THE COURT OF APPEAL

(CIVIL)

Neutral Citation Number: [2016] IECA 293

RECORD NO: 2015 NO. 488

RECORD NO: 2015 NO. 527

PEART J.
IRVINE J.
MAHON J.

IN THE MATTER OF ARTICLE 40.4 OF THE CONSTITUTION AND IN THE MATTER OF SECTION 16(6)(b) OF THE EUROPEAN ARREST WARRANT ACTS 2003 AND 2012

BETWEEN:

FRANCIS LANIGAN

APPELLANT

- AND -

GOVERNOR OF CLOVERHILL PRISON, MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 19TH DAY OF OCTOBER 2016:

1. There are two appeals before this Court. The first is Mr Lanigan's appeal against the refusal by Barrett J. on the 17th September 2015 of his application for release following an inquiry into the lawfulness of his detention under Article 40.4 of the Constitution. The second is his appeal against the refusal by Noonan J. on the 15th October 2015 to direct an inquiry under Ar. 40.4 of the Constitution into the lawfulness of the appellant's detention, but on different grounds than the application heard by Barrett J. For that reason each appeal will be addressed separately in this judgment. I should mention perhaps that the respondents to each appeal are common, but were heard only on the first appeal, the second being an ex parte appeal.

Factual chronology

2. There is a lengthy and somewhat complicated factual background which it is necessary to summarise so that the context of the appellant's applications for his release can be properly understood.

3. The authorities in Northern Ireland sought the surrender of the appellant on foot of a European arrest warrant so that he can be prosecuted there on charges of murder and possession of a firearm in May 1988. He was arrested here on foot of that warrant on the 16th January 2013. He was brought before the High Court in accordance with the provisions of the Act and was remanded from time to time in custody until the application for his surrender under s. 16 of the Act eventually came on for hearing before Ms. Justice Murphy on the 30th June 2014. Having completed that hearing on 4th July 2014 she reserved her judgment.

4. Several issues had been raised by the appellant in his Points of Objection filed prior to the hearing. For the moment it is necessary to refer to just one of them, namely his contention that if he was surrendered his life would be at risk, and that his surrender was therefore prohibited under s. 37 of the European Arrest Warrant Act, 2003 as amended ("the Act"). His fear was based on his previous experience in Northern Ireland, and his belief that if surrendered, the prison authorities would be unable to provide him with sufficient protection while in custody. The Minister on the other hand considered that his present fears are based on facts and events that occurred back in the 1980s, and could not form the basis for his current opposition to surrender. The appellant had filed an affidavit in which his fears were set forth, and a corroborating affidavit was also filed on his behalf.

5. In the lead up to the s. 16 hearing the High Court directed that any replying affidavit that the Minister might wish to file in answer to the appellant's affidavit should be filed not later than the 24th April 2014. An important factor in the context of later events is that the Minister filed no such affidavit prior to that deadline. However, just before the hearing commenced it appears that some communications from the UK authorities had been received and were exhibited in an affidavit sworn by Hugh Dockery of the Chief State Solicitor's Office. In addition, at the hearing counsel for the Minister sought to adduce into evidence a letter from the Northern Ireland Prison Service which purported to address the appellant's concerns as to the risk to his life if surrendered. The appellant had objected to material being given to the Court in this informal and unsworn manner. On the final day of the hearing this letter was exhibited in an affidavit sworn by Mr. Davis of the Central Authority and provided to the Court in this way as an exhibit. Again, this manner of providing evidence to the Court in answer to the sworn evidence of the appellant was strenuously objected. These objections were not upheld. An application for leave to cross-examine Mr. Davis on his affidavit was refused, as was an application for discovery.

6. At that hearing, the appellant argued that in the absence of any affidavit being filed by the Minister his own averments as to the basis for his belief that his life would be at risk if surrendered to Northern Ireland were uncontroverted and therefore had to be accepted by the Court, thus mandating a refusal of the application for surrender on the basis that it was prohibited under s. 37 of the Act.

7. Having reserved her judgment at the conclusion of the hearing on the 4th July 2014, Murphy J. gave a preliminary ruling on the 17th November 2014 in which she referred to the non-adversarial nature of the hearing on an application for surrender, and stated that when considering, *inter alia*, whether or not surrender was prohibited under Part III of the Act (which includes s. 37) *"the Court must be satisfied regardless of the urgings of the parties before making a decision to surrender"*. In that respect she mentioned that

no replying affidavit had been filed to contradict or in any way dispute the facts set out by the appellant in his grounding affidavit in support of his belief that his life would be put at risk by his surrender to Northern Ireland. She was not satisfied about the provenance of the letter that had been provided to the Court by way of exhibit to Mr Davis's affidavit.

8. The High Court judge concluded, however, that because of the non-adversarial and *'sui generis'* nature of the Courts' inquiry on an application for surrender under the Act, and also because s. 20 of the Act specifically enables the Court of its own motion to seek such additional information as it felt necessary in order to perform its function, she would do so in this cas*e because she was satisfied that in accordance with the test set out in* MJELR v. Rettinger [2010] IEHC 206 the appellant had adduced sufficient evidence in affidavit form in relation to threats to his life *"such as to put the Court on inquiry both as to the nature of any threats and the capacity of the Northern Ireland authorities to protect his right to life"*. She went on to state that such information as was received did not have to be in the form of sworn evidence.

9. Murphy J. therefore exercised her power under s. 20 and directed the Minister, as the Central Authority under the Act, to seek information from the Northern Ireland authorities in relation to the matters raised by the appellant and as to the capacity of those authorities to adequately protect him against threats to his life while in custody there.

10. Following that preliminary ruling, the Central Authority sought and obtained information from those authorities. This was provided in the form of a letter from an Assistant Chief Constable, Crime Operations of the PSNI, which was produced to the Court on the 8th December 2014. The appellant did not challenge the content of that information on that date, but rather, confined his objection to its admissibility as evidence, being simply in the form of a letter handed into court, and on which nobody could be cross-examined. He had also issued a notice of motion returnable for the 8th December 2014 in which he sought discovery of any communications between the Central Authority and the authorities in the United Kingdom regarding possible answers to his contention that his life would be under threat if surrendered on foot of the warrant. As noted by the trial judge in her judgment, the respondent also sought a reference to the CJEU under Article 267 TFEU *"of questions touching upon whether or not Ireland, in giving effect to the Framework Decision was obliged to depart from national rules of practice, procedure, evidence and conduct of trials having regard to Article 12 of the Framework Decision"*. In addition a reference was sought on the proper interpretation of Article 17 of the Framework Decision setting out time limits in respect of the process for surrender. He also renewed an application for bail.

11. This motion was adjourned for one week to give the Minister an opportunity to consider and respond to it. On the 15th December 2014, bail was granted on certain terms which it would appear the appellant was unable to meet. Those terms were successfully appealed, and ultimately the respondent took up his bail in July 2015 as noted by the trial judge. As for the balance of the motion bearing upon the admissibility of the information sought and obtained under s. 20 of the Act, the trial judge rejected the appellant's application, holding that the interpretation of the Act and the Framework Decision contended for by him was misconceived, and had already been the subject of her ruling on the 14th November 2014. The application for a reference to the CJEU on this issue was also rejected since the Court had already given its ruling.

12. However, the Court did accede to the application for a reference to the CJEU on the question of time limits for surrender under Art. 17 of the Framework Decision. That reference was made even though that issue was, in the opinion of the trial judge, being raised very late in the day, and had not been raised in Points of Objection or at the s. 16 hearing itself. However in her ruling on the 15th January 2015 the trial judge considered that it was clear that *"our system cannot function within the time limits set out by Article 17"* and that *"the consequences of that inability are a matter of real substance, and the Court, independently of the parties, would wish to have the assistance of the Court of Justice in interpreting Article 17 as the outcome could affect the Court's ultimate decision in this case"*.

13. The judgment of the CJEU issued on the 16th July 2015. The terms of the judgment are summarised by the trial judge. There is no need to dwell upon it here, save to say that, as noted by the trial judge, it coincided very much with the view expressed by the Supreme Court in *Dundon v. Governor of Cloverhill Prison* [2006] 1 IR. 518,and that the obligation to surrender remained upon the requested state even after the time limits referred to in Art. 17 had passed.

14. Following the issue of that judgment by the CJEU the parties reconvened in the High Court on the 20th July 2015 for further submissions in relation to the information which had been provided in the form of a letter by the UK authorities pursuant to the request made under s. 20 of the Act already referred to, and which had been produced to the Court by the Minister on the 8th December 2014.

15. On the 20th July 2015 the appellant once again returned to his objection to the admissibility of this information in the form of a letter handed to the Court. A further objection was based on a submission that the Court enjoys no power under s. 20 to seek such information of its own motion without giving the respondent an opportunity to make submissions in that regard. The respondent submits that the appellant in fact had every opportunity to make any submissions he wished to make on that question, but did not do so. In any event, on the 2nd September 2015 the trial judge rejected his s. 20 submissions, saying that they were misconceived. She went on to consider the contents of the letter and to reach a conclusion that, applying the *Rettinger* test, *"the Court is therefore satisfied that the Northern Ireland authorities can and will take all reasonable measures to safeguard the life of the respondent, if he is surrendered to their custody"*.

16. This objection by the appellant to the admissibility of the letter obtained pursuant to the Court's power under s. 20 of the Act assumes prominence in the context of the present appeals for reasons which will become apparent.

17. Having given judgment on the 2nd September 2015, the matter was put back until the 4th September 2015, when the Court made and perfected two orders. The first order of that date is the usual order for the surrender of the appellant to the requesting authorities, and for his committal to prison pending the carrying out of that order. Importantly in the context of the first appeal, this first order went on to direct as follows:-

> *"The Court further directs (a) that if the respondent is not surrendered before the expiration of the time for surrender under s. 16(3)A of the European Arrest Warrant Act 2003 as amended he is to be brought before the High Court again as soon as practicable after that expiration or (b) if it appears to the Central Authority that because of circumstances beyond the control of the state or the issuing state concerned that the respondent will not be surrendered on the expiration referred to at (a) he is to be brought before the High Court again before that expiration."*

18. The second order made on the 4th September 2015 was one refusing the appellant's application for leave to appeal pursuant to s. 16(11) of the Act. Notwithstanding that leave to appeal was refused, the appellant nevertheless filed and served a notice of appeal. I can only presume that the basis on which this was done in the face of such refusal is because on 23rd July 2014 the appellant had commenced plenary proceedings (Record No. 2014 No. 6374P) in which he sought declarations of unconstitutionality in respect of

certain provisions of the Act and its interpretation by the Court, including in respect of the limited appeal provision of s. 16(11), and in order to protect his position in the event that he should succeed in those proceedings. The filing of that uncertified appeal was met by an application by the Minister to this Court for an order striking out that appeal, or otherwise declared it to be null and void. Having heard the parties' submissions, this Court acceded to the Minister's application.

19. At this point I should refer in more detail to the plenary proceedings commenced by the appellant on the 23rd July 2014. The General Indorsement of Claim therein states the following:-

> *"THE PLAINTIFF'S CLAIM is that insofar as the European Arrest Act 2003, as amended, has introduced an inquisitorial and sui generis procedure that permits departure from fundamental norms of fair procedure, as particularised in paragraph 21 of the Statement of Claim herein, and also unfairly restricts the right of appeal, it is repugnant to the Constitution and contravenes the European Convention on Human Rights and the EU Charter on Fundamental Rights, and that the plaintiff's surrender to the U.K. as sought in related proceedings (2013/1 EXT) should not be permitted."*

20. It will be recalled that the s. 16 hearing had concluded on the 4th July 2014 and that judgment had been reserved. During that hearing the appellant had objected to the manner in which unsworn material (*i.e.* the letter from the Northern Ireland authorities) was offered to the Court by the Minister. It will be recalled that in her preliminary ruling on the 17th November 2014 the trial judge had, *inter alia*, directed that further information be obtained from the Northern Ireland authorities since she was not satisfied as to the provenance of that letter. Given the nature of the relief sought in the plenary summons, it seems a reasonable inference that by the end of the s. 16 hearing on the 4th July 2014 the appellant at least suspected that the unsworn material to which objection had been taken would be relied upon by the trial judge in answer to his concerns as to the risk to his life if surrendered, and to which he had sworn on affidavit, and further, that he anticipated that if an order for surrender was made he might not be granted leave to appeal under s. 16(11) of the Act. However, as of the date on which that plenary summons was issued the events which might give him standing to pursue those proceedings had not actually occurred. Presumably it was for that reason that he did not serve those proceedings until December 2014, though a statement of claim had already been drafted for delivery.

21. As already noted, on the 1st December 2014 the further letter from the Northern Ireland Prison Service was produced to the Court, and the matter was put back to the 8th December 2014 for further argument. It was on the 1st December 2014 also that the appellant served his plenary summons on the Chief State Solicitor on behalf of the defendants. On the 12th December 2014 an amended statement of claim was delivered in order to bring matters more up to date, including by reference to the preliminary ruling given by the trial judge on the 17th November 2014 and the direction that further information be obtained for the Court by the Central Authority from the Northern Ireland Prison Service. However, whether at that point he had standing to seek a declaration of unconstitutionality in relation to the limited appeal provision in s. 16 (11) of the Act is surely debateable. In the event, it is not something upon which further comment is necessary, since from the 4th September 2015 he has been somebody adversely affected by s. 16(11) when leave to appeal was refused.

22. It was on the 8th December 2014 that the Court, inter alia, referred questions on the interpretation of Article 17 of the Framework Decision to the CJEU. It appears that on this date also the existence of the above plenary summons proceedings was brought to the attention of the trial judge. According to the appellant, she refused to deal with the issues raised therein in the EAW proceedings. How she could have been expected to deal with those proceedings within the EAW proceedings is not at all clear since pleadings would have to be exchanged in the normal way before those plenary proceedings could be heard. The answer from the CJEU was received in July 2015. The State defendants named in the plenary proceedings delivered their defence on the 17th July 2015. The appellant complains that despite his frequent urgings in the eight months from December 2014 to July 2015 the State defendants' defence was not delivered until July 2015. He goes on to make the point that if the defendants had not delayed the delivery of their defence for so long, those plenary proceedings could have been determined before the trial judge gave judgment on the 2nd September 2015 and therefore before she made the order for surrender on the 4th September 2015. It is contended that if the appellant had succeeded in obtaining the reliefs which he sought in the plenary proceedings he would have obtained the following declarations which would have had a significant impact of the result of the s. 16 application itself and the right of appeal:-

> (a) A declaration that in so far as the European Arrest Warrant Acts 2003 and 2012 impose an inquisitorial and sui generis procedure on the Courts of Justice, that is not expressly provided for therein or in the specific requirements of the Framework Decision, the same are unconstitutional;
>
> (b) In so far as this Act and/or the Framework Decision permits outcomes such as are summarised in paras. 17-19 of this statement of claim, they are repugnant to the Constitution and/or contravene the EU Charter on Fundamental Rights;
>
> (c) That part of s. 16(11) of this Act which in practice enables the High Court to veto plainly eligible appeals from itself, is unconstitutional and/or contravenes the EU Charter.

23. On the 4th September 2015 the appellant urged the trial judge not to make the order for surrender until the issues raised in the plenary proceedings had been determined in the High Court. However, she declined to postpone the making of the order, and furthermore refused leave to appeal. It was the refusal of the trial judge to postpone the making of her order until such time as the plenary proceedings were determined that led the appellant to consider that his detention thereafter was unlawful because *"it was made in disregard of the constitutional objection"*. This led in turn to the first application for an inquiry under Art. 40.4 of the Constitution into the lawfulness of his detention which was heard by Barrett J, on the 14th September 2015. In his judgment delivered on the 17th September 2015 Barrett J. rejected the application. I will come to the arguments and the judge's reasons for refusing the application in due course. He also refused an application for bail pending appeal against his order, stating that it was more appropriate to apply to this Court for bail. It can be noted at this point that this Court granted bail on the 9th November 2015, and the appellant has been on bail ever since. The first appeal before this Court therefore is against that judgment and order of Barrett J. in which he found that the appellant's detention on foot of the committal order of Murphy J. was in accordance with law, and dismissed the proceedings.

24. But before addressing the arguments on that first appeal to this Court, I need to advance the narrative to subsequent events in order to provide context for the second application for an inquiry under Art. 40.4 of the Constitution, which came before Noonan J. on the 15th October 2015 and which he refused to direct, and which is the subject of the second appeal herein.

25. Recalling that the surrender and committal orders were made by Murphy J. on 4th September 2015, it must now be noted that the Minister returned to the High Court on the 25th September 2015 (Butler J.) on notice to the appellant and made an application for a stay on the order for surrender, and a stay on the part of the order of Murphy J. which directed that if surrender was not effected within the period specified in s. 16(3)A of the Act the appellant should be brought back before the High Court. I have previously referred to the terms of that order at para. 17 above.

26. The reason for the Minister's application for these stays was because the appellant had lodged an appeal against the order of Barrett J. refusing relief under Article 40.4 of the Constitution, and in the light of s. 16(6)(b) of the Act which prohibits surrender taking place while Article 40.4 proceedings are yet to be finally determined. It would appear that the Minister did not wish to have to bring the appellant back before the High Court as required by s. 16(4)(c) where the only reason why surrender was not taking place within the period specified in the Act was the appellant's own action in launching an Article 40.4 inquiry, and upon its dismissal, lodging an appeal, as opposed to some circumstance outside the control of the Minister or the issuing state preventing surrender taking place within the prescribed period.

27. In any event, Butler J. granted the stays applied for by the Minister despite the appellant's submission firstly that no stay on surrender was necessary given the terms of s. 16(6) of the Act, and secondly his objection to the removal of the protection he was entitled to under s. 16(4c) of the Act (as amended) by the granting of a stay on the operation of that provision which, he submitted, resulted in the indefinite postponement of the date for surrender until the first Article 40 proceedings were finally determined, and the removal of the obligation upon the Minister to bring the appellant back before the High Court where surrender did not happen within the period prescribed by the Act.

28. On the 15th October 2015 the appellant made a second application for an inquiry under Art. 40.4, alleging that the stay on the operation of s. 16 (4c) of the Act granted by Butler J. on the 25th September 2015 had the effect of denying him his statutory right to be brought back before the High Court in the event that the prescribed period for his surrender was exceeded, thus rendering his continued detention other than in accordance with law.

29. That ex parte application for an inquiry under Article 40.4 of the Constitution came before Noonan J. on the 15th October 2015. The written note of his *ex tempore* judgment shows that the argument put forward by the appellant was that the combined effect of the stay orders made by Butler J., and in particular the stay on the operation of s. 16(4)(c) of the Act, rendered his continuing detention pending his surrender unlawful. Noonan J. refused to direct such an inquiry. He considered that to do so would be to permit a collateral attack upon the orders of Butler J. made on the 25th September 2015, and that he had no jurisdiction to do so. He considered that the proper course was for the appellant to appeal the orders made by Butler J. The appellant appeals now against that *ex parte* refusal by Noonan J. to direct an inquiry. The orders of Butler J. are not themselves the subject if any appeal.

30. I believe that the above narrative is sufficient to provide the context for the two appeals that are before this Court, save to repeat that on the 9th November 2015 the appellant was granted bail by this Court pending the determination of these appeals, and has been on bail since that date.

The first appeal (488/2015) – against the judgment and order of Barrett J. dated 17th September 2015

31. In his Application for an Inquiry under Art. 40.4 of the Constitution which came before Barrett J. the appellant gave a brief summary of facts and events leading to the making of that order refusing his application for release from detention. It will be recalled that Murphy J. had rejected the appellant's contention that the letters produced to the High Court by the Minister in response to her direction to the Central Authority under s. 20 of the Act were inadmissible, and that she did so, broadly speaking, on the basis that EAW proceedings were *sui generis* and that the usual rules as to proof and admissibility of evidence at a trial did not apply in such proceedings. She held that an application for surrender was neither a trial nor an adversarial process, and that the Court's function on such an application is to ascertain whether the requirements of s. 16 of the Act have been complied with, including by being satisfied that surrender is not prohibited by Part III of the Act. She specifically held that under s. 20 of the Act the Court was entitled to seek and receive further information from the requesting authorities to enable it to carry out these functions, and furthermore that it was not essential that such information as was provided under the section should be in the form of an affidavit, provided that the Court could be satisfied as to the provenance and authenticity of the material/information obtained.

32. It will be recalled that in July 2014 the appellant had been concerned that the trial judge was intent on receiving information informally – in other words not proven in the normal way by affidavit or oral evidence which could be the subject of cross-examination – on the basis that EAW proceedings were *sui generis* and non-adversarial, and that he, presumably in anticipation of an adverse decision, had commenced plenary proceedings (not served until December 2014) in which he sought to challenge the constitutionality of such an informal manner of receiving 'evidence' and/or information to contradict what he had stated on affidavit and on which he had not been cross-examined.

33. It will be recalled also that the trial judge had been requested by the appellant to postpone making any order for surrender until such time as his plenary proceedings were heard and determined, and that he had complained that the only reason that the proceedings had not already been determined by the time the trial judge was deciding to make the order for surrender was that the State defendants had delayed unreasonably in the delivery of their defence until July 2015, following the response from the CJEU on the preliminary reference on the delay issue. The trial judge had rejected the submission that she should delay making her order until the plenary proceedings were determined. She proceeded to make the orders as already described, and also refused leave to appeal following an application being made in that regard.

34. It is no doubt the frustration of his desire to challenge the constitutionality of the informal procedures permitted by s. 20 of the Act, at least as interpreted by the trial judge, and her informal receipt of such information, prior to any surrender order being made that has provoked the appellant to avail of the Art. 40.4 procedure in another effort to try and get these issues determined by the Court, since under s. 16(6) of the Act he may not be surrendered until the Article 40 proceedings are finally determined.

35. As already described, the existence of Art. 40.4 proceedings prevents surrender taking place until such time as those proceedings are finally determined. The appellant has been open about the fact that the purpose of the application under Article 40.4 is in order to provide a period of time within which the plenary proceedings could be determined.

36. It was contended on the application for an inquiry that the failure to postpone the making of the surrender order until such time as the plenary proceedings were finally determined rendered the detention of the appellant on foot of the committal order made on the 4th September 2015 unconstitutional and therefore not in accordance with law. That submission appears as follows at para. 4 of the Grounds contained in the filed Application for Inquiry under Article 40.4:-

> *"4. As the pleadings in the plenary action show, several serious questions about their constitutionality arise with reference to the interpretations placed by the Judge on parts of the EAW Acts. Assuming for argument's sake that the objections to them are well-founded, the applicant's purported surrender before that case is heard and determined would be unconstitutional as well as being barred by inter alia section 37(1)(a) of the EAW Act. Accordingly, his present custody is unlawful/unconstitutional and in breach of E.U. law. Were he to be surrendered before the constitutional objections are finally determined, that might very well be deemed to render moot his constitutional case, and deprive him of the right of access to the courts protected by inter alia the E.U. Charter of Fundamental Rights.*

37. As for the ground based upon the claim that the limited right of appeal provided for in s. 16(11) of the Act is unconstitutional, it is set forth in para. 5 of the Grounds as follows:-

> *"As for the refusal of the certificate to appeal the surrender order (unless itself unconstitutional), that may give rise to the somewhat bizarre situation where the High Court is debarred from ruling on a variety of contentious interpretations placed on the EAW Act and is called on to adjudicate on the constitutionality of these provisions, as so interpreted, notwithstanding the presumption of constitutionality and conforming interpretation obligation. In the constitutional case, inter alia reliance will be placed on the very reasons for refusing a certificate to demonstrate how flawed a procedure s. 16(11) is, contravening the nemo iudex principle."*

38. On the return of the application before Barrett J. on the 14th September 2014 the Governor of Cloverhill Prison certified that he held the appellant in custody pursuant to the warrant signed by Murphy J. dated 4th September 2014.

39. In his written judgment delivered on the 17th September 2015 Barrett J. commenced by stating that there was *"nothing wrong on the face of the warrant"* and that the reason that the appellant claimed that his detention was unlawful was based upon the judgment of Denham C.J. in *F.X v. Clinical Director of the Central Mental Hospital* [2014] IESC 1, namely on the basis that while there was nothing wrong on the face of the warrant itself, there has been a fundamental denial of justice such that the detention could not be considered to be in accordance with law. Barrett J. referred to the submission by the appellant that the trial judge's interpretation of the Act and the Framework Decision as permitting an inquisitorial or non-adversarial type of procedure which departs from fair trial procedures otherwise applicable, as well as the restricted right of appeal under s. 16(11), rendered the Act unconstitutional, and therefore his detention unlawful.

40. In concluding that the detention of the appellant was in accordance with law, Barrett J. stated as follows at para. 7 of his judgment:-

> *"7. Mr Lanigan's application is essentially flawed in its construction and substance. The essential flaw is this: all of his pleadings constitute a collateral challenge to, and an impermissible parallel attack upon, the conduct of the European Arrest Warrant proceedings, the jurisdiction of the High Court in those proceedings, and the judicial and procedural integrity of those proceedings. Shortly put, his application comprises an attempt to re-litigate much if not all that transpired before Murphy J. using the shield of Article 40 as a means of concealing the essential flaw in the foundation of the case. But even that shield is inadequate. In FX the Chief Justice offered as an example of a 'fundamental denial of justice, or … fundamental flaw' that would justify the High Court granting Article 40 relief in the context of a High Court order for detention, the situation presented in State (O) v. O'Brien: there a juvenile was sentenced to a term of imprisonment that was not open to the Central Criminal Court to impose. Nothing of that sort presents here: the shield does not work: the whole foundation of these proceedings is fatally flawed: and Mr Lanigan's application must therefore fail."*

41. Barrett J. then proceeded to address in some detail the bases on which the appellant claimed that the procedures adopted by Murphy J. were unconstitutional. He referred to the judgment of Macken J. in *MJELR v. Sliczynski* [2008] IESC 73 where she referred to the *'sui generis'* nature of EAW proceedings. He stated that the appellant had not identified any deficiency that contravenes constitutional or natural justice, and that in so far as he was arguing that the denial of a right to cross-examine on the material presented to the Court, the appellant ought to have raised the issue with the trial judge, and in so far as he did not, he was now estopped from doing so in the present proceedings under Article 40.4 of the Constitution.

42. As to the arguments based on the restricted right of appeal provided for in s. 16(11) of the Act, Barrett J. referred to the text of that section and stated at para. 15 of his judgment:-

> *"15. There is nothing unusual, never mind unconstitutional, about the just-quoted provision. Restrictions on the right of appeal are expressly contemplated by Article 34 of the Constitution. Section 16(11) of the Act is but a statutory manifestation of the licence allowed the Oireachtas by the People through the medium of Article 34. There is, to borrow from the phraseology of the Chief Justice in FX, no 'fundamental denial of justice or a fundamental flaw' effected by or pursuant to s. 16(11) which would justify the High Court granting a remedy in these Article 40 proceedings in respect of a detention order previously made by the High Court."*

43. He also concluded that there was no merit in the argument that what is provided for in s. 16(11) of the Act offends against the principle of *'nemo iudex in causa sua'*. The argument put forward was that in making a decision whether to permit an appeal, the trial judge was in effect deciding a matter in her own cause. This argument need not be dwelt upon. In my view, Barrett J. was correct to reject it. In my view it would be a totally unwarranted extension of that important principal of natural and constitutional justice. A decision under s. 16(11) of the Act cannot be characterised as being one that is made in any cause in which the judge has any personal or pecuniary interest. To put it mildly, it was not the appellant's best point, and in my view ought to have been abandoned at an early stage, or not advanced at all.

44. Barrett J. noted also that the appellant was arguing that there had been a breach of the *'audi alteram partem'* principle during the s. 16 hearing because the trial judge had, following her 'preliminary ruling' on the 17th November 2014, directed the Central Authority to seek and provide certain additional information without first hearing counsel for the respondent on whether such information should be sought. He rejected this argument in the following terms:-

> *"It is, with respect, breathtakingly wrong to contend that a judge who, pursuant to the obligations arising for the court under the Act, requests in open court that she or he be provided with further information (in sui generic proceedings where the Court is required to be satisfied of certain matters) has not listened to the other side. If the other side considers that it has not for some reason been listened to, then they should say so, but if they fail to do so or fail to succeed on the point it does not follow that a right arises to ventilate the point anew in Article 40 proceedings that have little substance and make less sense … .".*

45. He also rejected arguments based upon the refusal of the trial judge to make a reference under Art. 267 TFEU other than one in respect of the delay question on which she did make a reference. His reasons appear at para.18 of his judgment. There is no need to set them forth. I am satisfied that Barrett J. was correct to reject that argument out of hand. In my view it is simply unstateable as a ground for claiming that the detention of the respondent is unlawful.

46. On this appeal the appellant makes serious complaint about what Barrett J. went on to state in Part IX of his judgment commencing at para. 19. He complains that he went on to consider and reach conclusions upon the constitutionality of the Act itself,

and that this was not part of what he was required to do on the Article 40 application. It is argued that by doing so he has in effect trespassed upon the very plenary proceedings which he is anxious to have heard before the surrender is implemented, and in which those issues arise. His counsel has urged upon this Court that the constitutional arguments underlining those plenary proceedings were not ventilated to any great extent, and certainly not as extensively as would have been the case had it been realised or anticipated that Barrett J. was intending to reach those conclusions. He fears that those conclusions will now be used by the State defendants in the plenary proceedings in order to contend that the issues are *res judicata* and may not re-opened, thereby further frustrating his wish to have the so-called constitutional issues determined.

47. The question of whether Barrett J. went further than was necessary on an Article 40 application by expressing views on the substantive constitutional issues raised by the appellant in his plenary proceedings, so that those issues maybe now *res judicata*, is not something which this Court needs to address on this appeal. That question will be something to be debated if and when those plenary proceedings come on for hearing. This Court does not have the transcript of the hearing before Barrett J. but the State respondents' submissions have informed the Court that the hearing took place over a full day, and that it is clear from the judgment of Barrett J. that not only did the appellant have the opportunity to make the case that was stated in his Application for an Inquiry, but was permitted to expand upon the grounds set forth therein despite the objections of the State. It would seem that every latitude was given to the appellant to make his case on whatever basis he wished to put forward.

48. Given that latitude, it seems likely that the appellant took the opportunity to advance the constitutional arguments subtending the plenary proceedings as part of the arguments supporting his case that his detention was unlawful, and that he should be released. Perhaps the fact that the trial judge expressed views on the merits of that constitutional case is because those merits were part of the argument made before him. In that sense, the appellant has perhaps been hoisted by a petard of his own concoction, given that there was nothing on the face of the warrant itself that would render his detention unlawful, and that the whole basis of his claim under Article 40.4 was that there were outstanding constitutional claims to be determined before surrender should take place. It would be strange in such circumstances if the merits of the claims in the plenary summons were not debated and urged upon the Court as a reason why the appellant should be released.

49. Seen in this way, it is difficult to escape the conclusion that in this case the use of Article 40.4 of the Constitution was simply a device to delay surrender, given the effect of s. 16(6) of the Act, and that in truth the appellant had no case to legitimately make that his detention was not in accordance with law. In fact para. 6 of his own written submissions, repeated in oral submissions, makes this clear because when setting forth what orders were being sought from the Court on the Art. 40.4 application, the only order stated to be sought by the appellant, apart from a reference under Article 267 TFEU, is couched as follows:-

> *"6. This Court should direct that the plenary action be heard and determined with reasonable expedition, release Mr Lanigan on bail and adjourn this Article 40.4 [application] until the plenary action is finally decided".*

50. Delay was explicitly stated to be the purpose of the Article 40.4 application – perhaps not for its own sake, but certainly so that the plenary proceedings could be heard and determined prior to surrender.

51. It is clear from the authorities that the Court is constrained on an Article 40.4 application to determining the lawfulness of detention, and if it is found to be unlawful, ordering the release the person detained. I accept that in Art. 40.4 applications brought in the context of detention under the Mental Health Act, 2001 there have been cases where, even though the detention of the patient has been found to be not in accordance with law, the Court exceptionally in that context has adjourned the making of an order for release so that, in the best interests if the patient, some sensible and practicable arrangements can be put in place so that the making of such an order would be unnecessary. But that is an exceptional jurisdiction, and cannot avail a person in the position of this appellant who wishes to delay the process of surrender while other proceedings are brought to finality.

52. One can understand the appellant's wish to ventilate all his claims as to the unconstitutionality of certain aspects of the Act before any surrender occurs. But in my view Art. 40 must not become a mechanism whereby a person in respect of whom an order for surrender has been made, and who has been refused leave to appeal, may yet seek to circumvent those events by throwing up arguments, not for the purpose of seeking to impugn the lawfulness of the detention ordered, but rather to try and gain a space in which to ventilate points either not argued on the s. 16 application, or on which his arguments failed. I fear that in this case the appellant has grasped at s. 16(6) of the Act by invoking Article 40.4 but on grounds which could never truly speak to the unlawfulness of detention. I hesitate to describe such tactics as an abuse of process, but it certainly has all the appearance of seizing upon Art. 40 as a life raft to assist a collateral purpose, but upon grounds that have little to say in relation to the lawfulness of detention. I believe that Barrett J. was correct to reject the arguments put forward and to dismiss the application made under Article 40.4 of the Constitution.

53. I should also refer to the relief sought by the respondent at para.7 of his written submissions to the High Court on the Art. 40.4 application. Therein he sought the following:-

> *"7. This Court also should refer questions under Article 267 to the C.J.E.U. being:-*
>
> ☐ *Those that Murphy J. refused to refer and*
>
> ☐ *Does the Mamatkulov case qualification to Art.6 of the European Convention equally apply to Art. 47 of the E.U. Charter and proceedings under the EAW Act (Murphy J. held 'No')"*

54. In my view those questions do not arise in the present proceedings. If they arise at all, they do so in the EAW proceedings, and there is no reason therefore why this Court would refer them.

The second appeal (527/2015) – against the judgment and order of Noonan J. dated 15th October 2015

55. At paras. 23-26 above, I have set forth the events which led to the ex parte application to Noonan J. on the 15th October 2015 to direct an inquiry under Art. 40.4 of the Constitution, which he refused. It will be recalled that following the lodgment of an appeal against the judgment and order of Barrett J. the Minister made an application to the High Court (Butler J.) on notice to the appellant for a stay on the order of surrender (even though s. 16(6) of the Act specifically provides that the respondent may not be surrendered while Article 40 proceedings are extant), and sought also a stay on that part of Murphy J's order of the 4th September 2015 that directed that he be brought back before the High Court if he had not been surrendered within the time prescribed by the Act (i.e. 25 days following the making of the order).

56. The requirement that the person whose surrender has been ordered be brought back before the High Court if not surrendered within the prescribed time is a statutory obligation created by s. 16 (4)(c) of the Act, as amended. The question arises in these

circumstances as to whether that statutory obligation can be the subject of a stay by the Court, particularly given its clear purpose to ensure that there is some judicial oversight over the length that a person might remain in detention pending surrender actually taking place, and whether detention beyond that 25 day period, absent that statutory safeguard, is arguably at least detention that is not in accordance with law. It will be recalled also that an application for bail was refused by Barrett J. following the delivery of his judgment, on the basis that such an application should be made to this Court in the event that an appeal against his order was lodged. In the event, this Court has granted bail following an application in that regard. Nevertheless the appellant maintains that his appeal is not moot, and that he is entitled to have an appeal heard in respect of the refusal by Noonan J. to direct an inquiry under Art. 40.4 of the Constitution on foot of his ex parte application in that regard on the 15th October 2015 – which, I should add, was prior to his being granted bail by this Court.

57. The affidavit of the appellant's solicitor which grounded the *ex parte* application set forth a brief reference to the surrender order, the refusal of the first Article 40.4 application to Barrett J., the fact that it was under appeal, and the subsequent stay application successfully made to Butler J. on the 25th September 2015. The deponent, Padraig O'Donovan, solicitor, expressed some surprise on his own part and on the part of counsel that the State parties sought such a stay on the order for surrender, given the fact that s. 16(6) itself provides that surrender cannot take place while Art. 40 proceedings are not finally determined. He went on to describe the advance notice he received of the proposed application for a stay on the surrender order, and to state that it was only just prior to the application being made to Butler J. that his counsel was handed a draft of the order proposed, and saw for the first time that a second stay was being sought, namely on the statutory requirement in s. 16(4)(c) of the Act that the appellant be brought back before the High Court where surrender was not effected during the prescribed period, as had been ordered.

58. Mr O'Donovan averred that he was advised that the effect of the second part of the stay was to remove a statutory protection in relation to the appellant's continued detention beyond the prescribed period, rendering his continuing and indefinite detention unlawful where the protection of judicial supervision had been removed. It was argued on the application that this issue raised an arguable issue as to the lawfulness of the respondent's continuing detention, so that an inquiry was mandated.

59. Being *an ex parte* application for an inquiry under Article 40.4 of the Constitution, the detainer was not a party to the application, and therefore was not a party to this *ex parte* appeal.

60. Having heard this ex parte application Noonan J. gave an ex tempore decision refusing the application for an inquiry stating, inter alia, the following when reaching his conclusion:-

> *"5. …it is argued on behalf of the applicant, the combined effect of these orders and in particular the order of Mr Justice Butler is to disapply the application of s. 16 of the EAW Act with the consequence that, as Dr Forde submits, the applicant's detention is currently rendered unlawful. As a result this application has been moved before me today.*
>
> *6. In my view the effect of this application is to invite one judge of the High Court to review the order of another, and effectively declare it invalid. I am satisfied that this court has no jurisdiction to embark on this enquiry or in effect to collaterally review in some shape or form the order that has already been made by Mr Justice Butler.*
>
> *7. It seems to me that the proper course in this case for the applicant, if the consequences he allege arise from the order, is for him to appeal that order of Mr Justice Butler that he alleges is invalid. However, I am satisfied that I cannot entertain this application in circumstances that have been put before me, and for these reasons I am dismissing this application."*

61. At this point I should just refer to what I believe would be the uncontroversial background to the amendment of s. 16 which was effected by the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012 ("the Act of 2012"). As originally enacted, s. 16(5) of the Act of 2003 provided:-

> *"(5) Subject to subsection (6) and section 18, a person to whom an order for the time being in force under this section applies shall be surrendered to the issuing state not later than 10 days after:-*
>
> *(a) the expiration of the period specified in subsection (3), or*
>
> *(b) such date (being a date that falls after the expiration of that period) as may be agreed by the Central Authority in the State and the issuing state."* [emphasis added]

62. However, by s. 10 of the Act of 2012, certain amendments were made to s. 16, including by the substitution of new provisions for subsections (3) to (13) as originally enacted. For present purposes, it is the amendments affecting the old subsection (5) that are relevant. New subsections (3) and (3A) provide for the same period within which the respondent must be surrendered as were provided for in the old subsection (5). However, importantly for present purposes it is provided in the new subsection (4)(c) that where a surrender order is made the High *Court "shall (unless it orders postponement under s. 18 of the Act)*:-

> *(a) …,*
>
> *(b) …,*
>
> *(c) direct that the person be brought before the High Court:-*
>
> *(i) if he or she is not surrendered before the expiration of the time for surrender under subsection (3A), as soon as practicable after that expiration, or*
>
> *(ii) if it appears to the Central Authority in the State that, because of circumstances beyond the control of the State or the issuing state concerned, that person will not be surrendered on the expiration referred to in subparagraph (i), before that expiration.*

63. The Act of 2012 went on to enact a new subsection (5) mandating what the High Court must do when such a person is brought back before the Court pursuant to an order under subsection (4)(c), as follows:-

> *(5) Where a person is brought before the High Court pursuant to subsection (4)(c), the High Court shall:-*
>
> *(a) if satisfied that, because of circumstances beyond the control of the State or the issuing state concerned, the*

person was not surrendered within the time for surrender under subsection (3A) or, as the case may be, will not be so surrendered :-

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

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

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

64. My own view is that this new provision was not intended to apply in a situation where the only reason why surrender did not take place within the prescribed timeframe was because the person to be surrendered commenced proceedings under Art. 40.4 prior to surrender, resulting in his surrender being prohibited until such time as those proceedings are concluded. However, the wording of the subsection as enacted, and as read literally, may be read as not excluding the Article 40 scenario. It is possibly an infelicity in the drafting of the new provision that it does not make that clear in some way.

65. Prior to the enactment of these new provisions there had been situations arising unexpectedly following an order for surrender where, for practical or logistical reasons, the surrender could not take place within the prescribed time. For example, it might have been impossible for the issuing state to arrange air transport within the time permitted, or some form of industrial action by air traffic controllers meant that a planned flight could not take place. I can recall a particular occasion in April 2010 when an unpronounceable Icelandic volcano violently erupted causing a dust cloud of such intensity over parts of Europe as to cause many flights to be cancelled or delayed, and that this caused problems for a number of surrenders, and that new dates for surrender had to be put in place and agreed under the provisions of old subsection (5). The problem with that subsection was that there was nothing to indicate within what period the new date for surrender had to occur, and that in turn had implications for the duration of the respondent's detention, and perhaps its lawfulness. As far as the new date was concerned, it could strictly speaking be any date in the future under old subsection (5) which provided for *"such date (being a date that falls after the expiration of that period) as may be agreed by the Central Authority in the State and the issuing state"*. In such circumstances there was no judicial control over the length of detention which might occur before surrender took place.

66. In my view it was this lacuna that the new provisions were in all likelihood intended to address, so that the Court was given a measure of control over the length of continuing detention in the event that circumstances occurred which were beyond the control of the State and the issuing state rendering it impossible to meet the timeframe otherwise prescribed under the Act.

67. By contrast, where the person who is subject to a surrender and committal order commences Article 40 proceedings, as is his right, s.16(6) of the Act, as originally enacted, provided simply that he/she may not be surrendered while those proceedings are pending. That provision is retained under the amendments made under the 2012 Act. The Court therefore retains control over the respondent's period in detention, firstly because the Article 40.4 proceedings are before the High Court and will be heard with as much expedition as practicable in all the circumstances, and of course the High Court retains its inherent jurisdiction to grant bail to the respondent while those proceedings remain pending.

68. What I have stated in paras. 63-66 should not be taken as a concluded view on my part. It is more in the nature of discussion, as no party has had the opportunity to present argument on the interpretation of the new provisions, and the interplay between new s. 16(4) and (5) of the Act and what was always provided for in s. 16(6) of the Act. The issue on this appeal is simply whether on the *ex parte* application for an inquiry under Article 40.4 of the Constitution the appellant had raised an arguable issue sufficient at a minimum to require the Court to direct an inquiry into the lawfulness of his detention, given the fact that the High Court (Butler J.), by granting the stay on the order of Murphy J. made as required under new subsection (4)(c) of the Act, had removed a protection to which the appellant was entitled under the Act in circumstances where the prescribed time for surrender had passed, and where the time which he might spend in custody while his Article 40 proceedings were being heard and finally determined was thereafter indefinite and likely to be of significant length.

69. I have explored above what I perceive may have been the purpose of the new provisions in s. 16 as enacted by s. 10 of the 2012 Act, and I have referred to an issue as to the possible interplay between new s. 16(4) and (5) and what was always provided for in s. 16(6) of the Act. I express no concluded view in that regard. It would require the parties to have the opportunity to address the Court on whether the new subsections (4) and (5) must be read as applying to an Art. 40.4 application context as well as the more prosaic reasons (some examples of which I have suggested) as to why in any particular case it may not be possible to meet the prescribed deadline for surrender to take place.

70. In my view the point being raised was sufficient to require the Court to direct an inquiry in order to satisfy itself as to whether or not in these circumstances the ongoing detention was in accordance with law, given the removal of the protection claimed to exist for the benefit of the respondent under s. 16 (4) and (5) as substituted. I would not agree with the trial judge that the High Court lacked jurisdiction to so inquire for the reasons he stated. Detention is detention, and it must be in accordance with law. If it is not, the High Court is required by Article 40.4 of the Constitution to release the applicant.

71. I would allow this appeal and remit the matter to the High Court for an inquiry into the lawfulness of the detention in the light of the stay granted by Butler J.

72. I would add the following remarks. Firstly, further consideration should in my view be given by the Minister to the need to make an application at all for a stay on an order for surrender when an Article 40.4 application is the reason why surrender cannot occur during the prescribed period, given the express terms of s. 16(6) of the Act. The Act itself stays surrender. Secondly, although this appeal has been allowed, leading to an inquiry now into the lawfulness of detention, notwithstanding that the appellant is on bail, the Minister might consider returning to the High Court to have the stay on the order made under s. 16(4)(c) lifted, thereby assuaging the appellant's concern that he has lost a protection which he contends, rightly or wrongly, is for his benefit while his Article 40 proceedings are pending. That argument was made in the context of his then detention. He is now on bail. I am not to be taken as agreeing with the appellant on this question. I express no concluded view. But I cannot see what disadvantage there can be by applying to have the stay lifted, and for the Court, on notice to the appellant of course, to be informed of the reason for the failure to surrender him within the prescribed time (i.e. the existence of the Article 40.4 proceedings) and so that the matter might be re-entered at the conclusion of the Article 40 proceedings for the purpose of fixing a new date for surrender with the agreement of the issuing state as provided for in new s. 16(5) of the Act. Clearly no new date can be sensibly fixed until the date of final determination of the Article 40 proceedings is known. There is an attractive pragmatism in such an approach, which might even render moot the inquiry now being directed, and avoid further unnecessary litigation on the point. These are only suggestions as to a possible way

forward. I have not heard the parties on them, and there is no need to. But they might at least be considered by the parties.