he or she has committed an offence within the territory of the European Union, irrespective of his or her*

nationality."

74. Therefore it cannot be accurate to assimilate, ideologically or practically, the case law or mind-set of extradition into those of *intra*-Union surrender: *Minister for Justice, Equality and Law Reform v. Altaravicius* [2006] 3 IR 148 and *Minister for Justice, Equality and Law Reform v. Stapleton* [2008] 1 IR 669 are ample support for this conclusion. I am satisfied that this represents an entirely new system. Surrender is not extradition. There is no hearing into the merits of the prosecution, pending or anticipated in the requesting jurisdiction; nor should there be; and the Executive no longer has a role. There is a special relationship between the Member States of the Union. By virtue of this unity there is increased judicial co-operation between Members. However there is necessarily a great level of trust that the other Member State will act in accordance with the highest and fundamental principles of the Union; namely rule of law, peace, freedom and democracy. Nonetheless, there may be circumstances where certain Member States may be lacking in this regard. It is for this reason that procedural safeguards are placed within the Framework Decision.

75. The movement of persons accused or convicted of crimes in another Member State of the Union is fundamentally different from the movement of such a person to a non-Member State. Surrender within the Union must be seen as more akin to the transfer of persons from one federal jurisdiction to another within a federal state, rather than between independent states. There is a significant level of integration and reciprocity within the Union. How could an area of freedom and security be maintained if national measures imposed serious restriction on the surrender of suspects or convicts from one Member State to another? The criminal would merely move to another Member State; as indeed many Irish criminals did in the 1980s and 1990s. With citizenship of the Union there comes both benefits and obligations. Those who use the freedoms afforded to move between the States of the Union, should not be surprised if, when they commit a crime in another State, they are easily and swiftly returned there to face charges. As stated, such is a necessary corollary of the creation of an area of freedom and security.

76. In my opinion therefore there is a fundamental difference in the nature of proceedings for surrender and those for extradition. They are founded upon very different relationships between the States in question. Persons being extradited are therefore in a different situation to those being surrendered. It is therefore not the case that there is discrimination between persons in a similar position, and in any event I am satisfied that any differences which do exist between the two systems are entirely justified given the ultimate objectives of the EAW scheme under the Framework Decision.

77. With regards to allegations that the applicant is being discriminated against by virtue of being treated less favourably in relation to his right to appeal, when compared to the right to appeal under other legislation, I am again satisfied that those considered under the other legislation are in a different position to a person being surrendered. The Oireachtas is entitled to introduce differing procedural legislative schemes to deal with different areas of law and litigation. When deciding the procedural regime for one area of litigation, it need not take into account how it has dealt with such in other areas; they are different. I therefore can see no legitimate basis for a complaint of discrimination in this regard.

78. With regards to the implementing measures adopted in other Member States it could not be the case that a person in one Member State could complain that he is being discriminated against by virtue of differing procedural rules or regulations in another. As with much European legislation, a level of discretion is left to the Member States in relation to how they attain the objectives of the legislation in question. Provided that these objectives are properly implemented there can be no complaint that a measure was more favourably adopted in another Member State. In any event it must be borne in mind that procedural laws are, in general, peculiar to each Member State. There are significant differences between the organisation of the Courts in this jurisdiction and others in the Union. There are also differences in how Courts may approach matters; particularly considering differences between the adversarial system in this jurisdiction, and the inquisitorial one in most other Member States. It would almost certainly be impossible to craft procedural regulations which would happily fit into all Member States' systems; that is indeed why these matters are left up to Member States to properly outline. Furthermore, Member States will naturally be in a better position than the EU to implement those procedural regulations, having regard to the nuances of their national systems and constitutional requirements.

79. I am therefore satisfied that the fact that the right to appeal to the Supreme Court is limited in a different way to other Member States in its implementation of the Framework Decision is not sufficient to ground a complaint of discrimination.

80. The applicant finally drew attention to the fact that the State has failed to make any Declaration under Article 35(2) allowing preliminary references to the Court of Justice: this putting him in a worse position when compared to persons in other Member States (see para 40 *supra*). I am again satisfied that the applicant can have no legitimate complaint in this regard. The making of such a Declaration is a function purely for each Member State. Where specific provision is made for the opting out of certain provisions there can be no complaint where the State chooses to so do. If the provision was meant to be compulsory it would have stated so. To hold as a form of discrimination the fact that a Member State had not made a voluntary Declaration would wholly undermine its voluntary nature. This fact cannot therefore be said to assist the applicant in this regard. In any event, as stated, the Court has no role in investigating why no Declaration has been made, nor has it a role in commenting thereupon. I would note, however, that I have considered it as part of the overall statutory regime and whether the applicant's right of access to the Courts has been infringed, but am satisfied that it has little or no bearing on my findings in this regard.

81. I am therefore satisfied that s. 16(12) EAWA 2003 does not discriminate in the way as alleged by the applicant, or at all.

Bias:-

82. The applicant alleges that s. 16(12) gives rise to a form of objective bias because it is likely that the same judge who hears the main s. 16 application will also determine whether to grant a certificate allowing an appeal. He claims that this breaches principles of fairness and the rules of *audi alteram partem* and *nemo iudex in causa sua*. I must state at the outset that the section itself is silent on the question of which judge should hear the certificate application. Bearing this in mind and also the presumption of constitutionality, even if it could be said that it was inherently biased for the same judge to determine the certificate application as decided the s. 16 application, this finding could not invalidate the legislation; it would merely require an alteration in the ordinary practice currently associated with the regime. There can thus be no question of the section being invalid on this ground. I therefore proceed to consider whether, in the circumstances of this case, there could be said to be objective bias.

83. The general position in relation to objective bias has been considered in a number of cases and is well-settled (see *e.g. R v. Sussex Justices ex parte McCarthy* [1924] 1 KB 256; *Dublin Wellwoman Centre Ltd v. Ireland* [1995] 1 ILRM 408; *O'Neill v. Beaumont Hospital Board* [1990] ILRM 419; *O'Reilly v. Judge Cassidy (No. 2)* [1995] 1 ILR 311*; Bane v. Garda Representative Association* [1997] 2 IR 449; *Radio One Limerick v. Independent Radio and Television* [1997] 2 IR 291; *Orange Communications Ltd v. Director of Telecommunications Regulation* [2000] IESC 22; *Bula Ltd (In Receivership) v. Tara Mines Ltd (No. 6)* [2000] 4 IR 412; *Rooney v. Minister for Agriculture* [2001] 2 ILRM 37; *D.D. v District Judge Conal Gibbons* [2006] 3 IR 17; *Kenny v. Trinity College and Dublin City*

Council [2007] IESC 42). From these it can be seen that the general test is that objective bias will arise where a decision is such that it will give rise to a reasonable apprehension of bias or the perception of bias in the mind of a reasonably informed person. Addressing the qualities of the "reasonable man", Fennelly J. stated in *Kenny v. Trinity College and Dublin City Council* [2007] IESC 42 as follows:

> *"The hypothetical reasonable person is an independent observer, who is not over-sensitive, and who has knowledge of the facts. He would know both those which tended in favour and against the possible apprehension of a risk of bias. […] [T]he hypothetical independent reasonable observer would also know the substance and tenor of the allegation made in the proceedings."*

84. The decision of Hedigan J. in *E.P.I. v. Minister for Justice, Equality and Law Reform* (Unrep., High Court, 16th December 2008) was referred to. In that case the judge recused himself from a decision on a substantive judicial review hearing after he had made remarks during an earlier interlocutory application for an injunction: to the effect that a fair question had not been raised. In his opinion the question which he had to ask himself was whether:

> *"objective bias would arise where a person in the position of the applicants, being reasonable persons and knowing the facts surrounding this Court's involvement in the interlocutory application in the within proceedings, might reasonably doubt that they would have a fair and independent hearing of the substantive question at issue by reason of the views expressed by this Court in its decision …"*

Although in general the Court has a duty to hear a case (*Bula Ltd (In Receivership) v. Tara Mines Ltd (No. 6)* [2000] 4 IR 412), nevertheless, as was held by Keane C.J. in *Rooney v. Minister for Agriculture* [2001] 2 ILRM 37, the "*established and prudent practice*" is for a judge to disqualify himself if he has any reservations about the matter. Hedigan J. noted that:

> *"Judges are obliged on occasion to judge cases in which they have heard applications on an interlocutory basis and there can be no objection in principle to their doing so. Indeed, in many cases, having heard a case on an interlocutory basis, it may well be appropriate that that same judge who will have become familiar with the facts and the legal issues arising in such application should hear the substantive case when it comes on for hearing."*

In that case he had been obliged, in accordance with the requirements of *Campus Oil Ltd v. Minister for Industry and Energy & Ors (No. 2)* [1983] 1 IR 88, to determine at the interlocutory stage whether or not there was a fair question to be tried at the substantive stage. He considered that:

> *"I am confident that I would be able to fairly and impartially hear further argument on the grounds sought to be advanced by the applicant at the substantive stage and come to a different conclusion to that reached at the interlocutory stage were the case sufficiently convincing."*

He was therefore satisfied that there was no question of subjective bias on his part. However, he went on to consider the objective bias test and came to the conclusion that in the circumstances of the case there was "*a substantial basis for a reasonable perception that the grounds upon which the applicant brings her case have already been adjudicated by the Judge who is to hear the substantive action*". He therefore recussed himself.

85. This case however should not be taken as any support for the general proposition that a judge, who hears an interlocutory or previous application in the same case, may not hear the substantive or future action. In *E.P.I.* it was of importance that the judge had expressed opinion as to the strength of the applicant's case; if he had not, no issue could possible arise. In any event, I feel that the decision turned on its own fact, and it may be seen as a case where, if anything, the judge erred on the side of caution.

86. Two fundamental differences must be kept in mind between that case and the present one. Firstly, it is not in dispute that at no point prior to this *habeas corpus* application was any issue raised in relation to the trial judge hearing the certificate application. This is important as it goes towards indicating that there was nothing so objectionable in this course of action as to draw immediate criticism from the applicant. It is therefore more difficult for him to sustain such objection at this later stage.

87. Nonetheless, putting that aside, it must be borne in mind that the issues called for decision were of a fundamentally different nature as between the s. 16 application and the appeal application. In the latter circumstance, he was being asked the objective question of whether the judgment gave rise to "*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 must be made clear that he was not being called upon to make any further determination of the strength of the applicant's case, nor was he being called upon to re-affirm the correctness of otherwise of his earlier decision. The question which he faced, realistically, was whether there would be a public benefit in allowing an appeal to the Supreme Court so that a point of law may be settled and/or clarified by that Court. The judge will have no interest in whether his decision would be successfully appealed; indeed even if he has suspicions, one way or the other, he may feel it desirable or necessary to resolve some ambiguity within it.. I therefore have no doubt but that a judge is capable of coming to a decision thereupon in an impartial manner. These are matters that any reasonable person under the established test would be presumed to know.

88. Given that the reasonable person would know that the judge in this case is being asked a fundamentally different question and has no interest in the outcome of the appeal, I cannot see that it would give rise to a reasonable apprehension of bias. The decision of Hedigan J. in *E.P.I.* is clearly distinguishable since in that case the learned judge had effectively expressed an opinion in the interlocutory application as to the strength of the applicant's case. The applicant would therefore, at the full hearing, have to put forward his case in the knowledge that the judge had certain reservations as to the strength thereof. This is not the case presently. I am therefore satisfied that there could be no reasonable apprehension of bias on the part of Peart J., nor was there anything improper in him hearing the application for a certificate to appeal. Furthermore, as stated, in circumstances where the legislation is silent as to which judge should hear the matter, it could not be read into the section that this was a requirement. In fact I could see no impediment, if proper objection was taken, in another judge hearing the application. Although inconvenient, some rare and unusual circumstances, may call for this. In any event, to finish on the point, it would not be possible to strike down the section on this ground even if I was satisfied that there might be a reasonable apprehension of bias from the trial judge also being the certificate judge.

The ECHR and CFR:

89. Argument was also put forth by the applicant alleging that, in the alternative, s. 16(12) EAWA 2003, as amended, was in breach of several articles of the ECHR and CFR (see para. 8 *supra*.). I am satisfied that the provisions of both the Convention and Charter

require in essence:

i) A fair and public hearing;

ii) An independent tribunal;

iii) An effective remedy.

Additionally, under Article 14 of the ECHR, rights are to be ensured without discrimination.

90. The first two requirements, a fair and public hearing and an independent tribunal, can both be seen to relate to apprehensions of bias, both systemic and actual. As with such considerations under Bunreacht na hÉireann, I am satisfied that s. 16(12) does not give rise to any objective bias. In this regard I would refer to my reasoning above, and need not reiterate such; similarly in relation to any allegations of discrimination. I am thus satisfied that neither the ECHR nor CFR are breached in these regards.

91. The further requirement that there be an effective remedy can be seen as an extension to the right of access. As stated, it is fundamental to governance based on the rule of law that access to the courts be both meaningful and purposeful. For such right to have any substance this must of course include the potential for an effective remedy. As noted, the threshold of "*exceptional public importance … in the public interest*" is not insurmountable. There have been several cases where this standard has been met. In this regard it could therefore not be said that the threshold excludes an effective remedy in such a way as to breach either the ECHR or CFR. Furthermore, it is clear that notwithstanding the possibility of an appeal, s. 16 itself is an effective remedy which an applicant may use to vindicate his rights. Again, there have been many cases in which persons have successfully challenged an EAW seeking their surrender.

92. I am thus satisfied that s. 16(12) EAWA 2003, as amended, does not breach Articles 6(1), 13 and 14 of the ECHR, or Article 47 of the CFR. It provides an effective remedy both at the s. 16 hearing, and at the leave to appeal stage. The impugned section also neither discriminates, nor gives rise to any apprehension of bias, for the same reasons set out in relation to the relevant articles of Bunreacht na hÉireann.

Conclusion:
90. I am thus satisfied that s. 16(12) is constitutional and in compliance with the CFR and ECHR. I would thus dismiss the applicant's habeas corpus application.