[2019] IEHC 168

**THE HIGH COURT**

**[2017 122 EXT]**

**[2018 302 EXT]**

**BETWEEN**

**MINISTER FOR JUSTICE AND EQUALITY**

**APPLICANT**

**AND**

**PAUL JAMES JOHN JOSEPH JOHNSTON**

**RESPONDENT**

**JUDGMENT of Ms. Justice Donnelly delivered on the 7th of March, 2019**

1. The surrender of the respondent to the United Kingdom of Great Britain and Northern Ireland ("the UK") is sought under two European Arrest Warrants ("EAW") issued by judicial authorities in Northern Ireland. The first EAW is dated the 12th May, 2017 and seeks the respondent's surrender for the purposes of serving the balance of a life sentence imposed upon him for the offence of murder. The second EAW is dated the 31st August, 2018 and seeks the respondent's surrender for the purpose of standing trial for the offence of being unlawfully at large. He was arrested on the 16th May, 2017 on the first EAW and on the 8th October, 2018 in respect of the second European arrest warrant.

2. According to the first EAW and additional information, on which his surrender to serve a life sentence in respect of an offence of murder is sought, he had originally been sentenced to be detained at the Secretary of State's pleasure as he was a young person at the time of the sentencing. That was varied on appeal on the 9th January, 2004 to life imprisonment with a tariff of imprisonment for 16 years. That tariff had expired on the 18th May, 2016 and his case was then subject to being considered by the Parole Commissioners for Northern Ireland ("the Parole Commissioners"). The Parole Commissioners considered his case and decided on the 14th March, 2017 that it was necessary that he continued to be confined.

3. The respondent was granted temporary release from prison for a brief period from 0900hrs on 27th April, 2017. He failed to return to prison as required at 1500hrs on the same date. The failure to return to prison is the basis for the allegation set out in the second EAW that he has committed the offence of being unlawfully at large.

4. The respondent's main objection to surrender was based upon his claim that his original arrest and subsequent detention at Kilmainham Garda Station on the 13th May, 2017 in respect of a drugs search was unlawful and a "colourable device" to make him available for arrest when the first EAW could be received from the Northern Ireland authorities and endorsed for execution in this jurisdiction. On that basis, the respondent claimed that his arrest on these EAWs was tainted by the unconstitutionality of his original arrest and that he should be at liberty.

**Section 16 of the European Arrest Warrant Act 2003, as amended**
5. In all applications for surrender pursuant to the European Arrest Warrant Act 2003, as amended ("the Act of 2003"), the High Court must consider whether the requested person's surrender is prohibited by any subsection of s. 16(1) of the said Act.

**Identity**
6. I am satisfied on the basis of the information contained in each of the EAWs and the affidavit of the respondent and his solicitor, that the respondent who appears before me is the person in respect of whom both EAWs have issued.

**Endorsement**
7. I am satisfied that both EAWs has been endorsed in accordance with s. 13 of the Act of 2003 for execution in this jurisdiction.

**Sections 21A, 22, 23 and 24 of the Act of 2003**
8. Having scrutinised the documentation before me, I am satisfied that I am not required to refuse the respondent's surrender under any of the above provisions of the Act of 2003.

**Part 3 of the Act of 2003**
9. Subject to further consideration of sections 37, 38, 41 and 45 of the Act of 2003, having scrutinised the documentation before me in respect of each EAW, I am satisfied that I am not required to refuse the surrender of the respondent under any other section contained in Part 3 of the said Act.

**Section 38 of the Act of 2003**
10. Under the provisions of s. 38(1)(b) of the Act of 2003, surrender is not prohibited if the offence for which surrender is sought has been designated as a list offence (within the meaning of Article 2, para. 2 of 2002/584/JHA Council Framework Decision on the European Arrest Warrant ("the 2002 Framework Decision") and is an offence of the required minimum gravity (three years). However, if the offence does not come within that list, correspondence and a different requirement of minimum gravity must be shown. Section 5 of the Act of 2003 states that for the purposes of the Act, an offence specified in an EAW corresponds to an offence under the law of the State "*where the act or omission that constitutes the offence so specified would, if committed in the State on the date on which the EAW is issued, constitute an offence under the law of the State*".

11. In the first EAW, the issuing judicial authority has ticked the box of "Murder". The circumstances in which the offence was committed are set out in part E:-

> *"At approximately 06:15 hours on 8 December 1999, two occupants of 74 Moyard Park, Belfast woke and thought they could smell smoke. They went outside and saw smoke coming from 68 Moyard Park, the home of Sean May….. Fire fighters entered the property. ... They located a body on the bed in the bedroom… The injured person was not breathing and no pulse was detected…. A doctor pronounced the injured person deceased at 07:55 hours. … The pathologist arrived at 10:42 hours and carried out an examination, identifying 14-16 stab wounds to the left side of the body. In addition to the initial findings, a full search of the scene revealed a duvet with two bloody footprints. … The post mortem revealed that the deceased had been stabbed 47 times, and was left with a knife blade sticking out of his*

*side. He had been struck on the head with a circular weapon a number of times, with at least three weapons believed to have been used to attack him. … On the 9 December 1999, Mary Johnson, step-mother of Stephen and Paul Johnson, brought her son Gerard McMahon to the Police. She had found him in his room on 8 December at 0800 hours. He was with Paul Johnson and Patrick Clarke known as Paddy Joe. Gerard admitted to Police that he had been at Mr May's house with Stephen and Paul Johnson and Paddy Joe…. On 13 December 1999, Police received information that [Paul Johnson] was in Scotland. He was arrested in West Lothian on 20 December 1999 on foot of a probation warrant. He was arrested later that same day for the murder of Sean May. He and Stephen Johnson were convicted murder on 22 March 2002 by Belfast Crown Court and sentenced to life imprisonment with a minimum tariff of 19 years. His traiff (sic) was reduced on appeal to 16 years. He (sic) tariff expired on 18 May 2016. THe (sic) release provisions under the Life Sentences (Northern Ireland) Order 2001 now apply. His case was referred to the Parole Commissioners for Northern Ireland. His case has been considered by the Parole Commission on two occasions, 1/11/15 and 17/11/16. On 14 March 2017 the Parole Commissioners determined that it is necessary for the protection of the public from serious harm that he should be confined. Paul Johnson was granted temporary release from prison on 27 April 2017 and failed to return…."*

12. It is stated at part C2 of the warrant that the length of the custodial sentence or detention order imposed was "*sentenced to be imprisoned during the Secretary of States' pleasure. This was varied on appeal on 9 January 2004 to 16 years. Life imprisonment with a minimum tariff of 24 years."* There is no manifest incorrect reliance on Article 2 paragraph 2 of the 2002 Framework Decision in respect of the offence of murder and the minimum gravity requirement is met. In the circumstances, his surrender is not prohibited under the provisions of section 38 of the Act of 2003.

13. In the second EAW, the issuing judicial authority has not opted for the ticked box offence and has given a full description of the offences in part E. Correspondence must be demonstrated.

14. The factual description of the offence is as follows:-

*"On 22nd March, Paul Johnson was convicted at Belfast Crown Court of the murder of Sean May. He was subsequently sentenced, following a variation on appeal, to 16 years imprisonment. On 27th April 2017 at 9.00 am Mr Johnston was given temporary release from HMP Maghaberry with a number of conditions one of which was that he was to return to custody at HMP Maghaberry no later than 3pm that day. Mr Johnson signed the declaration indicating that he was fully aware of the conditions under which this period of temporary absence was being granted and that he agreed to abide by those conditions. Mr Johnston failed to return at 3pm. Following his failure to return he was accordingly unlawfully at large while under sentence. …."*

15. The above description makes clear that the offence being described would if committed in this jurisdiction be an offence of being unlawfully at large. This is an offence contrary to Section 6 of the Criminal Justice Act, 1960, which provides as follows:

*"6.—(1) A person who, by reason of having been temporarily released under section 2 … of this Act, is at large shall be deemed to be unlawfully at large if (a) the period for which he was temporarily released has expired, or (b) a condition to which his release was made subject has been broken."*

16. This Court is satisfied that the factual circumstances set out above is sufficient to come within this definition of being unlawfully at large. Therefore, this Court is satisfied that there is correspondence with this offence. The terms of minimum gravity have also been met in respect of this offence. His surrender is therefore not prohibited in respect of the second European arrest warrant by the provisions of s. 38 of the Act of 2003.

**Section 45 of the Act of 2003**

17. Section 45 prohibits surrender in circumstances where a person was not present at their trial unless certain conditions have been met. In the present case, the issuing judicial authority have indicated at part D1 that the respondent appeared in person at the trial resulting in the decision. Therefore, his surrender on the first EAW is not prohibited by the provisions of section 45 of the Act of 2003.

18. In relation to the second EAW, I am satisfied that the provisions of section 45 are not required to be considered as this is a prosecution warrant.

**Section 37 of the Act 2003**

19. Section 37(1)(a) provides that a person shall not be surrendered if his or her surrender would be incompatible with the state's obligation under the European Convention on Human Rights ("ECHR"). Section 37(1)(b) prohibits surrender where surrender would constitute a contravention of any provision of the Constitution. The case-law determining how those subsections must be applied in considering whether surrender is prohibited is well established.

20. In particular, where a person is claiming that there has been a breach of fair trial rights in the issuing state, and that surrender would contravene a provision of the Constitution, the Supreme Court in *Minister for Justice and Equality v. Brennan* [2007] IESC 21 held that the mere fact that the legal system or system of trial in another jurisdiction differed from that envisaged by our Constitution would not mean that surrender would contravene our Constitution. Murray C.J. went on to state that: -

*"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."*

21. Judgment was given in the case of *Minister for Justice v. Stapleton* [2008] 1 IR 669 shortly after the decision in *Brennan*. The *Stapleton* case concerned a prospective trial in the issuing state. The Supreme Court (Fennelly J.) quoted with approval the dicta of Murray C.J. in *Brennan*. Fennelly J. identified the principles of mutual trust and mutual recognition as being at the heart of the EAW system. Fennelly J. stated that the principle of mutual confidence was broader than the principle of mutual recognition. Mutual confidence encompassed the system of trial in the issuing state. It followed therefore that the courts of the executing Member State, when deciding whether to make an order for surrender, must proceed on the assumption that the courts of the issuing member state will, as is required by Article 6.1 of the Treaty on European Union, "*respect human rights and fundamental freedoms*".

22. Fennelly J. went on to link the principle as regards the need to find a clearly established and fundamental defect in the system of justice of the requesting state to both a claim under constitutional and ECHR breaches. It is on this basis that that the Court must examine the respondent's arguments.

23. The respondent made a claim about his conditions of detention, in particular relating to his mental health and also to the fact that he had not been accepted for release by the committee dealing with his case. The issue as to his release is a matter which is for the issuing state to resolve. There is no evidence of any egregious breach, such as a defect in the system of justice in the issuing state that would prohibit his surrender.

24. In respect of the conditions in HMP Maghaberry, the respondent has not produced cogent evidence demonstrating substantial or reasonable grounds to believe that he is at real risk of being subjected to inhuman and degrading treatment should he be surrendered. I have taken into account his affidavit and exhibits in this regard but nothing in this or in the Parole Commissioner's report gives rise to any concerns about mistreatment on account of any psychological or mental health issue. I am not satisfied that updated, reliable, specific and objective material discloses any real risk that he, by virtue of his personal circumstances, will be subjected to inhuman and degrading treatment.

**Abuse of Process**

***A Colourable Device*?**
25. The respondent's claim was that his arrest and detention in respect of the drugs search was not a *bona fide* exercise of those powers by a member of An Garda Síochána. He claimed the arrest was made because of the existence in Northern Ireland of the EAW and with a desire to make him available for arrest on that warrant when it was transmitted to this state. In light of the serious claim by the respondent and the resultant implication for these surrender proceedings, it is necessary to give detail of the evidence before the Court. It is also relevant to present the sequence in which this evidence was placed before the Court.

26. The respondent and his wife swore affidavits concerning their detention for the purpose of a drugs search on the 13th May, 2017. Members of An Garda Síochána involved in the stop of the vehicle which the respondent was driving, his detention and his subsequent arrest in respect of an offence of escaping from lawful custody in Northern Ireland also swore affidavits. The Deputy Director of Public Prosecutions also swore an affidavit.

27. On an application for cross-examination of the Garda witnesses by the respondent, this Court gave liberty to cross-examine two members of An Garda Síochána. These were the Gardaí who detained the respondent, and the gaoler at Kilmainham Garda Station who made certain entries in the custody record; Garda Martin and Garda Nevin.

***The evidence on affidavit***
28. On the 17th June, 2017, the respondent swore an affidavit in which he stated as follows: -

> *"On Saturday 13th May 2017, I was charged with being a person present in the State who had escaped from Maghaberry Prison, an alleged offence contrary to s. 3 subs. 1 of the Criminal Law Jurisdiction Act 1976. A Garda car came up behind me when I was driving my wife's car in the Kilmainham area and flashed its lights, signalling to me. A Garda got out and asked me for ID. I indicated that I did not have any. He then searched me for drugs and found a small quantity of suspected cannabis in my possession. He then brought me back to Kilmainham Garda Station for the purposes of a further drugs search, but the only charge that was preferred was the escape from custody charge."*

29. The respondent said he was brought before the District Court and advised of his right to be tried in Northern Ireland on that charge. He said that: -

> *"whereas I was initially disposed to return for trial there, I strongly suspected that this was just a ruse to return me to Maghaberry Prison, where I believe I have served my sentence and where I do not want to be."*

The respondent said he then elected for trial in this jurisdiction and there was an application on behalf of the DPP to amend the wording of the charge and the matter was adjourned to Cloverhill District Court on the 23rd May, 2017 where it was withdrawn and struck out on that date by the District Judge.

30. The respondent stated he believed his arrest and charge on the 13th May, 2017 was a charade. It was for the purpose of ensuring that he was returned to Northern Ireland or was available for the execution of the European Arrest Warrant. He believed that the Garda Síochána were made aware of the belief of the Northern Ireland authorities that he was in this jurisdiction. He believed that the Gardaí also became aware of the existence of the EAW warrant and would then have been aware that it had not been endorsed for execution. He also believed that the withdrawal of the domestic charge after the EAW had been endorsed and executed offers strong support for his belief and concern that his remand and detention was designed to ensure his availability and to facilitate the processing of that warrant.

31. In response to that affidavit, Garda Paddy Martin, averred on oath that on the 13th May, 2017, at approximately 00:45 am he was on mobile patrol with Garda Orla Mornahan and Garda Kevin Cassidy when he observed a silver Volkswagen Golf driving along Grattan Crescent, Dublin 8, travelling in the opposite direction. The patrol car was equipped with automated number plate recognition ("ANPR") technology, and on reading the registration of the vehicle, the ANPR technology brought to his attention the following information: -

> *"Missing person in N/Irl. Kathryn Johnson, DOB 03/05/1954 of 70 De Wind Drive, Comber, Co. Down has access. If stopped contact Cavan Ballyconnell Gardaí. May be in the company of Paul Johnston."*

32. At that point, Garda Martin said, he turned the patrol car and stopped the vehicle on Inchicore Road, Dublin 8. The driver of the vehicle was Paul Johnston and that the front seat passenger identified herself as Kathryn Johnston. He said that he immediately noticed drug paraphernalia in the vehicle which indicated that the occupants were possibly in possession of cannabis. This was a plastic bottle adapted to act as a bong for smoking cannabis, along with a cannabis grinder. At 00:50 am, he invited the respondent to accompany him back to Kilmainham Garda Station for the purpose of a drugs search in accordance with section 23 of the Misuse of Drugs Act 1977-1984. He said that the respondent agreed to accompany him and that he was then conveyed to Kilmainham Garda Station for the purpose of conducting the search. He cautioned the respondent and the respondent said he understood.

33. Garda Martin said that the ANPR information was linked to intelligence on the Garda PULSE system and from which he was made aware of the following: -

*"Violent murderer unlawfully at large N.I. since 27-4-17. Kathryn Johnston McKelland aka McCreanor, may be with him under duress, PLS ESD. This, PSNI to apply for EAW. Exercise caution."*

34. Garda Martin said that he was aware that at the same time Garda Kevin Cassidy had detained Kathryn Johnston for the same purpose. Both the respondent and Kathryn Johnston and the vehicle were conveyed to Kilmainham Garda Station for the purposes of a search being conducted. He said that on arrival at Kilmainham Garda Station he introduced the respondent to the station orderly on duty, Garda Eilis Nevin. Garda Nevin entered the respondent's details into the custody record and Garda Nevin told him why he had been arrested in ordinary language. At 01:25 am, accompanied by Garda Cassidy, he brought the respondent to a cell to be searched which proved negative. Garda Cassidy and himself then searched the vehicle which also proved negative. He said there was a lot of food in the vehicle, a lot of which was perishable goods such as bread along with red wine and beer. There were changes of clothes for both the respondent and Kathryn Johnston and a tent which they stated they had been staying in together. He said the respondent had two mobile phones in his possession and these mobile phones went with him when he was transported to court. He said that he found no money during the course of the search.

35. Garda Martin also said that during this time he made enquiries with the Police Service of Northern Ireland ("PSNI") in relation to the respondent. He communicated with Inspector Stephen McGuigan of the PSNI Serious Crime Branch who informed him that the respondent was unlawfully at large from Maghaberry and that he had been serving a life sentence. He was told certain details of how it was that the respondent was considered an escapee from lawful custody. He was told an EAW had been issued for the arrest of the respondent on the 12th May, 2017 but this had not yet been sent to the state.

36. Garda Martin said that he spoke with Sgt. Martin Comerford who was the member in charge. In turn, Sgt. Comerford spoke with Insp. Tom Doran and following that it was decided that Paul Johnston was to be arrested for an offence contrary to section 3 of the Criminal Law (Jurisdiction) Act, 1976 Act ("the Act of 1976"), namely escape from lawful custody in Northern Ireland. He said that at 02:48 am, he arrested the respondent for an offence contrary to section 3 of the Act of 1976. He introduced Paul Johnston to the station orderly on duty who entered the respondent's details into the custody record. At 04:57 am, Garda Martin was present when Sgt. Comerford charged Paul Johnston with the said offence. He said that the fact that there was a EAW in Northern Ireland in respect of the respondent had no bearing on the decision to charge Paul Johnston with the offence of section 3 of the said Act.

37. Garda Martin exhibited the two custody records that had been created for the respondent on the day in question. Garda Nevin who had filled in the first custody record did not swear an affidavit. On examining the custody record, it can be seen that under the heading "offence in respect of which arrest/detention was made" "unlawfully at large" is written, but this is crossed out and "section 23 MDA" is written on the line below.

38. Garda Kevin Cassidy in his affidavit stated he observed a cannabis grinder and a plastic bottle in the vehicle, and that it appeared that the plastic bottle was being used to smoke cannabis. He said that he invited Kathryn Johnston to come to the Garda station for the purposes of a search, and she agreed. He said that the search in the cell of each of the two persons brought to the Garda station was negative. He assisted in searching the vehicle and the vehicle was negative. There was a tent in the vehicle along with clothing and he observed food and alcoholic beverages in the vehicle.

39. Garda Moynihan averred on affidavit that there were a lot of items in the car. She said that the ANPR which read the registration number warned them that the vehicle may be in possession of one Kathryn Johnston and the respondent. It also warned them that the respondent was unlawfully at large from Northern Ireland and specifically Maghaberry Prison.

40. Sgt. Martin Comerford, the member in charge, averred that he detailed Garda Nevin to complete the custody record in respect of Paul Johnston. He was aware of the detention of the respondent and his wife and of the status of the respondent in Northern Ireland. He said he was aware that the respondent and the vehicle was also searched with negative results. He said he was aware that Garda Martin had spoken to Insp. McGuigan from the PSNI and that the foregoing information was confirmed pertaining to Paul Johnston having failed to return to prison following day release. He said that he also contacted his divisional inspector, Tom Doran, and updated him in relation to Paul Johnston. He said he informed Insp. Doran that Garda Patrick Martin was going to arrest the respondent on his release from the drugs search for an offence of escape from lawful custody, contrary to section 3 of the Act of 1976. He said that he asked if this was the correct offence and he was satisfied that it could be so used. He confirmed that he was the Garda who had charged him as set out on a particular charge sheet.

41. Insp. Tom Doran said that shortly before he finished his duties on the 13th May, 2017, he received a telephone call from Sgt. Martin Comerford in Kilmainham Garda Station. He was informed of the arrest of one Paul Johnston whom he was advised had escaped from custody in Northern Ireland. He said that he was conversant with General Direction no. 3 issued by the DPP and which concerns the institution and conduct of prosecutions by a member of An Garda Síochána. He said he was also aware of the provisions of the Act of 1976 having been previously involved in the prosecution of serious offences under the said Act. He said that in line with the provisions of the Act of 1976 and General Direction no. 3, he advised that the respondent should be charged with an offence contrary to section 3 of the Act of 1976 and that the arresting member should familiarise himself with the provisions of the said Act and the right to information regarding venue for trial when brought before the District Court.

42. Barry Donoghue, Deputy Director of Public Prosecutions, averred that on the 13th May, 2017 he received a call from Insp. Stephen Keane in relation to the case of the respondent. He said he had a number of telephone calls with the Gardaí on that date. He was advised that the respondent had been arrested and charged under section 3 of the Act of 1976 due to an escape from lawful custody in Northern Ireland. That charge had been preferred by the Garda Síochána without any prior direction of the Office. He was informed that he had been brought before the District Court and charged and that the presiding District Court Judge made the respondent aware of the terms of section 14 of the Act of 1976. He was aware that the respondent opted to go in custody to Northern Ireland and that an order to that effect had been made by the District Court and the case had been remanded to the 16th May, 2017. He said he made reference to section 20, subsection 20 of the Act of 1976 and advised that no further action should be taken on the matter until the papers had been referred to the Attorney General for her to consider whether she should consent to further proceedings in the case. He asked that the Gardaí furnish a report on the following Monday morning.

43. On Monday morning 15th May, 2017, he received a Garda report. He shortly thereafter forwarded that report to the Office of the Attorney General for the purpose of seeking consent under the Act of 1976. The accused appeared in the District Court on the 16th May, 2017. The respondent was represented by a solicitor who informed the presiding judge that his client now wished to stay in the jurisdiction. The solicitor for the DPP indicated that she had an application to make to amend the charge sheet in a number of aspects. The defence solicitor objected to one of the proposed amendments and he sought an adjournment to consider the matter further. The District Court was informed that the Attorney General had to consent to further proceedings and further time was needed for that purpose. The solicitor for the DPP also made reference to the words "preliminary examination" which appeared in section 42(b) of the Act of 1976 and said that this might raise an issue in relation to the court's jurisdiction. The respondent was

remanded in custody to the 23rd May, 2017.

44. Later, on the 16th May, 2017, Mr. Donoghue informed the Attorney General's office that the respondent was no longer consenting to going to Northern Ireland. On the 18th May, 2017, he received further information from An Garda Síochána in relation to the case. He received that information and met with the investigating Gardaí. Having reviewed all the information then available to him, he decided that the charge under section 3 of the Act of 1976 should be withdrawn. He informed the Gardaí. He believed that on the 23rd May, 2017, the charge under section 3 was withdrawn before the District Court.

45. In reply to these affidavits, the respondent swore another affidavit. He maintained his assertion that his arrest and detention on the 13th May was a charade. He said that he profoundly disagreed with the circumstances of his arrest as described and deposed to by the Gardaí. He stated: -

> *"One of the first things that Garda Martin did was to take the keys out of the ignition of my car. He then asked me why I was down in the area and I indicated that we were looking for a B&B. He then asked me to get out of the car for a "quick search" and I fully complied. I do not accept that any drugs paraphernalia were visible in the car. I had a small piece of cannabis on my person but the Garda wasn't particularly interested in that although I informed him it was a piece of hash."*

46. The respondent said that at the Garda station he believed the Garda who had responsibility for completing the custody record was informed that he had been arrested for escaping from lawful custody and she recorded that in the custody record. This caused Garda Martin to become very angry and vociferous, but the Garda in charge indicated that the entry could not be changed but he believed she may have crossed it out. He believed that the Garda interaction with him arose from the fact that his car was recognised by the Garda ANPR technology and the indication given by that system that he had escaped from lawful custody. He said he believed that that was the real reason for his arrest and the suggestion that he was simply detained for a drugs search was a ruse.

47. The respondent said that when he was sitting in the custody area he was aware that Garda Martin was in contact with the PSNI officer and he believed they were trying to organise things. He said that when he was being brought to the cell in Kilmainham Garda Station, a Garda informed him that they were trying to get the EAW as otherwise they might have to let him go. In the circumstances, he believed the charge preferred by Garda Martin was preferred solely to insure that he would be available for the execution of the European Arrest Warrant. He believed the domestic charge that was preferred was so deficient the DPP felt it necessary to propose radical amendments.

48. Kathryn Johnston, the wife of the respondent, also swore an affidavit. She said they were on a road somewhere near Kilmainham, it was dark. The Gardaí pulled them over and officers came to the respondent's window and asked him for ID. She thought her husband said that he did not have any identification, then one of the Gardaí said that he found that hard to believe, but she said she had ID. They came around to her window and told her they were taking her in for a drugs search. She said she did not do drugs and was not told of any reason why she was suspected of having drugs. She said she had been eating chips and drinking wine in the car. She did not object to a search but was handcuffed nonetheless. She was put into a car with two Gardaí and taken to Kilmainham Garda Station whereas the respondent was taken in a separate car. She said she heard a Garda comment to her husband about him being unlawfully at large.

49. At Kilmainham Garda Station she was put into a cell where she was strip searched by female officers with negative results for drugs. She was taken out of the cell and had to wait in a reception area while her car was being searched. She was released without charge and her car keys were returned to her.

50. Before she was released, Mrs. Johnston said Garda Martin informed her in an excited fashion that he had discovered a new law and that Paul could be charged here in relation to being unlawfully at large. She believed this was the true reason for his initial detention. She said she was not aware of any drug paraphernalia. She said there was a water bottle under the front passenger seat of her car but that was not visible at the scene of her arrest and she believed it was still in the car when it was returned to her.

51. In response to that affidavit, Garda Cassidy said that the reason he suspected her of being in possession of a controlled drug was because of observations made by him in terms of the presence of the cannabis grinder and the plastic bottle in the vehicle in which she was travelling and it appeared that the plastic bottle was being used to smoke cannabis. He said that he informed her of the reasons why he suspected her to be in possession of a controlled drug at the time.

52. Garda Eilis Nevin also swore an affidavit in reply to the supplemental affidavit of the respondent. She was the gaoler at the time the respondent was brought in to Kilmainham Garda Station. She said that she completed Part A of the custody record in which she filled in personal details of the respondent and she said that the respondent provided Maghaberry Prison as his current address. She said that following this she carried out a person check on PULSE where she became aware that the respondent was unlawfully at large from prison. She then completed Part B of the custody record. As she filled in Part B offence for which he was arrested or detained, she noted "unlawfully at large" in the custody record. She said that she then spoke with Garda Martin following her entry and he explained to her that he had arrested the accused at 00:50 am at Inchicore Road for a search under section 23 of the Misuse of Drugs Act, 1977-1984. She said she noted the foregoing in the custody record and crossed out her previous entry. She said she made various other entries into the custody record and in addition the respondent was informed by her of his various rights while in Kilmainham Garda Station.

53. Garda Paddy Martin swore a further affidavit in which he denied telling the Garda who completed the custody record that he had arrested the respondent for escaping from lawful custody and/or that he had become angry or vociferous with her at any stage in respect of her completion of the custody record. He said that he was aware that Garda Nevin in error had entered "unlawfully at large" into the custody record and then corrected this position to record the position with respect to section 23 of the Misuse of Drugs Act, 1977-1984. He then said as regards any of the averments made by the respondent that are inconsistent with the averments made by him, he repeated the averments made in his principal affidavit and the respondent's averments were denied by him.

***The cross–examination***

54. At the hearing of the application for surrender, counsel for the respondent cross-examined Garda Martin. He was asked whether he had taken the keys of the car from Mr. Johnston and he said he did not recall "to be honest". He was asked whether if it was put to him, that the first thing he did was take the keys of the car from him, would he dispute it? He said he would because he did not remember taking the keys. He said he would not have immediately walked up to the car and taken the keys. He said he accepted that he took the keys at some stage because the car was conveyed to Kilmainham Garda Station.

55. Garda Martin agreed that he had not encountered many people where the ANPR technology had flagged that they were unlawfully at large. Garda Martin stated that the technology had told him that there was a missing person attached to the car who was possibly with a male under duress. Garda Martin said that the technology was a small screen with only space for a certain amount of letters and that it did not mention at that stage that the person was unlawfully at large.

56. Garda Martin stated that it was not pitch black as there was good street lighting at the time. He said he was at the driver's door and that Mr. Johnston rolled down the window. He said he was speaking to him. There was a possibility that the woman in the car was under duress so they were speaking to him at that stage to establish both persons' identities. The respondent gave identity details but he did not have an ID on him, and the female passenger gave his colleague her identity details and had an ID on her. It was put to him that it was quickly established that there was no duress on her part. Garda Martin replied that it could not be established immediately whether the female passenger was under duress given that she was in the company of the respondent. He said that his colleague was speaking with her whilst he was speaking solely with the respondent.

57. Garda Martin established the respondent's details and carried out a PULSE check over the radio, which confirmed that the respondent was unlawfully at large. When asked what he did then, he said he opened the door of the car and he saw there was a plastic bottle in it that was adapted to be used as a bong; he later described the bong. He was asked why he opened the car door and he said to get him to step out of the car. The respondent stepped out of the car to take him away from the situation so as to establish if Mrs Johnson was with him under duress, or if she was there of her own free will. He was asked what his colleague was doing and he said he was not fully aware of what he was doing. He said that when he opened the door of the car, he noticed the cannabis grinder and the plastic bottle adapted to be a bong used for smoking cannabis in the car. He said that the cannabis grinder was in the door of the car and the bong was behind the driver's seat on the floor. He said they were in plain sight. He said that the respondent's car was a three door car so the driver's door was considerably longer and there was considerable space between where the door starts and the back footwell could be seen quite clearly.

58. He said he asked him to step out of the car and have a chat with him, confirming his details. He said that he told his colleague of what he had observed in the car. He said that the duress inquiry was still ongoing and it was not until they had finished searching later on in the station, that they were satisfied she was not with him under duress. He said there was no direct link between the drugs search and her being under duress, but it was in the back of their minds. When asked about the PULSE check he had done over the radio, and whether that had established that Mr. Johnston was unlawfully at large, he said it had stated he possibly was unlawfully at large. He said he only had minor details at that stage over the radio. He agreed that the fact that Mr. Johnston was unlawfully at large was in the back of his mind as he proceeded to carry out other investigations. He said they had three issues involved – the question of Mrs. Johnston being under duress, the communication from PULSE that he was unlawfully at large, and that there may have been a controlled substance in the car. It was put to Garda Martin that the third issue came into being to allow him to proceed with the first two issues and primarily the second issue concerning Mr. Johnston being unlawfully detained. Garda Martin strongly disputed that contention.

59. Garda Martin agreed that he got out of his car, went over to the driver's side window, and was talking through the window. He agreed that at some stage he asked the respondent to get out of the car so his colleague could assist in establishing whether Mrs. Johnson was under duress, and whilst doing that, he saw the grinder and the plastic bottle. He was asked whether he had put his suspicions to the respondent at the roadside and he said yes he did. He was asked what was the result of that, and he said that he invited him to come back to the Garda station for the purposes of a drugs search. He was asked whether he picked up the plastic bottle, and he said he did not believe so. He said they brought him back and the car was quite full of stuff so it would not have been possible to search the car and their person at the side of the road. He said the whole thing was packed full of stuff. When it was put to him that he had previously said that it was roomy and there was no problem with seeing stuff, Garda Martin replied that he could clearly see the bottle on the back of the floor once he opened the driver's door. He said he did not recall taking out the cannabis grinder. He did not record that in his notebook and he said that the cannabis grinder had been left in the car because it was not an offence to have a cannabis grinder or indeed a bottle.

60. He described the cannabis grinder. When asked if Mr. Johnston had given him a bit of hash, he said he did not. He said there were no drugs on him at the roadside but he did say that there would have been minute amounts of drugs in the cannabis grinder. He said he could smell that from it and he was asked whether he had taken it out and smelled it and he said he smelled it back in the station when he was searching the car. He said that the traces would have been minute. He was asked whether it was an offence to have minute traces of cannabis and he said it would have been, yes. When asked about the detention in the Garda station being for misuse of drugs and whether he thought that was relevant and he said, "well no, I didn't find it necessary to keep it".

61. Garda Martin said that if Mr. Johnston had had cannabis on him, it would have proven his case of the drugs search. It was put to Garda Martin that the only issue he was concerned with was the fact that he had received information to say he was unlawfully at large. Garda Martin disputed that contention.

62. Garda Martin said the respondent had been invited back to the Garda station for the purposes of a drug search. He said he had agreed to do so and was informed that he was being detained for the purposes of the drugs search. He said he had searched him briefly at the roadside and did not find anything of note. He said he was handcuffed and placed in the back seat of the car. He said, he had informed the respondent that he was detained for the purposes of a drugs search. He said he did not arrest him but detained him. He said that he had formed an opinion to suggest that a drugs search was warranted. This was based on the cannabis grinder and the bong in the car, leading him to believe that there was more cannabis to be found either on their persons or in the car.

63. Garda Martin was questioned in relation to the practice of filling up the custody records. He suggested that Garda Nevin would have been the person who conducted the PULSE check over the radio. He said he presented the respondent to her. She asked him what he was arrested for and he told her. He said at that stage she had already written in "unlawfully at large" into the reason for arrest. He said it was unusual that she had proceeded to fill in the custody record without asking him what he was there for. He said he informed her of various details and she made the assumption that it was for being unlawfully at large that he had been arrested, but that was untrue.

64. He disputed that he had lost his cool. He disputed that she had documented the true reason for the arrest. He said he put him in a cell. He confirmed that the time he was brought to the cell was 1:25 am. He said that the search end time was not noted, but it would have lasted between five and ten minutes. He was asked why he did not release him from detention then, and he said that they wanted to search the car that he had been found in. He was asked whether he had detained him further so he could search his car and he said "That's correct yes".

65. He did not have a note of what time the search of the car was completed. His notebook simply had the registration of the car, the name of the respondent, his date of birth, Maghaberry Prison Lisburn, conveyed to Kilmainham, negative search. The time of the

detention was 00:52 am. He had nothing about drugs or reasons for suspicion or anything.

66. Garda Martin was questioned over the absence of notes and it was suggested to him that if there had been a genuine reason for believing that he had drugs on his person, he would have noted down what he had seen. Garda Martin replied that he was able to recall without notes. He said that he recalled the major issues were the presence of the cannabis grinder and the plastic bottle.

67. In relation to Mrs. Johnston, he said she was released with her car and allowed to drive away after the car was searched. Garda Martin then stated that he thought she was actually released prior to the search of the car because the respondent was the primary focus of the drug search as the cannabis grinder and bong had been found on his side of the car. He was not released because they had not finished searching the car.

68. Garda Martin was asked about the search of the car and he said it took well over one hour. He said that the respondent was not detained after the search of the car was completed as the minute the search of the car had proved negative, he returned to the station and spoke to the member in charge. He said he had been in contact with the PSNI while the search of the car was going on and he established that the respondent was unlawfully at large. He said it was at that stage that he arrested the respondent under section 3 of the 1976 Act. This was at 02:45 am.

69. He was asked whether he was in direct contact with somebody from Northern Ireland in respect of an EAW and he said "No, not in respect of an EAW but in relation to him being unlawfully at large". He did say however that it had formed part of the conversation that there was a warrant in Northern Ireland but it had not been sent to this state. He said that was a minor part of the conversation; the major part was that he was unlawfully at large from prison in Northern Ireland.

70. Garda Martin said there was a moment of wonder about whether they could do anything with the respondent or if he had to be simply released, but within moments they spoke to Insp. Tom Doran and found that section 3 of the Act of 1976 gave them power to charge Mr. Johnston. Garda Martin agreed that it formed part of what was going on in the hour they searched the car as to whether there was anything they could with him so that he would be available. He was not clear if he had spoken to Insp. Doran, he thought it was Sgt. Comerford who was talking to him.

71. He said that his colleague, Garda Cassidy, had been conducting the search of the car. Garda Martin was in and out from the search process and was speaking to various people. He said he decided what to do with him before the end of the drugs search. He said that they had decided that if there were no further controlled substances found in the car that he would be arrested for being unlawfully at large. He agreed that his presence in the cell for the duration was his call. When it was suggested to him that the Gardaí had put their heads together to say "what they could get him for lads", Garda Martin said absolutely not, it was making it sound like they were out to get him or something. He said they were not out to get him; he was simply doing his job on the night. He agreed that this was a novel set of circumstances. Garda Martin stated that it was only after his arrival in Kilmainham that he was in contact with the PSNI inspector. He said that contact was separate to the drug search.

72. It was put to him that the Misuse of Drugs Act, 1977-1984 would have allowed him search a person without being detained. He said that yes, at the roadside possibly yes, but he was in fact detained for the purpose of the drugs search. It was put to him that the power of arrest was triggered when somebody did not cooperate with him for the purposes of the drugs search. He said he detained him for the purposes of a drugs search and brought him back to Kilmainham Garda Station.

73. He was asked about the delay in preferring the charge to him. He said it was quite an unusual charge. There was no standard charge in PULSE, so he had to create a PULSE incident and create a charge sheet for the offence with the appropriate wording. He got no guidance from anyone in respect of that apart from the legislation. He said he got help from his seniors in respect of the parts of the Act requiring certain precautions.

74. Under cross-examination Garda Eilis Nevin said she did not recall being involved in any radio or other communications prior to the respondent's arrival in Kilmainham. She said that a few Gardaí arrived in so initially and she was not told exactly the reason for the arrest. She started filling out the custody record as she normally did, as regards details of the prisoner. The respondent gave his name and address and she said when filling out section A she moved on to section B.

75. The respondent had given an address of Maghaberry Prison which was unusual for her to hear. Following that Garda Martin was not present in the custody area so she did a person check on the Garda PULSE system. This told her he was unlawfully at large from prison. She said that from there she entered "unlawfully at large" into the custody record in section B. Following this she immediately spoke with Garda Martin and he informed her. She ascertained the details of the arrest in which it was said that it was section 23 Misuse of Drugs Act, 1977-1984. She was asked why she did not wait for that conversation before she filled in the record, and she said it was probably due to the fact that she was suspicious with the address once it was given by the respondent. She undertook to do the person search herself and saw that he was unlawfully at large and made the entry herself. She was asked why did she not ask Garda Cassidy but she did not remember having a conversation with him.

76. She said that Mrs. Johnston was there first but she did not have a recollection of who brought her in. She gave information about reading rights to him and that he was in the custody area and not the cell area at that stage. At 01:25 am he was brought to the cell for a search. She did not know how long that lasted. She noted from the custody record that she herself was involved in searching her at 01:05 am. She agreed that between the arrival of the respondent at 00:55 am and giving him his notice of rights at 01:10am, she was searching Mrs. Johnston. She believed that it took less than five minutes to search Mrs. Johnston. She said generally a strip search can be completed in less than five minutes.

***Submissions***

77. Counsel for the respondent submitted that the nature of the arrest contaminates both warrants. He said the first EAW was the product of delayed detention for a specific purpose; to ensure that whatever was afoot in Northern Ireland had some traction in this state and that the respondent would be available. The second EAW was executed while he was remanded in custody on the first one, and was therefore contaminated. Counsel for the respondent relied upon the evidence that had been given. He placed emphasis on the contradictions between Garda Martin and Garda Nevin.

78. Counsel relied on the discrepancy between the lack of recall of Garda Martin about certain matters that had occurred and his specific recall about the cannabis grinder and the bottle. He relied on the fact that while Garda Martin got a smell from the cannabis grinder. he took the view there was nothing in breach of the law there and none of the items were seized or taken. He also queried how he could see the bottle through his vantage point.

79. The respondent also raised an issue with regard to the detention and the length of the detention. He queried whether he should

have been arrested at all in terms of section 23 of the Misuse of Drugs Act, 1977-1984. He also queried whether it have been exercised in circumstances where the respondent had apparently agreed to go with the Gardaí to the station.

80. The respondent also queried Garda Nevin's evidence and the fact that she was aware that the issue of Northern Ireland was being talked about. He also referred to the respondent being detained longer than his wife and the explanation that he was more central to the drugs search, but the drugs search of him had appeared to take 10 minutes.

81. The respondent questioned the length of time between 02:30 am when he was told he was going to be charged under section 3 and that it took until 04:45 am before he was actually charged. There was no power of detention to detain him as he was not being detained for investigation. Counsel also referred to what he said was a tacit concession that heads were being put together to see if there was anything that they could come up with to justify his detention. It was clear that the inspector had communicated to the sergeant that a section 3 charge would be something worthy of consideration. It appears that as the offence was withdrawn and we do not know and are not entitled to the information that formed the basis of that offence.

82. It was submitted that there was no real valid reason for the initial drugs arrest. He relied on the provisions of section 23 of the Misuse of Drugs Act, 1977-1984 and said that there seemed to be a requirement for non-cooperation before a power of arrest can arise. Counsel relied upon the discrepancy between what Garda Martin had written about him being unlawfully at large and the evidence that had been given that it was an arrest under section 23.

83. Counsel submitted the Court had to look at two issues. The first was the question of whether there was a deliberate and conscious detention that contravened his constitutional rights. If that was the case the Court had to vindicate that right by not ordering his surrender. He submitted that if the Court was of the view that there was a notional detention for drugs, but where the reality was that they were aware of a warrant in Northern Ireland and the detention was to ensure that he was available for arrest on that warrant, then there was an abuse of process. The respondent supported this argument by referring to the *dicta* in *Minister for Justice and Equality v. J.A.T. (No. 2)* [2016] IESC 17 that the appropriate courts would then not allow the fruit of that violation.

84. The respondent also relied upon the decision in T*he State (at the Prosecution of Robert Trimbole otherwise known as Michael Hanbury) v. The Governor of Mountjoy Prison* [1985] IR 550 and said that there was a certain resonance with the facts as outlined in this case. He submitted that even in the context of the EAW proceedings the Court could make a similar decision. Overall his submission was that there was an effort and an endeavour to ensure that the respondent would have been available for an arrest on the European Arrest Warrant. That was the principal submission.

85. Counsel for the minister pointed out that the respondent appeared to be making two distinct arguments. The first was a *Trimbole* point which appeared to be that there was an unjustified detention for a wholly improper purpose. Counsel referred to the fact that the reference to *J.A.T. (No. 2)* was made in the context of an abuse of process. Counsel submitted that it was a wholly different species of an abuse of process and it was nothing like the issue that was being dealt with in this case.

86. Counsel submitted that Trimbole and the case of *State (Quinn) v. Ryan* [1965] IR 70 dealt with a deliberate invasion of constitutional rights for an entirely improper purpose where the exercise of state power was essentially fraudulent. Indeed, he submitted, the exercise was probably criminal in both its effect and its intent because it was an unlawful imprisonment or a misfeasance of public office to do what was done in those cases. The other type of abuse of process was one which involved a question of whether the process was oppressive to the subject of that litigation.

87. Counsel submitted that a *Trimbole* point could not be made lightly. It was not to be made where there were various technical objections in respect of the section 22 issue. Counsel submitted that a *Trimbole* point would only arise where the Court concluded that Garda Martin had detained the respondent where he not only had no basis for doing so, but he knew he had no basis for doing so and his purpose was to keep him in custody until such time as something else might be done. Counsel submitted that it was unclear even at this stage whether the respondent's case was that the section 23 drugs search was a "ready up" or whether the "ready up" was charging him with the offence under section 3 of the Act of 1976.

88. Counsel referred in particular to the case of *Kane v. Governor of Mountjoy Prison* [1988] IR 757, although counsel suggested that each of the cases turned on their own facts. Even in *Kane*, while the High Court had been critical of evidence of the Gardaí, the court ultimately held that as Mr. Kane had assaulted one of the Gardaí in the course of the operation, there was a valid ground for arrest and therefore he could and should have been in custody.

89. Counsel submitted that to suggest there was something inappropriate about the nature of the inquiries that the Gardaí made in this case, particularly in light of the admitted facts that the question of cannabis possession arose at the scene would be to suspend forensic disbelief.

90. Counsel questioned whether the respondent's submission as to the interpretation of section 23 was correct. Counsel submitted that Gardaí were entitled to make a requirement of a person to come to the Garda station. They were entitled to take the car and they were entitled to require a person to stay with the vehicle so that nothing else arises. However, counsel submitted that this was only a purely technical submission and even if the Gardaí had exercised the incorrect power, there was no *Trimbole* type facts at issue.

91. Counsel submitted that in terms of the decision to charge him with section 3 there is and was no doubt that they were entitled to do so. There was also perhaps a degree of ingeniousness in coming up with that offence but nonetheless it was an actual offence for which they were entitled to charge and did so charge.

***Analysis and determination of the Court on abuse of process***

92. The courts have not only an inherent jurisdiction but a positive duty: -

> (a) To protect persons against the invasion of their constitutional rights;
>
> (b) If an invasion has occurred, to restore as far as possible the person so damaged to the position in which he or she would have been if their rights had not been invaded,
>
> and
>
> (c) To ensure as far as possible that persons acting on behalf of the executive who consciously and deliberately violated the constitutional rights of citizens do not for themselves or their superiors obtain the planned results of that invasion.

93. The foregoing represented the essence of finding of the Supreme Court in the Trimbole case. In that well known case, the High Court released that applicant from custody where the court was satisfied that his arrest pursuant to section 30 of the Offences Against the State Act, 1939 was illegal because its purpose had been to ensure he would be available for subsequent extradition proceedings. The High Court held there was no genuine suspicion that Mr. Trimbole had committed a firearms offence. On the finding of facts made by the High Court, the Supreme Court confirmed the legal implications of those findings. The Supreme Court held that the well-recognised jurisdiction of the courts at common law to prevent an abuse of their own process was amplified and reinforced by the position of the courts within the framework of the Constitution and a direct duty arises to prevent such abuse of their process.

94. In *Trimbole*, the Supreme Court affirmed the principles set out in *Ryan* which had also concerned extradition proceedings. In that case there had been a deliberate decision to bring the arrested person across the border with Northern Ireland without giving him any access to court. O' Dálaigh C.J. described what has occurred in the *State (Quinn) v. Ryan* as follows: -

> *"In plain language the purpose of the police plan was to eliminate the Courts and to defeat the rule of law as a factor in Government."*

95. Although the present proceedings have not been constituted as Article 40 proceedings, it is undoubtedly the case that if there was no genuine basis for his detention other than a desire to make him available for these EAW proceedings, there would be an abuse of process of the court. In those circumstances the Court would be fully justified, indeed required, to refuse his surrender on these warrants. The Court "*would no longer be engaged in the administration of justice*" (see O'Donnell J. in *J.A.T. (No 2)* at para 8).

96. It is necessary to consider carefully what occurred in Kilmainham in the early hours of the 13th May, 2017. Modern technology, in the form of ANPR software, permitted the Gardaí to become aware that the car travelling in the opposite direction may contain a missing woman from Northern Ireland who may be in the company of a male. It has never been suggested, nor could it be, that the Gardaí did not have a right to stop the vehicle to make further inquiries.

97. It is also clear that during the course of this stop, Garda Martin became aware that the respondent was a person said to have escaped from lawful custody in Northern Ireland. He asked him to step out of the car. Garda Martin said that he observed a plastic bottle that was used as a bong for smoking cannabis on the floor behind the driver's seat and that he saw a cannabis grinder in the side pocket of the car. It was on that basis, Garda Martin said, that he decided to carry out a drug search and for that purpose asked the respondent to accompany him to Kilmainham Garda Station. He said that he detained him for that purpose.

98. It is a curious feature of these proceedings that the respondent states that a piece of cannabis was found in his possession on the roadside but that Garda Martin does not accept it. While there is a discrepancy between that evidence, there is no dispute on a central aspect of the case: he was detained for the purpose of a drug search.

99. The respondent highlighted Garda Nevin's entry into the custody record, "unlawfully large", as the main support for his claim. It is important to emphasise, that there is no suggestion that "Section 23 MDA" was entered at a time other than on the night in question. On the contrary, the respondent insisted there was a dispute between the two Gardaí when Garda Martin became aware of the entry.

100. I have considered the evidence given on affidavit and under cross-examination. As Garda Martin fairly indicated in his evidence, this was an unusual circumstance. He had indeed stopped an escaped murderer. It appears that during the roadside stop and later in Kilmainham Garda Station, the fact that the respondent was an escaped murderer was common knowledge in the Garda station. I accept however that at the scene there were three factors at play. The first of those was an initial enquiry into what may be the case of a missing person who may have been under duress from the male in the car with her. I accept that the Gardaí would not, and indeed should not, accept a simple indication of lack of duress by a person who may be in the presence of a controlling person. Secondly, the person stopped was wanted as a person who was unlawfully at large having been convicted of an offence of murder in Northern Ireland. This fact does not stop the Gardaí from carrying out appropriate enquiries having made a vehicle stop and following any investigative leads as to other offences that may appear to have been committed.

101. There is no doubt that there was a genuine investigation into whether there were prohibited drugs in the possession of the respondent and for that matter in the possession of his wife. The respondent himself was clear that he was brought back for the purposes of as he said, "a further drug search". Garda Martin accepted there was an initial search on the road. That did not constitute a full drug search, he was being brought back to the station for that purpose. Such a search is appropriate for safety reasons. The only area of dispute is to what triggered that drug search i.e. the finding of cannabis or the finding of drug use paraphernalia.

102. I have listened carefully to the evidence of Garda Martin and I accept his evidence that there was drug use paraphernalia in the car. It would be entirely illogical for him to deny that he had found a small piece of cannabis on the respondent. The finding or handing over of the cannabis would not have prevented Garda Martin from detaining the respondent for the purpose of a more detailed search in Kilmainham Garda Station or indeed for the purpose of searching the car in greater detail.

103. I also accept Garda Martin's statement that he could smell cannabis from the grinder when he searched the car. I do not accept that the fact that the cannabis grinder and the plastic bong were not retained is indicative of a lack of a genuine reason for his detention for the purpose of search. As had been indicated, the possession of these items in and of themselves are not unlawful. By the time the car was being handed back to Mrs. Johnson, it was clear that they were not wanted for the purpose of evidence of any charge that was being preferred under the Misuse of Drugs Act 1977-1984. The absence of any reference in Garda Martin's notebook to those items does not cast doubt on his evidence. He recorded the minimum necessary.

104. As regards the fact that the custody record states "unlawfully at large" this is not indicative of the fact that that was the reason for the detention. Even the respondent himself accepted in his first affidavit, sworn prior to any Garda affidavits, that his arrest had been for the purpose of a drugs search. That entry reflected Garda Nevin's mistaken view of what the situation was but it was quickly outlined to her the real true grounds as indeed have been accepted by the respondent. Undoubtedly, there was a surprise at dealing with somebody who gave his address as Maghaberry Prison and Garda Nevin mistakenly jumped to the wrong conclusion. This was pointed out to her and corrected on the night. I am of the view that the respondent's second affidavit was sworn because he wished to take advantage of the error that was revealed in the custody record exhibited by Garda Martin. Furthermore, I am satisfied that the respondent would have raised these issues at a far earlier stage if there was any basis to his claim that the true reason for his arrest was being unlawfully at large.

105. There has been a complaint as regards the length of time the respondent was detained in Kilmainham Garda Station. It appeared that the Gardaí dealt with the respondent's wife at an earlier stage than dealing with the search of this respondent. She was also

released at an earlier time than he was. I accept this was on the basis that she was not the driver of the vehicle and the evidence as regards the cannabis possession was on the respondent's side of the vehicle. There has been evidence, and it has not been disputed, that the car was particularly crammed full of clothes, a tent, foodstuffs and drink. The Gardaí were involved in searching that for approximately an hour. The respondent did not refer to any specific legal provisions to demonstrate that there was no right to hold him or require him to be available during the search of the vehicle. During the course of that time, it appeared that Garda Martin was making inquiries as to how he may proceed if no evidence of an offence for which the respondent could be charged was found in the vehicle. What has been submitted was that the vehicle search was part of the ruse or colourable device to keep him there until some warrant could be obtained.

106. Garda Martin was undoubtedly in contact with the PSNI and he was aware that the EAW had not been transferred for execution in this state. Together with his senior colleagues, he identified an offence for which the respondent could be charged in this jurisdiction. It has not been argued that the Gardaí were not entitled to charge him with such an offence in this jurisdiction. It is an offence prosecutable in this jurisdiction to escape from lawful custody in Northern Ireland. Undoubtedly there was a genuine and reasonable suspicion by Garda Martin that the respondent had committed that offence. The Gardaí are entitled to prosecute an offence contrary to s. 3 of the Act of 1976. It was never been suggested that there was a deliberate intention to prosecute the respondent in an unlawful for that offence without the consent of the DPP or the Attorney General. I do not accept that the proffering of the charge was for any other reason than a desire by Garda Martin that he be prosecuted for it. While it may be that Garda Martin, and indeed the other Gardaí on duty that night, were relieved that they did not have to release the respondent, that relief arose from the fact that through diligent police work they had actually identified an existing, albeit little used, offence for which Garda Martin had a reasonable suspicion to arrest him and charge him. In the circumstances of the reasonable suspicion genuinely held by Garda Martin, there was nothing unlawful about the decision to arrest him for and charge him with the offence under the Act of 1976.

107. The respondent made a further complaint that it took two hours to actually charge him with that offence subsequent to his arrest on suspicion of that offence. This has been explained, quite understandably, by the fact that Garda Martin had to make entries in the PULSE system in respect of his arrest but also had to draft the charge from scratch, so to speak. This was because it was an unusual charge for which there was no template available to him. From the charge sheet that has been placed before the Court, it is clear that he was unsuccessful with that attempt to draft a perfect charge from scratch. That charge had to be amended significantly by the DPP. That amendment was not indicative of a lack of a genuine belief and intention to prosecute him for the offence. On the contrary, it indicated the novelty of the situation that had arisen, and the attempts that were made by the Gardaí to deal with the situation in the early hours of the morning without access to the advice of legal advisors who might have been able to assist them in that regard.

108. Furthermore, the fact that it took so long to draft the correct charge, lends credence to Garda Martin's statement that as soon as the search of the car was over, and had proved negative, he arrested the respondent in respect of the section 3 charge. It was then that he commenced the novel process of actually drawing up the charge sheet for this rarely used offence. In those circumstances, there was no delay that would warrant the granting of a *habeas corpus*. Moreover, even if there had been a delay between arrest and subsequent charging, the appearance in the District Court cured any defect in that regard.

109. The respondent relied on the case of *DPP v. Finn* [2003] 1 IR 372, but that is a case of an entirely different nature and related to the obtaining of evidence. This was a case where a man had been arrested for the purpose of charge and no admissibility of evidence issues arose. A delay in the proffering of the charge certainly does not amount to the type of deliberate and conscious violation of his rights that would require this Court to refuse surrender.

110. The high point of the respondent's case is the delay from the point he arrived at Kilmainham Garda Station until the point that he was released and subsequently arrested for section 3. The period of time in the Garda Station was from 00:55 am until 02:47 am. That is a period of almost two hours. During that period, he was provided with his rights, he was searched in the cell and then kept in the cell until such time that the search of the car was completed. That search only commenced after he had been searched in the cell. I am satisfied from all of the evidence that I have heard that there was a genuine reason for his detention during the period of time. He was being detained for the purpose of the search and the search of the car. There was an active search of an especially crammed car ongoing. The Gardaí had a genuine suspicion with regard to possession of drugs. The Gardaí had a coterminous concern about the respondent's position as an escaped person from custody. Garda Martin acted with diligence in carrying out simultaneous enquiries in respect of that matter. As a result of the conversations he had with his sergeant who then spoke to the inspector, an appropriate offence for which there was a genuine and reasonable basis for charging him with and prosecuting him for was identified.

111. In the circumstances, this is a case which is far removed from the facts of either Trimbole or *State (Quinn) v. Ryan*. I am satisfied that there was a genuine opinion grounding the decision to detain him for a drugs search. That desire to carry out and finalise the drugs search continued throughout the detention until such time as he was released and charged with the section 3 offence of being unlawfully at large.

112. Insofar as the respondent has claimed that the detention at Kilmainham Garda Station for the drug search breached the provisions of the Misuse of Drugs Act 1977-1984, I am not so sure that that is in fact correct. Section 23(1) of the Misuse of Drugs Act 1977-1984 provides:-

> *"23.—(1) A member of the Garda Síochána who with reasonable cause suspects that a person is in possession in contravention of this Act of a controlled drug, may without warrant—*
>
> *(a) search the person and, if he considers it necessary for that purpose, detain the person for such time as is reasonably necessary for making the search,*
>
> *(b) search any vehicle, ….*
>
> *(c) ….*
>
> *(1A) Where a member of the Garda Síochána decides to search a person under this section, he may require the person to accompany him to a Garda Station for the purpose of being so searched at that station. …."*

113. According to the provisions, there is a right to search where the reasonable suspicion exists, and if necessary to detain for a search and to require a person to accompany the Garda to a Garda station for the purpose of the search. In relation to the search of a vehicle, there are provisions allowing Garda to require a person to take or cause to be taken a vehicle to a place for the purpose of

a search and to require a person in control or charge of the vehicle to accompany the vehicle to that place and remain for as long as the requirement exists. Garda Martin expressly invoked the sub-section when he said that the respondent, his wife and the vehicle were conveyed to Kilmainham Garda station for the purpose of a search being conducted. He acted under the powers granted to him by the relevant provisions of section 23.

114. Even if however, Garda Martin did not follow precisely the steps required by the said section which could have resulted in a subsequent prosecution in respect of any matter that may have been found on his person or in the car being dismissed on the basis of an illegality in the terms of the detention and search, that would not require this Court to refuse his surrender as an abuse of process. A genuine but mistaken belief in the powers that a Garda has to arrest, detain or search a person for a particular offence could not and does not form the basis for a finding that such an arrest and detention was in the nature of a deliberate and conscious violation of constitutional rights which requires that any *other proceedings* to which a person might subsequently have become amenable to be struck out as an abuse of process. That is not the law as found by the Supreme Court in *Trimbole*. This type of abuse of process jurisdiction is reserved for the kind of outrage against the principles of the rule of law that were indicated by O' Dálaigh C.J. in *State (Quinn) v. Ryan.*

115. I am satisfied that this was a genuine detention for the purpose of a Misuse of Drugs Act search by Garda Martin. He had a reasonable suspicion in respect of that search. Garda Martin also had a genuine belief that he was entitled to detain the respondent for the purpose of both the personal search and the search of the vehicle of which he had control. Garda Martin diligently followed up on enquiries and established a reasonable suspicion that he had committed the offence of escaping from lawful custody in Northern Ireland. On foot of that suspicion he arrested him and caused him to be charged by Sgt. Comerford with that offence. There was no deliberate and conscious violation of his rights at any point.

116. In all the circumstances, there has been no abuse of process. There has been no abuse of process in the *Trimbole* sense. There is also nothing in the present case to support any contention that this is a case where an abuse of process should be found under *J.A.T. (No. 2)*. As O'Donnell J stated in that case "[s]omething is either an abuse of process, or it is not." What occurred in this case was not an abuse of process.. I therefore reject this point of objection on behalf of the respondent.

**Section 41 of the Act of 2003**
117. Section 41 (1) of the Act of 2003 states: -

> *"A person shall not be surrendered under this Act for the purpose of his or her being proceeded against in the issuing state for an offence consisting of an act or omission that constitutes in whole or in part an offence in respect of which final judgment has been given in the State or a Member State."*

118. The respondent makes this claim with respect to the offence of escape from lawful custody only.

119. In his points of objection to the first EAW regarding the murder offence, the respondent claimed that his surrender was expressly prohibited by *inter alia*, section 41 of the Act of 2003. The respondent also claimed that his surrender was prohibited on the grounds of section 42 which prohibits surrender where the DPP is considering but has not yet decided whether to bring proceedings against the person or proceedings are pending in the State against the person. The respondent did not proceed with the argument under section 42. In respect of section 41, the respondent had been asked to give particulars of that pleading. He said in his replies to particulars in respect of the first EAW, that it is prohibited by section 41 "*because he would be proceeded against in the issuing State for an offence consisting of an act or omission that constitutes in whole or in part an offence in respect of which final judgment has been given in the State or a Member State*."

120. The respondent had repeated that claim that his surrender was prohibited under section 41 of the Act of 2003 in his notice of objection to the second European arrest warrant. That EAW had concerned the escape from lawful custody whereas the first EAW had concerned the murder charge.

121. Given that the plea had been made in the context of the first EAW on which surrender was sought for murder, this plea was somewhat unusual. At the hearing of the action, the respondent put forward a claim that because the proceedings had been struck out in the District Court, that there had in fact been a final judgment against him.

122. This claim was made on the basis that "final judgment" meant final determination by a court that was not open to further appeal. He submitted that because a court strikes something out that this was a final determination. It was highly unusual that counsel had not placed the order of the District Court before the court in making this submission. Neither had counsel considered the case of *Minister for Justice and Equality v. Renner Dillon* [2011] IESC 5. Counsel did not refer the Court to any other decision from the Court of Justice of the European Union (CJEU) as to how the concept of final judgment within the meaning of the Framework Decision should be interpreted. It was submitted that the Court could interpret final judgment as finally disposed of.

123. In the case of *Renner Dillon*, the Supreme Court had been asked to look at the concept of final judgment in the context of a decision in the UK to acquit that respondent in respect of a charge of rape but a later decision to set aside that acquittal and retry him. The Supreme Court referred to a number of decisions of the CJEU with regard to the Schengen Agreement and Article 55 thereof concerning the concept of "finally disposed of".

124. The Supreme Court held having referred to a decision of the CJEU that "it is clear that 'finally judged' in the Framework Decision has an autonomous meaning in the law of the European Union. Where under the law of the issuing member state a judgment, in this case a judgment of acquittal, does not definitively bar further prosecution or as stated in *Mantello* (Case C-261/09), "*Constituted procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts against that person. Then that person has not been finally judged. A judgment which does not definitively bar further prosecution does not constitute a ground for mandatory non – execution of a European Arrest Warrant."*

125. The respondent did not seek to argue that a strikeout in the context of the case having been withdrawn in the District Court would mean a bar to further prosecution. Certainly no decision in this jurisdiction was opened to this Court to substantiate such a proposition. In the circumstances, applying the decision of the Supreme Court in *Renner Dillon*, I reject this point of objection.

**Conclusion**
126. For the reasons set out above, I reject the respondent's objections to surrender in respect of both European arrest warrants. I therefore make an order for the surrender of the respondent to such other person as is duly authorised to receive him by the issuing state in respect of both of these European Arrest Warrants.