Neutral Citation Number: [2014] IEHC 321

THE HIGH COURT

[2013 No. 206 EXT.]

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003

AS AMENDED

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

JASON PATRICK BUCKLEY

RESPONDENT

JUDGMENT of Mr. Justice Edwards delivered on the 28th day of May, 2014

Introduction
The respondent is the subject of a European arrest warrant dated 12th August, 2013, issued by a competent judicial authority in the United Kingdom of Great Britain and Northern Ireland ("the United Kingdom") which seeks the rendition of the respondent for the purpose of prosecuting him for the single offence of Conspiracy to Cause Explosions, as particularised in part (e) of the warrant. The warrant was endorsed for execution in this jurisdiction by the High Court on 15th August, 2013. The respondent was arrested in execution of the warrant on 4th September, 2013, by Sergeant Sean Fallon and was brought before the High Court on the same day pursuant to s.13 of the European Arrest Warrant Act 2003 ("the Act of 2003"). In the course of the s.13 hearing, a notional date was fixed for the purposes of s.16 of the Act of 2003 and the respondent was remanded on bail to the fixed date. Thereafter, the matter was adjourned from time to time, ultimately coming before the Court for the purposes of a surrender hearing.

The respondent does not consent to his surrender to the United Kingdom. Accordingly, this Court is now being asked by the applicant to make an order, pursuant to s.16 of the Act of 2003, directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him. The Court must consider 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 dependent upon a judicial finding that they have been so satisfied.

Uncontroversial s.16 issues
The Court has received and scrutinised a true copy of the European arrest warrant in this case. Further, the Court has taken the opportunity to inspect the original European arrest warrant which is on the Court's file and which bears this Court's endorsement.

The Court has also received an affidavit of Sergeant Sean Fallon sworn on 21st January, 2014, testifying as to his arrest of the respondent. He states at para. 3 of his affidavit that the man that he arrested acknowledged that he was Jason Buckley. Moreover, he acknowledged the other part (a) details when they were put to him.

In addition, counsel for the respondent has confirmed that no issue arises as to either the arrest or identity of the respondent.

I am satisfied following my consideration of these matters that:

(a) The European arrest warrant was endorsed for execution in this State in accordance with s.13 of the Act of 2003;

(b) The warrant was duly executed;

(c) The person who has been brought before the Court is the person in respect of whom the European arrest warrant was issued;

(d) The warrant is in the correct form;

(e) The warrant purports to be a prosecution type warrant and the respondent is wanted in the United Kingdom for the purpose of being tried for the offence particularised in part (e) of the warrant;

(f) The nature and classification of the offence to which the warrant relates "Conspiracy to cause explosions, Contrary To Section 3(1)(a) Of the Explosive Substances Act 1883".

(g) The underlying domestic decision on which the warrant is based is a warrant of arrest at first instance, dated 12th August, 2013, and issued at Birmingham Magistrates' Court for an offence of conspiracy to cause explosions.

(h) The issuing judicial authority has not invoked para. 2 of Article 2 of Council Framework Decision of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/J.H.A.), O.J. L190/1 of 18.7.2002 ("the Framework Decision") and, accordingly, the Court requires to be satisfied both with respect to correspondence and minimum gravity;

(i) The offence is adequately particularised within the warrant as follows:

> "JASON BUCKLEY between the 20th day of June 2012 and the 18th day of August 2012 unlawfully and maliciously conspired together with Thomas James Leslie Snr, Jason Joseph William Taft, Thomas Richard Leslie Jnr, Kevin Proctor and Martin William Drewery and with others to cause by explosive devices explosions of a nature likely to

endanger life or cause serious injury to property in the United Kingdom or the Republic of Ireland contrary to section 3(1) (a) of the Explosive Substances Act 1883."

The warrant also contains considerable further information within part (e), describing the circumstances in which the alleged offence is said to have occurred and reference will be made to this, where necessary, later in this judgment.

(j) Counsel for the applicant has invited the Court to find correspondence with the offence in Irish law of "Conspiracy to cause explosions, contrary to section 3(1)(a) of the Explosive Substances Act 1883". The same legislation applies here as applies in the United Kingdom. Counsel for respondent accepts that the legislation in both jurisdictions is identical and has confirmed that he is raising no issue as to correspondence in the double criminality sense of that expression. Having considered the facts set out in the warrant and the ingredients of the candidate corresponding offence, the Court is satisfied to find correspondence with the suggested s. 3(1)(a) offence.

(k) The minimum gravity threshold is that which now finds transposition into Irish domestic law within s. 38(1)(a)(i) of the Act of 2003, namely that a potential sentence of at least 12 months should be available to the court in the issuing state. As we are told in part (c) that the offence to which the warrant relates attracts a potential penalty of up to life imprisonment, the minimum gravity threshold is clearly met;

(l) There are no circumstances that would cause the Court to refuse to surrender the respondent under ss. 21A, 22, 23 or 24 of the Act of 2003, as amended.

In addition, the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) Order 2004 (S.I. No. 4 of 2004) ("the 2004 Designation Order"), and duly notes that by a combination of s. 3(1) of the Act of 2003, Article 2 of the Framework Decision and the Schedule to the 2004 Designation Order, the United Kingdom 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.

The Point of Objection

The respondent opposes his surrender on foot of a single and net point of objection which is pleaded in the following terms:

> "To surrender the respondent to the issuing State would be to expose him to practices or procedures which if exercised within this State would amount to infringements of his constitutional right to fair and just procedures. The respondent submits that this arises in circumstances where the alleged offence he is required to answer in the issuing State is one of conspiracy. The respondent submits that should he be surrendered to the issuing State for the purpose of trial on the charge of conspiracy, he will be faced with the introduction of evidence which would be inadmissible and/or would fall foul of the constitutional guarantees of fair procedures. It is submitted that the respondent, in facing such a charge, would lose the protection of this jurisdiction to another where such protection would not be enjoyed by him."

The Respondent's Evidence

The respondent has put forward an affidavit of laws sworn by a Mr. James Patrick Morris, a member of The Law Society of England and Wales, who is currently practising as a solicitor in Staffordshire in the United Kingdom. No issue was taken by the applicant concerning Mr. Morris's expertise concerning the criminal law of the United Kingdom.

In his said affidavit, Mr. Morris describes the law relating to conspiracy charges in the United Kingdom. In the course of his exposition he deals with certain rules of evidence and the procedures that can apply in the trial of persons charged with conspiracy charges. In particular, he describes ss. 74 and 75 of the United Kingdom's Police and Criminal Evidence Act 1984 (PACE) ("the Act of 1984") and expresses an opinion concerning whether they could find application in the trial of the respondent in the event that he is surrendered. In that regard, the deponent states:

> "The trial of the single conspirator
>
> Under the Police and Criminal Evidence Act (PACE) 1984, sections 74 and 75 are particularly important to this subheading. I will set the provisions out below:
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> **74.-Conviction as evidence of commission of offence.**
> (1) In any proceedings the fact that a person other than the accused has been convicted of an offence by or before any court in the United Kingdom or any other member State or by a Service court outside the United Kingdom shall be admissible in evidence for the purpose of proving, that that person committed that offence, where evidence of his having done so is admissible, whether or not any other evidence of his having committed that offence is given.
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> (2) In any proceedings in which by virtue of this section a person other than the accused is proved to have been convicted of an offence by or before any court in the United Kingdom or any other member State or by a Service court outside the United Kingdom, he shall be taken to have committed that offence unless the contrary is proved.
>
> (3) In any proceedings where evidence is admissible of the fact that the accused has committed an offence, …, if the accused is proved to have been convicted of the offence—
>
> (a) by or before any court in the United Kingdom or any other member State; or
>
> (b) by a Service court outside the United Kingdom,
>
> he shall be taken to have committed that offence unless the contrary is proved.
>
> (4) Nothing in this section shall prejudice—
>
> (a) the admissibility in evidence of any conviction which would be admissible apart from this section; or
>
> (b) the operation of any enactment whereby a conviction or a finding of fact in any proceedings is for the purposes

of any other proceedings made conclusive evidence of anv fact.

75. Provisions supplementary to section 74.
(1) Where evidence that a person has been convicted of an offence is admissible by virtue of section 74 above, then without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based—

(a) the contents of any document which is admissible as evidence of the conviction;

and

(b) the contents of—

(i) the information, complaint, indictment or charge-sheet on which the person in question was convicted, or

(ii) in the case of a conviction of an offence by a court in a member State (other than the United Kingdom), any document produced in relation to the proceedings for that offence which fulfils a purpose similar to any document or documents specified in sub-paragraph (i),

shall be admissible in evidence for that purpose.

(2) Where in any proceedings the contents of any document are admissible in evidence by virtue of subsection (1) above, a copy of that document, or of the material part of it, purporting to be certified or otherwise authenticated by or on behalf of the court or authority having custody of that document shall be admissible in evidence and shall be taken to be a true copy of that document or part unless the contrary is shown.

(3) Nothing in any of the following—

(a) Section 14 of the Powers of Criminal Courts (Sentencing) Act 2000 (under which a conviction leading to probation or discharge is to be disregarded except as mentioned in that section);

(aa) section 187 of the Armed Forces Act 2006 (which makes similar provision in respect of service convictions);

(b) section 247 of the Criminal Procedure (Scotland) Act 1995 (which makes similar provision in respect of convictions on indictment in Scotland); and

(c) section 8 of the Probation Act (Northern Ireland) 1950 (which corresponds to section 13 of the Powers of Criminal Courts Act 1973) or any legislation which is in force in Northern Ireland for the time being and corresponds to that section,

shall affect the operation of section 74 above; and for the purposes of that section any order made by a court of summary jurisdiction in Scotland under section 182 or section 183 of the said Act of 1975 shall be treated as a conviction.

(4) Nothing in section 74 above shall be construed as rendering admissible in any proceedings evidence of any conviction other than a subsisting one.

The provisions highlighted at sections 74 and 75 Police and Criminal Evidence Act 1984 would enable the prosecution to adduce evidence of the co-conspirators convictions if Jason Buckley were to stand trial in the UK. This would seem to be a case whereby it would certainly be open to the prosecution to make use of these provisions and that there is no reason to believe that they would not attempt to do so."

Submissions on behalf of the Respondent
The respondent relies upon s. 37(1)(a) and (b) of the Act of 2003 in conjunction with Article 6 of the European Convention on Human Rights ("the Convention") and Article 38.1 of the Constitution of Ireland.

Section 37(1)(a) and (b) of the Act of 2003 provides:

"A person shall not be surrendered under this Act if—

(a) his or her surrender would be incompatible with the State's obligations under—

(i) the Convention, or

(ii) the Protocols to the Convention,

(b) his or her surrender would constitute a contravention of any provision of the Constitution…"

The case made under s. 37(1)(a) of the Act of 2003

It was submitted by counsel for the respondent that if his client is surrendered to the issuing state, there is a risk of a flagrant denial of his rights pursuant to Article 6 of the Convention and, in particular, Article 6 (3)(d), which states:

> "[Everyone charged with a criminal offence has the minimum right] to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

It was submitted that it is a well-established principle under the Convention that any assessment of an alleged evidential imbalance or unfairness is to be examined in light of the proceedings as a whole, including whether the applicant has been deprived of an ability to participate effectively in the proceedings or whether the position of the defence was significantly impaired. A number of cases were cited in support of, and to illustrate, the case being made and the commended approach. These included the cases of *Barbera, Messegué and Jabardo v. Spain* (Application no. 10590/83, 6th December, 1988) (1989) 11 E.H.R.R. 360; *Papageorgiou v. Greece* (Application no. 24628/94, 22nd October, 1997) [1997] E.C.H.R. 86; *Ellis v. O'Dea and Anor.* [1989] 1 I.R. 530 and *Borges v. The Fitness to Practice Committee of the Medical Council and Anor.* [2004] IESC 9, [2004] 1 I.R. 103.

The case made under s. 37(1)(b) of the Act of 2003

Counsel for the respondent has submitted that his client apprehends that if he is surrendered to face trial in the United Kingdom the prosecution may seek to admit the fact that another person other than the accused has been convicted of the offence, and that such evidence would be admissible as evidence for the purpose of inferring that the respondent also committed the offence. Furthermore, any statements by another person convicted of the same offence could be admitted as evidence against the respondent without any opportunity being afforded to the respondent to cross-examine the maker of the statement. It was submitted that to admit such evidence at a trial would violate both the presumption of innocence and the right to defend oneself where there is no opportunity to cross-examine such evidence. Such evidence would be regarded in Ireland as inadmissible on the basis of being inconsistent with the notion of fair procedures and trial in due course of law, as guaranteed under Article 38.1 of the Constitution. It was therefore urged that it would be inappropriate for the Court to surrender the respondent to face trial in circumstances where such evidence could be adduced against him, and should be regarded as being prohibited under s. 37(1)(b) of the Act of 2003.

Anticipating reliance by the applicant upon this Court's decision in *Minister for Justice and Equality v. Shannon* [2012] IEHC 91, counsel for the respondent suggests that it is distinguishable on its facts from the circumstances in the present case. It was submitted the presumption of innocence, the right to defend oneself at trial and the right to cross-examine are all fundamental components of a fair trial which will be impinged upon if the apprehended evidence is adduced at the respondent's trial in the United Kingdom. It was contended that such basic rights have been repeatedly and universally deemed by Irish courts to be fundamental to fairness and fair procedures. Furthermore, it was submitted that the potential evidence which may be adduced in the respondent's case would have a much greater influence on the outcome of the trial than the bad character evidence that it was apprehended might be adduced in the *Shannon* case.

Finally, the respondent also places very considerable reliance on certain remarks of Walsh J. in the Supreme Court decision of *Ellis v. O'Dea & Anor*. [1989] 1 I.R. 530, an extradition case in which the late learned judge not only deprecated the inclusion of a charge of conspiracy where there was also a charge relating to the substantive offence as being procedurally unfair, but also suggested that the special rules that apply in conspiracy trials may, of themselves, be unconstitutional. He stated in the course of his judgment, at p. 538:

> "Apart from some very obvious considerations which could arise, the present case provides a possible illustration of what could arise. One of the charges laid in the present case is that of conspiracy. It is accompanied by a charge relating to the substantive offence. For many years judicial authorities have condemned the joinder of a conspiracy charge when there is a charge for the substantive offence. Whatever justification may exist in certain cases for preferring a charge of an inchoate crime, such as that it may prevent a substantive crime from being committed, it is difficult to see what, if any, justification can exist in justice for adding as a count where the substantive offence is charged. To adopt it as a policy is, to say the least, very dubious. Because of the wide ambit and the elasticity of the offence it can operate most oppressively. Naturally the advantage to the prosecutor of such a charge is that it widens the evidence which may be introduced and permits the introduction of evidence which would be totally inadmissible against the accused person tried on the substantive charge, whether he was tried with another person or alone. The special rules of evidence which apply to conspiracy have in the light of experience demonstrated that it is not always desirable in the interest of justice to have such a charge. It can, for example, result in wholly innocent persons being convicted on the untrue 'admissions' of a co-accused. Thus if the courts of this country should at some future time decide that these special rules of evidence were such as to fall foul of the constitutional guarantees of fair procedures it is obvious that no court here could extradite a person from the protection of this jurisdiction to another where such protection would not be enjoyed."

In counsel for the respondent's submission, the special rules of evidence provided for under ss. 74 and 75 of the the Act of 1984 are as objectionable as the special rules of evidence to which Walsh J. was alluding, and for the same reasons. He contends that they would not pass constitutional muster in this jurisdiction if challenged and, in the circumstances, this Court should not surrender the respondent to face a process of trial in which evidence of the conviction of others, said to have been involved in the said conspiracy, may be and, on the evidence of Mr. Morris, is likely to be adduced as part of the case against him.

Submissions on behalf of the Applicant

Counsel for the applicant has submitted that for the respondent to successfully resist surrender on the grounds of s. 37(1)(a) or (b) of the Act of 2003, the respondent must:

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

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

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

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

As to the likelihood that evidence of the conviction of others said to have been involved in the said conspiracy may be adduced as part of the case against him in reliance on ss. 74 and 75 of the Act of 1984, it was submitted that the affidavit of Mr. Morris does not support the contention that the respondent will necessarily be subject to any procedural injustices or that the provisions in question will be invoked. It was submitted that those provisions are not automatically applicable and any evidence which it is proposed to

adduce in reliance upon them may be subject to admissibility arguments before the court of trial. Counsel for the applicant asserts that the respondent's side ought to have made the Court aware of s. 78 of the Act of 1984 which, she claims, may give the court of trial discretion to exclude such evidence. Counsel for the respondent, responding to this, has pointed out that no affidavit of laws has been put forward by the applicant setting out the terms of s. 78 or to explain how it operates *vis-à-vis* ss. 74 and 75 of the Act of 1984. In response, counsel for the applicant contends that it is not for her to do so. She submitted that this Court is entitled to proceed on the basis of the presumption under s. 4A of the Act of 2003 that the issuing state will respect the respondent's rights unless there is cogent evidence tending to rebut that which is presumed. It is for the respondent to adduce cogent evidence tending to rebut that presumption. Such evidence should include the absence of safeguards or remedies, if it is being contended that that there are no safeguards or remedies. The respondent's evidence does not address possible safeguards or remedies, and does not suggest an absence of safeguards or remedies. She merely draws attention to the fact that s. 78 of the Act of 1984 is referred to in the many English textbooks on criminal procedure and evidence, which are cited daily in the criminal courts here, and on the face of it would seem to provide a possible safeguard. However, it is not for the applicant to satisfy the Court as to the existence of safeguards or remedies, rather it is for the respondent to establish the absence of safeguards or remedies.

Counsel for the applicant also makes the point that, contrary to what was submitted by counsel for the respondent, Mr. Morris's evidence does not go so far as to suggest that "any statements by another person convicted of the same offence may also be admitted as evidence against the accused without being subjected to cross-examination." He refers only to the possibility of evidence of a conviction of another person being admissible.

It was submitted that the evidence of Mr. Morris fails to establish that the respondent will be deprived of an ability to participate effectively in his trial. Moreover, the respondent does not indicate specifically how his defence will be impaired in circumstances where evidence of the conviction of another or others said to have been co-conspirators with the respondent will not be the only evidence against the respondent.

Counsel for the applicant further asks the Court to note that notwithstanding the fact that the provision in question has been in force in the United Kingdom since 1984, it has not been successfully challenged as being contrary to the Convention.

It is suggested that, in these circumstances, the respondent has not demonstrated that he will be subjected to an egregious breach of his rights, or that there is a real risk that he will be subjected to a flagrant denial of justice.

In relation to the requirement to establish the absence of a remedy, the applicant relies upon the decision of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Brennan* [2007] IESC 21, [2007] 3 I.R. 732 which, it is said, requires as a *sine qua non* that there be evidence to the effect that no adequate remedy is available in the requesting state before the courts here will enter upon a consideration of whether surrender should be refused. The point is made that the United Kingdom, being a signatory to the Convention, does guarantee both minimum procedural and substantive safeguards in its criminal process and specifically a right to an effective remedy for the purpose of asserting those rights. In so far as the Framework Decision is based upon mutual confidence between the member states, there is a presumption that the member states will protect fundamental rights. There is also a presumption that the respondent will have, at his disposal, an effective remedy upon surrender.

Turning specifically to the suggestion that to surrender the respondent would breach his rights under Article 38.1 of the Constitution, the Court was referred to the following quotation from the judgment of Murray C.J. in *Minister for Justice, Equality and Law Reform v. Brennan*, at paras. 35-38:

> "35. There is no doubt that the operation of the process for surrender as envisaged by the Act of 2003, 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.
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> 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 conform 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 indeed 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.
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> 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."

Counsel for the applicant has further submitted that in the Supreme Court decision of *Minister for Justice, Equality and Law Reform v. Stapleton* [2007] IESC 30, [2008] 1 I.R. 669, Fennelly J. rejected the contention that the purpose of s. 37 of the Act of 2003 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.

It was respectfully submitted by counsel for the applicant that it is not for this Court to adjudge the finer points of admissibility of evidence in another jurisdiction. Counsel for the applicant further submitted that it is in any event arguable that evidence of an earlier conviction would be admissible, where relevant, in criminal proceedings in Ireland as *prima facie* evidence of the guilt of the person concerned in respect of the offence for which his/her conviction was recorded, notwithstanding the absence of a statutory provision expressly allowing for it. It was submitted that a recent case, albeit concerning civil proceedings, supports the view that the admissibility of the record of a conviction as *prima facie* evidence would not necessarily be unfair. The case in question was *Nevin & Anor. v. Nevin* [2013] IEHC 80, [2013] 2 I.L.R.M. 427, in which Kearns P. held that the conviction of the defendant for her husband's murder was admissible in the civil proceedings as prima facie evidence of the fact that she had committed such murder. Kearns P. indicated, however, that he would go no further than to say that the conviction was prima facie evidence that Mrs. Catherine Nevin

murdered her husband. It was still open to her on the trial of the civil proceedings to contend that she did not murder her husband and that she should not have been convicted. Counsel acknowledges that in Nevin the conviction at issue related to a party to the case but she submits that the approach advocated by Kearns P. would arguably also permit the record of the conviction of a non-party, such as an alleged co-offender or co-conspirator, to be adduced, where relevant, as *prima facie* evidence of the truth of that which is recorded.

Counsel for the applicant has further submitted that, in substance, the respondent invites this Court to speculate on what evidence might be adduced at a trial in the issuing state, and then on the basis of that speculation, *i.e.*, that evidence of co-conspirators' convictions might be adduced pursuant to ss. 74 and 75 of the Act of 1984, to pronounce that the intended trial would be unfair. In counsel for the applicant's submission, the inappropriateness of that which is contended for is clear from the decision of this Court in *Minister for Justice and Equality v. Shannon.* This Court stated in that case:

> "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 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."

The Court later went on to add:

> "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."

Counsel for the applicant rejects the suggestion made by counsel for the respondent that the decision in Shannon is legitimately distinguishable. She contends that the respondent has failed to substantiate how that is so. The respondent has simply asserted that the presumption of innocence, the right to defend oneself at trial and the right to cross-examine are violated by the evidential provision at issue. It was submitted that counsel for the respondent has not made any or any real or sustainable link between the provision in issue and the rights in question. Counsel for the applicant asks rhetorically, how does this impinge on the presumption of innocence, the right to defend oneself and the right to cross-examine? Further, how is it demonstrated that the admission of evidence by way of proof of a previous conviction is considered universally to be a fundamental defect in the system of justice?

In seeking to address the case made by the respondent, based upon Article 6 of the Convention, counsel for the applicant makes a number of points.

First, she says that it is a fact of the respondent's case that the conviction of the respondent's alleged co-conspirators as evidence of the existence of the alleged conspiracy is not the only prosecution evidence against the respondent. In that regard counsel points out that the affidavit of Mr. Morris in fact details sixteen points of potential evidence that might be used in the prosecution of this case, including telephone evidence and analysis relating to all alleged co-conspirators, transcripts of recorded telephone calls, phone company evidence on calls, cell site analysis showing the location of mobile phones in respect of phone masts close to targeted premises and mobiles carried by persons involved. Other anticipated evidence includes CCTV footage of the cars and locations where the pipe bombs were detonated, forensic evidence in respect of the pipe bombs, eye witness testimony, and evidence derived from Automatic Number Plate Recognition technology concerning the location of the vehicle used during the course of the offence. Further, it is anticipated that there will be evidence from ballistics, firearms and explosives experts, evidence based on witness statements and surveillance evidence.

Secondly, the jurisprudence of the European Court of Human Rights indicates that the trial court and appeal courts of the issuing state are those best placed to judge the overall fairness of the trial.

Thirdly, there is no certainty that the impugned provision will be utilised at all.

The Court's attention was drawn to the case of *Al-Khawaja and Tahery v. The United Kingdom* (Application nos. 26766/05 and 22228/06, 15th December 2011) (2009) 49 E.H.R.R. 1, which dealt with hearsay evidence admitted in the United Kingdom under provisions contained in Criminal Justice Act 2003. The Act made wide, but carefully balanced provision for the admission of hearsay evidence. The Grand Chamber of the European Court of Human Rights held that Article 6(3)(d) of the Convention had a content of its own but, given that it did not create any absolute right to have every witness examined, the balance struck by the Criminal Justice Act 2003 was legitimate and wholly consistent with the Convention. The Court recognised that there could be a very real disadvantage in admitting hearsay evidence and it needed cautious handling. However, having regard to the safeguards contained in the Criminal Justice Act 2003, which were rigorously applied, there would be no violation of Article 6 of the Convention if a conviction were based solely or to a decisive degree on hearsay evidence. Where the hearsay evidence was demonstrably reliable, or its reliability could properly be tested and assessed, the rights of the defence would be respected, there would be sufficient counterbalancing measures and the trial would be fair. The Grand Chamber observed that whatever the reason for the defendant's inability to examine a witness, whether absence, anonymity or both, the starting point for the Court's assessment of whether there was a breach of Article 6(1) and (3)(d) was set out in *Luca v. Italy* (Application no. 33354/96) (2003) 36 E.H.R.R. 46, at para. 40:

> "If the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene Art. 6 (1) and (3)(d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that it is incompatible with the guarantees provided by Art. 6."

The Grand Chamber then considered the counterbalancing factors that, in each case, the trial judge correctly applied the relevant statutory test and that the Court of Appeal reviewed the safety of each conviction. The question in each case was whether there were sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that

evidence to take place.

It was submitted that the cases of *Al-Khawaja and Tahery* demonstrate that provisions allowing for the admissibility of hearsay evidence will not necessarily be repugnant to Article 6 of the Convention and give rise to an unfair trial where there are adequate safeguards and counterbalancing measures. The same approach can be applied to ss. 74 and 75 of the Act of 1984 and evidence proposed to be admitted pursuant to those provisions. The difficulty with the respondent's case in regard to Article 6 of the Convention is that, as previously pointed out, the evidence that he has adduced does not address safeguards, counterbalancing measures or remedies at all. In particular, he does not assert an absence or insufficiency of safeguards, counterbalancing measures or remedies. In the circumstances, the s. 4A presumption has not been not rebutted.

Finally, in regard to *Ellis v. O'Dea & Anor*. [1989] 1 I.R. 530, counsel for the applicant says that that case can be distinguished in that the "special rules of evidence" that Walsh J. was alluding to were not those set forth in ss. 74 and 75 of the Act of 1984 and did not concern the admissibility of the convictions of alleged co-conspirators. Moreover, it was submitted that Walsh J.'s remarks were *obiter dictum.*

The Court's Decision
The Court finds itself in general agreement with the criticisms of the respondent's case advanced by counsel for the applicant and for those reasons, and also for the additional reasons set forth below, is not disposed to uphold objections pursuant to s. 37(1)(a) and (b) of the Act of 2003 in this case.

Addressing the s. 37(1)(a) and (b) objections in reverse order, the Court indicated in its judgment in *Minister for Justice and Equality v. Nolan* [2012] IEHC 249 that s.37(1)(b) arguments should be approached as follows:

> "104. First, applying the reasoning in Nottinghamshire County Council to the extradition context, where it is suggested that the Court should not surrender a respondent on s. 37(1)(b) grounds, the focus of the Court's enquiry should be on the act of surrender itself. In this regard, it must be asked whether (to paraphrase O'Donnell J.) what is apprehended as being likely to happen in the issuing State is something which would depart so markedly from the essential scheme and order envisaged by the Constitution and be such a direct consequence of the Court's order that surrender is not permitted by the Constitution.
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> 105. Secondly, the constitutional rights at issue must be precisely identified.
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> 106. Thirdly, before the Court proceeds to measure the particular provision of the law of the foreign state at issue against the standards and norms required by the Constitution of Ireland for the purpose of judging whether that law, either in its terms or in its effect, meets those standards, consideration must be given to the focus of application of the constitutional provision or provisions relied upon. Are they primarily intended to apply to the situation of persons who are within the jurisdiction of Ireland and its courts (i.e., to what occurs in Ireland) or are they truly fundamental in the sense of being regarded as of universal application?
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> …
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> 111. Fourthly, although it has already been touched on in the context of the first principle enunciated above, it bears repetition that sufficient proximity requires to be demonstrated between the proposed surrender and the apprehended harm that will or may arise from the circumstance complained of as being egregious. In this context, it is worth noting the following statement of O'Donnell J. in Nottinghamshire County Council, at para. 66:
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> > 'the question whether what is argued to be impermissible is a possibility rather than a certainty, is an entirely relevant inquiry. The more inextricably linked the Irish Court is to the outcome, the more plausibly it can be said that to order the return would be a breach of the obligation to protect the constitutional rights.'
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> 112. Fifthly, regard may be had to the nature and degree of the differences between the law of the requesting state and the law which it is asserted the Irish Constitution would permit or require in this jurisdiction, bearing in mind that it is clear that the Constitution expects the legal systems of friendly nations will differ from that of Ireland. (It is worth noting that the European arrest warrant system is founded upon mutual trust and confidence between the participant states, and a commitment to mutual recognition of, and respect for, the judicial decisions of the courts of other Member States. Indeed, the whole system is designed to take account of differences in the legal systems, laws and procedures of the participating Member States. That said, truly fundamental rights are not to be sacrificed on the altar of mutual trust and confidence.)
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> 113. Sixthly, the Court may also consider and have regard to whether what is asserted to be possible, probable or certain in the requesting jurisdiction is something which the Irish Constitution forbids absolutely or permits in certain circumstances."

Applying the first consideration to the circumstances of the present case, I do not consider that the evidence adduced by the respondent concerning what is likely to happen in the issuing state is something which would depart so markedly from the essential scheme and order envisaged by the Constitution and be such a direct consequence of the Court's order that surrender is not permitted by the Constitution.

In this Court's recent judgment in *Minister for Justice and Equality v. J.A.T* (otherwise "*T. No. 2*"), (Unreported, High Court, Edwards J, 9th May 2014) I said the following with respect to the passage from the judgment of Walsh J. in *Ellis v. O'Dea & Anor*. [1989] 1 I.R. 530, which the respondent relies upon in the present case:

> "It requires to be observed that the passage from the judgment of Walsh J in *Ellis v. O'Dea* [1989] IR 530 upon which the respondent places great reliance was very much *obiter dictum* in the following circumstances. This was an appeal against a refusal of the High Court to prohibit the District Court from proceeding with a Part III rendition hearing until such time as the applicant was furnished with true copies of sworn informations apparently grounding two warrants issued by an English magistrate. The High Court had ruled that unless there was good reason to the contrary, and there was none in that case, it was to be assumed by a court that any statement of fact appearing on the face of a warrant sent for execution in the State was a true statement. The appeal was determined by the Supreme Court sitting as a bench of three. It was unanimous in its view that the appeal should be dismissed. The principal judgment was that of Walsh J who

noted that extradition (rendition, strictly speaking, in the case in question), being a matter of reciprocity, required good faith from each side. The court considered that in the absence of anything suggesting that the warrants were not backed up by the recited informations there was no basis for prohibiting the proceedings in the District Court, noting that the District Court had jurisdiction to decline to order the extradition of a person to a jurisdiction where he would be exposed to practices or procedures amounting to an infringement of his right to just and fair procedures. However, two members of that court, Finlay C.J. and McCarthy J., although concurring with Walsh J that the appeal should be dismissed for the reasons just indicated, expressly disassociated themselves from the further views expressed by Walsh J in the controversial passage upon which the respondent in the present case relies. Indeed, both Finlay C.J. and McCarthy J., each stated that they would prefer to express no view on the consequences of including a charge of conspiracy in the warrants in that case, in circumstances where the topic had neither been included in the grounds seeking prohibition nor been argued before the court.

In these circumstances the point made by the applicant with regard to *Ellis v. O'Dea* has validity in this Court's view. Moreover, there is absolutely no evidence before this Court that the type of evidential rules that render prosecutions in this jurisdiction for the inchoate offence at common law of conspiring to commit some substantive offence, whether under statute or under common law, constitutionally suspect per Walsh J, would apply in the case of prosecutions in the issuing state in respect of the statutory conspiracy offences which are the subject of the European arrest warrant, and with which it is proposed to charge and try the respondent if he is surrendered. Moreover, even if it was possible for the prosecution to avail of such rules there might be other counter-balancing safeguards available under the law of the issuing state. The evidence is silent as to that. This Court is, however, bound to proceed upon the presumption that the issuing state will respect the fundamental rights of the respondent in the event that he is surrendered, in the absence of cogent evidence suggesting the contrary. The mere fact that they do things differently in the issuing state does imply that the respondent's rights will not be respected."

In the Court's view, the evidence that has been adduced does not begin to approach what would be required to establish that the apprehended adduction of evidence of a co-conspirator's convictions at the respondent's trial, in the event that he is surrendered, would be so egregious, unfair and unjust that it would never be allowed in this jurisdiction. Nor is the suggestion tenable that were the Oireachtas to enact legislation equivalent to ss. 74 and 75 of the Act of 1984 it would inevitably be struck down as unconstitutional. That simply cannot be said. It might or it might not, depending on the scheme of the legislation as a whole and the availability of safeguards and counterbalancing measures. The respondent has not adduced evidence concerning the place of ss. 74 and 75 within the scheme of the Act of 1984 as a whole, or concerning safeguards, counterbalancing measures or remedies available to an affected person under that legislation, or more widely under United Kingdom law. Thus, it is impossible to assess how a constitutional challenge in this jurisdiction to hypothetical equivalent legislation and laws might be resolved even as a matter of likelihood.

In illustration of the Court's point, it can be said that evidence of bad character is not generally admissible in a criminal trial under Irish law. However that is not to say that it can never be admitted in a trial in Ireland. It may be admissible under highly controlled exceptional circumstances, e.g., under s. 1 of the Criminal Justice (Evidence) Act 1924, as amended by s. 33 of the Criminal Procedure Act 2010. Apart from the strict statutory conditions restricting the circumstances in which such evidence may be adduced, which represent a safeguard in themselves, there are also rules of criminal practice and procedure laid down by the superior courts which operate as further safeguards and which serve to ensure compliance with constitutional notions of fair procedures and due process. For example, in the judgment of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Ferris* [2008] 1 I.R. 1, Fennelly J. cites with specific approval the judgment of Haugh J. in *The People (Attorney General) v. Bond* [1966] I.R. 214. In that case the accused had been cross-examined as to previous convictions on the basis that the defence had attacked the character of prosecution witnesses. Haugh J., at p. 223, explained that this evidence was admissible only to show that the accused was a person whose evidence might not be worthy of credit. It had, however, wrongly been used to show that the accused had probably committed the offences with which he was charged. The cases of *Ferris* and *Bond*, respectively, are authority for the proposition that a trial judge should explain to a jury in his/her charge that such evidence only goes to credit and should on no account be used to show the probability of the accused's guilt. However, where such a direction is given by the judge it represents a safeguard that should operate to counterbalance the possibility of the evidence being used inappropriately and unfairly.

In the present case, however, the respondent's evidence is wholly silent as to possible safeguards, counterbalances and remedies that might exist under United Kingdom law to guard against unfairness and injustice in the operation of ss. 74 and 75 of the Act of 1984. The Court would not be justified in inferring or presuming that none such exist. On the contrary, the Court is bound by the presumption in the other direction that arises under s.4A of the Act of 2003. In the absence of evidence suggesting the non-existence or inadequacy of such safeguards, counterbalances and remedies, there is nothing tending to rebut that which is presumed under s. 4A of the Act of 2003.

As to the second consideration, the constitutional rights at issue have been not been specifically identified. It is true that counsel for the respondent has referred to an apprehension that if the evidence in question is admitted, it may inure to the prejudice of his client's trial rights. He has specifically identified his client's presumption of innocence, his right to defend himself at trial and his right to cross-examine witnesses at trial, but he has not set out specifically, and in terms identified, what rights guaranteed to the respondent under the Constitution of Ireland would be breached. It may be presumed that Article 38.1 at least is engaged and certainly the respondent's written submissions refer specifically to that provision. However, and in that regard, this Court has specifically held in its judgments, in the cases of *Minister for Justice and Equality v. Shannon* and *Minister for Justice and Equality v. Nolan*, that the guarantee of trial in due course of law under Article 38.1 of the Constitution is only intended to apply to trials in this jurisdiction and not to trials held in other states.

This brings the Court to the third consideration identified as relevant in *Minister for Justice and Equality v. Nolan*. To succinctly reiterate the point just made, the constitutional guarantee contained in Article 38.1 of the Constitution in respect of the trial rights, referred to by counsel for the respondent, is intra-territorial only in scope and is not intended to operate extra-territorially.

In regard to the fourth and sixth considerations identified in *Minister for Justice and Equality v. Nolan*, there must be sufficient proximity between the proposed surrender and the apprehended harm that will or may arise from the circumstance complained of as being egregious. In this case, to surrender the respondent will not automatically expose him to the apprehended harm. He will face trial in the United Kingdom but it is not pre-ordained that ss. 74 and 75 of the Act of 1984 will be utilised at his trial. In that regard, the evidence goes no further than to suggest that it is a possibility. The evidence of Mr. Morris in regard to that was:

"This would seem to be a case whereby it would certainly be open to the prosecution to make use of these provisions and that there is no reason to believe that they would not attempt to do so."

Moreover, it has not been established that if the prosecution sought to utilise those provisions that the respondent could not object, and challenge their entitlement to do so as being unfair and in breach of his rights, including his rights under Article 6 of the Convention, which, in the Court's understanding, can be directly relied upon and invoked before the Courts in the United Kingdom.. If the respondent has an entitlement to make such an objection, and it must be presumed that he could do so in the absence of evidence to the contrary, he might well be successful in preventing the impugned evidence from being adduced at all; or in restricting the purposes for which it might be used; or in securing a commitment by the Court to address fairness concerns in another way, e.g., specific directions to the jury in the judge's charge; or by the use of other counterbalancing measures that might be available to the Court. It is clear that many contingencies would have to come to pass before the harm apprehended by the respondent would become a certainty, and, in those circumstances, there would be a lack of close proximity between any surrender order that might be made by this Court and the harm apprehended if it were to arise.

Finally, in so far as the fifth consideration referred to in *Minister for Justice and Equality v. Nolan* is concerned, it is clear, as O'Donnell J. has remarked in *Nottinghamshire County Council v. B and Ors*. [2011] I.E.S.C. 48, at para. 66, that the Constitution expects the legal systems of friendly nations will differ from that of Ireland. The remarks of Murray C.J. in Minister for Justice, Equality and Law Reform v. Brennan relied upon by the applicant echo this. Indeed, the former Chief Justice went on to say, at paras. 39 and 40:

> "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 the 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.
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> 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." [The reference to s. 37(2) was clearly intended to be a reference to s. 37(1)(b) of the Act of 2003.]

For all of these reasons the Court is not disposed to uphold the s. 37(1)(b) objection.

Moving then to the s. 37(1)(a) objection, many similar considerations arise. The Court is entitled to refuse surrender on Article 6 grounds if it is satisfied that there are substantial grounds for believing that there is a real risk that the respondent will be subjected to a flagrant denial of justice at his trial. While the operation of ss. 74 and 75 of the Act of 1984 might conceivably give rise to unfairness and a denial of justice if they were permitted to be used indiscriminately and/or to be used without safeguards or counterbalancing measures aimed at ensuring fairness, the evidence does not go so far as to establish that there are substantial grounds for believing that these provisions might be utilised in that way in the respondent's case.

Further, in the absence of cogent evidence suggesting the contrary, the Court is obliged to presume that the respondent's Article 6 rights will be respected. The evidence is not sufficient to rebut that which is presumed by virtue of s. 4A of the Act of 2003.

The Court is not therefore disposed to uphold the s. 37(1)(a) objection.

Conclusion
It is appropriate in all the circumstances of the case to surrender the respondent to the issuing state. The Court will therefore make an order pursuant to s. 16(1) of the Act of 2003 directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him.