THE HIGH COURT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT, 2003 AS AMENDED

Record No. 2011/78 EXT.

BETWEEN:

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

GERARD SHANNON

RESPONDENT

JUDGMENT of Mr. Justice Edwards delivered the 15th day of February, 2012.

1. Introduction:
The respondent is the subject of a European arrest warrant issued by a judicial authority from within the England and Wales jurisdiction of the United Kingdom of Great Britain and Northern Ireland (hereinafter the U.K.) on the 2nd of February, 2011. The warrant was endorsed for execution by the High Court in this jurisdiction on the 23rd of February, 2011. The respondent was arrested at 54 Marguerite Road, Dublin 9 on the 24th of March, 2011 by Sgt. Sean Fallon and was brought before the High Court on the same day pursuant to s. 13 of the European Arrest Warrant Act, 2003 (hereinafter the Act of 2003).

The respondent does not consent to his surrender to the U.K. Accordingly, this Court is now being asked by the applicant to make an Order pursuant to s. 16 of the European Arrest Warrant Act, 2003 as amended (hereinafter the Act of 2003) directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him. In the circumstances the Court must enquire whether it is appropriate to do so having regard to the terms of s.16 of the Act of 2003.

The respondent, as is his entitlement, does not concede that any of the requirements of s. 16 aforesaid are satisfied. Accordingly, as no admissions have been made, the Court is put on inquiry as to whether the requirements of s. 16 of the Act of 2003, both controversial and uncontroversial, have been satisfied and this Court's jurisdiction to make an order directing that the respondent be surrendered is dependant upon a judicial finding that they have been so satisfied. In addition the Court is required to consider in the particular circumstances of this case certain specific objections to the respondent's surrender which are pleaded in detail in the Points of Objection that have been filed, and which are helpfully summarised in counsel's written submissions as follows:

> (a) that the European arrest warrant does not have the required degree of specificity required in relation to the offences alleged to have been committed by the respondent, and;
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> (b) that the surrender of the applicant will be in breach of his constitutional and convention rights, in particular his right to a fair trial and therefore his surrender is prohibited by s.37 of the Act of 2003.

2. Uncontroversial Section 16 Issues
The Court has received an affidavit of Sgt. Sean Fallon sworn on the 18th of May, 2011 and has also received and scrutinised a copy of the European arrest warrant in this case. Moreover the Court has also inspected the original European arrest warrant which is on the Court's file and which bears this Court's endorsement. The Court is satisfied following its consideration of this evidence and documentation that:

> (a) the European arrest warrant was endorsed for execution in this State in accordance with s. 13 of the Act of 2003;
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> (b) the warrant was duly executed;
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> (c) the person who has been brought before the Court is the person in respect of whom the European arrest warrant was issued;
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> (d) the warrant is a prosecution type warrant and the respondent is wanted in the U.K. for trial in respect of six offences particularised in Part E of the warrant;
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> (e) no question arises of the respondent having been tried *in absentia* (as the case is a prosecution case), and accordingly it is not a case in which the court would require an undertaking under s. 45 of the Act of 2003;
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> (f) the High Court is not required, under ss. 21 A, 22, 23, or 24 (inserted by ss. 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005), to refuse to surrender the respondent under the Act of 2003.

Subject to dealing with the specific objection raised in relation to an alleged lack of specificity, the Court is otherwise satisfied that the European arrest warrant in this case is in the correct form.

In addition the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) Order 2004, S.I. 4/2004 (hereinafter the 2004 Designation Order), and duly notes that by a combination of s. 3(1) of the Act of 2003, and Article 2 of, and the Schedule to, the 2004 Designation Order, the U.K. is designated for the purposes of the Act of 2003 as being a state that has under its national law given effect to the Framework Decision (Council Framework Decision of 13th June, 2002 on the

European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA)).

3. Correspondence and Minimum Gravity
The warrant relates to six charges of alleged burglary of stately homes in England. The issuing judicial authority has not sought by the ticking of a box in Part E.I. of the warrant to invoke paragraph 2 of Article 2 of the Framework Decision. Accordingly, the Court must be satisfied both as to correspondence and as to minimum gravity in respect of each offence.

It was submitted that in so far as correspondence is concerned, the offences in question all correspond with the offence of burglary in Irish law as defined in s. 12 of the Criminal Justice (Theft and Fraud Offences) Act 2001 (hereinafter the Act of 2001). The respondent has not sought to contest that suggestion and the Court, having considered all of the information in the warrant, agrees with that suggestion and is satisfied to find correspondence in each instance with the offence under Irish law of burglary contrary to s. 12 of the Act of 2001.

In so far as minimum gravity is concerned, the relevant provision is s. 38(1)(a)(i) of the Act of 2003. According to that provision, the offence should be punishable under the law of the issuing state by imprisonment or detention for a maximum period of not less than 12 months. In the present case the potential penalty for the offence of burglary under the law of the issuing state is stated in Part C of the warrant to up to 10 years imprisonment. In those circumstances the requirements of s. 38(1)(a)(i) of the Act of 2003 are clearly met and the minimum gravity threshold is comfortably exceeded.

4. The Offences as Particularised in Part E of the European Arrest Warrant.
In circumstances where the warrant is challenged as being invalid for lack of specificity in relation to the offences alleged to have been committed by the respondent, it is necessary to set out precisely what particulars are in fact given in relation to the offences in question.

The following information appears under the heading *"Description of the circumstances in which the offences were committed, including the time, place and degree of participation in the offences by the requested person"* in Part E of the warrant:

> "This case concerns a planned trip to the UK from the Republic of Ireland by Gerard Shannon and his brother Andrew. The purpose of their visit was to visit stately homes posing as innocent tourists but taking the opportunity to steal antique objects usually from public areas but on some occasions from private quarters. Andrew Shannon was arrested at the scene of one of the stately homes in possession of stolen property. He pleaded guilty to six burglaries of separate stately homes between 31 July 2008 and 3 August 2008 and receive a sentence of three years imprisonment at York Crown Court on 11 May 2009. He accepted that items had been stolen to the value of about £4500.
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> On Sunday 3rd August 2008 at about 4:15 PM Andrew Shannon was found in an unauthorised part of Castle Howard by an assistant caretaker. He was found in possession of two small paintings from the house, a ceramic lid and two walkie talkies. Before he was apprehended he was allowed to use a toilet and thus, it seems likely, have an opportunity to use the walkie-talkies.
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> Following the discovery of the burglary, an inventory was carried out in the area of the house where Andrew Shannon was found. A number of paintings, pieces of porcelain and books were found to be missing from a series of rooms on the Upper West Wing. It was also realised that a large number of items had been taken from the vicinity of the private part of the house within the previous two months.
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> Enquiries showed that on Friday, 31 July 2008 a Fiat Multipla entered England at Holyhead (i.e. from the Dublin to Holyhead ferry). The vehicle was registered to Andrew Shannon and was insured for him to drive. CCTV at Castle Howard on 3 August 2008 showed a green Fiat Multipla travelling towards Castle Howard. Further CCTV within the admissions hall showed Andrew Shannon entering the ticket hall in company with Gerard Shannon (subsequently identified by the Garda).
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> On 4 August 2008 the Garda stopped the Fiat Multipla in Dublin having disembarked from the Holyhead to Dublin ferry. The sole occupant was detained giving his name as Gerard Shannon. He said the car belonged to his brother Andrew and he was driving it back to Dublin for him as he had been arrested in England. The evidence suggests that Gerard Shannon can only have known of the arrest of his brother by having been present at Castle Howard. Within the vehicle were documents including a receipt for accommodation in Preston on the night of 3 August in the name of Gerard Shannon. The overwhelming inference is that Gerard Shannon was also at Castle Howard with his brother and following his brothers arrest, drove the Fiat away before returning to Ireland the next day.
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> Within the vehicle was a quantity of jewellery, ornaments, pictures and books. The satellite navigation system showed that 12 locations had been entered, all linked to a stately home or National trust property. They included Castle Howard, Coughton Court, Woodstock (Blenheim Palace), Belvior Castle, Ragley Hall and Chatsworth House.
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> A large number of items were identified as having come from Castle Howard including a painting, a Chinese vase and four antique books. In particular the police found a small Chinese canister. The item was minus its lid. The ceramic lid found in the possession of Andrew Shannon proved to be the missing lid.
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> Enquiries with other stately homes showed that the theft had taken place of a walking stick on August 2008 at Coughton Court, Warwickshire. At 10:40 AM on 1 August 2008 two middle-aged men with Irish accents spoke to staff about visiting the house. One staff member saw that one of the men who entered seemed to be hiding something up his sleeve and saw the end of a stick. The stick was subsequently found in the Fiat by the Garda.
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> Likewise on 3 August 2008 a collection of four plates was discovered to be missing from a Cabinet at Ragley Hall and was identified as coming from the Fiat.
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> Likewise it was discovered on 3 August 2008 that eight Meissen and Derby figurines had been taken from a locked cabinet from the Lower Entrance hall (part of the private quarters) of Blenheim Palace. They were identified as items from the Fiat.
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> Further property (antique books) was found to be stolen from Chatsworth House and Belvoir House.
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> Further antique items were found in the car none of which has yet been linked to a particular property. However, given the nature of the objects, the inference is clear that these items were also stolen property.

When interviewed by the Garda, Gerard Shannon made no reply

The Crown's case is that the two men had a clearly planned trip to England visiting stately homes with a view to burgling the premises and that at least six substantive burglaries were carried out."

5. The Objection based on Lack of Specificity

Submissions on behalf of the respondent

Counsel for the respondent submits that of the Act of 2003 requires that, in so far as is practicable, the European arrest warrant should be in the form set out in the Annex to the Framework Decision. Part E of the form requires a description of the circumstances in which the offences were committed including the time, place and degree of participation in the offences by the requested person. Section 11(1A)(f) requires the European arrest warrant to specify "the degree of involvement or alleged degree of involvement of the person" concerned. This reflects Article 8(1)(e) of the Framework Decision which, using slightly different language, speaks of "the degree of participation in the offence by the requested person."

The Court's attention was drawn to a passage in *Minister for Justice, Equality and Law Reform v. Desjatnikovs* [2009] 1 I.R. 618, where Denham J, giving judgment on behalf of the Supreme Court (nem diss), stated at p. 632:-

> "The fact that there is a precise description of the facts of the case is important, even though the issue of double criminality is not required to be considered. It is important that there be a good description of the facts. An arrested person is entitled to be informed of the reasons for his arrest and of any charge against him in plain language which he can understand. Also, in view of the specialty rule, the facts upon which a warrant is based should be clearly stated."

Reliance was also placed *on Minister for Justice, Equality and Law Reform v. Stafford* [2009] IESC 83 (unreported, Supreme Court, 17th December 2009) where the Court, again per Denham J. (*nem diss*), said at paras. 15 to 20:-

> "15. It is required that there be a description of the acts upon which the warrant is based. This is similar to the situation under the Extradition Act 1965, as amended, and indeed classically in extradition law. A description of the acts, or the acts alleged, are the facts upon which the executing judicial authority may apply the law. By describing the acts the facts are before the court and so a decision may be made as to whether there is, for example, double criminality. I am satisfied that the facts on the warrant in this case are sufficient to describe the circumstances in which alleged offences were committed.
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> **Participation**
> 16. The next issue is the submission that the information is insufficient to show that the appellant "participated".
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> 17. The Framework Decision, in Article 8, in describing the content and form of the European arrest warrant states in (1)(e)"... and degree of participation in the offence by the requested person ". The European arrest warrant form in t he annex to the Framework Decision states: "...and degree of participation in the offence(s) by the requested person". The Act of 2003, as amended by s.72 of the Criminal Justice (Terrorist Offences) Act 2005, requires in s.11 (A)(f) "... and the degree of involvement or alleged degree of involvement of the person in the commission of the offence...". It is these words which fall to be considered in this case.
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> 18. While the Framework Decision uses the word "participation" and the Act of2003 uses the word "involvement", I am satisfied that no issue arises on the use of different terms. Both mean to take part in, to participate in, to be involved in . There is no significance in the use of the different words.
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> 19. The question which arises for determination is whether the acts alleged on the warrant show a link with the requested person. It is not necessary to show a *prima facie* case. It is not necessary to show a "strong" case. The issue of guilt or innocence is for the jury in the requesting state.
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> 20. This case is one of circumstantial evidence. There is no reason why an accusation of a crime based upon circumstantial evidence could not be the basis for a European arrest warrant. It is necessary to look at the facts alleged in each warrant."

Counsel for the respondent submitted that in the instant case there is nothing to indicate the respondent's alleged degree of participation or involvement. There is nothing to indicate the case against him in relation to each charge. The present case can be distinguished from Stafford where there was a full description of the nature of the case. It has further been urged that even if the Court is satisfied that there is sufficient detail with regard to the Castle Howard matter, there is an absence of detail with regard to the other matters. Counsel submits that in relation to the alleged burglaries of the other stately homes there is insufficient detail concerning the alleged degree of involvement of the respondent, and that in the circumstances the warrant does not comply with s. 11 (1A)(f) of the Act of 2003 and the court ought not to surrender the respondent to the issuing state on foot of it.

Submissions on behalf of the applicant

Counsel for the applicant contends that it is important not to confuse the nature of the allegations with the evidence in support of the allegations. In support of this proposition he relies upon *Minister for Justice, Equality and Law Reform v. Hamilton* (2008) 1 I.R 60. In the course of his judgment, Peart J. dealt with a submission that the warrant contained insufficient detail as follows:-

> "Deficiencies in the warrant
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> [9] Counsel for the respondent submits that the warrant in this case, on foot of which the respondent was arrested, is not in the form required by the Act of 2003. As already stated, there is a prescribed form of warrant for use in these cases and one of the paragraphs contained in that form is headed:-
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> > "Description of the circumstances in which the offence was committed, including the time and place they were committed and the degree of participation by the requested person.'
>
> [10] Counsel for the respondent submits that the way in which this section of the warrant has been completed falls short

of containing sufficient information in order to comply with what is required to be inserted by the heading. To deal with this submission, I ought to set out in full what details have been provided in the warrant under that heading:-

> 'On the 13th August, 2004, the accused, Daniel Hamilton, co-accused, Joseph Hamilton, the deceased, Paul Anthony Donald Whyte and witnesses, Margaret Hamilton and Angela Hamilton, were within Flat 2, 12 Riverford Road, Pollokshaws, Glasgow. Between approximately 12.30 a.m. *(sic),* the deceased, Daniel Hamilton and Joseph Hamilton were alone in the upstairs bathroom, where an altercation took place. Sometime later, the accused, Daniel Hamilton, left the premises.
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> Upon investigation, witness, Margaret Hamilton, found the now deceased badly injured within the bathroom. An ambulance was called and the deceased was conveyed to the local hospital. The deceased was not responding to medical treatment and was found to be suffering from a catastrophic brain injury and a depressed skull fracture. He remained unconscious and was taken to the intensive care unit and put on a life support machine. The life support machine was switched off as he did not respond to any medical treatment.
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> On the 1st October, 2004, at Sheriff Court of Glasgow and Strathkelvin, Glasgow, Scotland, a petition arrest warrant was granted for Daniel Hamilton in respect of the offence of murder'"

"[12] In addition, counsel for the respondent submits that there is nothing with in this paragraph which gives any detail to indicate the degree of participation in the crime by the respondent and that this is required to be included by the precise wording of the heading to that paragraph ....."

"[14] My view of the matter is that the purpose of the warrant is not simply that the respondent might be aware of why his extradition is requested, but that this court, when asked to endorse the warrant for execution, might be satisfied that there is an offence alleged in which the pro posed respondent is implicated in some way. When the application for endorsement of the warrant is made initially under s. 13 of the Act, the court must be satisfied that the warrant is in the proper form before it can endorse it for execution. At that stage, the court itself must be in a position, from the manner in which the warrant is completed, to see in what way the offence alleged involves the person named therein.

[15] There is no question of this court, in carrying out that exercise, being concerned as to the strength of the case against the person named. That is not involved in the exercise of being satisfied that the warrant is in the proper form. Clearly, there must be some detail, however, from which the court can be satisfied that the person named has some involvement in the alleged offence. There must be some connection made between the alleged offence and the person named in the warrant. But the fact that the paragraph is headed in such a way as to require the time and place, as well as the degree of involvement of the person, does not mean that anything akin to a *prima facie* case must be set forth. That type of matter will be a matter for the prosecution authority in the requesting country to deal with by whatever procedure applies in that jurisdiction, such as would occur here by the service of the book of evidence.

[16] In the present case, I am satisfied that even allowing for the absence of some words following "12.30 a.m." the time and place have been sufficiently set forth. As to the degree of involvement of the respondent, the information provided in the narrative puts the respondent not only in the flat but also in the bath room itself where with victim was found injured after an altercation had taken place in that bathroom in circumstances where the respondent was said to be present. We are also told that the respondent left the premises "sometime later".

[17] It is hard to imagine what further information is necessary in order to indicate a degree of involvement, a part from somebody being actually in the bathroom when injury was inflicted and who could then say whether this respondent inflicted the blows, or whether he was simply an onlooker to what was happening, or whether he was an accessory and so forth. These are matters which will no doubt be ventilated at any trial which will take place. But there is detail sufficient to show a degree of involvement and this court is not required to pass any judgment upon the level or amount of that involvement. I am satisfied that the form of the warrant complies with the prescribed form as provided for in the Framework Decision."

Counsel for the applicant submits that a similar approach was adopted by the Supreme Court in *Stafford*, to which the Court has already been referred by counsel for the respondent.

Counsel for the applicant also very properly alluded to *Minister for Justice, Equality and Law Reform v. Kaprowicz* [2010] IEHC 207 (unreported, High Court, Peart J., 13th May 2010). In that case surrender was refused where persons other than the respondent were alleged to have committed a particular offence to which the warrant related and there was no mention of the respondent's name in the warrant in relation to that particular offence. It was contended that that case was wholly distinguishable on its facts from the present case.

Dealing with *Minister for Justice, Equality and Law Reform v. Desjatnikovs*, on which counsel for the respondent placed reliance, counsel for the applicant readily acknowledges that it is correct to say that the purpose of the information to be set out at Part E of the warrant is not just to enable the Court to consider correspondence. It can also, as Denham J. pointed out, be required to enable the Court to consider an issue arising in relation to the rule of speciality. However, it is urged that an issue only arises under s. 11 of the Act of 2003 if it gives rise to a difficulty on the part of the Court in determining whether or not there is correspondence, or if it can be anticipated that it is going to frustrate a surrendered person asserting a right, in accordance with the rule of speciality, not to be prosecuted for any offence other than that for which he was surrendered. Counsel submits that it is fanciful in the extreme to suggest that the respondent in the present case would have any difficulty in asserting his specialty entitlements, *i.e.*, in trying to distinguish what he has been surrendered for with other charges were they to be brought against him.

It is submitted by counsel for the applicant that this is a case of participation in a joint enterprise based on circumstantial evidence. There are sufficient facts and details set out in the warrant to link the respondent to the crimes and to indicate the degree of his alleged participation or involvement. However, it is not necessary that the warrant should, in such a case, specify to the nth degree exactly what acts the respondent did and did not do in furtherance of the joint enterprise. It is sufficient if it contains basic information as to the nature of the offence alleged against the respondent and indicates in general terms how he participated or was involved.

The Court's decision on the specificity point

The Court is satisfied that the European arrest warrant contains sufficient particulars both of the offences to which it relates, and concerning the alleged degree of the respondent's involvement or participation. The case is based on circumstantial evidence. The allegations are clear. The respondent is said to be the brother of a man who was caught red handed stealing from Castle Howard, and who pleaded guilty to stealing from that premises and also from five other stately homes. The respondent is recorded on CCTV as having entered Castle Howard on the day in question in the company of his brother. He was later stopped in Dublin driving a green Fiat car that had been seen at Castle Howard at the time of the theft from that premises. That car had just disembarked from the Holyhead/Dublin car ferry. He was found in possession of items from all six of the stately homes in question. The car also contained a satellite navigation system programmed with the locations of all six stately homes. This is strong circumstantial evidence and clearly invites the inference that the respondent and brother had, in joint enterprise, toured the stately homes in question and committed the offences to which the warrant relates.

Accordingly, the nature of respondent's involvement or participation is in fact clear from the warrant. He is alleged to have burgled six different stately homes and it is quite clear, although not stated in terms, that he is considered to have committed the offences acting in joint enterprise with his brother. There is no doubt in the Court's mind but that that is what is being alleged. In joint enterprise the acts of any one participant are attributable to all of the participants in the enterprise. It is not therefore necessary that the warrant should specify every act personally performed by the respondent.

Moreover, although it is true to say, as counsel for the respondent pointed out to the Court, that the particulars set out in Part E of the warrant would probably also have supported handling type charges against the respondent, that is of no particular significance in the Court's view. It is not an uncommon situation and, certainly in Ireland, the prosecutor cannot charge both. He must elect. In the present case the prosecutor in the issuing state has made a clear election to charge theft type offences (specifically burglary) rather than handling type offences. There is no ambiguity about it. The respondent cannot therefore be in any doubt as to what offences the warrant relates.

In the circumstances the Court is satisfied that the objection based of alleged Lack of specificity is not made out.

6. The Objection based on Section 37

Submissions on behalf of the respondent

The issue under this heading concerns whether the respondent will receive a fair trial in the event that he is surrendered. It is apprehended that the prosecution may seek to introduce evidence of the respondent's previous convictions in any forthcoming trial in an attempt to show propensity. It is common case that he has a large number of convictions for burglaries and theft. It is also common case that in England and Wales convictions may be admissible to show propensity, but not in Ireland.

The respondent relies upon an opinion of Ian MacDonald Q.C., a Barrister practicing before the Courts of England and Wales, and exhibited in an affidavit sworn by him on behalf of the respondent in these proceedings. Mr. McDonald says the following in his opinion:-

> **"Bad character - the statutory background**
> 5. In England and Wales the law regarding the introduction of evidence of bad character was fundamentally overhauled in 2003. Previously, as regards the prosecution, it depended largely on there having been an attack by a defendant on the character of a prosecution witness and it went to the credibility of the defendant but not to his or her propensity to offend.
>
> 6. Now evidence of the bad character of a defendant is governed by Sections 98 - 113 of the Criminal Justice Act 2003. Section 99 abolished the common law rules governing the admissibility of evidence of bad character in criminal proceedings. Admissibility of a defendant's bad character, including previous convictions, must now be through one of the seven gateways as specified in Section 101 and goes to propensity as well as credibility:-
>
> *101. Defendant's bad character*
>
> *(1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if-*
>
> *(a) all parties to the proceedings agree to the evidence being admissible.*
>
> *(b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it.*
>
> *(c) it is important explanatory evidence,*
>
> *(d) it is relevant to an important matter in issue between the defendant and the prosecution,*
>
> *(e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,*
>
> *(f) it is evidence to correct a false impression given by the defendant,*
>
> *or*
>
> *(g) the defendant has made an attack on another person's character.*
>
> *(2) Sections 102 to 106 contain provision supplementing subsection (1).*
>
> *(3) The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.*
>
> *(4) On an application to exclude evidence under subsection (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the*

offence charged

7. The offences charged are burglaries; Gerard Shannon has 32 convictions in Ireland going back to 1979. These convictions include burglaries and thefts. For these to be admissible the prosecution is likely to apply under gateway S. 101 (1) (d), on the basis that they are relevant to an important matter in issue between the defendant and the prosecution. This is explained by reference to S. 103:-

103. "Matter in issue between the defendant and the prosecution"

(1) For the purposes of section 101 (1)(d) the matters in issue between the defendant and the prosecution include -

(a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;

(b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect.

(2) Where subsection (1)(a) applies, a defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of-

(a) an offence of the same description as the one with which he is charged. or

(b) an offence of the same category as the one with which he is charged.

(3) Subsection (2) does not apply in the case of a particular defendant if the court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust for it to apply in his case.

(4) For the purposes of subsection (2) -

(a) two offences are of the same description as each other if the statement of the offence in a written charge or indictment would, in each case, be in the same terms;

(b) two offences are of the same category as each other if they belong to the same category of offences prescribed for the purposes of this section by an order made by the Secretary of State.

(5) A category prescribed by an order under subsection (4)(b) must consist of offences of the same type.

(6) Only prosecution evidence is admissible under section 1OJ (1)(d).

(7) Where-

(a) a defendant has been convicted of an offence under the law of any country outside England and Wales ("the previous offence"), and

(b) the previous offence would constitute an offence under the law of England and Wales ("the corresponding offence") if it were done in England and Wales at the time of the trial for the offence with which the defendant is now charged ("the current offence"), subsection (8) applies for the purpose of determining if the previous offence and the current offence are of the same description or category.

(8) For the purposes of subsection (2) -

(a) the previous offence is of the same description as the current offence if the corresponding offence is of that same description, as set out in subsection (4)(a);

(b) the previous offence is of the same category as the current offence if the current offence and the corresponding offence belong to the same category of offences prescribed as mentioned in subsection (f)(b).

(9).....[not relevant]

(10).....[not relevant]

(11).....[not relevant]

8. There is no bar on the admission of convictions for offences committed outside England and Wales. Gerard Shannon's previous convictions include thefts and burglaries in Ireland, which, as they are offences recognised by English law, could be admitted as allowed for under S. 103 (7) (a) and (b).

9. A "matter in issue between the defendant and the prosecution". By s. 101 (1) (d), this includes whether the defend ant has a propensity to commit offences of the kind with which he has been charged and this can be established by showing he has been convicted of offences "of the same description" or offences "of the same category". An Irish offence of the same description (see s 103(8)(a)) might be a burglary, particularly a burglary of a stately home. Previous Irish offences are treated as of same category as the current offence if it and the corresponding Irish offence belong to the same category of offences prescribed in parts 1 and 2 of the schedule to The Criminal Justice Act 2003 (Categories of Offences) Order 2004 (S.I. 2004 No. 3346. Part 1 is the theft category and covers a range of offences under The Theft Act 1968 including offences under SS. 1-6 (theft); S. 8 (robbery); S. 9 (1) (a) and 9 (1) (b) (burglary); S. 22 (handling stolen goods).

10. Gerard Shannon has convictions for theft/larceny in 1979, 1982, 1984, 1985, 1992, 1994, 2006, 2007; convictions for burglary in 1979, 1982, 1987, 1988 and 1989; handling in 1979 and 1992. He also has convictions for dissimilar offences, being sexual offences, in 2002 and 2003.

11. Before the past convictions can be put before a jury there must be a degree of similarity between the past offence and current allegation, e.g. it would be inappropriate to admit any conviction involving dishonesty. The circumstances of the prior offence must have been such as to have some probative force by reason of the similarity of the conduct to that involved in the current allegation ; ***R v Clements****, The Times, December 4 2009, CA.*

12. A propensity can be established by one previous conviction although this is less likely, particularly if the conviction was some years ago, and there would have to be some distinctive feature common to both the past offending and the present allegation. Gerard Shannon has 5 convictions for burglary, sufficient to perhaps establish a propensity, although the most recent is 1989. For these convictions to be admitted there would have to be some similarity in the offending with the present allegation, e.g. burglaries of stately homes.

13. If a court determined that Gerard Shannon had a propensity to commit offences of the type with which he is charged, the court must then go on to consider whether this is relevant to an important matter in issue between the defendant and the prosecution, S 101 (1) (d). This can be established when the fact of such propensity, combined with other evidence in the case, serve to eliminate doubt or to found a convincing case. If, however, the evidence in the case was weak, bad character evidence ought not to be admitted to bolster such a case - ***R v Hanson; R v Gilmore; R v P*** */ 2005/ 2 Cr App R 21 CA.*

14. If the prosecution establish both propensity and relevance to an important matter in issue between the defendant and the prosecution, the trial judge still has a discretion not to admit the bad character evidence under S. 101 (3) (the admission of the evidence would have such an adverse effect on the fairness of the proceedings) and S. 103 (3) (by reason of the length of time since the conviction ... it would be unjust..). With the exceptions of the two thefts in 2006 and 2007 his burglary/handling convictions are all some time ago and, without a striking similarity they would be unlikely to be admitted. The prosecution would have to provide details of these offences in order to argue their relevance as to why they should be admitted. The sexual offences are not relevant to the current allegations and would not be admitted as they do not show a propensity to commit the types of offences with which he is charged. Depending on the circumstances of the thefts in 2006 and 2007 they could form part of a bad character application but again the prosecution would have to provide details to show why they are relevant. If the burglaries and thefts are in completely different circumstances to the present allegations it is ***possible*** *that none of his previous convictions would be admitted.*

15. If the convictions are admitted the judge must warn the jury in summing up not to place undue reliance on previous convictions and tailor the relevance to the individual facts of the case. Guidelines in summing up were established in ***R v Hanson; R v Gilmore; R v P*** *(ibid) as follows:-*

> *a. They should not conclude that the defendant was guilty or untruthful merely because he had those convictions;*
>
> *b. Although the convictions might show propensity, that did not mean that he committed the offences or been untruthful in this case:*
>
> *c. Whether they in fact showed a propensity was for them to decide:*
>
> *d. They must take into account what the defendant said about his previous convictions, and*
>
> *e. Although they were entitled to, if they found propensity shown, to take that into account when determining guilt, propensity was only one relevant factor and they should assess its significance in light of all other evidence in the case.*

16. Even with the appropriate warning it is impossible to know what effect the admission of previous convictions has on the minds of the jury."

Counsel for the respondent submits that Mr. McDonald Q.C's opinion establishes that there is a real risk that the respondent's previous convictions could be put in evidence at any trial in the issuing state in order to show his propensity to commit burglary, and that this creates a real and substantial risk that the respondent will not receive a fair trial in the event that he is surrendered, contrary to his right to a fair trial guaranteed under Article 38 of the Constitution of Ireland. Consequently, it is submitted that the Court is prohibited under s. 37 of the Act of 2003 from surrendering the respondent.

In development of this point Counsel for the respondent reviewed the Irish law on the admissibility of evidence as to bad character. She stated that the law in Ireland relating to admissibility of previous convictions, which she submits is based upon the common law, statute and ultimately the Constitution, is that such evidence is only admissible in certain well defined categories and cannot be admitted to show propensity.

She further submits that the Irish cases on admissibility of bad character evidence clearly acknowledge that to introduce such evidence at a trial may lead to an injustice unless its probative value is very clear.

The Court was referred to *The People (Director of Public Prosecutions) v. B.K.* [2000] 2 I.R. 199 where the Court of Criminal Appeal held at p. 203 that:-

> "For such evidence to be so admissible, it would be necessary for the probative value of such evidence to outweigh its prejudicial effect. In practice, this test is applied where there is a similarity between the facts relating to the several counts. On the one hand, there is system evidence which is so admissible; and, on the other hand, there is similar fact evidence, which is inadmissible. In the latter case, the reason is that, just because a person may have acted in a particular way on one occasion does not mean that such person acted in the same way on some other occasion. System evidence on the other hand is admissible because the manner in which a particular act has been done on one occasion suggests that it was also done on another occasion by the same person and with the same intent." [Emphasis added]

The statutory position is set out in the Criminal Justice (Evidence) Act 1924, as amended, and has been considered i n a number of Irish cases. The historical background was referred to by the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Ferris* [2008] 1 I.R. 1 at pp. 6 and 7:-

> "The common law has acted on one fundamental principle of proof since early modern times and since the abandonment of the primitive methods of proof of Saxon times. This rule has operated for centuries and is that the only evidence which is admissible at a criminal trial, whether for or against the guilt of the accused, is evidence which is relevant. This means evidence which tends to prove or disprove whether the accused committed the act with which he is charged. Evidence of character is, in general, not admissible. It was said that evidence of good character first came to be allowed for the defence only in capital cases on the humane principle of acting in *favorem vitae*. In that sense, it was an anomaly. It was a distraction from the true nature of the inquiry. The judges were strict about it. They realised that it was dangerous to try a man on the basis of his reputation, because it ran the risk that injustice would be done. This court has maintained these principles and has been vigilant to ensure that the character of the accused not be put in issue unless the relevant statutory provisions are strictly met (e.g. *The People (Director of Public Prosecutions) v. McGrail* [1990] 2 I.R. 38)".

In *The People (Director of Public Prosecutions) v. McGrail* [1990J 2 I.R. 38 the Court of Criminal Appeal rejected the principles set out in various U.K. decisions to the effect that where a witness has given evidence implicating an accused in the offence for which that accused is on trial, if it is put to that witness that he or she has lied to the Court in giving the evidence that he or she gave, that is sufficient to put the accused's character in issue. In interpreting the legislation strictly, the Court of Criminal Appeal stated at p. 51:-

> "This court is of the view that the principles of fair procedures must apply. A procedure which inhibits the accused from challenging the veracity of the evidence against him at the risk of having his own previous character put in evidence is not a fair procedure. The gratuitous introduction of material by way of cross-examination or otherwise to show that the witness for the prosecution has a general bad character, divorced from the facts of the case at hearing, is a different matter."

Counsel for the respondent submits that the reference to fair procedures is instructive. The right to fair procedures is a fundamental right of both the Irish criminal justice system and indeed abroad. Counsel further submits that the Court of Criminal Appeal, by interpreting the Act of 1924 restrictively, gave that Act a constitutional interpretation. If the Act had been interpreted as permitting unfair procedures it would have been unconstitutional.

It was submitted on behalf of the respondent that the law in England and Wales allowing evidence of an accused's bad character to be adduced for the purpose of establishing propensity permits an unconstitutional and unfair procedure. This is not something in respect of which the respondent can seek a remedy before the Courts of England and Wales. In these circumstances, the applicant is not entitled to invoke a presumption that the respondent's rights will be respected and that he will be treated fairly. It cannot be presumed that he will be treated fairly. Rather, the cogent evidence adduced by the respondent suggests that there is a real risk that he will be subjected to unconstitutional and unfair procedures.

Counsel on both sides, respectively, acknowledge the importance of the judgment of Murray C.J. in *Minister for Justice, Equality and Law Reform v. Brennan* [2007] 3 I.R. 732 in the context of objections to surrender in European arrest warrant cases based upon an alleged real risk that the respondent will not get a fair trial.

The respondent in *Brennan* absconded to Ireland from prison in the U.K. whilst serving sentences for various offences. A European arrest warrant was issued by the U.K. authorities, seeking his surrender to serve the balance of his sentences and also to be prosecuted and tried for an offence of escaping from lawful custody. Having unsuccessfully resisted his surrender before the High Court on various grounds, the respondent appealed to the Supreme Court only in respect of that aspect of the European arrest warrant seeking his return to the U.K. to stand trial in relation to the offence of escaping from lawful custody. The warrant stated that the offence of escaping from lawful custody was punishable by a term of imprisonment and a fine. The term of imprisonment was not prescribed and was at the discretion of the judge, but as it was a common law offence, the maximum term of imprisonment that could be imposed was life imprisonment. Paragraph (h) of the warrant gave information concerning the measures applicable to persons sentenced to life imprisonment and stated that the offender had to serve an appropriate minimum period (the tariff) that reflected the punitive element of the sentence. It was alleged by the respondent that the European arrest warrant disclosed that he faced the imposition of a mandatory minimum sentence upon him if convicted of that offence, which meant that, in denial of his rights under the Constitution, he would be sentenced to a mandatory minimum period, which did not take into account the particular circumstances of the case, including the respondent's personal circumstances, in order to ensure that the sentence was proportionate.

Giving judgment for the Supreme Court in *Brennan*, Murray C.J. (*nem diss*) stated at pp. 743 and 744:

> "35. There is no doubt that the operation of the process for surrender as envisaged by the Act of2003, as amended, is subject to scrutiny as to whether in any particular case it conforms with constitutional norms and in particular due process so that, for example, the respondent in such an application has an opportunity to be duly heard in the proceedings.
>
> 36. However the argument of the respondent goes much further. He has contended that the sentencing provisions of the issuing state, in this case the United Kingdom, did not conform to the principles of Irish law, as constitutionally guaranteed, governing the sentencing of persons to imprisonment on conviction before our courts for a criminal offence.
>
> 37. The effect of such an argument is that an order for surrender under the Act of 2003, and indeed any order for extradition, ought to be refused if the manner in which a trial in the requesting state including the manner in which a penal sanction is imposed, does not con form to the exigencies of our Constitution as if such a trial or sentence were to take place in this country. That can hardly have been the intention of the Oireachtas when it adopted s. 37(1) of the Act of 2003 since it would inevitably have the effect of ensuring that most requests for surrender or extradition would have to be refused. And in deed if that were the intent of the Framework Decision, which the Act of 2003 implements, and other countries applied such a test from their own perspective, few, if any, would extradite to this country.
>
> 38. Indeed it may be said that generally extradition has always been subject to a *proviso* that an order for extradition, as with any order, should not be made if it would constitute a contravention of a provision of the Constitution. I am not aware of any authority for the principle that the extradition or surrender of a person to a foreign country would contravene the Constitution simply because their legal system and system of trial differed from ours as envisaged by the Constitution.

> 39. The manner, procedure and mechanisms according to which fundamental rights are protected in different countries will vary according to national laws and constitutional traditions. The checks and balances in national systems may vary even though they may have the same objective, such as ensuring a fair trial. There may be few, if any, legal systems which wholly comply with the precise exigencies of our Constitution with regard to these matters. Not all for example will provide a right to trial by jury in exactly the same circumstances as our Constitution does in respect of a trial for a non-minor offence. Rules of evidence may differ. The fact that a person would be tried before a judge and jury in this country for a particular offence could not in my view, be a basis for refusing to make an order for surrender solely on the grounds that in the requesting state he or she would not be tried before a jury. The exceptions which we have to th e jury requirement, as in trials before the Special Criminal Court, acknowledges that a fair trial can take place without a jury even though it is constitutionally guaranteed for most trials in this country.
>
> 40. That is not by any means to say that a court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may well be egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting state, where a refusal of an application for surrender may be necessary to protect such rights. It would not be appropriate in this case to examine further possible or hypothetical situations where this might arise. The sole matter which I wish to make clear here is that the mere fact that a trial or sentence may take place in a requesting state according to procedures or principles which differ from those which apply, even if constitutionally guaranteed, in relation to a criminal trial in this country does not of itself mean that an application for surrender should be refused pursuant to s. 37(2) of the Act."

Murray C.J.'s remarks have repeatedly been quoted with approval, and relied upon, in many subsequent Supreme Court and High Court judgments in European arrest warrant cases involving fair trial rights, many of which have concerned issues such as delay and pre-trial publicity. Among these is the important Supreme Court case on delay and the right to an expeditious trial in *Minister for Justice, Equality and Law Reform v. Stapleton* [2008] 1 I.R. 672, where Fennelly J. rejected the contention that the purpose of Section 37 was to allow a respondent to assert fair trial rights at the earliest point, namely where an application for surrender was made. Rather the purpose of s. 37 was, in general, to allow the court to consider the effect of surrender rather than the trial itself. It is only in exceptional circumstances that trial issues will fall to be considered under s. 37.

This Court has previously reviewed the circumstances of Stapleton in various previous judgments. In *Minister for Justice and Equality v. Adams* [2011] IEHC 366 (unreported, High Court, Edwards J., 3rd October 2011) I said:-

> "In the *Stapleton* case the respondent's surrender was resisted on the grounds of delay. Mr Stapleton had succeeded in the High Court essentially on two grounds. First, the learned High Court judge was not persuaded, despite evidence adduced by the applicant suggesting the contrary, that an application by the respondent to the courts of the issuing state to have his trial stayed on the grounds of lapse of time would enjoy the same prospects of success as a similar application made before the courts of this jurisdiction. (In that regard the learned judge had, following a review of certain English jurisprudence to which he had been referred, formed the view that the courts of the issuing state do not have the same regard as do the courts of this jurisdiction for what he described as a free standing right to an expeditious trial, even in the absence of actual prejudice.) Secondly, he held that the respondent's right to an expeditious trial was one that he was "entitled to invoke and have protected on the first occasion on which it becomes relevant for argument, and that it is not a matter to be postponed so that it can be ventilated at some date in the future in another country, and after the respondent has been return ed in custody to that place" - see *Minister for Justice, Equality & Law Reform v. Stapleton* [2006] 3 I.R. 26 at pp. 49 and 50).
>
> The applicant appealed successfully to the Supreme Court which held that the learned High Court judge was mistaken in seeking parity of criminal procedure in the issuing member state. In regard to that, Fennelly J. said at pp. 690-692):-
>
> > '[73] The trial judge was mistaken in seeking parity of criminal procedure in the issuing member state. It is apparent that, even under the long establish ed extradition jurisprudence, as it applied between some member states prior to 2004 and, as it still applies between this country and third countries, such a comparison was not required. Extradition does not demand that there be parity of criminal procedures between contracting states. It is notorious that criminal procedures vary enormously between states. Indeed, it is obvious that they approximate much more closely between this country and the United Kingdom than between either of those states and the great majority of member states practising the civil law system, where, for example, there is no tradition of cross-examination of the sort practised in our courts, and which is here regarded as totally fundamental to the rights of the defence.
> >
> > [74] Since the hearing of this appeal, this court has given judgment in the case of *Minister for Justice v. Brennan* [2007] IESC 21, [2007] 3 I.R . 732 where Murray C.J. considered the correct approach to the balancing of constitutional rights against the obligations of the state pursuant to the framework decision...
> >
> > [75] I cannot see that any of the differences discerned by the trial judge between the right to seek prohibition of tri al in the English courts and our own could amount to the establishment of infringement of the right to fair trial, or fair procedures, whether by reference to the Convention or to the Constitution. They certainly do not amount, to repeat the words of Murray C.J., to "a clearly established and fundamental defect in the system of justice of [the] requesting State".'

The Supreme Court noted that on the facts of the case before it, there was available to the respondent a procedure which would enable him, on surrender to the issuing member state to seek a remedy based on the very long period of time which has elapsed since the alleged commission of the offences.

The Supreme Court also held that the learned High Court judge was mistaken in holding that the respondent was entitled to have his right to a speedy trial protected on the first occasion on which it becomes relevant for argument. It further stated that:-

> '...on the facts of the case, it is demonstrably more efficient and more convenient that those matters be debated before the courts of the country where the respondent is to be tried."'

Fennelly J.'s judgment in *Stapleton* was followed and applied in the later Supreme Court cases of *Minister for Justice, Equality and Law Reform v. Gardener* [2007) IESC 40 (unreported, Supreme Court, 20th July 2007); *Minister for Justice, Equality and Law Reform v. S.MR.* [2008] 2 T.R. 242 and *Minister for Justice, Equality and Law Reform v. Hall* [2009] IESC 40 (unreported, Supreme Court, 7th

May 2009) as well as by this Court in *Minister for Justice, Equality and Law Reform v. Adam (No.1)* [2011] IEHC 68 (unreported, High Court, Edwards J., 3rd March 2011) and *Minister for Justice and Equality v. Adams* to which the Court has referred already.

Counsel for the respondent has sought to stress that these cases, and in particular the judgment of Denham J. in *Minister for Justice. Equality and Law Reform v. Hall*, do not rule out the possibility than in an appropriate case an Irish Court could refuse to surrender a respondent on risk to fair trial grounds. To quote Denham J. in *Hall* at para. 21: "it would depend on the circumstances". Counsel for the respondent has urged upon the Court that the present case is one in which the Court would be justified in taking that step.

Counsel for the respondent further submits that *Minister for Justice, Equality and Law Reform v. Brennan* is distinguishable from the circumstances of the present case. She submits that unlike in *Brennan*, the Court in the present case is not concerned with disparity of procedures in the criminal process but rather with fundamental differences in the law relating to the admissibility of evidence. She submits that where different rules concerning the admissibility of evidence in the issuing state create a risk of a constitutionally repugnant unfairness in the trial process, this Court is bound not to surrender the applicant. Moreover, it was submitted that cases such as *Stapleton, Gardner, S.MR., Hall, Adam (No. 1)* and *Adams* were concerned with particular circumstances of the trial process, such as delay or pre-trial publicity, that were theoretically capable of being addressed or remedied by a trial judge, or another court, in the issuing state. However, every court is obliged to apply its own national laws and if those laws themselves create a risk of a constitutionally repugnant unfairness in the trial process then neither the trial judge, nor any other court in the issuing state, could provide somebody in the position of the respondent with an effective remedy. Rather, the existence of such Jaws must be regarded as a egregious circumstance amounting to, in the words of Murray C.J. in Brennan at p. 744: "a clearly established and fundamental defect in the system of justice" of the issuing state.

Counsel for the respondent further relies upon *Larkin v. 0' Dea* [1995] 2 I.R. 485. In that case the respondent faced extradition from this country to Northern Ireland so that he might be prosecuted for murder. He had previously been arrested by a member of An Garda Siochana and detained at Dundalk Garda Station, under s. 4 of the Criminal Justice Act 1984 (hereinafter the Act of 1984). He was later released without charge. He was subsequently re-arrested and further detained under s. 4 of the Act of 1984 purportedly on the authority of an Order of the District Court made pursuant to s. 10 of the Act of 1984. In the High Court, it was submitted on behalf of the applicant that the sworn information on foot of which the warrant for his second arrest was based was not proper information such as would enable a judge of the District Court to be satisfied that further information had come to the knowledge of the Garda Siochana since the applicant's release as to his suspected participation in the offence for which his arrest was sought; that the warrant was, accordingly, invalid and the applicant's detention on foot thereof unconstitutional; and that any statements which he had made during that period of detention were taken in violation of his constitutional rights and were, in consequence, inadmissible. It was further submitted that, having regard to the fact that the statements were likely to be admitted in evidence at the applicant's trial in Northern Ireland, the court should refuse to extradite the applicant. The respondent was successful before the High Court, and Morris J. refused to surrender him. The applicant then appealed to the Supreme Court. The Supreme Court held that having regard to the wording of the sworn information on foot of which the order authorising the re-arrest of the applicant was made. the judge of the District Court could not have been satisfied that the information that had come to the knowledge of the gardai related to the suspected participation of the applicant in the offence in respect of which he was arrested. Accordingly, the order of the District Court authorising the re-arrest of the applicant was invalid; the applicant's detention on foot thereof was, in consequence, unconstitutional; and the evidence gathered during the applicant's detention would be inadmissible at any trial of the applicant within the State. It further held that for the court to permit the applicant to be extradited pursuant to Part III of the Extradition Act, 1965, to a jurisdiction where evidence taken in violation of his constitutional rights would be tendered against him at his trial, and might be admitted, would constitute a failure on the part of the court to vindicate the applicant's constitutional rights; the applicant had established that the provisions of Part III of the Act of 1965 were sought to be used in a manner inconsistent with the applicant's constitutional rights, and the court was, accordingly, bound to refuse to give effect to them.

Counsel for the respondent in the present case acknowledges that in *Larkin v 0'Dea* the inadmissible evidence had been obtained in violation of constitutional rights in this jurisdiction. Nonetheless, she contends that the case is of importance in showing that the question of protection of constitutional rights may extend to issues of admissibility in courts of trial in another jurisdiction. Applying that approach to the circumstances of the present case, counsel for the respondent submits that it is incumbent on this Court to act to protect the respondent against the anticipated breach in another jurisdiction of his constitutional right to receive a fair trial.

Submissions on behalf of the applicant

Counsel for the applicant has submitted that there can be little dispute as to the manner in which the court ought to approach the operation of s. 37 of the Act of 2003. In *Minister for Justice v. Adams* this Court recently reviewed the various decisions of the courts and concluded as follows:-

> "In this Court's view the law is clear, as is this Court's duty. It should not engage with the merits of the complaints made by the respondent in relation to trial issues where he acknowledges that there are remedies available to him in respect of those issues before the courts of Northern Ireland, unless it is satisfied that such local remedies cannot be effective remedies in the particular circumstances of his case. If the court is of the view that the respondent lacks an effective remedy in regard to all or any of his complaints, it must consider whether the matters complained of, coupled with the absence of an effective means of addressing them, expose him to such a serious risk of an unfair trial as to be properly characterised as egregious circumstances. If at that point the court does not consider the circumstances to be egregious then that is the end of the matter. However, if this Court determines that egregious circumstances do exist, it should then consider whether its intervention is necessary to protect the respondent's rights."

Counsel for the applicant submitted that the respondent must establish a number of matters in evidence before the argument that he seeks to raise can be entertained. These are as follows:

1. The respondent must show that he is likely to be subjected to the evidential provision of which he complains;

2. He must show that same amounts to an egregious breach of his rights, and;

3. He must demonstrate that he enjoys no adequate domestic remedy in respect of same.

Counsel has further submitted that the respondent has failed to establish any of these matters in evidence.

However, and perhaps more fundamentally, counsel for the applicant suggests that the respondent's argument under this heading is entirely misconceived. He submits that it is implicit in the argument made by the respondent that he complains only of an anticipated breach of his right to a fair trial under Article 38 of the Constitution rather than any rights under the European Convention on Human

Rights. In counsel's submission no support is to be found in the jurisprudence of the European Court of Human Rights to the effect that a provision that allows evidence of propensity to commit an offence is repugnant to the Convention.

Counsel for the applicant submits that it is not permissible for the respondent to seek to assert trial rights that are guaranteed under the Constitution in respect of a foreign criminal process, and suggests that this is well established in the cases of *Minister for Justice, Equality and Law Reform v. Brennan and Minister for Justice, Equality and Law Reform v. Stapleton*. He places particular reliance on paragraphs 35 to 40 inclusive of Murray C.J.'s judgment in *Brennan* and quoted earlier in this judgment.

Counsel for the applicant submits that in substance the respondent seeks to have the Court engage in an exercise whereby it will essentially assess whether or not aspects of the Criminal Justice Act, 2003 in the U.K. are compliant with the provisions of Bunreacht na hEireann. It is submitted that such an exercise is impermissible and, in practical terms, impossible. In this regard counsel referred to *The People (Director of Public Prosecutions) v. Campbell* [1983] WJSC 201 (unreported, Court of Criminal Appeal, 7th February 1983). In that case the accused were convicted of extra-territorial offences under the Criminal Law (Jurisdiction) Act, 1976 relating to an escape from prison. At trial issue was taken in relation to the legality of their detention in Northern Ireland. The Court of Criminal Appeal clearly rejected the idea that constitutional norms ought to be applied to foreign criminal processes. Giving the judgment of the Court, Hederman J. said at pp. 221 to 223:-

> "It is clear that neither this passage nor any other part of the judgment of Supreme Court is an authority for the argument which is now urged on this Court. The Chief Justice was dealing with the powers of the Courts during a trial in this jurisdiction in relation to the evidence of a witness whose testimony had been taken in Northern Ireland. The point now raised is an entirely different one; namely whether in adjudicating on the lawfulness of an act in Northern Ireland (*i.e.*, in this case, the lawfulness of the accused's custody) the Courts here can decide that the act is unlawful if it does not accord with our laws (constitutional or otherwise). As to the rights which Irish citizens are granted by the Constitution, the judgment of the Supreme Court makes it clear that the right to obtain "constitutional justice" from tribunals (judicial and non-judicial) is a right which does not extend to tribunals established outside the jurisdiction of the state. The lawfulness of the custody in Northern Ireland of an Irish citizen cannot therefore be impugned by reference to a non-existent right. The conclusions of the Supreme Court with regard to the right to constitutional justice apply with equal force to any of the other unspecified personal rights which an accused person may enjoy by virtue of Article 40 (3) of the Constitution in relation to criminal proceedings in this State. As to rights conferred by statute, it is obvious that the laws of Northern Ireland in relation to the trial of offences are different to the laws of this State. It would lead to a result manifestly contrary to the intentions of the Oireachtas if the Courts here were required to find that a person who escaped from a custody which under the law of Northern Ireland was perfectly legal had committed no offence under the 1976 Act because the custody in question failed to comply with the statutory laws of this State. As to rights granted by the common law, again the Court is of the opinion that the 1976 Act does not require the courts to determine the lawfulness of the custody in Northern Ireland of an accused person by reference to common law principles which operate in this jurisdiction."

(The passage referred to in the quotation is a passage from *In re The Criminal Law (Jurisdiction) Bill*, 1975 [1977] TR 129 at pp. 157 to 158 of the report)

Counsel for the applicant submits that a similar approach was taken to extradition cases under Part III of the Extradition Act, 1965 in relation to an attempt by a requested person to mount a collateral attack on his conviction in *Clarke v. McMahon* [1990] 1 I.R. 228. Costello J, at first instance, had declined to enter upon a consideration of the merits of the conviction and suggestions that it had been obtained in breach of the applicant's constitutional rights. His reasoning was upheld by Finlay C.J. at pp. 235 and 236:-

> "Costello J. rejected this portion of the applicant's claim upon a number of grounds, viz.
>
> > (1) That the court could not properly undertake a n investigation into the validity of a conviction where extradition to serve an imposed sentence arising from such a conviction is sought.
> >
> > (2) That the fact that the courts of t he requesting state were never asked to adjudicate on the applicant's present claim that his statement was inadmissible, means that for the courts of this state to do so would be contrary to the extradition arrangements which are contained and reflected in the Act of 1965.
> >
> > (3) That what the court in this case was asked to do was to investigate a complaint that criminal assaults took place eleven years ago in another jurisdiction, and that the attempt to do so would be an unconstitutional exercise of the court's judicial powers.
>
> I agree with the decision of Costello J. and with the reasons for which he reached it.
>
> In the course of his judgment he acknowledges that the court has, in addition to its powers under s. 50 of the Act of 1965, inherent powers for the protection of constitutional rights. The statement that the court cannot in an extradition case properly undertake an investigation into the validity of a conviction recorded in a requesting state must be understood as being subject to this inherent power. The facts of this case, in my view, go nowhere near establishing a situation in which this inherent power might be invoked and it is, therefore, not necessary for me to speculate on what might constitute, in any other case, such a situation. I would, accordingly, be satisfied that the applicant's appeal on this ground must fail."

Counsel for the applicant submits that at the heart of the argument made by the respondent is a supposition that Article 38 was intended to apply with extra-territorial effect. It is clear from the terms of the article that this cannot be so. Most obviously it guarantees a right to trial by jury which is not available in the great majority of EU Member States. It is difficult to see why it should be the case that fair procedure rights under Article 38 should apply beyond the national territory whilst other rights such as the right to trial by jury should not.

The Court's decision on the s.37(1) point

The Court agrees with counsel for the applicant that the respondent's case under this heading is misconceived. It is fundamentally misconceived because it asks the Court to to engage in a completely artificial, and indeed inappropriate, exercise and that is to exercise a supposed jurisdiction that is premised on the application of the Constitution to the laws of England and Wales and to pore over the issuing state's criminal justice process to determine, as the court is invited to do, that it differs in different respects from what is constitutionally mandated in this jurisdiction. In this Court's view it is clear from the Supreme Court judgments both in *Minister*

for Justice, Equality and Law Reform v. Brennan and in *Minister for Justice, Equality and Law Reform v. Stapleton* that to do so would be entirely inappropriate. This Court has no jurisdiction to take the laws of another jurisdiction and subject them to constitutional scrutiny. Moreover, the cases to which counsel for the respondent referred in the course of his submissions, *viz*. *The People (Director of Public Prosecutions) v. Campbell* and *Clarke v. McMahon* are both consistent with, and provide support for, this Court's view in that regard.

If I had any doubt about this, and I do not, the recent decision of the Supreme Court in *Nottinghamshire County Council v. B* [2011] IESC 48 (unreported, Supreme Court, 15th December 2011) engages directly with the issue, and provides yet further support for this Court's view. The parties were unable to refer me to this decision because judgment was not delivered until two days after this Court's hearing in the present case. Although it was a Hague Convention case, the appellant had, in like manner to what the respondent asks the Court to do in the present case, invited the Court to take the laws of another State and subject them to constitutional scrutiny. The Supreme Court firmly indicated that it would be inappropriate for it to d o so. In his judgment in that case, O'Donnell J. dealt with the issue as follows at paras 44 and 45:-

> "44. It can said that the most far-reaching proposition advanced on behalf of the Appellants - that no child should be returned to a jurisdiction which does not recognise the inalienable and imprescriptible rights of the family - is one which if correct could mean that Article 20 would no longer be the exception but would, as least as far as Irish law is concerned, become the rule. As Professor Binchy has observed, it can be fairly said that few if any countries have constitutional provisions relating to the family which can be said to be identical to those contained in Articles 41 and 42. Thus if the Appellants broadest argument was correct then almost any return of any child would not be possible under the Convention. However, in my view the principle asserted on behalf of the Appellants here has no basis in Irish constitutional law.
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> 45. Neither in its general provisions, nor in the specific provisions of Articles 41 and 42, does the Irish Constitution contain any suggestion that Ireland wished to assert the form of constitutional splendid isolationism (whether relating to the family or more generally), which would be involved in determining that there could be no useful cooperation with the legal systems of any other state, which had not adopted something approximating to the very specific provisions of the Irish Constitution. It is an obvious but nonetheless compelling point that if such an unusual provision was intended, one would expect it to have been set out in explicit terms in the text of the Constitution. Not only is there no such starkly fundamentalist provision contained in the Constitution, but in my view, for reasons I will elaborate upon later in this judgment, every indicator in the Constitution is to the contrary.

Returning to this theme later in the judgment, O'Donnell J. added at paras. 57 to 65:-

> "57. All we know is that in childcare applications the Courts in England and Wales are required to take a single track approach so that all issues including adoption can be addressed in a single hearing. It may perhaps be inferred that in practice adoption orders may be made more readily in England than in Ireland, but that is by no means enough to prohibit return. It is I think important in this regard that even in the case of an adoption order made in England (or anywhere else) in circumstances where it could be positively demonstrated, that such an order would not have been permitted in Ireland, Irish law would not interfere with such an adoption, and would in all probability recognise it under the Adoption Act 1991. That is, in part, because the relationship between Irish law and that of other States is itself a constitutional issue.
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> 58. The essence of the argument of the Appellants in this case is that an adoption of the children in this case *"would be a breach of the constitutional rights of the family".* On any analysis, the act which it is alleged would constitute a breach of the rights of the family is the feared adoption of the children which if it were to occur, would happen in England. The *Northampton* derived argument however treats such an adoption as if it occurred in Ireland. However that is to beg the question at the heart of the case.
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> 59. The statement that the return of a person by order of the court to another jurisdiction is not permissible if the person may be subject to some process which *"would be a breach of his constitutional rights"*, is perhaps a short hand which might be thought to be in itself unobjectionable. But it is important to recall that the question of the extent to which Irish law has regard to events occurring abroad and under and in accordance with the law in another jurisdiction is in itself a distinct constitutional issue.
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> 60. If the Irish Constitution is viewed solely through the lens of the reported cases, a somewhat distorted picture might emerge. It is natural that most constitutional litigation and commentary has focussed upon the important provisions of the Constitution contained in Articles 40-45. But the Irish Constitution is much more than simply a vehicle for the fundamental rights provisions. It regulates the relationship between the People and the State they created. It establishes the machinery of government and allocates responsibility between the different branches, and importantly for present purposes, it seeks to locate the State in an international context. In this regard, the Irish Constitution is not unique. In truth it can be said that every constitution regulates the relationship between a state and its citizens and indeed those obtaining the benefit of the society created and maintained by the state. But it follows in my view, that any question of interaction between Irish law and events occurring abroad, and in particular events occurring pursuant to the law of another state, raises issues of constitutional dimensions. To say that an adoption, carried out as it would be in accordance with the law of the United Kingdom, and in respect of persons who were subjects of that jurisdiction, is nevertheless itself contrary to the Irish Constitution should raise an alarm.
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> 61. The true question for an Irish Court is whether what is done within this jurisdiction can be said to be contrary to the Constitution. This is why Article 20, can be seen to precisely focus attention on the correct issue. That is whether the return (and not the adoption) would itself be a breach of the Irish Constitution. Now, if the law was that an Irish Court could not return a person if there was a possibility of some event occurring which would, if it occurred in Ireland, be a breach of the constitutional rights of the citizen, then this would be a merely verbal distinction. However framing the issue as to *whether* the return itself would be a breach of the Constitution focuses attention on the very issue of *whether* the Irish Constitution does, or does not, distinguish between events occurring abroad and those occurring in this jurisdiction. There is no a priori answer to this question. It is a matter of constitutional interpretation.
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> 62. Even assuming that an adoption in this or any other case was not merely a possibility but rather a certainty, had the family not left England I do not consider that any such adoption would give rise to any concern as a matter of Irish constitutional law. If the parents had come to Ireland without the children and sought an injunction to restrain an adoption taking place in the United Kingdom, I do not conceive that an Irish Court would have entertained the application. By the same token if an adoption were effected in the United Kingdom and subsequently an issue arose in an Irish Court

> as to the status of the children, there would as I understand it be little doubt but that the adoption would be recognised here under the Adoption Act 1991 . It might therefore be asked in what way is this case any different? A difference does lie however in the fact that in the examples considered above, the English jurisdiction is able to carry out its orders without the assistance of an Irish Court. In the case of an application under the Hague Convention, the Irish Courts processes are invoked and the Court is obliged to uphold the Constitution. It is thus a legitimate question whether the Court can lawfully make such an order when it is said t hat the end point of the process may be an order of the English court which would not be constitutionally permissible in Ireland. The issue is the approach that the Constitution requires a court to take when such a claim is made.
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> 63. It is conceivable, at least in theory, that any particular state at any particular time might have so ideological or fundamentalist a view, or be so self-absorbed or self confident, or indeed simply so powerful, as to insist that it would, through its legal system only deal with those countries who conformed to its precise standards. Again it is conceivable that an international convention adhered to by a number of countries might require a country to concern itself with the manner in which persons are dealt with in another country. There may be many reasons why a constitution or human rights instrument may require that courts enforcing that instrument should not order the return of a person to another jurisdiction where it is considered that the treatment to be afforded in that jurisdiction will fall below the standards required by that constitution or instrument.
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> 64. It seems plain however, that the Irish Constitution does not demand the imposition of Irish constitutional standards upon other countries or require that those countries adopt our standards as a price for interaction with us. First and most obviously, the Constitution simply does not say so. Indeed it might be expected that such a sensitive issue would be dealt with if that was the intention of the drafters and thus the people who adopted the Constitution. Furthermore, the historical context in which the Constitution was introduced was one in which international relationships were to the forefront of public concerns.
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> 65. Article 29 of the new Constitution addressed the position Ireland was to take in its international relations. This in itself was a significant departure from the 1922 Constitution and a conscious attempt to assert nationhood. The significance of this Article, particularly in its historical context, was explored by Mr. Justice Barrington in his Thomas Davis lecture, *The North and the Constitution*. As he points out, it is of some significance that Mr. deValera was the President of the League of Nations in 1936 when the Constitution was being drafted. Indeed it appears that some of the values of the Covenant of the League of Nations were reflected in the Constitution and in particular in Article 29. The Article affirmed Ireland's devotion to the "The ideal of .... friendly cooperation amongst nations". In one sense accession to the Hague Convention can be seen as a particular example of such cooperation. Such cooperation necessarily encompasses recognition of differences between states and the manner in which they approach the organisation of their societies. This together with the Constitution's recognition of the territorial boundaries of the State and the reach of its laws are important parts of the Constitution to which regard must be had when it is contended that the return of a child in another contracting state is not permitted by the Constitution. This is why in my judgment the Constitution requires the Courts to refuse return only when the foreign procedure is so contrary to the scheme and order envisaged by the Constitution and so proximately connected to the order of the Court, that the Court would be justified, and indeed required, to refuse return."

In the Court's view, there is substance in any event in the point made by counsel for the applicant that the respondent has failed to show that he is likely to be subjected to the evidential provision of which he complains. However, even if it were not necessary for him to demonstrate likelihood or probability, even if it were enough for him to demonstrate a real risk in that regard, he has manifestly failed, in the Court's view, to demonstrate that it would amount to an egregious breach of his rights amounting to a fundamental defect in the system of justice in the issuing state. The fact that the rules are different in the issuing state does not render them fundamentally defective. To establish that, the respondent would have to be in a position to demonstrate that the laws of the issuing state differ fundamentally from universally held notions of what constitutes fairness and fair procedures *e.g.* the presumption of innocence, the right to defend oneself at a trial, matters of that sort. The fact that the Law in England and Wales on the admissibility of evidence of bad character is merely different to the law in Ireland is insufficient in itself to establish a fundamental defect in the system of justice in the issuing state. The Irish position on the admissibility of such evidence is not universally, or even widely, considered to be fundamental to fairness and fair procedures.

The Court therefore finds that the objection under s. 37(1) of the Act of 2003 is not made out.

7. Conclusion

The Court is not disposed to uphold any of the specific objections made by the respondent in this case, and in the circumstances it is appropriate to make an order for his surrender under s. 16 of the Act of 2003.