Neutral Citation Number: [2010] IEHC 197

THE HIGH COURT

2009 186 MCA

Between:

Liam Campbell

Applicant

And

The Minister for Justice, Equality and Law Reform

Respondent

And

The Information Commissioner

Notice Party

THE HIGH COURT

2009 192 MCA

Between:

Brendan McGuigan

Applicant

And

The Minister for Justice, Equality and Law Reform

Respondent

And

The Information Commissioner

Notice Party

Judgment of Mr Justice Michael Peart delivered on the 14th day of January 2010:

Each applicant in the above entitled proceedings seeks an order from this Court setting aside a Ministerial Certificate issued by the respondent pursuant to Section 25 of the Freedom of Information Act, 1997-2003 ("FOI"), by which the Minister has certified that the records sought in the Requests are exempt from the obligation to provide access to them, for the reasons stated therein.

Section 42 FOI entitles a requester or other affected person to appeal to the High Court on a point of law against the issue of a s. 25 Certificate.

The same issues arise in each application and the legal submissions are common to both, though the factual background to each application is different in some respects. In setting out the factual backgrounds, I will deal with each applicant separately.

Liam Campbell:

This applicant was arrested here on the 20th January 2009 on foot of a European arrest warrant which issued in Lithuania and which sought his surrender so that he could face prosecution there for three offences as set forth in detail in that warrant. It is unnecessary to set out these alleged offences in the same detail as they are set forth in the warrant. Briefly stated they involve allegations that in 2006/2007 he, while acting in an organised group, made arrangements in this State for the acquisition of illegal firearms, ammunition and explosives in Lithuania, and made arrangements for the smuggling of such material to this State, and by doing so he provided support for a terrorist group, namely the 'Real IRA'. The details in the warrant go on to state that he failed to complete these offences since he was detained by Lithuanian law enforcement officers.

Following his said arrest on foot of this European arrest warrant here, the applicant was granted bail on certain conditions, and he took up that bail pending the hearing of the application for his surrender. However, before that hearing could take place the applicant was arrested in Northern Ireland on foot of an identical European arrest warrant which had been transmitted to that jurisdiction by the Lithuanian authority. The circumstances in which that occurred do not matter for the purpose of the present application. But it is a fact that he was arrested there, and that the warrant here has been withdrawn in view of the fact that the application for surrender is now one being dealt with by the Court in Northern Ireland where he is held in custody pending that hearing.

Prior to the withdrawal of the warrant here, and after his arrest in Northern Ireland, he had filed Points of Objection to his surrender, which raise a large number of issues, some of which are relevant to the present application.

At the outset it is stated that the warrant was issued not for the purpose of a prosecution, but rather "*for the purpose of his detention, questioning and other related investigative steps prior to his possible prosecution for the alleged offences set out in the European arrest warrant*".

At paragraph 8 it is stated:

> *"8. It is the intention of the requesting state to prosecute the Respondent largely on foot of the evidence of an agent or agent provocateur of the United Kingdom's military intelligence service, MI5, namely one Michael Jordani. The evidence which will be adduced as against the Respondent will in large part derive from an unauthorised operation conducted by the said intelligence service within the State. As such the greater part of the evidence which will be lead as against the Respondent derives from within the State and was gathered within the State. In the premises the surrender of the Respondent for the purpose of trial outside the State in respect of offences alleged to have occurred within the State will have the effect of depriving the Respondent of the ability to contest the admission of such evidence on the grounds that it contravenes the provisions of the Constitution and/or the law of the State. As such the surrender of the Respondent ought to be refused on the grounds that the Respondent will be unable to litigate or canvass such issues in the course of any subsequent trial."*

At 9 it is stated:

> *"9. Further or in the alternative to the matters pleaded at Paragraph 8 above the surrender of the Respondent amounts to a device whereby the provisions of the Constitution and/or the law of the State insofar as they may relate to the admission of evidence, the manner in which evidence is gathered, the conduct of any investigation and/or the entitlement of foreign police or military intelligence agents to conduct operations or investigations will be avoided or defeated. As such the surrender of the Respondent ought to be refused on the grounds that such surrender is precluded by the provisions of Section 37 of the European Arrest Warrant Act, 2003 in that it would amount to a breach of his constitutional rights. In particular the Respondent's entitlement to a trial in due course of law pursuant to Article 38 of the Constitution would be defeated."*

At paragraph 12 the applicant states that surrender is precluded by virtue of s. 37 of the European Arrest Warrant Act, 2003 "*in that the criminal process in the requesting state fails to meet the basic requirements of Article 6 of the European Convention on Human Rights and Article 38 of the Constitution*", and that paragraph sets out a number of particulars which form the basis of his contention that the process which he will face if surrender fails to meet a fair trial standard.

In his grounding affidavit for the present application, which was sworn on the 3rd August 2009, Mr Campbell avers that for the purpose of considering the legality of the request for his surrender and for his preparation for any trial in the requesting state, it is necessary that he be fully acquainted with the case being made against him, and that he apprehends that part of the case being made against him will consist of material provided by the Minister to the requesting state pursuant to international mutual assistance conventions, or pursuant to the Criminal Justice Act, 1994 or other statutory authority. He goes on to state that he is anxious to establish what material, if any, has been supplied by the Minister to the requesting state and, in addition, to establish whether there is other material held by the Minister which has not been released to the requesting state, but which would be relevant to the proposed surrender and/or prosecution and which would ordinarily be supplied to an accused person here pursuant to the normal disclosure rules here. For this purpose he made a Freedom of Information Request to the Minister on the 11th May 2009 and he exhibits a copy of that Request, and it sought all records of any nature or kind relating to him and held by the Minister, but not limited to:

> 1. All requests and responses to requests of any nature or kind for the provision of information regarding him to the authorities, of whatever nature and kind, in any third country, whether made pursuant to international Mutual Assistance Conventions, or pursuant to the Criminal Justice Act, 1994 or other statutory authority whatsoever.
>
> 2. Copies of all records maintained, and authorities granted in respect of interception and surveillance whether pursuant to the Postal and Telecommunications Service Act, 1983, the Interception of Postal Packages and Telecommunications Messages (Regulations) Act, 1993 and the Criminal Justice (Terrorist Offence) Act 2005 or other authority.

Mr Campbell states that the response which he received to that Request was received in two parts. In relation to No. 1 above, a letter dated 12th June 2009 was received notifying that it was refused, and went on to state that if dissatisfied with the decision an internal review of the decision could be requested. By letter dated 21st July 2009 such a review was requested, and that request was refused by letter dated 27th July 2009, which also informed that he could submit a further Freedom of Information Request. Mr Campbell states in his affidavit that he proposes making such a further Request.

As to the Request for records of material set out at 2 above, he avers that this was refused by means of a Certificate under s.25 of FOI which was signed on the 10th June 2009 and which expires on the 10th June 2011. That Certificate is one by the Minister in which he declares that the records requested are exempt by virtue of the provisions of Section 23(1)(a)(i)-(iii), and also Section 24(1)(a) of FOI. Each of these provisions is set forth in the Certificate as being the reasons for exemption.

These provisions provide for exemption in the following way:

> *"23. (1) A head may refuse to grant a request under section 7 if access to the record concerned could, in the opinion of the head, reasonably be expected to –*
>
> *(a) prejudice or impair –*
>
> *(i) the prevention, detection or investigation of offences, the apprehension or prosecution of offenders or the effectiveness of lawful methods, systems, plans or procedures employed for the purposes of the matters aforesaid,*
>
> *(ii) the enforcement of, compliance with or administration of any law,*
>
> *(iii) lawful methods, systems, plans or procedures for ensuring the safety of the public and the safety or security of persons and property.*
>
> *(iv) – (vii) …… ".*

"24. -- (1) A head may refuse to grant a request under section 7 in relation to a record … if, in the opinion of the head, access to it could reasonably be expected to affect adversely –

(a) the security of the State

(b) -(e) …… ".

In his grounding affidavit Mr Campbell states that he apprehends that the Minister is in possession of material which is relevant to the application for his surrender and to the prosecution which he may face in Lithuania if surrendered. As I have said, that application for surrender is one now being processed by a court in Northern Ireland.

However, he asserts that serious issues arise relating to the legality of the procedures whereby such information was obtained, and the legality of the procedures whereby some or all of the information so obtained was released to the authorities in Lithuania. He believes that his constitutional and Convention rights, including those of privacy and to a trial in due course of law have been breached and are being breached, and that in order to assert and vindicate those rights it is necessary that he be appraised of the extent of the material which has been gathered by the Minister, as well as its content, and of what material has been provided to third parties.

Mr Campbell believes that the material, or some of it, which has been provided to the Lithuanian authorities, may have been obtained unlawfully, and wishes to be able to establish if this is the case, and, if so, whether it is permissible to release it to third parties as the Minister has done. That clearly was the purpose of the s. 7 FOI Request referred to.

In his affidavit, Mr Campbell states that the grounds upon which exemption is asserted on the basis of the provisions of sections 23 and 24 FOI as above have no validity in circumstances where the secrecy of the activities conducted on the Minister's behalf has been waived where assistance has been provided to the prosecuting authority in Lithuania, and where in all probability the Minister has conducted investigations here at the request of that authority. He believes that this material has been provided other than in compliance with international and national conventions, and in particular that the information was provided in circumstances where no regard was had to his rights and where he has been afforded no opportunity to be heard, and he apprehends that he will have no opportunity to be heard if he is not now appraised of the material that has been accumulated and as to what has been released to the authorities in Lithuania.

The point is also made by Mr Campbell that concerns which the Minister may have and which resulted in him exempting this material cannot really arise in circumstances where the investigation is now clearly complete and charges have been brought against him; and he goes on to submit that if such charges had been brought in this State this material would in any event have been required to be disclosed under disclosure rules, whether or not the prosecution sought to rely upon it. He believes that his ability to properly defend himself against the Lithuanian charges is severely impaired if he does not get the information which was sought in the Request.

In his affidavit Mr Campbell has asserted that the Minister has misconstrued the purpose and scope of a Certificate under s. 25 FOI, and that the Minister is not entitled to withhold material and information concerning his affairs in circumstances where the withholding constitutes an obstacle to him having a reasonable opportunity to litigate a matter which is before a court (albeit a court in Northern Ireland), namely an application for his surrender to Lithuania, and which is relevant also to any trial he may in the future face in that jurisdiction, and he repeats his contention that such a certificate should not issue when the investigation itself is by now completed and charges have been preferred, and that the Minister has exceeded his authority by issuing this Certificate when its effect is to deprive him of disclosure which he would ordinarily be entitled to were such charges to be preferred against him in this State, and that his constitutional rights are breached accordingly, or at least set at nought in circumstances where they cannot be vindicated in Northern Ireland or in Lithuania.

The Minister has not filed any replying affidavit.

Brendan McGuigan:

Mr McGuigan, unlike Mr Campbell, is presently before this Court having been arrested here on foot of a European arrest warrant, and that application has yet to be heard. It will be recalled that Mr Campbell is no longer in this jurisdiction and is the subject of an application for his surrender which is currently before the court in Northern Ireland.

The three offences which are set forth in the European arrest warrant seem to be the same charges as faced by Mr Campbell, if surrendered.

In his Points of Objection and Additional Points of Objection filed in this case, a large number of issues are raised by Mr McGuigan.

It is some of those contained in the Additional Points of Objection which are relevant to the present application by way of appeal against the s. 25 Certificate issued in response to this applicant's Request made under s.7 FOI.

The following points of objection appear to be those relevant to the present application:

"11. The surrender of the Respondent should be refused under Section 37 of the European Arrest Warrant Act, 2003 in circumstances where no undertakings or guarantees have been given as to the Respondent's entitlement to challenge the admissibility of any evidence allegedly obtained from the Respondent's home in the Republic of Ireland; and the Respondent will not or may not be permitted to make such a challenge. Efforts on the part of the Respondent to establish the nature and extent of such evidence sought through a request made pursuant to the Freedom of Information Act [sic].

12. The trial process in the requesting state vests discretion in the prosecuting authorities as to whether or not material should be disclosed at the pre-trial investigative stage. In circumstances where the testimony of witnesses and their examination at the pre-trial stage may be admitted in evidence for the purposes of the trial an accused is put at a fundamental disadvantage as compared to the prosecuting authorities. Specifically the Respondent would be denied an entitlement to carry out any meaningful examination of any witnesses that might be called during the pre-trial stage.

17. It appears that (a) it is the intention of the requesting state to prosecute the Respondent on foot of the evidence of an agent or agent provocateur of the United Kingdom's military intelligence service, BSS; and (b) the evidence which will be adduced as against the Respondent will in large part derive from an unauthorised operation conducted by the said

intelligence service within the State. As such a substantial part of the evidence which will be lead as against the Respondent derives from within the State and was gathered within the State. In the premises the surrender of the Respondent for the purpose of trial outside the State in respect of offences alleged to have occurred within the State will have the effect of depriving the Respondent of the ability to contest the admission of such evidence on the grounds that it contravenes the provisions of the Constitution and/or the law of the State. As such the surrender of the Respondent ought to be refused on the grounds that the Respondent will be unable to litigate or canvass such issues in the course of any substantial trial.

18. Further or in the alternative to the matters pleaded at paragraph 17 the surrender of the Respondent amounts to a device whereby the provisions of the Constitution and/or the law of the State insofar as they may relate to the admission of evidence, the manner in which evidence is gathered, the conduct of any investigation and/or the entitlement of foreign police or military intelligence to conduct operations or investigations will be avoided or defeated. As such the surrender of the Respondent ought to be refused on the grounds that such surrender is precluded by the provisions of Section 37 of the European Arrest Warrant Act, 2003 and in that it would amount to a breach of his constitutional rights and a usurpation of the role of the courts in protecting the constitutional rights of citizens generally. In particular the Respondent's entitlement to a trial in due course of law pursuant to Article 38 of the Constitution would be defeated."

An affidavit sworn by a Lithuanian lawyer, who represents Michael Campbell (a co-accused) who is presently in custody and awaiting trial in Lithuania in respect of charges linked to those alleged against Mr Campbell and Mr McGuigan, has been filed in support of these and other Points of Objection for the purpose of the s. 16 hearing in due course. She describes in a general way the investigation/prosecution process which exists in Lithuania under the Code of Criminal Procedure, but does not deal in any way with what rights an accused person has or has not in relation to pre-trial disclosure, challenging the admissibility of evidence, and cross-examining witnesses, either at the investigative stage of the prosecution process or at trial, if it is decided to put the accused on trial. But she states that the surrender of Mr McGuigan is sought under the European arrest warrant for the purpose of investigation and that at the present stage no decision has yet been made to prosecute him. She has stated that under the procedures in Lithuania there are two distinct parts to the prosecution process – an investigative phase and, if a decision to charge is made, the trial process itself.

Mr McGuigan has sworn an affidavit to ground his present application by way of appeal from the Section 25 Certificate. He refers to his belief that part of the case being made against him in Lithuania will consist of material provided by the Minister to the authorities in Lithuania under mutual assistance arrangements, and states that he is anxious to establish what material has been provided, and whether there is other material held by the Minister, but which has not been released, and which could be relevant to his surrender and/or prosecution, and which would ordinarily be provided to an accused person here under the disclosure rules.

At paragraph 10 of his affidavit he avers as to his belief that "*serious issues arise to be determined in relation to the legality of the procedures whereby the information was obtained, and critically the legality of the procedures whereby some or all of the information was released to third party States, particularly the Republic of Lithuania*".

In that paragraph he also states that his constitutional and Convention rights as to privacy and to a trial in due course of law have been and are being breached. He submits that in order to assert those rights and have them vindicated it is necessary for him to be appraised of the extent of the material accumulated by the Minister, its content, as well as all materials relevant to the question of whether such materials were procured in accordance with law and with his constitutional rights and the details of what material has been released to third parties.

Mr McGuigan goes on to state that he is disadvantaged in seeking undertakings that no evidence obtained by Irish authorities will be admitted in proceedings held in Lithuania without him being afforded an opportunity to challenge the admissibility of such evidence according to legal standards applicable in this State. In particular he states that he needs to be in a position to establish whether or not such material was in the first instance lawfully acquired within this jurisdiction.

In his affidavit he refers to the grounds stated by the Minister for exempting the material and information which he has requested under FOI, and submits that they have no legal validity in circumstances where the secrecy of the activities conducted on the Minister's behalf have been voluntarily waived by the Minister in circumstances where the Minister through his agents has provided assistance to the prosecuting authority in Lithuania, and where, as he states, in all probability the Minister has conducted investigations on behalf of the Lithuanian authorities. He "apprehends" that investigative material has been produced by the Minister to the requesting authorities other than in proper compliance with the international and national conventions, and in circumstances where "*no regard was had to [his] rights and where I have been afforded no opportunity to be heard*" and he apprehends that he will be provided with no such opportunity to be heard if he is not appraised at this stage of what material has been accumulate and, at least in part, has been released.

He goes on to refer to the various ways in which he believes that his position both in relation to the application for his surrender and any prospective trial in Lithuania is prejudiced, as set forth in his Points of Objection referred to, if the material and information which he has requested is permitted to be certified as exempt by virtue of the Section 25 Certificate, and believes that this Certificate should be set aside by this Court on a point of law, and is defective in that it does not specify whether Section 23(3)(a)(i) applied or not. That provision states:

"23. -- (3) Subsection (1) does not apply to a record –

(a) if it –

(i) discloses <u>that an investigation</u> for the purpose of the enforcement of any law, or anything done in the course of such investigation or for the purposes of the <u>prevention or detection of offences</u> or the apprehension or prosecution of offenders, <u>is not authorised by law or contravenes any law</u>, or

(ii) contains information concerning –

(I) the performance of the functions of a public body whose functions include functions relating to the enforcement of law or the ensuring of the safety of the public (including the effectiveness and efficiency of such performance), or

(II) the merits or otherwise or the success or otherwise of any programme, scheme or policy of a public body for preventing, detecting or investigating contraventions of law or the effectiveness or

efficiency of the implementation of any such programme, scheme or policy by a public body, and

(b) in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the request concerned." (my emphasis)

An affidavit has been sworn also by Lisa Tomlinson, a solicitor in Messrs. MacGuill & Co, solicitors acting for Mr McGuigan in which she states that his home was the subject of a search before he was arrested on the European arrest warrant and that materials were seized during that search. She does not state her means of knowledge, and it is hardly likely that she was present on that occasion to witness it herself. I presume that she has been informed about it by someone. However, she states that she wishes to ascertain what was seized and whether the said search was lawful or in breach of her client's constitutional rights.

Ms. Tomlinson also makes reference to the contents of the EAW in the case of Mr Campbell, and draws attention to the fact that in fact as appears from that warrant the Lithuanian authorities are not alleging that Mr Campbell committed any act in Lithuania, and rather that he did so in Ireland.

Legal Submissions:

Liam Campbell:

Hugh Hartnett SC for Mr Campbell submits that the s. 25 Certificate which the Minister has issued giving the material sought an exempt status is defective as a matter of law in that it does not identify in any meaningful way the basis on which it is exempt, in as much as the reasons given are merely formulaic by setting out the wording of the relevant sections and fails to distinguish between such provisions. It has been submitted that thus the Certificate precludes any meaningful appeal as provided for in s. 42 of the Act. In effect, it is submitted, there have been no proper reasons given for this refusal, and that simply to set forth the provisions of s. 23 (1) (a) (i-iii) and the provisions of s. 24 (1) (a) FOI cannot constitute adequate or proper reasons for refusal, in the absence of setting out a factual basis for the decision to exempt the records and material in question. It is submitted that it is not therefore a reasoned decision which can be appealed in any meaningful way, and that the Certificate has been prepared in a way which conceals the actual reasons underlying the Minister's decision to exempt the records and frustrates the applicant's s. 42 appeal.

Mr Hartnett refers also to the provisions of s. 23(3) FOI which I have already set forth and which excludes from the ambit of s. 23(1) records which have themselves been generated in the course of an investigation but which were obtained by unlawful means. In this regard reference is made to the averment by Mr Campbell that *"serious issues arise to be determined in relation to the legality of the procedures whereby such information was obtained ……"*. He has referred also to the fact that there is no reference in the Certificate or otherwise to whether the Minister has considered if this section is engaged in this case, and that no replying affidavit has been filed by the Minister in the face of the applicant's concern in that regard as to the legality of the procedures by which such material was gathered.

In relation to the right to appeal provided by s. 42 FOI, Mr Hartnett has submitted also that it follows that the High Court can have access to the relevant records and material in order to determine the appeal, and has referred to the provisions of s. 43 FOI in that regard, which provides:

"43. – (1) In proceedings in the High Court under or in relation to this Act, that Court shall take all reasonable precautions to prevent the disclosure to the public or, if appropriate, to a party (other than a head) to the proceedings of –

(a) information contained in an exempt record, or

(b) information as to whether a record exists or does not exist in a case where the head concerned is required by this Act not to disclose whether the record exists or does not exist.

(2) Without prejudice to the generality of subsection (1), precautions under that subsection may include –

(a) hearing the whole or any part of any such proceedings as aforesaid otherwise than in public,

(b) prohibiting the publication of such information in relation to any such proceedings as it may determine, including information in relation to the parties to the proceedings and the contents of orders made by the High Court in the proceedings, and

(c) examining a record or a copy of a record without giving access or information in relation thereto to a party (other than a head) to the proceedings."

Mr Hartnett has referred to the judgment of McKechnie J. in *Deely v. Information Commissioner* [2001] 3 I.R. 439 at p. 452 in the context of the scope of an appeal on a point of law from a decision of the Information Commissioner. At p. 452 the learned judge stated:

"There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or via a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following:

(a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;

(b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;

(c) it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally

(d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision ……".

In *Sheedy v. Information Commissioner* [2005] 2 I.R. 272, the Supreme Court (per Kearns J. as he then was) commented upon this

statement as follows:

> *"This is a helpful resumé with which one would not disagree, but it would be obviously incorrect to apply exclusively judicial review principles to matters of statutory interpretation in the way that might be appropriate to issues of fact. A legal interpretation of a statute is either correct or incorrect and the essence of this case is to determine whether the interpretation given first by the respondent and later by the High Court (Gilligan J.) to s. 53 of the Education Act 1998 was correct or otherwise."*

It is submitted in the light of these statements that the scope of the appeal under s. 42 and by reference also to s. 43 is broad and can extend to drawing alternative inferences from facts, and that in the present case, given the manner in which the reasons for exemption have been stated in the s. 25 Certificate by simply citing the statutory provisions, the Court is not in a position to reach a proper determination in relation to the applicant's appeal. It is submitted that the Certificate is defective by not disclosing any rational or factual basis for its issue, and that this frustrates the appeal right in much the same way as a failure by an administrative body to give reasons for a decision prevents or interferes with the right to appeal that decision and renders it unreviewable. In that regard, reliance is placed upon a passage from the judgment of Costello P. in *McCormack v. Garda Siochána Complaints Board* [1997] 2 I.R. 489 at p. 500:

> *"Constitutional justice imposes a constitutional duty on a decision-making authority to apply fair procedures in the exercise of its statutory powers and functions. If it can be shown that the duty includes in a particular case a duty to give reasons for its decision then a failure to fulfil this duty may justify the court in quashing the decision as being ultra vires.*
>
> *It is not the law of this country that procedural fairness requires that in every case an administrative decision-making authority must give reasons for its decisions. Where a claim is made that a breach of a constitutional duty to apply fair procedures has occurred by a failure to state reasons for an administrative decision the court will be required to consider (a) the nature of the statutory function which the decision-maker is carrying out, (b) the statutory framework in which it is to be found and (c) the possible detriment the complainant may suffer arising from that failure to state reasons. To give an example of a possible detriment; if a statute permitted an appeal to the court from the decision of an administrative body on a point of law, the failure to give reasons for a decision may well amount to a breach of a duty to apply fair procedures, if it could be shown that their absence rendered ineffectual a statutory right of appeal."*

Mr Hartnett submits, in the light of what is thus stated, that the FOI specifically provides for an appeal to the court in respect of the s. 25 Certificate, and that it cannot be permissible for the Minister to effectively oust the jurisdiction of this Court by what is described in his written submissions as *"the simple expedient of ensuring that the certificate is bland to the point of inscrutability thereby precluding an appeal on a point of law"*. Accordingly it is submitted that the certificate which issued to the applicant is ineffective and invalid.

Brendan McGuigan:

Unlike Mr Campbell, Mr McGuigan is facing an application for surrender in this jurisdiction. That apart, the factual background is, as set forth, virtually identical.

Giolliosa O'Liodhadha SC for Mr McGuigan has put forward three basic propositions by way of appeal under s. 42 FOI.

Firstly, it is submitted that where material and documents have as a matter of fact already been provided to third parties, i.e. the Lithuanian authorities for the purpose of prosecuting the applicants, it is not open to the Minister to maintain a claim of confidentiality as a reason for denying the material and documentation to the applicants, as he has done by the s. 25 Certificate.

Secondly, it is submitted, as in the case of Mr Campbell, that it is an insufficient giving of reasons by the Minister for him simply to 'cut and paste' into the Certificate the provisions of s. 23(1)(a) and s. 24(1)(a) FOI, and where the Minister has not stated which of the alternatives contained in these provisions is relevant to this application, the Certificate is vague, and too uncertain to be adequate. Mr O'Liodhadha has submitted that absent a recital by the Minister that he has found that the documents are of such sensitivity or seriousness that they should be exempted, as stated in s. 25(1)(a)(ii) FOI, that the Certificate is bad on its face, even though the Act does not itself specify that this must be recited.

Thirdly, it is submitted that in the present case the exempting of this material and documentation by the Minister serves to conceal a breach of Mr McGuigan's constitutional rights in the manner in which same was obtained and/or provided. As such, it is submitted that s. 23(3) FOI applies and the Minister has made no reference to same in his Certificate. In that regard it is submitted that the provision of this unconstitutionally obtained material/documentation to the authorities in Lithuania puts the applicants in the position where they cannot be certain that it will be disclosed to them prior to any trial for the offences in Lithuania, as would happen if that trial was to take place in this State under disclosure rules, and that the exempting of same by the s. 25 Certificate serves to cause or lead to a breach of their right to a fair trial, and that this ought not to be permitted. Mr O'Liodhadha has pointed also to the fact that the Minister has chosen not to file any replying affidavit refuting or contradicting what has been stated by Ms. Tomlinson about her belief that material has been obtained unlawfully.

It is submitted that the correct course for this Court to adopt in these circumstances is to call for the production of the material/documentation to the Court so that the Court can itself come to a view as to the reasonableness for it being certified as exempt on the grounds as certified. The Court has been referred to the judgment of Walsh J. in *Murphy v. Corporation of Dublin* [1972] I.R. 215. In that case the defendant had made a compulsory purchase order in respect of the plaintiff's land. The plaintiff's and others' objections to the making of that order were the subject of a public inquiry held by an inspector who furnished a report of the inquiry to the Minister for Local Government, who in turn confirmed the compulsory purchase order. In proceedings subsequently commenced by the plaintiff in which he sought a declaration that the order was invalid, the Minister disclosed the existence of the inspector's report in an affidavit of discovery, but claimed privilege over it on the grounds that its production was contrary to public policy and the public interest. In the High Court, Kenny J. in refusing to order production of the report, concluded, *inter alia*, that while there was no absolute right vested in the Minister to withhold production of the report (and that it was for the Court to decide if the report should be provided, and that the Court could require production to the Court for inspection for that purpose), nevertheless where a Minister certifies that it would be against the public interest to disclose the contents of a specified document which he has considered, the Court should accept that view unless (a) it is shown not to have been formed in good faith, or (b) it is one which no reasonable Minister could take, or (c) it is based on a misunderstanding of the issues in the case in which production

was sought. On appeal to the Supreme Court, Walsh J. (with whom Ó Dalaigh CJ, Budd, Fitzgerald and McLoughlin JJ concurred) allowed the appeal, but by concluding that the report in question was not of a class of document to which a claim of 'executive privilege' could attach since it was not a document which emanated from the exercise of any executive power of the State. However, Mr O'Liodhadha relies upon a passage from the judgment at p.236 where the learned judge considers whether Kenny J. was correct in concluding that the Court should accept the Minister's view that the production of a document would be contrary to the public interest unless (a), (b) or (c) above were satisfied. In that regard, Walsh J. stated:

> *"In my view in the present case Mr Justice Kenny was not correct in accepting without examination the Minister's judgement on this matter, namely that the production of the report would be contrary to public interest and detrimental to the public interest and service. The learned judge does not appear to have expressed any view upon the further claim, made in the affidavit of the Assistant Secretary of the Department of Local Government, to the effect that the public interest concerned was that the production would in some way impede the freedom of communication between the presiding inspector at a public inquiry and the Minister; and the learned judge has not found that it would be the case or, even if it were the case, that it would be a ground for not ordering the production of the document. Whatever the Minister's grounds may be, he has not disclosed them and his certificate or order simply states a conclusion. In my view a case has not been made for the non-production of the document concerned and in that event the learned trial judge ought to have directed the production of the document, at least for his own inspection, when he could then decide the matter."*

I should just refer to the fact that Walsh J. adverted to the civil nature of the proceedings before the Court in *Murphy*, and that at p.233 he stated the following:

> *"The action in which the present question arises is a civil suit inter partes, one of the parties being the Minister for Local Government. Therefore, the Court has not to review the considerations which might arise if in the course of a criminal prosecution an effort was made to obtain the disclosure of communications passing between members of the police force or from informants to the police and, on the other side of the coin, it is not necessary to examine the considerations which might arise in a criminal prosecution where the refusal to disclose certain evidence relevant to the trial could result in the condemnation of an innocent accused."*

Given the background in the present case of criminal charges being prosecuted against the applicants, albeit in the Republic of Lithuania, this statement has some relevance.

While the present application is an appeal under the Freedom of Information Act, 1997, it has been submitted that similar considerations should apply, namely that once the documents have relevance to the applicants' situation the onus should be clearly on the Minister to justify their exemption from production on a properly reasoned basis, or that the same should be made available to the Court so that it can form its own view for the purpose of determining the appeal to which the applicants are entitled under s. 42 FOI.

In support of his submission that the applicants should be entitled to the information sought in their Request, Mr O'Liodhadha has referred also to the judgment of Kearns J. in *Sheedy v. Information Commissioner* [2005] 2 I.R. 272, a case brought against a background of a refusal by the Information Commissioner to provide reports of a school inspector in respect of certain schools, on the basis that to do so would enable school league tables to be compiled and that this would impact adversely upon the school system and the ability of the Minister for Education and Science to manage those schools. When considering the principles which should apply to an appeal under s. 42 FOI, Kearns J. referred to the judgment of O'Donovan J. in *Minister for Agriculture v. Information Commissioner* [2000] 1 I.R. 309 and that of McKechnie J. in *Deely v. Information Commissioner* [2001] 3 I.R. 439 when he stated as follows:

> *"As was emphasised by O'Donovan J. in Minister for Agriculture v. Information Commissioner [2000] 1 I.R. 309 at p. 319:-*
>
> > *"In the light of its preamble it seems to me that there can be no doubt but that it was the intention of the legislature, when enacting the provisions of the Freedom of Information Act, 1997, that it was only in exceptional circumstances that members of the public at large should be deprived of access to information in the possession of public bodies and this intention is exemplified by the provision of s. 34(12)(b) of the Act which provides that a decision to refuse to grant access to information sought shall be presumed not to have been justified until the contrary is shown."*
>
> *It is clear that the trial judge in this case brought an approach to the appeal before him which reflected this sentiment, not only as regards the decision-making power of the respondent under the Act of 1997, but also as regards the respondent's interpretation of s. 53 of the Act of 1998.*
>
> *In his conclusion, the trial judge brought to all issues the principles which McKechnie J. suggested were appropriate in Deely v. Information Commissioner [2001] 3 I.R. 439, when he stated at p. 452:-*
>
> > *"(a) it (i.e. the court) cannot set aside findings of primary fact unless there is no evidence to support such findings;*
> >
> > *(b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;*
> >
> > *(c) it can, however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;*
> >
> > *(d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that is also a ground for setting aside the resulting decision".*
>
> *This is obviously a helpful résumé with which one would not disagree, but it would be obviously incorrect to apply exclusively judicial review principles to matters of statutory interpretation in the way that might be appropriate to issues of fact. A legal interpretation of a statute is either correct or incorrect and the essence of this case is to determine whether the interpretation given first by the respondent and later by the High Court (Gilligan J.) to s. 53 of the*

Education Act 1998 was correct or otherwise."

In support of the submission that a s. 25 Certificate cannot be issued where to do so would effectively conceal a breach of the applicant's constitutional rights, or a breach of the law in respect of or leading to the interception of private communications or property or surveillance, and in this regard reference is made to the provisions of s. 23(3) FOI above, Mr O'Liodhadha has referred to *Duff v. Minister for Agriculture* [1997] 2 I.R. 22. In his judgment in the Supreme Court, the decision of the High Court (Murphy J.) was reversed, but it has been submitted by Mr O'Liodhadha that, in doing so, O'Flaherty J. did not take issue with the following statement by Murphy J. in the High Court (p.42) where he considered the nature and extent of the criteria by reference to which the exercise of a discretion by a Minister should be reviewed, if at all:

> *"… it seems to me hat there are certain fixed points which have been established with reasonable clarity, namely:*
>
> *1. That the legislature cannot and a fortiori neither can a Minister of Government take any action or do anything which would infringe the constitutional rights of any citizen.*
>
> *2. Rarely, if ever, are rights, powers or discretions conferred on any Minister, Administrator or Tribunal for the benefit of the donee. They are received effectively as trustees and are exercisable for the benefit of third parties: not the donee. It is inconceivable that the donee of a public power would attempt to justify his exercise thereof by saying as did Shylock "it is my whim".*
>
> *3. The great range of powers conferred on executive authorities are capable of being reviewed – not appealed – by reference to what are usually described as the Wednesbury principles …… subject to the clarification or amplification of the concept of unreasonableness as provided by Henchy J. in The State (Keegan) v. The Stardust Victims Compensation Tribunal [1986] I.R. 642.*
>
> *4. Discretions conferred on a Minister do not give him an arbitrary power. The position was summarised by Walsh J. in East Donegal Co-operative Mart Ltd v. The Attorney General [1970] I.R. 317 at p. 343 as follows:*
>
> > *'All the powers granted to the Minister by s. 3 which are prefaced or followed by the words 'at his discretion' or 'as he shall think proper' or 'if he so thinks fit' are powers which may be exercised only within the boundaries of the stated objects of the Act; they are powers which cast upon the Minister the duty of acting fairly and judicially in accordance with the principles of constitutional justice, and they do not give him an absolute or an unqualified or absolute power to grant or refuse at his own will'.*
>
> *Where, as in s. 31 of he Broadcasting Authority Act, 1960 or s. 14 of the Companies Act, 1990, a Minister may exercise certain powers 'if he is of the opinion' that certain circumstances exist, the Court may be required to investigate whether the opinion in question was bona fide held and whether it was factually sustainable and not unreasonable. See The State (Lynch) v. Cooney [1982] I.R. 337 and Desmond v. Glackin (No. 1) [1993] 3 I.R. 1."*

In the light of this statement, it is submitted that having regard to the provisions of s. 23(3) FOI this Court should consider the material in question in order to determine whether there is any material or information, or anything contained in any such material or information which could reasonably justify the exempting of the material, and whether or not it discloses any breach of the applicants' constitutional rights, such as would bring it within s. 23(3), especially since there is no reference to a consideration of s. 23(3) FOI by the Minister in the s. 25 Certificate.

Respondent's legal submissions:

Shane Murphy SC for the applicant has stated succinctly at the outset of his submissions that neither applicant has put forward any evidence to support this application by way of appeal, and that what is stated as the basis for their apprehensions is mere speculation. Specifically he submits, firstly, that no evidence has been adduced that any material or information has been provided by the authorities here to the Lithuanian authorities by way of mutual assistance or otherwise, and that they are merely inferring that this may be the case from what is contained in the body of the European arrest warrant; and, secondly, that they have put forward no evidence that any unlawful means was adopted by any authority here in order to search for and gather any such material or information, such that any constitutional right of the applicants, or either of them has been breached. In words more commonly associated with an application for discovery, it is submitted that the applicants are indulging in a fishing expedition.

In such circumstances, it is submitted on behalf of the Minister that insufficient evidence, if any, has been put forward in order to lead to a conclusion that the Minister has failed to carry out his statutory functions in a proper manner, and that while it should not be presumed by the Court that a Minister might never fail to so comply with his obligations, the present applicants have failed to discharge the onus upon them to establish even a risk that there has been some wrongdoing on his part. It is submitted in any event that the Certificate which issued pursuant to s. 25 FOI fulfils the requirement that reasons be given for the exempting of records

Mr Murphy submits that it is not a requirement that reasons be elaborated upon beyond what is contained in the present certificates, and that to set them out by reference to the statutory provisions is precisely what the Act requires and he refers to the provisions of s. 25(5) FOI in that regard, which provide:

> *"25. -- (5) A Certificate shall specify—*
>
> *(a) The request under Section 7 concerned,*
>
> *(b) The provisions of Section 23 or 24, as may be appropriate, by reference to which the record to which it relates is an exempt record,*
>
> *(c) The date on which the Certificate is signed by the Minister of the Government concerned, and the date of its expiration, and*
>
> *(d) The name of the requestor.*

And it shall be signed by the Minister of the Government by whom it is issued."

Mr Murphy has referred also to the provisions of s. 25 (7) FOI which provide for a review of the operation of s. 25 (1) by An Taoiseach, jointly with other Ministers as prescribed by the Government, as soon as may be after the expiration of each period of twelve months following the commencement of s. 20 FOI, and where the Ministers are not satisfied upon such a review that a record to which such a certificate relates is an exempt record they can request that the certificate issued be revoked.

It is submitted that no more detailed reasons are required to be given in the Certificate, and that in any event there is no appeal on the merits provided for in the Act, and that any appeal is confined to one on a point of law. Mr Murphy submits that unless the applicants can show that the Minister wrongly or improperly issued the certificates their appeals must fail, and that they have failed to put forward any basis for such an argument.

Reference has been made in this regard by Mr Murphy to the judgment of Costello P. in *McCormack v. Garda Siochána Complaints Board* [1997] 2 I.R. 489. That was a case where the applicant had made a complaint to the Board, following which it was found to be admissible, following which an investigation followed which resulted in a finding that no offence or breach of discipline was disclosed, and the applicant was duly notified of that decision. He sought to have that decision quashed on the grounds, *inter alia*, that the decision failed to give reasons for the decision, and having first of all unsuccessfully requested the Chairman of the Board to state reasons. Costello P. held, *inter alia*, that a person aggrieved by a decision has no right to obtain reasons for it merely for the purpose of seeing whether or not the decision-maker had erred in the carrying out of its functions and there was no duty imposed by the Constitution on administrative decision-makers to comply with a request made to them for this purpose.

A point of distinction with the present case, of course, is that, as stated in the judgment, in relation to a decision of the Garda Complaints Board there was no right of appeal, either on the merits or on a point of law. Having concluded that constitutional justice imposes a constitutional duty on a decision-making authority to apply fair procedures, and having stated that if it can be shown that this duty includes in a particular case a duty to give reasons for its decision, then a failure to fulfil that duty may justify the court in quashing the decision as being *ultra vires*, Costello P. went on to state at p. 500:

> *"It is not the law of this country that procedural fairness requires that in every case an administrative decision-making authority must give reasons for its decisions. Where a claim is made that a breach of a constitutional duty to apply fair procedures has occurred by a failure to state reasons for an administrative decision the court will be required to consider (a) the nature of the statutory function which the decision -maker is carrying out, (b) the statutory framework in which it is to be found and (c) the possible detriment the complainant may suffer arising from the failure to state reasons. To give an example of a possible detriment; if a statute permitted an appeal to the court from the decision of an administrative authority on a point of law, the failure to give reasons for a decision may well amount to a breach of a duty to apply fair procedures, if it could be shown that their absence rendered ineffectual a statutory right of appeal.*
>
> *There may also be circumstances in which (a) no unfairness arose by a failure to give reasons when the decision is made but (b) the concept of fair procedures might require that reasons be given should subsequently be given in response to a bona fide request for them. Therefore in such cases the court would not grant an order of certiorari (because the decision itself was not an ultra vires one) but it would have jurisdiction to grant an order of mandamus directing the decision-making authority to carry out its constitutional duty (which the court had found existed) to provide reasons when asked.*
>
> *Finally, there may be circumstances in which the duty to apply fair procedures may not oblige a decision-making authority to state reasons for its decision at the time or after it has made it but which might oblige the authority to explain to an affected person the material on which the decision was based."* (my emphasis)

In a later passage at p. 501, the learned judge stated:

> *"It seems to me that that issue can largely be determined by considering whether some detriment is suffered by the applicant by the failure of the Board to give reasons for the opinion which it reached because of no detriment is suffered then no unfairness can be said to exist."*

Having pointed to the fact that the applicant in that case had no right of appeal either on the merits or on a point of law, Costello P. was of the opinion that what remained to be considered was whether or not the failure to give reasons rendered ineffectual or otherwise prejudiced the applicant's right to seek orders of certiorari or mandamus. In the end, he concluded that the absence of reasons did not prevent the Court from exercising its supervisory jurisdiction, and the application was refused.

It must be recalled of course in the present case that in fact reasons are stated in the Certificates. It is the adequacy of those reasons which is impugned in the present appeal. Equally, this appeal is not to be confused with an application for reliefs by way of judicial review, and I refer again to the remark by Kearns J. in *Sheedy v. Information Commissioner* already set forth above. I will return to this question in due course.

Finally it is submitted that in circumstances where the applicants apprehend that they may have been the subject of an unlawful interception of either post or telecommunications, they have never sought to avail of a complaints procedure which is available to them under Section 9 of the Interception of Postal Packets and Telecommunications (Regulation) Act, 1993. That section provides for the establishment of a Complaints Referee to be appointed by An Taoiseach, and that a complainant may apply to the Referee for an investigation, whereupon (save in the case of a frivolous or vexatious complaint) the Referee shall investigate whether an authorization for the interception was in place and, if so, whether there has been any breach of any condition attached thereto. Section 9 (7) provides that in the event that there has been a contravention the Referee shall notify the applicant of that conclusion, make a report of findings to An Taoiseach, and, if he thinks fit, do one or more of the following: order that the authorisation be quashed, direct the destruction of any copy of the intercepted communications, make a recommendation for compensation to the applicant.

Conclusions:

It must be borne in mind that the present application is not one in which relief by way of judicial review is sought. It is an appeal, confined to an appeal on a point of law, against the Minister's s. 25 certificates. That is the only appeal against the Minister's decision that the Oireachtas has made provision for in the statutory scheme. There is no provision for an appeal on the merits, and it matters not, therefore, whether this Court, if it were to see the records in question, might reach a different conclusion to that which

was reached by the Minister when he decided that the records were such as came within the stated provisions of s. 23 and s. 24 FOI.

It has to be borne in mind also in the context of the present applications that merely to have sight of the records in question would not necessarily place the Court in the same position as the Minister in order to decide a matter such as whether the security of the State was a sufficient justification for the exemption of the record. Other matters within the Minister's knowledge, qua Minister, could feed into such a conclusion. It would be an exceptional case indeed in which a Court in such circumstances could conclude that the Minister's discretion had been exercised unlawfully.

There are of course similarities between an appeal on a point of law and the seeking of certiorari by way of judicial review, since in each the Court looks not at the merits as such of the decision impugned, but at the lawfulness of the process by which the decision was reached and communicated.

The points of law identified by each applicant herein and on which their appeal must be solely based are, firstly, that the manner in which the reasons for refusal have been certified by simply restating in the certificates the provisions of the statutory provisions relied upon by the Minister, is an insufficient discharge by him of the obligation to provide a reason or reasons for refusal, and that by failing to explain in any more expansive way why he was certifying the records as exempt, he has made it impossible for the decision of the Minister to be appealed in any meaningful way; and, secondly, that there is nothing in the certificates to indicate that the Minister has even considered whether or not the records are such as escape exemption on the basis that they disclose some illegality in the manner in which they were obtained, as provided for in s. 23 (3) FOI. In so far as it is contended also that any confidentiality which may attach to the records in question has already been waived by the Minister by their having been already provided to a third party in Lithuania, and that he cannot now continue to rely on such confidentiality as a reason to exempt the records, this could constitute another point of law for the purpose of an appeal under s. 42 FOI.

Before considering each of these points of law which have been raised, it is necessary to refer to the general background to the applicants' request for access to the records and material which they have made. It is against a background whereby their surrender is sought by authorities in Lithuania, and where they fear that they will be unable to properly and fairly defend themselves against charges which they face if they are surrendered on foot of European arrest warrants. While that is undoubtedly the backdrop to the present application, it has no particular relevance to the appeal available under s. 42 FOI. The apprehension of an unfair trial process in Lithuania, which is at the heart of the applicants' concerns, is a matter which the applicants will be entitled to agitate under s.37 of the European Arrest Warrant Act, 2003, as amended, in due course, but it adds nothing to the question as to whether or not the Minister has or has not complied with his statutory obligations in the manner in which he has chosen to refuse to provide access to records referred to in the applicants' requests.

Adequacy if reasons given:

This is not a case in which no reasons have been provided for the decision to refuse access to records. The Act has provided for a number of reasons which will justify refusal, and has provided also that where access is being refused a certificate will be issued by the Minister and it is further specifically provided as to what such a certificate shall contain. The Minister has certified his reasons and has complied precisely with what the legislation provides that he must do. Section 25 (5) (b) FOI mandates, as set forth above, that "*the provisions of Section 23 or 24, as may be appropriate, by reference to which the record to which it relates is an exempt record*" shall be specified. The Minister has done this. The section does not go further and require that the Minister explain in his certificate the reasons why he considers that the records in question come within these provisions. The Minister clearly has a discretion in this regard. While that discretion is not an unfettered one and is one which must be exercised judicially so that his decision is not based on a mere whim, the Court is entitled to presume that the Minister has acted constitutionally. The Oireachtas when providing for what a s. 25 Certificate shall contain could have chosen to require that the Minister explain in the certificate why the records in question come within these particular provisions. It has not done so. In my view, by asking this Court to look behind these reasons, and in order to do so, to seek production of the records in question and form its own view upon them, the applicants are asking this Court to reach a conclusion on the merits, as opposed to a point of law.

As set forth above, the applicants submit that their right to appeal the decision as provided for in s. 42 FOI is frustrated by the absence of clearly stated and specific reasons, and rendered useless. Given the limited nature of the available appeal I cannot agree with that submission. Given the nature of the reasons provided for in s. 23 and s. 24 FOI for the exempting of records, it is understandable why the Oireachtas has chosen to provide that the reasons be stated in broad terms by reference to particular statutory provisions, since any more specific narrative as to the reasons, or justification, could by virtue of their sensitivity defeat the very reason for their exemption. The decision as to that sensitivity is that of the Minister.

If the FOI Act did not contain very specific provisions as to what a s. 25 certificate must contain by way of justification for exempting the records, this Court might have to consider, in the context of a point of law appeal, the adequacy of what is contained in the decision by way of reasons, which would then involve a consideration of general principles of constitutional fairness as to the adequacy of reasons given, as they apply in judicial review proceedings, such as in *Murphy v. Corporation of Dublin, McCormack v. Garda Complaints Board and Duff v. Minister for Agriculture*, to which counsel for the applicants have referred, and as already set forth.

No reference to s. 23 (3) FOI in the certificates:

As I have already set forth, this point arises because the FOI Act provides by s. 23 (3) thereof, *inter alia*, that a record might, in certain circumstances, not be certified as exempt if it "*discloses that an investigation for the purpose of the enforcement of any law, or anything done in the course of such investigation or for the purposes of the prevention or detection of offences or the apprehension or prosecution of offenders, is not authorised by law or contravenes any law……".* Clearly this provision makes it possible for the Minister to decide that such a record should be provided under an FOI request if he considers that "*the public interest would, on balance, be better served by granting than by refusing to grant the request concerned*". If, in the context of the present case, any records sought by the applicants disclosed that they, or information, had been obtained unlawfully by, for example, members of An Garda Siochána, the Minister could decide that it was in the public interest that the request be granted rather than be refused. One can think of an example whereby records or information were obtained by a search of a person's house which was carried out without a lawfully obtained search warrant during the course of an investigation of an offence. That is a power which the Minister has by virtue of the statutory scheme in place. But Section 25 (5) (b) FOI does not require the Minister to state in his s. 25 certificate, when refusing a request, that he has considered whether the records disclose such an illegal investigation, and if so, that it is not in the public interest that the request be granted. Again, it must be concluded that the Minister is presumed to act constitutionally, and it would take something more than the mere assertion by Mr Campbell, and the unspecific and presumably hearsay averment by Ms. Tomlinson on behalf of Mr McGuigan about his house having been searched, to move this Court to find on

appeal on a point of law that the s. 25 certificate is invalid because it does not deal with the proviso in s. 23 (3) FOI.

The applicants have failed to establish in any sufficient or satisfactory way that an unlawful search of either or both of their or other premises, or any other unlawful interception of communications has occurred. They have simply speculated that this has occurred. That is insufficient. In my view the onus is upon them to put forward some substantial evidence that records have been procured by some unlawful investigation before the Minister could be expected to indicate a consideration by him of s. 23 (3) and to then justify the refusal of the request in respect of same.

It is relevant in relation to the latter possibility, as Mr Murphy has stated in submissions, that there is a complaints procedure available to them under Section 9 of the Interception of Postal Packets and Telecommunications (Regulation) Act, 1993 whereby they can have their concerns addressed, and that they have not attempted to avail of that procedure.

Waiving of confidentiality by providing records to a third party:

The applicants seek to argue that in circumstances where the Minister has already disclosed the records or information gleaned from them to a third party, namely the authorities in Lithuania, he cannot maintain confidentiality as a reason for non-disclosure.

I cannot agree that this is so. If the Minister has disclosed information from such records, or has provided copies of such records to a prosecuting authority in Lithuania, he has done so under mutual assistance arrangements. There is nothing to suggest that by complying with his obligations to another State under such arrangements he in some way has undermined or set at nought the protection from disclosure which such records may enjoy under the FOI legislation.

They also assert that since the investigation into these alleged offences are by now completed the denial of access to the records in question cannot any longer be justified on the basis that to do so would impede the investigation, that being one of the reasons given in the certificates. However, in my view, this submission is undermined fatally by what has been sworn to by a Lithuanian lawyer who already represents a co-accused, namely, a Michael Campbell. I have referred to those averments already above. That lawyer is at pains to point out that the criminal process in Lithuania envisages a two-stage process – an investigative phase firstly which results in a decision either to prosecute or not to prosecute, and in the event of a decision to prosecute, then the second phase, the trial phase. It is, as already set forth, her view that the process in so far as Mr McGuigan is concerned is still at the investigative stage and that a decision has yet to be made to prosecute him. Mr Campbell's Points of Objection filed in the surrender application state, *inter alia*, and as I have already set forth, that his surrender is sought *"for the purpose of his detention, questioning and other related investigative steps prior to his possible prosecution for the alleged offences set out in the European arrest warrant"*. That sits uncomfortably beside an assertion that the investigation is in fact complete.

For all these reasons I am satisfied that the appeal against the issue of the s. 25 certificates on a point of law must fail, and I refuse the application to set aside the certificate in each case.