Neutral Citation [2012] IEHC 249

THE HIGH COURT

Record No 2011/350 EXT

Between/

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

And

GAVIN NOLAN

Respondent

JUDGMENT of Mr. Justice Edwards delivered on the 24th day of May, 2012.

Introduction

1. The respondent is the subject of a European arrest warrant issued by the United Kingdom of Great Britain and Northern Ireland (hereinafter "the U.K.") on the 5th October, 2010. The warrant was endorsed for execution in this jurisdiction by the High Court exactly one year later on the 5th October, 2011. The respondent was arrested on the 24th October, 2011. and brought before the High Court in accordance with s. 13 of the European Arrest Warrant Act 2003, as amended (hereinafter "the Act of 2003") when a date was fixed for the purposes of s. 16 of the Act of 2003. Thereafter the matter was adjourned from time to time, until it came on for hearing before this Court over two days, *viz*. the 8th and 12th March, 2012. Following the s. 16 hearing the Court reserved its judgment, which it now delivers.

2. This Court is 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 respondent does not consent to his surrender to the U.K. and this Court's jurisdiction to make an order directing that the respondent be surrendered is dependant upon a judicial finding that the requirements of s. 16 of the Act of 2003 have been satisfied. Accordingly, the Court has been put on inquiry as to whether the requirements of s. 16 of the Act of 2003, both controversial and uncontroversial, have been satisfied. In so far as specific points of objection are concerned, the Court has had to consider a number of specific objections to the respondent's surrender and it is proposed later in this judgment to consider the specific objections pleaded.

Uncontroversial Matters

3. The Court has before it an affidavit of arrest sworn by Detective Sergeant Sean Fallon. Although at the time of his arrest the respondent gave his name as Laurence Kelly, and indeed has filed an affidavit in these proceedings in the name of Laurence Kelly, counsel for the respondent has confirmed that no issue is being raised in any case either as to arrest or as to identity. In response to a query from the Court, counsel for the applicant stated that Laurence Kelly is believed to be a second name or alias sometimes used by the respondent. However, there is no information to suggest that he has legally changed his name by Deed Poll and his correct name is understood to be Gavin Nolan. The Court also notes, however, that the respondent in the aforementioned affidavit, which was sworn by him on the 17th November. 2011 contends, in effect, that the position is the other way around, *i.e*. that his real name is Laurence Kelly and that the name Gavin Nolan is an alias. Regardless of what the position as to his correct name is, there is an acceptance by the respondent that he is the person to whom the European arrest warrant relates and the Court can proceed for the moment on that basis. However, in the event of the Court deciding to surrender him it will be important for the purposes of formulating any Order to ascertain with certainty which of the two names that he uses is on his birth certificate and is therefore his correct name.

4. The Court has also received and scrutinised a true copy of the European arrest warrant in this case, together with additional information dated the 3rd August. 2011, and further 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 is satisfied following its consideration of this evidence and documentation that:

(a) the European arrest warrant in this case has been endorsed for execution in accordance with s. 13 of the 2003 Act;

(b) the European arrest warrant in this case was duly executed and the person who was arrested and who was brought before the Court is the person in respect of whom the European arrest warrant was issued;

(c) the European arrest warrant in this case is manifestly in the correct form, save for an ambiguity in relation to whether paragraph 2 of Article 2 of the Framework Decision was being invoked, and if so in respect of what offence or offences. However, the position has been clarified by the additional information dated the 3rd August, 2011 and the ambiguity has been resolved to the Court's satisfaction;

(d) although the European arrest warrant in this case is a conviction type warrant there is no suggestion that the respondent was tried *in absentia* and accordingly no question of an undertaking for the purposes of s. 45 of the Act of 2003 arises;

(e) the Court is not required, under ss. 21 A, 22, 23, or 24 of the Act of 2003 (as inserted by ss. 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005), to refuse to surrender the respondent.

5. 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) (hereinafter "the 2004 Designation Order"), and duly notes that by a combination of s. 3(1) of the Act of 2003, and Article 2 of, and the Schedule to, the 2004 Designation Order, the "United Kingdom of Great Britain & Northern Ireland" 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.

6. The European arrest warrant in this case relates to two offences, *viz*. attempted rape, contrary to s. 1 of the Sexual Offences Act 1956, and assault occasioning actual bodily harm contrary to s. 47 of the Offences Against the Person Act 1861, in respect of which the respondent was convicted at a trial before Harrow Crown Court on the 8th November 2005, and was duly sentenced. Following an appeal to the Court of Appeal (Criminal Division) against the severity of his sentences, the sentences initially imposed were adjusted.

Sentencing of the Respondent
7. According to Part C of the warrant the attempted rape charge carried a potential sentence of up to life imprisonment. The assault occasioning actual bodily harm charge carried a potential sentence of up to five years imprisonment.

8. Quoting from the Order of the Court of Appeal (Criminal Division) which is appended to the European arrest warrant, and which is reflected in Part C.2 of the warrant, the sentences that the respondent was ultimately required to serve were as follows:

> (a) on the attempted rape charge:
>
> "Detention in a Young Offender Institition for public protection under s. 226 of the Criminal Justice Act 2003 with a specified period of two years and six months imprisonment, less 211 days spent on remand to count towards sentence" of 30 months;
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> (b) on the assault occasioning actual bodily harm charge:
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> "an Extended Sentence of two years pursuant to s. 227 of the Criminal Justice Act 2003 made up of a custodial term of 1 years Detention in a Young Offender Institution and an extension period (i.e an extended period of licence) of 1 year, concurrent" to that imposed for the attempted rape.

9. Further, in Part C.3 of the European arrest warrant which deals with "remaining sentence to be served" it is stated:

> "This was due to be determined by the Parole Board in October 2010. As the requested person has absconded during release on temporary licence the Probation Service will not be recommending his release on licence at this time."

10. Some more detail is provided in regard to the respondent's absconding while on temporary licence in Part F of the warrant dealing with "other circumstances relevant to the case" wherein it is stated:

> "Unlawful absence from prison because the offender did not return to the prison facility after a period of temporary release from Her Majesty's Prison Leyhill from 19 July 2010 to 23 July 2010."

11. Further, Part H of the standard form of the European arrest warrant mandated by the Framework Decision (Council Framework Decision of 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA)) is designed to provide the executing judicial authority with information concerning whether under the legal system of the issuing State it is possible to seek a review of the penalty imposed, or clemency, in the case of custodial life sentences or lifetime detention orders. In the present case the issuing judicial authority has provided the following information in Part H:

> "The following offences on the basis of which this warrant has been issued are punishable by a custodial life sentence or lifetime detention order: attempted rape.
>
> The legal system of the issuing member State allows for the application of measures of clemency to which the person is entitled under the law or practice of the issuing member State, aiming at non-execution of such penalty or measure. The offender has to serve an appropriate minimum period (the tariff) that reflects the punitive element of the sentence. Once this punitive term of imprisonment has expired the offender enters into the risk element of the sentence. He may only be detained if he continues to present a risk to the public.
>
> An independent Parole Board conducts a review of the prisoner's sentence once the punitive element of the sentence has expired. A judge shares this panel. An oral hearing can take place to determine whether the prisoner's detention should continue.
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> The Parole Board must decide whether it is necessary for the protection of the public for the prisoner's detention to continue. At this hearing the prisoner has a right to be present, to be legally represented and to call and question witnesses. The Parole Board can direct the release of the prisoner. If it decides that the prisoner should not be released then a further hearing will take place within two years to review the prisoner's detention and at regular intervals thereafter."

12. The Irish Central Authority sought clarification from the issuing judicial authority concerning the nature of the sentence that had been imposed upon the respondent for the attempted rape offence, and the following additional information was provided by letter dated the 3rd August, 2011:

> "in relation to the paragraph entitled 'Sentence imposed in relation to two offences." This relate (sic) particularly to the indeterminate sentence imposed for public protection for the offence of attempted rape. An offence of attempted rape carries a maximum potential sentence of life imprisonment. In the instant case a life sentence was not imposed but an indeterminate sentence was imposed for public protection with the minimum custodial term of 30 months to be served before the defendant was eligible for release providing it was considered that there was not a significant risk to members of the public or serious harm by him committing a further specified offence. The defendant was released on 19th of July 2010 on a temporary release with a requirement return on the 23 July 2010 to her Majesty's Prison Leyhill, he failed to return. The Parole Board would have been due to have been determined (sic) his remaining sentence in October 2010.
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> A sentence of imprisonment or detention for public protection is not a sentence of imprisonment for life: the differences being in the case of imprisonment or imprisonment for public protection the Parole Board may on application 10 years after release directs the Secretary of State to order that a licence shall cease to have effect, and secondly in the case of such sentences no order can be made under section 82 (4) of the Powers of Criminal Courts Sentencing Act 2000 and that the early release provisions are not to apply.
>
> Theoretically a person might never be released if recalled in relation to an indeterminate sentence however there are

frequent reviews by the parole board as highlighted in section G of the European arrest warrant. There have been a number of decided cases relating to the review of indeterminate sentence prisoners after the minimum term has expired. It has been held that the Parole Board acts when prisoners are being recalled as a court and can be held to account where it does not conduct timely reviews and comply with its duties under Article 5 (4) of the European Convention on Human Rights.'

13. There is in fact nothing of any relevance in Part G of the European arrest warrant and the Court, having considered the warrant as a whole, believes it is reasonable to infer that the reference to "G" in the additional information should in fact be a reference to "H".

Correspondence and Minimum Gravity
14. The issuing judicial authority has ticked the box relating to •'Rape" in Part E of the warrant and it has been clarified that it is invoking paragraph 2 of Article 2 of the Framework Decision in respect of the inchoate version of that offence, namely, attempted rape. No issue was raised in regard to this, and the High Court has previously taken the view in *Minister for Justice, Equality and Law Reform v. Biggins* [2006] I.E.H.C. 351 (unreported. High Court, Peart J., 8th November. 2006) that paragraph 2 of Article 2 of the Framework Decision can be invoked in respect of both choate and inchoate forms of the generically described offences listed in that provision. Providing that the threshold with respect to minimum gravity specified in s. 38(1)(b) of the Act of2003 is met, this Court need not concern itself with correspondence in relation to this offence. S. 38(1)(b) of the Act of 2003 requires that under the law of the issuing State the offence is punishable by imprisonment for a maximum period of not less than three years. Part C.1 of the European arrest warrant specifies that the offence of attempted rape. contrary to s. 1 of the Sexual Offences Act 1956, attracts a maximum penalty of up to life imprisonment. Accordingly the requirements of s. 38(1)(b) with respect to minimum gravity are met.

15. In regard to the second offence. i.e. the offence of assault occasioning actual bodily harm contrary to s. 47 of the Offences Against the Person Act 1861, the Court is required to be satisfied both as to correspondence and as to minimum gravity.

16. In terms of the correspondence issue the underlying facts as set out in Part E of the warrant are that:

> "...on the 9th of April 2005 in the Kilburn area of London Gavin Nolan approached a 25 year old female from behind. He grabbed her and forced her into a nearby garden. He pushed her to the floor and he put his hands over her mouth and eyes preventing her from screaming. She felt him touching her body with his hands and she then became unconscious. Gavin Nolan was pulled from her by a passerby. The woman found that her blouse and bra had been pushed up leaving her breasts exposed and that her trousers had been undone and were around her ankles. The knickers that she had been wearing had been removed."

17. The Court has been invited by counsel for the applicant to find correspondence with the offence in Irish law of assault causing harm, contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997 (hereinafter "the Act of 1997"). Counsel for the respondent takes no issue with that. In circumstances where "harm" for the purposes (*inter alia*) of s. 3 of the Act of 1997 is defined within s. 1 of that Act as meaning "harm to body or mind and includes pain and **unconsciousness**" (the Court's emphasis), I have no difficulty in finding correspondence with the suggested offence. In any event it seems to me that correspondence could also be readily demonstrated either with assault contrary to s. 2 of the Act of 1997, or with sexual assault contrary to s. 2(1) of Criminal Law (Rape) (Amendment) Act 1990.

18. Turning then to the question of minimum gravity, the relevant threshold in regard to this offence is that set out ins. 38(1)(a)(ii) of the Act of 2003, i.e. that a term of imprisonment or detention of not less than four months has been imposed on the person in respect of the offence in the issuing State. As the respondent received a sentence of two years imprisonment for this offence the requirements as to minimum gravity are comfortably satisfied.

Specific Objections
19. The following points of objection have been pleaded on behalf of the respondent:

> "1. The surrender of the respondent to the issuing State would constitute a contravention of Article 40.4 of the Constitution and therefore is prohibited by Section 37(1) of the European Arrest Warrant Act 2003. This is in circumstances where the sentence which the respondent would be required to serve in the issuing State is preventative in nature, being an indeterminate sentence of imprisonment for public protection under the terms of the English Criminal Justice Act 2003. The respondent has already served 5 years and 3 months imprisonment in the issuing State in respect of a sentence, the punitive element of which was expressly specified as 30 months.
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> 2. The surrender of the respondent to the issuing State would constitute a contravention of Article 40.4 of the Constitution and /or Article 5 ECHR and therefore is prohibited by Section 3 7(I) of the European Arrest Warrant Act 2003. This is in circumstances where, although the punitive element of the respondent's sentence in the issuing State expired after 30 month imprisonment. the respondent was not afforded a parole hearing to purportedly establish his level of dangerousness to society until he had served more than 4 years in prison. Furthermore, the relevant authorities of the issuing State have confirmed that the respondent will not be recommended for parole if surrendered to the issuing State. There has already been a clear breach of Article 5(4) ECHR arising from the delay in conducting the respondent's initial parole hearing and it is unclear when, if ever, the respondent will be afforded another such hearing. The jurisprudence of the courts of the issuing State shows that they are restricted to granting declaratory relief in respect of breaches of Article 5(4) ECHR in such circumstances.
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> 3. The surrender of the respondent to the issuing State would constitute a contravention of Article 40.4 of the Constitution and Article 5 ECH Rand therefore is prohibited by Section 37(1) of the European Arrest Warrant Act 2003. This is in circumstances where the continued imprisonment of the respondent in the issuing State in respect of the sentence referred to in the European Arrest Warrant herein would constitute an arbitrary and disproportionate interference with the liberty of the respondent, where the sentencing court indicated that, had the offence in question been committed before the commencement of the English Criminal Justice Act 2003 less than one week earlier, the respondent would have received a determinate sentence of 5 years imprisonment. In circumstances where the respondent has already served 5 years and 3 months in prison, and where it is unclear when his next parole hearing would be if surrendered, the surrender of the respondent is prohibited by Section 37(1) of the European Arrest Warrant Act 2003.
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> 4. The surrender of the respondent to the issuing State would constitute a contravention of Article 40.1 of the Constitution and Articles 5 and 14 ECHR and therefore is prohibited by Section 37(1) of the European Arrest Warrant Act 2003. This is in circumstances where a Bill currently before the legislature in the issuing State proposes to abolish the

system of indeterminate sentences of imprisonment for public protection under which the respondent was sentenced, but this abolition will not apply retrospectively. The said system came into force in the issuing State just 5 days before the respondent committed the offence referred to in the European Arrest Warrant herein and appears likely to soon be abolished in the issuing State. In circumstances where there is no objective justification for causing such significant prejudice to the respondent by treating him differently on account of the date of his offence, the surrender of the respondent is prohibited by Section 37(1) of the European Arrest Warrant Act 2003."

Evidence Adduced on behalf of the Respondent

20. The respondent relies first upon his own affidavit, to which the Court has previously referred. This affidavit was initially filed in connection with a bail application, but the matters contained within it have further been relied upon for the purposes of the substantive hearing. The respondent deposes to the following matters therein:

1. "I am the respondent in the above-entitled proceedings and I make this Affidavit from facts within my own knowledge, save where otherwise appears, and where so appears I believe the same to be true. Although the European Arrest Warrant herein refers to me as Gavin Nolan, I say that I am the person sought therein and that my name is Laurence Kelly and not Gavin Nolan.

2. I say that I am currently detained at Cloverhill Prison, Cloverhill Road, Clondalkin, Dublin 22.

3. I say that I was arrested and brought before this Honourable Court on the 24th October 2011 pursuant to a European Arrest Warrant issued by a judicial authority of the United Kingdom on the 5th October 2010 and endorsed for execution by Order of this Honourable Court made on the 5th October 2011. I was remanded in custody on foot of the said warrant, and I was conveyed to Cloverhill Prison to appear again on the 2nd November 2011. I beg to refer to a copy of the said warrant upon which, marked with the letters "***LK1***", I have signed my name prior to the swearing hereof.

4. I make this Affidavit for the purposes of grounding my application for bail in respect of the proceedings herein.

5. I say that this Honourable Court has exclusive jurisdiction to grant bail in respect of the proceedings herein and that I have not previously applied for bail before this Honourable Court in respect of these proceedings.

6. I say that I am an Irish citizen and was born in the State on the 28th January 1987. Before my arrest in relation to the proceedings herein I was living with my mother at I West Demesne, Baltinglass, County Wicklow. If granted bail by this Honourable Court, I would undertake, subject to the directions of the Court, to live at this address, and I say and believe that my mother would be happy for me to live there with her. I would undertake to comply with any further conditions which might be imposed by this Honourable Court if I were to be granted bail pending the determination of the proceedings herein.

7. I say that I am of limited means and this would affect the level of cash lodgement that I would be able to make if required to do so by this Honourable Court as a condition of bail. I was receiving Jobseeker's Allowance before my arrest on foot of the European Arrest Warrant herein, and I have no assets in Ireland or elsewhere.

8. I say that I left Ireland and went to the United Kingdom in January 2005. Although I was involved in some offending behaviour and may have been remiss in attending court before this, this was when I was a minor and was in the context of the troubled childhood I had, as well as the addiction problems I had at the time. At 14 years old, I went into voluntary care. I had serious behavioural problems, including very serious Attention Deficit Hyperactivity Disorder (ADHD), and went on over the following two years to spend time in Trinity House children's detention centre and Ballydowd Special Care U nit. When I was 16 years old I went to live with my mother in Baltinglass, County Wicklow, but due to my behavioural problems and drug addiction I had to leave again and lived in the Orchard residential care centre in Clondalkin, Dublin 22. I was expelled from there when I was 17 years old, and it was after this that I went to the United Kingdom in January 2005.

9. I say that I no longer have any addiction problems. While in detention in the United Kingdom I completed numerous courses, including courses in alcohol awareness, drug awareness, anger management and advance thinking skills. I now fully understand the seriousness of the obligation to attend court while on bail and if granted bail by this Honourable Court I undertake to attend the Court on each day designated by the Court in respect of the proceedings herein and I undertake to make myself available for surrender in the event that this Honourable Court should order my surrender.

10. I say that I was given temporary release from prison in the United Kingdom from the 19th July 2010 to the 23rd July 2010. I failed to return to prison on the 23rd July 2010 and instead returned to Ireland. This was in circumstances where my mother was sick and the length of time I had remaining to serve in prison in the United Kingdom was entirely uncertain (and remains so). In June 2011, Sergeant Owens in Baltinglass Garda Station contacted me and asked me to come down to the Garda Station to talk to him. When I did so, he informed me that they had received information from the United Kingdom in relation to the sentence I had been serving and that, although I would not have to return to the United Kingdom, I would have to register as a sex offender here in Ireland and comply with the relevant conditions. I agreed to be registered as a sex offender and complied with all of the conditions required of me from June 2011 until I was arrested on foot of the European Arrest Warrant herein on the 24th October 2011.

11. I say that my compliance with the request to register as a sex offender my dealings with An Garda Síochana in relation to this serve as further evidence that I would not breach the terms of any bail which this Honourable Court might grant me in respect of the proceedings herein.

12. I say that I have two sisters and one brother. My brother works in Carlow and one of my sisters works in Dublin. The other sister works in the United Kingdom. As stated, my mother lives in Wicklow. My girlfriend lives in Carlow town and I act as a father figure to her children. My ties are to Ireland and I have no intention of leaving the jurisdiction - I fully intend resisting my surrender to the United Kingdom but should this Honourable Court order such surrender, I would make myself available to facilitate same.

13. I say, believe and am so advised that I have strong grounds for resisting my surrender. I say, believe and am so advised that it is clear from the European Arrest Warrant herein that, if I were surrendered on foot of same, my continued detention in the United Kingdom would be purely preventative in nature. I have served 5 years and 3 months imprisonment in respect of offences in respect of which I was sentenced to serve 2 and a half years imprisonment. The punitive period of my sentence expired after 2 and a half years. However, due to chronic administrative delays in t he parole system, I did not receive a parole hearing until I had already spent more than 4 years in custody. The parole hearing took place in the middle of 2009. The European Arrest Warrant herein States that my release will not be recommended by the Parole Board if I am surrendered to the United Kingdom, and it is unclear when my next Parole hearing would be. Furthermore, I say, believe and am so informed that there is currently a Bill before the parliament in the United Kingdom proposing to abolish indeterminate sentences but that this will not affect those people such as me who have already been sentenced to indeterminate imprisonment in the United Kingdom.

14. In relation to the fact that the proceedings herein are in the name of Gavin Nolan, which is not my name, I say that this was a false name which I gave to the Police in the United Kingdom when arrested in relation to a public order offence shortly after arriving in the United Kingdom in early 2005. My fingerprints were taken on that occasion, and the name Gavin Nolan showed upon on the system when I was arrested and fingerprinted in relation to the offences referred to in the European Arrest Warrant herein, on the 9th April 2005. I did not correct the United Kingdom authorities in relation to my name. All of this was in the circumstances described above when I was a teenager with serious behavioural problems.

15. I say that I am not in possession of any passport or any documentation which would permit me to travel and I undertake not to apply for any documentation or replacement passport/Identity Card.

16. I say, believe and am so advised that the provision s of Article 26 of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) will not benefit me as, due to the indeterminate nature of the sentence left to serve in the United Kingdom, any time spent in custody in Ireland on foot of the European Arrest Warrant herein cannot be deducted from any time left to serve in prison in the United Kingdom.

17. I therefore pray this Honourable Court for a n order granting bail pending the determination of the within proceedings."

21. The respondent has also adduced for the purposes of the substantive hearing, and relies upon, a lengthy affidavit, containing expert evidence as to the law in England and Wales and how it applies in the respondent's situation, from an English Barrister, Mr. Julian Bernard Knowles Q.C. There is no dispute as to Mr. Knowles' credentials or experience and his status as an expert is accepted by all concerned. While this affidavit, which was sworn on the 11th January, 2012, runs to some 64 paragraphs over 24 A4 pages of typescript, and the Court has considered it in detail, together with the exhibits thereto including a transcript of the judgment of the Court of Appeal (Criminal Division) in the respondent's case, Mr. Knowles provides a convenient summary of his conclusions at paragraphs 6 to 10 inclusive. He states:

"6. I can summarise my conclusions as follows.

7. An IPP is an indeterminate sentence of imprisonment or detention created by ss 225 and 226 of the CJA 2003. Section 225 applies to offenders aged 18 or over, whilst s 226 applies in relation to those under 18 years old. The relevant provisions came into force on 4th April 2005 and sentences of IPP may only be imposed for offences carried out on or after that date. An IPP may be passed where a defendant who has been convicted of one of the specified offences in the CJA 2003 is found to be a risk to the public.

8. An IPP [*the acronym stands for sentence of imprisonment for public protection*] consists of two parts. The first part is a minimum term of imprisonment (sometimes referred to as the tariff period), which is specified by the sentencing judge at the time of passing sentence. This period has been described as "the measure of [the defendant's] punishment': *R (James) v. Secretary of State for Justice* [2010] 1 AC 553, para 12. Once the defendant has served this minimum term he remains in custody until such time as the Parole Board directs his release on license. This second open-ended component is preventative in nature and is focussed on an assessment of future risk posed by the defendant. The Parole Board can only direct the defendant's release once he is no longer a risk to the public.

9. In relation to the future of IPP sentences in the UK, in June 2011 the Government introduced the Legal Aid, Sentencing and Punishment of Offenders Bill proposing the abolition of IPP sentences. The Bill is currently going through Parliament. During the legislative process there has been very considerable criticism of IPP sentences, for reasons of both principle and practicality.

10. Section 226 of the CJA 2003 has no application to the respondent’s case. It applies only to those who are under 18 years of age at the date of sentence. At all material times the respondent was aged 18 and over. The 'Order on the Appeal' of the Court of Appeal (Criminal Division) which was produced after the respondent's appeal against sentence in 2007 fails accurately to reflect the Court of Appeal's judgment. The Court of Appeal substituted a sentence of detention for public protection in a young offenders’ institution pursuant to s 225 of the CJ A 2003 as amended, for the original sentence of imprisonment for public protection imposed by Harrow Crown Court."

22. In addition, in paragraphs 41 to 47 respectively, Mr. Knowles discusses at some length certain proposals before the U.K.'s parliament for the abolition of Indeterminate Sentences for Public Protection (hereinafter "IPP sentences"). While the existence of such proposals is not something that is likely to influence this court in its deliberations, Mr. Knowles does refer at paragraph 47 to an aspect of the reform agenda which might have a relevance to the issue under consideration. *i.e.* the possibility that any measure abolishing IPP sentences would be non-retrospective. Mr. Knowles states in that regard:

"47. It is evident from these passages that the Government ha s a settled intention to abolish IPP sentences and to replace them with determinate sentences. The question then arises as whether the legislation will apply retrospectively. The Government's position is consistent with the standard practice concerning the introduction of new legislation. It has been made clear that the Legal Aid. Sentencing and Punishment of Offenders Bill will not apply retrospectively when it becomes law. Those defendants such as the respondent will continue to be subject to their IPP and those who have served their minimum tariffs will continue to be detained until the Parole Board directs their release."

23. The provision under which the respondent was sentenced, s. 225 of the U.K. Criminal Justice Act 2003, reads as follows:

"225 Life sentence or imprisonment for public protection for serious offences

(1) This section applies where -

(a) a person aged 18 or over is convicted of a serious offence committed after the commencement of this section, and

(b) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.

(2) If -

(a) the offence is one in respect of which the offender would apart from this section be liable to imprisonment for life, and

(b) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life, the court must impose a sentence of imprisonment for life.

(3) In a case not falling within subsection (2), the court may impose a sentence of imprisonment for public protection if the condition in subsection (3A) or the condition in subsection (3B) is met.

(3A) The condition in this subsection is that, at the time the offence was committed, the offender had been convicted of an offence specified in Schedule 15A.

(3B) The condition in this subsection is that the notional minimum term is at least two years.

(3C) The notional minimum term is the part of the sentence that the court would specify under section 82A(2) of the Sentencing Act (determination of tariff) if it imposed a sentence of imprisonment for public protection but was required to disregard the matter mentioned in section 82A(3)(b) of that Act (crediting periods of remand).

(4) A sentence of imprisonment for public protection is a sentence of imprisonment for an indeterminate period, subject to the provisions of Chapter 2 of Part 2 of the Crime (Sentences) Act 1997 (c. 43) as to the release of prisoners and duration of licences.

(5) An offence the sentence for which is imposed under this section is not to be regarded as an offence the sentence for which is fixed by law."(Emphasis added).

24. As Mr. Knowles Q.C. pointed out in his affidavit, the reference to s. 226 in the Order of the Court of Appeal (Criminal Division) quoted earlier in this judgment is mistaken. S. 226 applies only to offenders who are under the age of 18 at the date of the offence, whereas the respondent was aged 18 and over at all material times. His sentence was in fact substituted pursuant to s. 225 on appeal, despite the reference to s. 225 in the Order.

Submissions on behalf of the Respondent.
25. Counsel for the respondent has filed helpful written legal submissions for the assistance of the Court, and has sought to amplify the contents of those submissions in further oral submissions made at the hearing.

The Nature of IPP Sentences
26. In relation to the nature of IPP sentences, the Court was referred to the affidavit of Mr. Knowles Q.C. Mr. Knowles refers to the relevant legislative provisions and case law, concluding that the period of imprisonment/detention up until the expiry of the "tariff' set by the sentencing court is punitive in nature whereas the period following such expiry is preventative in nature, in that its objective is to prevent the commission of future offences. It was submitted that this i s the interpretation which should be applied by this Honourable Court.

27. The Court was referred to *R (James) v. Secretary of State for Justice* [2010] 1 A.C. 553 where the House of Lords confirmed that the IPP sentence of the type imposed on the respondent herein contains no rehabilitative objective. Lord Brown explained the background to the absence of rehabilitation as a sentencing factor at p.605:

"In determining the objectives of an IPP it is important to have in mind the provisions of section 142 of the 2003 Act. Section 142(1)(c) requires that amongst the purposes of sentencing to which ordinarily the court must have regard are "the reform and rehabilitation of offenders". Until, however, the IPP scheme came to be amended with effect from 14 July 2008, this provision was specifically disapplied to IPP sentences by section 142(2)(c). It appears that this may have been overlooked in the course of the judgments below. Clearly the Court of Appeal was correct ([2008] 1 WLR 1 977, para 69 quoted at para 46 above) to say that the primary object of IPPs is to protect the public, not to rehabilitate the offender. But other passages in the judgment suggest that they regarded rehabilitation at least as *an* objective of the sentence and seemingly Laws LJ [2008] 1 All ER 138 so regarded it-see, for example, his para 49 quoted at para 32 above. It was not."

28. Lord Judge C.J. came to the same conclusion at p. 619, stating "[a]s we have seen, the statutory structure applicable to IPPs provides for two purposes, commensurate punishment and public protection."

29. It was submitted that in the present case, in light of the fact that the respondent has completed the two and a half year tariff imposed as part of his IPP sentence, that the remaining sentence in respect of which his surrender is sought is therefore purely preventative in nature: his continued detention would have no punitive, therapeutic or rehabilitative basis.

Constitutional Prohibition on Preventative Detention
30. It was submitted that the imprisonment or detention of a person for the purposes of preventing him or her from committing a crime is unconstitutional save for the limited provisions in relation to the refusal of bail contained in Article 40.4.6°.

31. The Court's attention was drawn to the recent Supreme Court judgment in *Caffrey v. Governor of Portlaoise Prison* [2012] I.E.S.C. 4 (unreported, Supreme Court, 15th February, 2012) where Fennelly J. at. para. 54 stated that "[i]t is clear from a consistent

line of authority that a sentence imposed for purely preventative reasons is never permissible."

32. Further, in *In re the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 the Supreme Court (per Keane C.J.) held at p. 407 that "[i]t has been a long established principle of our constitutional jurisprudence that the courts would not uphold as constitutional what is known as 'preventive detention'"

33. It was submitted that the following oft-quoted extract from the judgment of Walsh J. in *The People (Attorney General) v. O'Callaghan* [1966] I.R. 501. at pp. 516 to 517 clearly applies not only in cases where the detainee enjoys a presumption of innocence but in all cases where the prevention of future crimes is the sole justification for detention:

> "In this country it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter upon which he has not been convicted or that in any circumstances he should be deprived of his liberty upon only the belief that he will commit offences if left at liberty, save in the most extraordinary circumstances carefully spelled out by the Oireachtas and then only to secure the preservation of public peace and order or the public safety and the preservation of the State in a time of national emergency or in some situation akin to that." (Emphasis added).

34. The Court's attention was further drawn to the fact that Murray C.J., giving judgment for the Supreme Court in the joined cases of *Whelan v. Minister for Justice, Equality and Law Reform and Lynch v. Minister for Justice, Equality and Law Reform* (unreported, Supreme Court, 14th May, 2010), made clear that the O'Callaghan principles had a broader application than simply bail:

> "The fact that the Constitution has been amended with regard to the grounds for refusing bail for a person awaiting trial does not affect the principle that a convicted person may not be sentenced by a court or detained by an executive order for a preventative or non punitive purpose."

IPP contrasted with Life and other Sentences

35. In this context, counsel for the respondent referred to the judgment of Denham C.J. on behalf of the majority of the Supreme Court in *Caffrey*, referred to above. The Chief Justice found that the nature of a life sentence imposed in England was the same as a life sentence imposed in this jurisdiction, notwithstanding the reference to a minimum tariff in the English system. She stated at paras. 29 to 30:

> "29. The appellant was sentenced to life imprisonment in England. This was a mandatory sentence. There was no discretion exercised by the sentencing judges. The nature of the sentence is one of life imprisonment.
>
> In fact this mandatory sentence is similar to the sentence a person convicted for murder would receive in the State, imprisonment for life. It is a mandatory sentence in Ireland also. There is no incompatibility between the sentence received in England and the penalty prescribed by the law of the State for a similar offence.
>
> 30..... The nature of the sentence in issue is that of imprisonment for life. It is a life sentence. Even when a person is released from prison the sentence continues to exist. The sentence is not at an end. The life sentence does not cease during the life time of the sentenced person, even when they are released on licence. The sentence in issue is imprisonment for life - it is not a twelve year sentence. The fact that there was a twelve year tariff in England does not change the nature of the sentence."

36. It was submitted that in contrast, it is clear that the nature of the sentence of two and a half years plus indeterminate preventative detention imposed in the respondent's case is unknown in this jurisdiction. The nature of the respondent's sentence is that of punitive detention for two and a half years immediately followed by detention for an indeterminate period in order to prevent the further commission of crime. Unlike an English life sentence, the respondent's sentence has no equivalent here. Thus, it was urged, if the situation before the Supreme Court in *Caffrey* had related to the transfer of an IPP prisoner whose tariff had expired, the applicant would have been successful in obtaining an order for his release.

37. It was further pointed out that the minority judgment of Fennelly J. in *Caffrey*, with whom Murray J. concurred, found that the nature of an English life sentence was in fact different from an Irish life sentence, because it involved a purely preventative period of imprisonment (after the tariff had expired).

38. It was submitted that the result is the same whether one applies the approach of the majority or the minority in *Caffrey* to the present case: an IPP sentence is clearly different in nature from any sentence which is known or constitutionally permissible in this jurisdiction.

39. It was contended on behalf of the respondent that, by imposing a life sentence, a court is indicating that the imprisonment of the sentenced person for the rest of his or her life is justified by reason of the gravity of the offence. No subsequent event (not even full rehabilitation) removes the legal justification for the person's continuing imprisonment until the end of their life. The Parole Board (the Court acknowledging, as it must, the significant differences between the respective roles played by the Irish Parole Board and the English Parole Board) may of course choose to exercise clemency in relation to the release of the person on licence, but this does not affect the lawfulness of the persons imprisonment should the Executive choose to revoke the licence. Some consideration may well be given to the risk of re-offending when deciding whether to grant or revoke a licence, but this is purely a matter of discretion and any finding in this regard has no consequences for the subsistence of the life sentence which was imposed by the court. It was submitted that the Supreme Court in *Dowling v. Minister for Justice, Equality and Law Reform* [2003] 2 I.R. 535 confirmed this view by describing (at p. 539) the power of the Minister to revoke a release on licence as "an administrative one for the purpose of withdrawing a discretionary privilege to a convicted prisoner whose sentence has not expired".

40. It has been urged upon the Court that the nature of an IPP under s. 225 of the U.K. Criminal Justice Act 2003 is entirely different. Upon the expiry of the punitive element or "tariff", the sole legal justification for the continuing imprisonment of the sentenced person is the danger to the public caused by the sentenced person. Following the expiry of the tariff, the danger to the public must be assessed by a judicial authority at reasonable intervals, and if it is found that no such danger exists, the lawfulness of the person's imprisonment is extinguished and the person must be released. Although it appears that in such circumstances the person is released on temporary licence, he or she cannot be re-imprisoned unless a danger to the public is shown, thus re-activating the legal justification for the imprisonment. Counsel for the respondent submits that it is clear that this is not a matter of clemency but rather one of legal imperative. If a person sentenced to an IPP consistently fails to satisfy the Parole Board that he is not a danger to the public, he or she will remain in prison until death, notwithstanding the fact that the gravity of the offence for which he or she was

sentenced may have been considered by the sentencing court to merit as little as two years imprisonment. In contrast, the gravity of the offence for which a life prisoner is sentenced will always have merited imprisonment for the rest of the person's life. The legislation which created IPP sentences- s. 225 of the U.K. Criminal Justice Act 2003- specifically provides that they may only be imposed where a life sentence would not be appropriate.

41. In the joined cases of *Whelan* and *Lynch* already referred to, the plaintiffs challenged their mandatory life sentences and the system of parole as unconstitutional and contrary to the European Convention on Human Rights (hereinafter "the ECHR"). One of their arguments was that the Minister for Justice, Equality and Law Reform was exercising a judicial function when deciding whether to release a life prisoner on licence. This was rejected by Irvine .J. in the High Court [2008] 2 I.R. 142 who found that a life sentence was entirely punitive, and did not cease to be so upon the involvement of the Parole Board and the Minister after seven years. The fact that the Parole Board and the Minister could consider the risk to society when deciding whether to release on licence did not render preventative any detention subsequent to that consideration. Irvine J. stated at p. 184:

> "The fact that the Parole Board or the first defendant may consider the issue of potential dangerousness of the individual upon whom a mandatory life sentence has been imposed prior to deciding upon their release does not mean that if the prisoner is not thereafter released they are being detained against this risk. Such an individual is being detained as a penalty for his or her crime and the first defendant, in incorporating within his decision any potential risk to the public which might arise upon release, is merely acting in accordance with his statutory obligations and in a manner consistent with the public interest when exercising clemency or affording temporary release."

42. The decision of Irvine J. was affirmed in the Supreme Court, where Murray C.J., giving the judgment of the Court, stated:

> "In the Court's view a life sentence imposed pursuant to s. 2 of the Act of 1990 is a sentence of a wholly punitive nature and does not incorporate any element of preventative detention. It is a sentence which subsists for the entire life of the person convicted of murder."

43. This Court was also referred to *Minister for Justice, Equality and Law Reform v. Murphy* [2010] 3 I.R. 77, in which case the respondent had escaped from hospital detention and his surrender was sought by the U.K. authorities. He had been convicted in the U.K. on rape and assault charges and was sentenced to a "hospital detention order" coupled with a "restriction order". The effect of this was apparently that the respondent was to be detained in a psychiatric hospital, with his discharge being at the discretion of the Mental Health Tribunal and the Secretary of State. The European a1Test warrant stated that "the defendant is to be detained indefinitely".

44. Neither the High Court nor the Supreme Court in *Murphy* accepted that the sentence received was purely preventative. In his decision in the High Court [2007] I.E.H.C. 443 (unreported, 19th December, 2007), Peart J. characterised the nature of the sentence as follows:

> "I prefer to adopt Mr Barron's characterisation of the respondent's detention as being protective rather than preventative. It can be seen as being protective both of the respondent in his own interests, and the general public at large, for as long as may be deemed necessary from a mental health point of view."

45. Giving judgment for the Supreme Court, Denham J. found that only part of the sentence which the respondent would have to serve involved preventing further harm to society. She stated at p. 90:

> "The law relating to sentencing is not identical in all member states. In this case the law of the United Kingdom enables a sentence to be one of detention by way of a hospital order. Such a detention order apparently involves elements of protection for society." (Emphasis added).

46. Thus, says counsel for the respondent, in contrast to the present case. the detention of the respondent in *Murphy* was not purely preventative. At all times during the detention of the respondent in *Murphy*, therapeutic and protective objectives were being served, as well as the obvious punitive element imposed. In that case the respondent had been convicted of rape and assault and so the sentence clearly incorporated a punitive element. It was not a case where the respondent was found to have had diminished responsibility or was given a technical acquittal by reason of insanity. In contrast to the present case, there was no period during the respondent's detention in Murphy where he would be detained purely for the protection of society. It was urged that in the present case the punitive element of the respondent's sentence has already been served. In *Murphy*, danger to the public was only one factor to be considered by the Secretary of State and the Mental Health Tribunal when deciding whether to lift the restriction order and/or discharge the respondent. It is said that in the present case, the only factor which would hold the respondent in prison if surrendered would be a finding that he poses a danger to society.

47. This Court's attention was also drawn to *Attorney General v. Doyle* (aka West) [2010] I.E.H.C. 212 (unreported, High Court, Peart J., 21st January. 2010), in which Peart J. ordered the extradition of the respondent to Florida to face trial for sexual offences. (Counsel for the respondent has very properly informed the Court that an appeal is currently pending before the Supreme Court in *Doyle*.) The respondent had pointed to a civil law provision contained in Florida's "Jimmy Ryce Act" which allowed a person convicted of a sexually violent offence to be detained "for long-term control, care and treatment" at the expiration of their sentence of imprisonment if this was found appropriate following an examination by a civil court taking place just prior to the expiry of the criminal sanction. The U.S. Supreme Court had previously found that a similar commitment procedure under the law of Kansas was civil in nature and did not amount to punishment (*Kansas v. Hendricks* 521 U .S. 346 (1997)). Peart J. referred to the "Jimmy Ryce Act" provisions as a "civil commitment procedure for the long term care and treatment of sexually violent predators" for a person's own good, with an ancillary preventative element for the benefit of society. He said:

> "I cannot regard a procedure which aims to assist a qualifying person, albeit that it serves a preventative purpose in the interest of the wider community, as one which breaches any constitutional right of the respondent."

48. Counsel for the respondent invites this Court to contrast this situation with the situation in the present case, where the respondent is sought to serve what is expressly termed a sentence "for public protection", which was imposed by a criminal court. The purpose of this sentence is not to "assist" the respondent but rather to prevent him from committing further crimes.

49. It has been indicated on behalf of the respondent that it is of course accepted that preventative detention for reasons other than the prevention of crime may be constitutionally permissible in certain circumstances. In *In re the Illegal immigrants* (Trafficking) Bill 1999 referred to above, the Supreme Court (at p. 408) noted that committal under the mental health legislation then in force did not offend against the Constitution, and also rejected the argument that the detention of proposed deportees where their deportation

was otherwise likely to be frustrated was unconstitutional. (This Court should add to this that in *V.T.S. v. The Health Service Executive and Others* [2009] I.E.H.C. 106 (unreported, High Court, Edwards J., 11th February, 2009), which involved an inquiry under Article 40 into the lawfulness of the involuntary detention and isolation of an AIDS sufferer who was suspected of also having infectious multi-drug resistant tuberculosis (MDR-TB) and possibly even extreme drug resistant tuberculosis (XDR-TB), and who was refusing treatment, upheld the constitutionality of the power under s. 38 of the Health Act 1947 as amended by s. 35 of the Health Act 1953 to detain and isolate a person with an infectious disease for the protection of the public.) However, be that as it ma y, it was urged that the preventative detention in the present case was clearly imposed by a criminal court for the purposes of preventing the commission of future crime, and thus offends against the well-established constitutional prohibition on preventative detention for such purposes.

Scope of s. 37(1)(b) of the Act of 2003

50. The relevant part of s. 37(1) for present purposes provides as follows:

> "37.--(1) A person shall not be surrendered under this Act if ...
>
> (b) his or her surrender would constitute a contravention of any provision of the Constitution..."

51. It was accepted on behalf of the respondent that although the wording of this section would appear to suggest that surrender is prohibited in any case where same would lead to the infringement of a constitutionally guaranteed right, the decision of the Supreme Court in *Minister for Justice. Equality and Law Reform v. Brennan* [2007] 3 I.R. 732 clarifies that a prospective breach of constitutionally guaranteed due process rights will preclude surrender only in "egregious circumstances". It was said that the rationale behind this limitation on the scope of s. 37(1)(b) is that the system of trial differs greatly amongst the Member States, and the European Arrest Warrant system would be unworkable if surrender were prohibited in every case in which the issuing State was shown to employ a method of trial or of sentence calculation which would be constitutionally repugnant in the executing State.

52. The respondent in *Brennan* sought to resist his surrender to the U.K. on the grounds, *inter alia*, that he would be exposed to a mandatory minimum sentencing regime where the sentencing judge would have no discretion, and that his surrender would be in breach of the Constitution and thus was prohibited by s. 37(1)(b). Giving judgment for the Supreme Court, Murray C.J. rejected this argument, finding (at p.743) that its effect would be that surrender 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." (Emphasis added).

53. It was submitted that to further illustrate the point, Murray C.J. referred to the example of the differing circumstances of entitlement to a jury trial for non-minor offences amongst the Member States. The respondent's complaint in *Brennan* was that the sentencing judge would not have discretion in the matter of the appropriate sentence. He was not complaining that the nature of the sanction which might be imposed (that being punitive imprisonment) was unconstitutional.

54. Counsel for the respondent contends that the wording of Murray C.J.'s judgment in *Brennan*, and the examples used by him, indicate that the limitation on the scope of s. 37(1)(b) applies only to rights guaranteed under Article 38 of the Constitution, which is contained in a section headed "Trial of Offences". These include the right to a trial "in due course of law", which extends to the manner in which a penal sanction is imposed but not to the nature of the penal sanction itself.

55. However, it is said, the constitutional prohibition on preventative detention is in an entirely different category. It stems from the protection of liberty guaranteed by Article 40.4, which is in a different section of the Constitution, headed "Fundamental Rights". Hypothetically speaking, if a Member State had a system whereby one of the penal sanctions open to a sentencing court was whipping, this would not be a due process matter but a matter relating to fundamental rights. Similarly, the imposition of preventative detention is not a due process matter. The process by which the judge in the issuing State decided to impose preventative detention in the present case relates to Article 38 rights and so need not comply strictly with Irish constitutional guarantees: the scope of s. 37(1)(b) is limited in that regard. By contrast, however, it is urged that the sanction of preventative detention itself offends against the respondent's Article 40.4 rights.

56. It was submitted that the surrender of the respondent would directly lead to an infringement of his fundamental constitutional right to liberty and thus is prohibited by s. 37(1)(b). No question of showing "egregious circumstances" arises as any prospective breach of such a fundamental right precludes surrender.

57. In further support of this counsel for the respondent referred to the judgment of O'Donnell J. in *Nottinghamshire County Council v. B and Others* [2011] I.E.S.C. 48 (unreported, Supreme Court, 15th December, 2011) where (speaking of the Hague Convention) he stated at para. 65:

> "... the Constitution requires the Courts to refuse return only when the foreign procedure is so contrary to the scheme and order envisaged by the Constitution and so proximately connected to the order of the Court, that the Court would be justified, and indeed required, to refuse return ."

58. The respondent contends, and this Court has accepted in its judgment in *Minister for Justice and Equality v. Shannon*, [2012] I.E.H.C. (unreported, High Court, Edwards J., 15th February, 2012), that a similar approach can be taken in extradition, and specifically European arrest warrant matters. It was submitted that in the circumstances of the present case, the IPP sentences are so contrary to the scheme and order envisaged by the Constitution and the likelihood of the respondent being subjected to preventative detention would be so proximately connected to any order that this Court might make for the respondent's surrender, that this Court would be justified, and indeed required under s. 37(1)(b) of the Act of 2003, to refuse surrender.

59. It was further submitted, without prejudice to the foregoing, that subjection to detention purely for the purposes of preventing future crime would constitute an egregious breach of rights as referred to by Murray C.J. in *Brennan*.

60. Counsel for the respondent, in his written submissions, further stated that:

> "the conclusions of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Stapleton* [2008] 1 IR 669 have the effect that the Court may presume that no fundamental right of a surrendered person will be infringed in the issuing

State and further that even if it is shown that there is a risk of such an infringement, the situation will be remedied in the issuing State, in that the surrendered person could seek relief under the laws of that State".

61. It was submitted that both of the presumptions enunciated in *Stapleton* are unquestionably rebutted in the present case. For the reasons already advanced by counsel, he submits that it is clear that the sentence which the respondent would be required to serve if surrendered to the issuing State would contravene his fundamental constitutional right to liberty. Furthermore, given that the IPP sentencing regime itself forms part of the law of the issuing State, and the evidence tends to show that its impending abolition will not operate retrospectively, the respondent will have no recourse to challenge the sentence on the basis that it is purely preventative in nature, and so there is no possibility of his fundamental constitutional right to liberty being vindicated post-surrender.

62. Further, it was submitted that although this Court has held in *Shannon* that in effect the Article 38 right to trial in due course of law relates to a trial before a court in Ireland, and that accordingly the challenge in that case was misconceived. *Shannon* has to be viewed in the context of its own facts. Counsel for the respondent contends that the circumstances in *Shannon* were such as to render it distinguishable from, and inapplicable to, the present case. ln *Shannon* the Court was asked to refuse surrender of the respondent to face trial in the U.K. in circumstances where it was possible. but by no means certain, and on one view unlikely, that evidence of some of his previous convictions for burglary would be admitted before the jury as evidence of propensity. The Irish courts have for many years adopted the position that such evidence cannot be adduced at a trial in this country because it would be unfair and contrary to an accused's right to trial in due course of law. It was urged by counsel for the respondent in the present case that unlike in *Shannon* the surrender of respondent is not being sought so that he may face trial. He has already been convicted and sentenced. Further, a major consideration for the Court in *Shannon* was the fact it was by no means certain, and as l have stated, perhaps unlikely, that the respondent in the *Shannon* case would be subjected to the apprehended breach of his rights. It was suggested that the Court may have had in mind the remarks of O'Donnell J. in *Nottinghamshire County Council* (at para. 66) to the effect that:

> "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."

63. It was urged that the situation in the present case is entirely different. It is beyond dispute in the present case that the apprehended breach of rights will occur, and moreover such breach would be inextricably linked to any order that might be made by this Court surrendering the respondent. It was submitted that in those circumstances *Shannon* is not particularly relevant in the context of the present case.

Review by the Parole Board

64. Counsel for the respondent has further submitted that his client has already suffered an arbitrary and disproportionate interference with his liberty. This is in circumstances where, upon the expiry of his two and a half year punitive sentence, he was detained for approximately two further years without any examination of whether he posed a danger to society. Furthermore, it is suggested that if he is surrendered he will be detained for at least 11 further months (according to the affidavit of Mr. Knowles Q.C.) without any examination of whether he poses a danger to society, notwithstanding the fact that the sole purpose of this detention would be to prevent the commission of future crimes.

65. In fact, the letter to the Irish Central Authority from the Crown Prosecution Service dated the 5th October, 20 I 0 and accompanying the European arrest warrant states that "I can confirm that if returned to the UK the requested person will not be recommended for parole".

66. It has been suggested on behalf of the respondent that this communication indicates that the issue of whether the respondent poses a danger to society has already been pre-judged by the Crown Prosecution Service and/or the Parole Board. Whilst it is accepted on behalf of the respondent that if there is a failure to afford him a timely review of his detention in breach of Article 5(4) of the ECHR he may seek declaratory relief before the English courts against the Parole Board and /or the Secretary of State, it is nevertheless urged that were he to embark on such a process upon being surrendered, he would necessarily have to serve a significant period in arbitrary and unlawful detention purportedly for the prevention of risk to the public. This would be in circumstances where no assessment of such risk has taken place since mid-2009 and where the English authorities have already expressly stated that he will not be recommended for release.

67. Counsel for the respondent has submitted that to surrender the respondent to undergo such arbitrary and disproportionate detention would contravene his constitutional right to liberty and would therefore be in breach of s. 37(1)(b) of the Act of 2003.

Abolition of IPP Sentences - Discrimination

68. It appears from paragraph 47 of the affidavit of Mr. Knowles Q.C. that the U.K. government's intended abolition of the IPP sentencing regime will not apply retrospectively, and thus that persons in the respondent's position will have to continue to serve indefinite sentences of imprisonment or detention regardless of the gravity of their original offending behaviour, whereas persons sentenced for similar offences following the proposed abolition will serve determinate sentences. It was submitted that this situation would amount to an unjustifiable discrimination and thus would constitute a breach of the respondent's rights under Articles 5 and 14 ECHR. It was further submitted that the respondent's surrender is thus prohibited by s. 37(1)(a) of the Act of 2003.

69. In this regard, the respondent relies upon the decision of the European Court of Human Rights (Fourth Section) in *Clift v. UK*. (7205/07; 13th July, 2010). In that case, it was found that legislative provisions which gave more favourable early release opportunities to life prisoners than to those serving determinate sentences of 15 years or more were in breach of Articles 5 and 14 ECHR. The Court stated as follows at para. 75:

> "In respect of the difference in treatment between prisoners serving determinate sentences of fifteen years or more and those serving indeterminate sentences, the Court observes that the imposition of a determinate sentence rather than an indeterminate sentence would appear to indicate that the individual in question poses a lower, and not a higher, risk upon release. The Court has found that only considerations of risk could justify the imposition of different early release requirements in the present case (see paragraph 74 above). Given the apparently greater risk posed by life prisoners, the Court is of the view that a system which imposes on them less stringent conditions for early release while prisoners serving fixed-term sentences of fifteen years or more are subject to more stringent conditions appears to lack any objective justification."

70. It has been submitted that there could be no reasonable justification for detaining the respondent indefinitely for an offence which, if committed after the proposed abolition of the IPP sentencing regime, would warrant a relatively short determinate sentence.

Submissions on behalf of the Applicant

The Constitutional Argument

71. Counsel for the applicant has referred the Court to the case of *Ryan v. Director of Public Prosecutions* [1989] I.R. 399 in which the High Court, and later on appeal the Supreme Court, was invited to depart from the principles laid down in *O'Callaghan*, discussed above.. Both Courts firmly refused to do so. However, while counsel for the applicant accepts that it can be stated that as a general proposition the superior courts in this country are most reluctant to countenance sentences involving purely preventative detention he contends that they have not adopted an absolutist position on this question. In support of this idea he relies on the following passage from the judgment of Finlay C.J. as suggesting the possibility of legislation which might, to some degree, permit of certain forms of preventative detention. Giving judgment in the Supreme Court in *Ryan*, Finlay C.J. remarked at p.407:

> "An intention to commit a crime, even of the most serious type, is not in our criminal law a crime itself unless it is furthered by overt acts of preparation or converted by an agreement with another into a conspiracy. The courts cannot create offences or crimes, though the Oireachtas may. Are they, however, to be permitted to detain a person because he is suspected of an intention, which even if proved in a full criminal trial, could not lead to his punishment? If such a power did exist in the courts, why should its exercise be confined to cases where the suspect is an applicant for bail? Why should the courts' prevention of the apprehended harm cease in the event of the determination without a sentence of imprisonment of the original charge, which charge may in its character and seriousness bear no resemblance at all to the feared offence? How can such an intention be proved, and by what standard of proof must it be established? Could there be any grounds on which an accused person suspected of such an intention would be afforded less comprehensive notice of the evidence to be offered against him of the grounds for such suspicion and less opportunity to prepare and be represented to contest such allegations than he is afforded in relation to the presenting of a criminal charge against him? Would every application for bail accordingly, in which this ground was advanced as the substantial ground of opposition, take on the nature and necessary requisites of a criminal trial? These queries not only indicate practical problems but more importantly highlight the nature of the jurisdiction which it is sought to invoke without legislation."

72. Indeed, remarked counsel for the applicant, the Supreme Court has previously considered that the fact that there may be a preventative aspect to a detention order in respect of which surrender is sought is not of itself a bar to surrender. In Murphy, to which counsel for the respondent has previously referred, the respondent was sought for surrender to the U.K. on foot of a medical treatment order imposed subsequent to conviction. Denham J. expressly considered 0'Callaghan and concluded at p. 90:

> "Similarly, I would distinguish the situation addressed in *The People (Attorney General) v. O'Callaghan* [1966] I.R. 501. That case arose on a bail motion where a prisoner had been returned for trial. The issue was whether the applicant could be held in preventative detention prior to his trial; it was submitted that if he were released on bail he might commit further offences. Walsh J. held that such detention would be a form of preventative justice, which has no place in our legal system and is alien to the purposes of bail. The facts and issues of that case are entirely different to the situation addressed in this warrant where there have been convictions for serious offences and for which the respondent has been ordered to be detained."

73. Counsel for the applicant submitted that it is also notable that in that case the fact that there was a direct causal connection as between the conviction of the respondent and the making of what was, in effect, an order of preventative detention was of significance.

74. It was further submitted that *Ryan* and *O'Callaghan*, respectively, relate to the issue of the grant of bail pre-trial, and by definition pre-conviction, and the constitutional aspects of the manner in which the presumption of innocence must operate. It is not controversial to suggest that different considerations might arise in a post-conviction scenario (*e.g. The People (Director of Public Prosecutions) v. Corbally* [2001] 1 I.R. 180).

75. It was further suggested that whilst Carney J. clearly felt compelled to apply the principles in *Ryan and O 'Callaghan* in the post-conviction context of *The People (Director of Public Prosecutions) v. Bambrick* [1996] 1 I.R. 265, it is not at all clear that an express legislative mandate. were one to exist, to take account of such risk and propensity for the purpose of sentencing would be unconstitutional.

76. Counsel for the applicant also referred this Court to the joined cases of *Whelan* and *Lynch* to which his opponent had already referred, and specifically directed its attention to the (dissenting) judgment of Murray C.J. In that case the applicants sought to suggest that the mandatory life sentence for murder was repugnant to the Constitution. They argued, *inter alia*, that s. 2 of the Criminal Justice Act 1990 must be interpreted as requiring a sentencing judge to indicate something equivalent to a tariff element of a life sentence by implication leaving a residual preventative period to be served at the conclusion of same. This approach was expressly rejected by Murray C.J. as follows:

> 'In the Court's view these submissions are not well founded. First of all the life sentence imposed by a court is exclusively punitive. As Walsh J., pointed out in *The People v. O'Callaghan* [1966] I.R. 501 preventative justice "has no place in our legal system".
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> In *The People (The Director of Public Prosecution) v. Jackson* (Unreported , Court of Criminal Appeal , 26th April 1993) Hederman J., said : "It is submitted on behalf of the applicant that what in fact the Central Criminal Court did in this instance was that it imposed a preventative sentence on the accused, a sentence of life in order, as the trial judge said, to protect women from the applicant. The Court is satisfied that preventative detention is not known to our judicial system and that there is no form of imprisonment for preventative detention." The fact that the Constitution has been amended with regard to the grounds for refusing bail for a person awaiting trial does not affect the principle that a convicted person may not be sentenced by a court or detained by an executive order for a preventative or non punitive purpose."

77. Counsel for the applicant has urged that whilst it must be accepted that the foregoing authorities clearly give rise to an arguable case that equivalent legislation in this jurisdiction might be unconstitutional, it is far from clear as to whether such an argument would succeed.

78. It was suggested that this gives rise to an immediate difficulty with the argument advanced by the respondent: namely, whether it is appropriate or permissible for the Court to sit in judgment on the "constitutionality" of a foreign statute. Further, counsel asks, what would be the consequences of a finding by the Court that the same provision, if enacted here, would be unconstitutional?

79. In seeking to address this question counsel for the applicant relies upon this Court's recent judgment in *Shannon*, referred to above. In that case, the respondent sought to suggest that certain evidential provisions that he might be subject to in the course of his trial if surrendered to the U.K. were in effect unconstitutional. The Court declined the invitation to engage in an assessment of the constitutionality of a foreign statute (seep. 37 *et seq*. of the judgment). The Court cited the decision of the Supreme Court in *Nottinghamshire County Council* which, counsel for the applicant suggests, effectively described the provisions of the Constitution as applying subject to a territorial limitation. It was submitted that the same considerations ought to apply in the present case and that no argument in respect of the constitutionality of a sentence imposed post conviction ought be entertained.

80. The submissions of the applicant rehearsed thus far are contained within the written submissions provided by counsel for the applicant for the assistance of the Court. However, in the course of the oral hearing in this matter counsel for the applicant sought to amplify considerably, and indeed extend, one particular aspect of his analysis. He contends that the reason that preventative detention is repugnant to the Constitution of Ireland is not because it is inconsistent with Article 40.4.1 ° but rather because it is inconsistent with Article 38 which requires that a person should only be punished in the criminal law context following a trial in due course of law. an important aspect of which is the presumption of innocence.

81. In that regard he points in particular to the quotation from the judgment of Walsh J. in *O'Callaghan* (at pp. 516 to 517) to which counsel for the respondent referred in his submissions and to which reference has already been made in this judgment, and also to the following quotation from the judgment of O'Dalaigh C.J . at p. 508:

> "The reasoning underlying this submission'" [i.e. the Attorney General's submission that the applicant should be held as a preventative measure] "is, in my opinion, a denial of the whole basis of our system of law. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty and seeks to punish him in respect of offences neither completed nor attempted. I say punish" for deprivation of liberty must be considered a punishment unless it can be required to ensure that an accused person will stand his trial when called upon."

82. In counsel for the applicant's submission both this and the other quotation from *O'Callaghan* make it clear that preventative detention is repugnant to Article 38 rather than Article 40.4.1°. However, as Article 38 does not in his submission have extra-territorial application it would not in fact be contrary to the Constitution for this Court to surrender the respondent to face likely preventative detention upon the resumption of his IPP sentence.

83. Finally, I should state that the Court was also referred at the oral hearing to *Pilecki v. Circuit Court of Legnica, Poland* [2008] 1 W.L.R. 325, a European arrest warrant case from our neighbouring jurisdiction, where Lord Hope of Craig head remarked at p. 335 that:

> 'it is a reasonable assumption ... that sentencing practice differs between member states... It is not to be supposed that it was the purpose of the Framework Decision to require member states to change their sentencing practices. The principle of mutual recognition indicates the contrary.''

Delay in Parole Hearing

84. Counsel for the applicant submitted that no cogent evidence has been put before the court in relation to the reason for the purported delay in conducting the first parole hearing. He contends that the affidavit of Mr. Knowles Q.C. acknowledges as much when he states that "[f]or reasons which are not clear the Respondent was not considered for release by the Parole Board until mid-2009, when the Parole Board did not recommend his release."

85. Counsel submitted that insofar as a lack of resources is posited as an explanation for the delay, Mr. Knowles Q.C. frankly acknowledges that this amounts to speculation on his part.

86. Moreover, he contends, the fact that the respondent was not released on foot of the 2009 hearing renders the delay issue entirely moot. He says that if one proceeds on the assumption that rehabilitation is a progressive process then the fact that the respondent was not released in 2009 when the Parole Board did consider his case suggests that he would not have been released had they considered his case earlier in October 2007 at the end of the tariff period. To put it another way, if the respondent was not released in 2009 then there is no reason to suppose that he would have been released earlier had he been given an earlier hearing.

Preventative Detention under the European Convention on Human Rights

87. Counsel for the applicant has pointed out that whilst preventative detention is unknown to Irish law, it is a feature of other criminal justice systems including the U.K. A similar system of preventative detention is also in operation in Germany. This was considered by the European Court of Human Rights (Fifth Section) in *Grosskopf v. Germany* (24478/03; 21st October, 2010). The system was described as follows:

> "26. The German Criminal Code distinguishes between penalties (*Strafen*) and so called measures of correction and prevention (*Maâregeln der Besserung und Sicherung*) to deal with unlawful acts. Preventive detention (Article 66 *et seq*. of the Criminal Code) is classified as a measure of correction and prevention. The purpose of such measures is to rehabilitate dangerous offenders or to protect the public from them. They may be ordered for offenders in addition to their punishment (compare Articles 63 *et seq*.). They must, however, be proportionate to the gravity of the offences committed by, or to be expected from, the defendants as well as to their dangerousness (Article 62 of the Criminal Code).

27. The sentencing court may, at the time of the offender's conviction, order his preventive detention under certain circumstances in addition to his prison sentence if the offender has been shown to be dangerous to the public (Article 66 of the Criminal Code).

28. In particular, the sentencing court orders preventive detention in addition to the penalty if someone is sentenced for an intentional offence to at least two years' imprisonment and if the following further conditions are satisfied. Firstly, the perpetrator must have been sentenced twice already, to at least one year's imprisonment in each case, for intentional offences committed prior to the new offence. Secondly, the perpetrator must previously have served a prison sentence or must have been detained pursuant to a measure of correction and prevention for at least two years. Thirdly, a comprehensive assessment of the perpetrator and his

acts must reveal that, owing to his propensity to commit serious offences, notably those which seriously harm their victims physically or mentally or which cause serious economic damage, the perpetrator presents a danger to the general public (see Article 66 § 1)."

88. In that case, the applicant had argued that preventative detention under Article 66.1 of the German Penal Code was contrary to the ECHR. However, the Court considered that so long as there remained a causal connection between the conviction and the detention (even if it was preventative in nature) there was no breach of Article 5 of the ECHR. The Court stated:

> "46. In that connection, the Court refers to its findings in its recent judgment of 17 December 2009 in the case of *M. v. Germany* (cited above). In that judgment, it found that Mr *M.'s* preventive detention, which, as in the present case, was ordered by the sentencing court under Article 66 § 1 of the Criminal Code, was covered by sub- paragraph (a) of Article 5 § 1 in so far as it had not been prolonged beyond the statutory maximum period applicable at the time of that applicant's offence and conviction (see *ibid*., §§ 96 and 97-105). The Court was satisfied that Mr *M's* initial preventive detention within that maximum period occurred "after conviction" by the sentencing court for the purposes of Article 5 § 1 (a). The Court took note of the fact that preventive detention was fixed with regard to the danger the person concerned presented to the public - and thus served (also) a preventive purpose. It considered, however, that an order of preventive detention under Article 66 § 1 of the Criminal Code was nevertheless always dependent on and ordered together with a sentencing court's finding that the person concerned was guilty of an offence and thus resulted from a "conviction'' (*ibid*.. § 96).'"

89. Counsel for the applicant says that significantly the court saw no difficulty with the idea of preventative detention *per se*:

> "52. . ...the domestic courts' decisions in the present case that it was necessary to prolong the applicant's preventive detention cannot be considered as unreasonable in terms of the objectives of the preventive detention order."

90. It was suggested that this approach is very much in line with earlier case law of the Strasbourg court, in particular, *Stafford v. U.K*. (46295/99; 28111 May, 2002).

Life Sentences am/ the ECHR

91. In this context counsel for the applicant referred this Court to the recent decision of the European Court of Human Rights (Fourth Section) in *Harkins and Edwards v. U.K*. (9146/07 and 32650/07; 17th January, 2012). In that case, the applicants sought to object to their extradition from the U.K. to the U.S. on the basis that they may be subjected to whole or irreducible life sentences in the event of conviction. It is of note that the court considered that there could not be a breach of Article 3 ECHR where a life sentence was reducible due to some eligibility for release:

> "135. The Court now turns to the second issue raised by the Court of Appeal and House of Lords. It considers that, subject to the general requirement that a sentence should not be grossly disproportionate, for life sentences it is necessary to distinguish between three types of sentence: (i) a life sentence with eligibility for release after a minimum period has been served; (ii) a discretionary sentence of life imprisonment without the possibility of parole; and (iii) a mandatory sentence of life imprisonment without the possibility of parole.
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> 136. **The first sentence is clearly reducible and no issue can therefore arise under Article 3."** (Emphasis added).

92. The court went on to consider certain difficulties under the ECHR that might arise in relation to irreducible or whole life sentences. It was submitted that one of the means by which a life or indeterminate sentence is rendered ECHR compliant is by means of providing for the possibility of release at some future point.

93. More pertinently, the Court went on to consider that the applicants were not in a position to argue that there was a breach of their Convention rights because they could not show that they were, at that point, being detained for reasons that could no longer be justified:

'137... an Article 3 issue will only arise when it can be shown: (i) that the applicant's continued imprisonment can no longer be justified on any legitimate penological grounds (such as punishment, deterrence, public protection or rehabilitation); and (ii) as the Grand Chamber stated in *Kafkaris*, cited above, the sentence is irreducible *de facto* and *de iure*."

94. Whilst the Court did not rule out the possibility at some future point that the applicants might find themselves being detained for no purpose, that point had not yet arrived. Counsel for the applicant submitted that the respondent in the instant case finds himself in a similar situation insofar as he makes complaints as to the possibility of his being detained on an indeterminate basis into the future.

Analysis of the Issues Raised in this Case

95. The Court agrees that in the particular circumstances of this case, where the respondent's rendition is sought so that he might resume serving an indefinite IPP sentence, in circumstances where he has already served the punitive element of that sentence, the respondent will, if surrendered, be in preventative detention. However, the respondent's contention that this would be a breach of his rights under Article 40.4.1° is entirely dependent upon the proposition that it is legitimate for this Court to subject a particular law of a foreign state (in this cases. 225 of the U.K. Criminal Justice Act 2003) to scrutiny to see whether in its terms or in its effect it conforms, or alternatively is repugnant, to the requirements of our Constitution. In *Nottinghamshire County Council*, briefly referred to already in this judgment, the Supreme Court recently examined whether, and in what circumstances, it may be legitimate to do so.

96. *Nottinghamshire County Council* was a child abduction case concerning a child "B", in respect of whom there were care proceedings pending before a court in England at the behest of Nottinghamshire County Council. B's parents had removed B from the U.K. to Ireland without the consent of either Nottinghamshire County Council or the Court. In response to this development, Nottinghamshire County Council successfully applied to the Irish High Court under Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter the Hague Convention") for an order directing that the child be returned to the U.K. The parents then appealed to the Irish Supreme Court relying on Article 20 of the Hague Convention, which states:

> "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

97. The parents' case was that they, together with their children, constituted a family for the purposes of Article 41 and 42 of the Irish Constitution and that return of the children would be in breach of those provisions of the Constitution because the law of the

U.K. permitted adoption of the children of married couples in circumstances which would not be permitted in this jurisdiction by virtue, it was said, of the constitutional rights afforded to families under the Irish Constitution.

98. This afforded a five judge bench of the Supreme Court (Denham C.J., Murray J., Fennelly J., Macken J. and O'Donnell J.) the opportunity not only to consider the particular issue raised, *i.e.*, how the Hague Convention is to apply in Ireland when the fundamental rights provisions of the Constitution are relied upon as the basis for asking the Court to refuse to return a child, but also to address at the level of principle so some wider issues of general application. In doing so, however, the Court (per O'Donnell J., *nem diss*, at para. 15) was at pains to point out that:

> "In the light of the limited authority and commentary and the relatively narrow range of authority cited in this case, it seems particularly inappropriate to attempt to seek to provide in this judgment the single all encompassing theory to which some of the commentary aspires. On the contrary, the approach suggested in this judgment is necessarily tentative, and may well require refinement in the light of more precise and focussed argument in particular cases."

99. In the course of his judgment, O'Donnell J. considered the general scheme of the Hague Convention and the place of Articles 13 and 20 respectively (on foot of both of which the return of a child might be refused) and stated at paras. 21 and 22:

> "21. Although Articles 1 3 and 20 are often treated as exceptions to the genera l rule of speed y return created by the Hague Convention, there is a significant difference between the two Articles. Article 13 prescribes a limited exception to the Convention rule and does so of its own force. The question for any Court is the interpretation and application of that Article by reference to the Convention as a whole. However, Article 20 is somewhat different. It does not so much create an exception as recognise one. If in any given case a court were to determine that the return of the child was not permitted by the Constitution of that State, then the court could not order the return, whatever the terms of the Convention. Article 20 provides a mechanism whereby the necessary flexibility is built into the Convention to avoid a conflict between the international obligations imposed by the Convention, and the dictates of the domestic constitution. The issue in any given case therefore is not simply the interpretation of the language of Article 20 per se, but is a l so, the interpretation of the domestic Constitution. For example, the language of the Article ("the return of the child ... may be refused . . .") might suggest that the requested court has a discretion whether or not to return the child in cases where it has been demonstrated that the return is not permitted by the fundamental principles of that country's constitution, but in truth in any case in which that issue a rose, at least in this jurisdiction, and it was demonstrated that the return was not permitted by the Constitution, then a court obliged to uphold the Constitution simply could not order the return of a child in such circumstances.
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> 22. I should say however that there is in my view no inconsistency between the test required by the Constitution in any case, and that required by the provisions of Article 20. Indeed for reasons which I will address later in this judgment, I consider that Article 20, by directing focus to the question of whether the return of the child is prohibited by fundamental principles of the Constitution, expresses quite precisely the test to be applied independently under the Constitution. It is however important to keep in mind that the ultimate standard for the Court is that imposed by the Constitution. For reasons which I will elaborate upon later in this judgment I consider that the Constitution prohibits the return of children under Article 20 when the adoption or other care proceedings in the requesting state are so proximately and immediate a consequence of the Irish court's order of return, and are so contrary to the scheme and order that the Constitution envisages and guarantees within Ireland , that the order of return would itself be a breach of the court's duty to uphold the Constitution. Why that is so, and the factors which may be considered in applying this test, will be addressed later in this judgment. However it should be said here that in this case the claim falls decisively short of satisfying either limb of the test. An adoption of these children is not so proximate and an immediate consequence of an order of return and in any event, it is not so contrary to the Irish constitutional scheme so as to require an Irish Court to refuse to make an order returning the children."

100. The judgment is lengthy and detailed but the part of it that is of particular interest to judges and legal practitioners engaged in extradition work is that from paras. 52 to 67 inclusive. O'Donnell J. stated:

> "52. There can be little doubt that in certain respects, the law of Ireland in relation to the care of children, particularly children of married parents, occupies a different place on a spectrum of views than that of the present law of England and Wales. However in my view, the fact that they are recognisably part of the same spectrum is at least as important as the differences between them. Thus it seems to me, that this part of the Appellants argument is also not made out. It is not sufficient to show that some aspect of the law of England and Wales is different from that of this jurisdiction or even that some aspect of the law of England and Wales, if enacted in this jurisdiction, would be found to be unconstitutional in some respect. It is necessary to go further and show that the manner in which these children would be dealt with by the courts of the requesting jurisdiction must necessarily offend against the provisions of the Irish Constitution if administered in an Irish court. There is I think, considerable difficulty in attempting to determine what would be done ads a matter of fact in the courts of a requesting country and whether, if occurring in Ireland, it would be permitted by the Irish Constitution, but in my view the difficulty of the task does not mean that it can be ignored. In my judgment, the Appellants' argument falls short of establishing even this proposition.
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> 53. However, there is a more fundamental objection to the Appellants' argument. That argument seems to assume that it is sufficient to establish that a legislative provision of the requesting state is different to that of the law of Ireland, at least in respect of an area where Irish law is derived from or influenced by the Constitution. In my view, as set out above, what is required on this leg of the argument, goes much further i.e. that a legislative or administrative provision of the requesting state would be applied in a particular case and would, if part of the law of Ireland, be unconstitutional. Even that, however, is not the test set by either Article 20, or the Irish Constitution.
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> 54. Article 20 does not ask whether the law, or even the constitutional law, of the requested state differs from that of the requesting State. If it did, it would be difficult to see how the Convention could function effectively. In such circumstances Article 20 might not merely prevent the return of children from Ireland, but might just as effectively inhibit the return of children to Ireland. The text of the Convention makes it clear however that this is not the test. The focus of Article 20 is not upon what occurs or may occur in the requesting State (in this case England). On the contrary it is what occurs in the requested State (the return) which is the focus for the Court of the requested State (in this case Ireland). The concept of "return" directs attention to at least two relevant matters. First, that the child has a prior connection with the State requesting the return (defined under the Convention as the State of habitual residence) to which he or she may be going back. Second, that a difference in the legal regime, and even a constitutional difference, will not itself suffice to trigger Article 20. The test is rather whether what is proposed or contemplated in the requesting State is

something which departs so markedly from the essential scheme and order envisaged by the Constitution and is such a direct consequence of the Court's order that return is not permitted by the Constitution. It is the return, not the possible adoption, that must be prohibited and which is therefore the focus of the court's inquiry when Article 20 of the Convention is invoked. This is I think consistent with the decision of the Australian Court in the Rhonda May Bennett case referred to earlier in this judgment."

101. Pausing here, it is appropriate to remark that the language of s. 37(1)(b) of the Act of 2003 requires the application of a similar approach. It provides that a person shall not be surrendered under the Act if 'his or her surrender would constitute a contravention of any provision of the Constitution". The focus must therefore be on the act of surrender itself and 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.

102. O'Donnell J. continued:

"Application of the Test

55. In applying this test it is important to remember that Article 20 was not drafted with the Irish Constitution alone in mind: on the contrary, it applies equally to all jurisdictions. It is therefore entirely possible in theory at least, that a national constitution may contain express prohibitions against the "return" of person s in certain circumstances. The test posed by Article 20 must therefore be whether the return is prohibited either by the express provisions of the Constitution or by necessary implication. There is no express provision in the Irish Constitution prohibiting the return of children of a marriage who may be adopted and therefore the question arises whether such a prohibition is to be necessarily implied from the Irish Constitution, as properly interpreted.

56. It is conceivable that what is proposed, contemplated or feared in a foreign jurisdiction will be so remote a possibility that an Irish Court could not properly consider that return is not permitted. This is in essence what underlies those decisions describing the proposed adoption as a mere "possibility". However it is also conceivable that what is proposed is proximate, and perhaps even a certain consequence of the order of return, but yet is not so offensive to the values of the Irish Constitution that it can be said that return is not permitted by the Constitution. In other words, a return has to satisfy both tests before a court would be justified in concluding that ret urn was not permitted. It must be said that the feared consequence is so closely linked to the order for return and is itself so offensive to the Constitution that return cannot be permitted. In my judgment, in this case, neither limb of the test is established. First I agree with the trial judge that adoption is only a possibility and not a certainty or near certainty in this case. This does not require any further elaboration. Second, I do not consider the likely application in this case of the law of England and Wales in relation to childcare has been demonstrated to be so at variance with the dictates of the Irish Constitution that a return of a child would be a breach of the constitutional duty of the Irish Courts.

57. All we know is that in childcare applications the Courts in England and Wales are required to take a single track approach so that all issues including adoption can be addressed in a single hearing. It may perhaps be inferred that in practice adoption orders may be made more readily in England than in Ireland, but that is by no means enough to prohibit return. It is I think important in this regard that even in the case of an adoption order made in England (or anywhere else) in circumstances where it could be positively demonstrated, that such an order would not have been permitted in Ireland, Irish law would not interfere with such an adoption, and would in all probability recognise it under the Adoption Act 1991. That is, in part, because the relationship between Irish law and that of other States is itself a constitutional issue.

58. The essence of the argument of the Appellants in this case is that an adoption of the children in this case "would be a breach of the constitutional rights of the family''. On any analysis, the act which it is alleged would constitute a breach of the rights of the family is the feared adoption of the children which if it were to occur, would happen in England. The Northampton derived argument however treats such an adoption as if it occurred in Ireland. However that is to beg the question at the heart of the case.

59. The statement that the return of a person by order of the court to another jurisdiction i s not permissible if the person may be subject to some process which "would be a breach of his constitutional rights", is perhaps a short hand which might be thought to be in itself unobjectionable. But it is important to recall that the question of the extent to which Irish law has regard to events occurring abroad and under and in accordance with the law in another jurisdiction is in itself a distinct constitutional issue.

60. If the Irish Constitution is viewed solely through the lens of the reported cases, a somewhat distorted picture might emerge. It is natural that most constitutional litigation and commentary has focussed upon the important provision s of the Constitution contained in Articles 40-45. But the Irish Constitution is much more than simply a vehicle for the fundamental rights provisions. It regulates the relation s hip between the People and the State they created. It establishes the machinery of government and allocates responsibility between the different branches, and importantly for present purposes, it seeks to locate the State in an international context. In this regard, the Irish Constitution is not unique. In truth it can be said that every constitution regulates the relationship between a state and its citizens and indeed those obtaining the benefit of the society created and maintained by the state. But it follows in my view, that any question of interaction between Irish law and events occurring abroad, and in particular events occurring pursuant to the law of another state, raises issues of constitutional dimensions. To say that an adoption, carried out as it would be in accordance with the law of the United Kingdom, and in respect of persons who were subjects of that jurisdiction, is nevertheless itself contrary to the Irish Constitution should raise an alarm..

61. The true question for an Irish Court is whether what is done within this jurisdiction can be said to be contrary to the Constitution. This is why Article 20, can be seen to precisely focus attention on the correct issue. That is whether the return (and not the adoption) would itself be a breach of the Irish Constitution. Now, if the law was that an Irish Court could not return a person if there was a possibility of some event occurring which would , if it occurred in Ireland, be a breach of the constitutional rights of the citizen, then this would be a merely verbal distinction. However framing the issue as to whether the return itself would be a breach of the Constitution focuses attention on the very issue of whether the Irish Constitution does, or does not, distinguish between events occurring abroad and those occurring in this jurisdiction. There is no a priori answer to this question. It is a matter of constitutional interpretation.

62. Even assuming that an adoption in this or any other case was not merely a possibility but rather a certainty, had the

family not left England I do not consider that any such adoption would give rise to any concern as a matter of Irish constitutional law. If the parents had come to Ireland without the children and sought an injunction to restrain an adoption taking place in the United Kingdom, I do not conceive that an Irish Court would have entertained the application. By the same token if an adoption were effected in the United Kingdom and subsequently an issue arose in an Irish Court as to the status of the children, there would as I understand it be little doubt but that the adoption would be recognised here under the Adoption Act 1991. It might therefore be asked in what way is this case any different? A difference does lie however in the fact that in the examples considered above, the English jurisdiction is able to carry out its orders without the assistance of an Irish Court. In the case of an application under the Hague Convention, the Irish Courts processes are invoked and the Court is obliged to uphold the Constitution. It is thus a legitimate question whether the Cow1can lawfully make such an order when it is said that the end point of the process may be an order of the English court which would not be constitutionally permissible in Ireland. The issue is the approach that the Constitution requires a cout1to take when such a claim is made.

63. It is conceivable, at least in theory, that any particular state at any particular time might have so ideological or fundamentalist a view, or be so self-absorbed or self confident, or indeed simply so powerful, as to insist that it would, through its legal system only deal with those countries who conformed to its precise standards. Again it is conceivable that an international convention adhered to by a number of countries might require a country to concern itself with the manner in which persons are dealt with in another country. There may be many reasons why a constitution or human rights instrument may require that courts enforcing that instrument should not order the return of a person to another jurisdiction where it is considered that the treatment to be afforded in that jurisdiction will fall below the standards required by that constitution or instrument.

64. It seems plain however, that the Irish Constitution does not demand the imposition of Irish constitutional standards upon other countries or require that those countries adopt our standards as a price for interaction with us. First and most obviously, the Constitution simply does not say so. Indeed it might be expected that such a sensitive issue would be dealt with if that was the intention of the drafters and thus the people who adopted the Constitution. Furthermore, the historical context in which the Constitution was introduced was one in which international relationships were to the forefront of public concerns.

65. Article 29 of the new Constitution addressed the position Ireland was to take in its international relations. This in itself was a significant departure from the 1922 Constitution and a conscious attempt to assert nationhood. The significance of this Article, particularly in its historical context, was explored by Mr. Justice Barrington in his Thomas Davis lecture, The North and the Constitution. As he points out, it is of some significance that Mr. deValera was the President of the League of Nations in 1936 when the Constitution was being drafted. Indeed it appears that some of the values of the Covenant of the League of Nations were reflected in the Constitution and in particular in Article 29. The Article affirmed Ireland's devotion to the "The ideal of .... friendly cooperation amongst nations". In one sense accession to the Hague Convention can be seen as a particular example of such cooperation. Such cooperation necessarily encompasses recognition of differences between states and the manner in which they approach the organisation of their societies. This together with the Constitution's recognition of the territorial boundaries of the State and the reach of its laws are important parts of the Constitution to which regard must be had when it is contended that the return of a child in another contracting state is not permitted by the Constitution. This is why in my judgment the Constitution requires the Courts to refuse return only when the foreign procedure is so contrary to the scheme and order envisaged by the Constitution and so proximately connected to the order of the Court, that the Court would be justified, and indeed required, to refuse return.

66. This may explain why the pragmatic approach adopted by the court below and supported by precedent, is grounded in the Constitution. 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. However that is not the sole inquiry. If it were otherwise, it might simply be a question of the timing of the particular application. In my view, as set out earlier in this judgment in the context of Article 20, the question also involves 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, in a context where it is clear that the Constitution expects the legal systems of friendly nations will differ from that of Ireland. In that regard it is relevant 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, and in any case whether the difference asserted is one of degree, or one of fundamental principle. It is here that I consider that the origin of the Appellants may become relevant. It is fundamental to the structure of the Irish Constitution that its principal focus of application is to persons within its jurisdiction. It follows from the approach of Article 29 that the Constitution expects and recognises the same essential structure in other states. Therefore, the application, for example, of French law to French citizen s, or to those who by residence in France have obtained the protection of the French state, is to be expected, and it is only in rare cases that the Constitution would require a court to seek to inhibit the application of such law. Again this is consistent with Article 20 of the Convention. The focus on "return" makes it clear that a child is normally being returned to the jurisdiction of habitual residence, and thus the jurisdiction with which it has the closest connection.

67. When these tests are applied here they make it plain that there is no breach of the Irish Constitution in making the order sought in this case."

103. While acknowledging the *caveat* registered by O'Donnell J. that in future cases the Supreme Court may have more to say, and may indeed seek to refine what it has already said, in this area of constitutional law, it is possible nonetheless to distil a number of important principles, and obtain significant guidance, from the judgment in *Nottinghamshire County Council.*

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.

105. Secondly, the constitutional rights at issue must be precisely identified.

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?

107. This is consistent with the approach taken by the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Campbell* (1983) 2 Frewen 131 and also previously by the Supreme Court in *Clarke v. McMahon* [1990] 1 I.R. 228.

108. In *Campbell* the accused were convicted of extra-territorial offences under the Criminal Law (Jurisdiction) Act 1976 relating to an escape from prison. At trial issue was taken in relation to the legality of their detention in Northern Ireland. The Court of Criminal Appeal clearly rejected the idea that certain constitutional norms ought to be applied to foreign criminal processes. Giving the judgment of the Court, Hederman J. said at pp.142 to 143:

> "It is clear that neither this passage [from *In re The Criminal Law (.Jurisdiction) Bill. 1975* [1977] I.R. 129 at 157 to 158] nor any other part of the judgment of Supreme Court is an authority for the argument which is now urged on this Court. The Chief Justice was dealing with the powers of the Courts during a trial in this jurisdiction in relation to the evidence of a witness whose testimony had been taken in Northern Ireland. The point now raised is an entirely different one; namely, whether in adjudicating on the lawfulness of an act in Northern Ireland (i.e., in this case, the lawfulness of the accused's custody) the Courts here can decide that the act is unlawful if it does not accord with our laws (constitutional or otherwise). As to the rights which Irish citizens are granted by the Constitution, the judgment of the Supreme Court makes it clear that the right to obtain "constitutional justice" from tribunals (judicial and non-judicial) is a right which does not extend to tribunals established outside the jurisdiction of the state. The lawfulness of the custody in Northern Ireland of an Irish citizen cannot therefore be impugned by reference to a non-existent right. The conclusions of the Supreme Court with regard to the right to constitutional justice apply with equal force to any of the other unspecified personal rights which an accused person may enjoy by virtue of Article 40 (3) of the Constitution in relation to criminal proceedings in this State. As to rights conferred by statute, it is obvious that the laws of Northern Ireland in relation to the trial of offences are different to the laws of this State. It would lead to a result manifestly contrary to the intentions of the Oireachtas if the Courts here were required to find that a person who escaped from a custody which under the law of Northern Ireland was perfectly legal had committed no offence under the 1976 Act because the custody in question failed to comply with the statutory laws of this State. As to rights granted by the common law, again the Court is of the opinion that the 1976 Act does not require the courts to determine the lawfulness of the custody in Northern Ireland of an accused person by reference to common law principles which operate in this jurisdiction."

109. In *Clarke v. McMahon* a somewhat similar approach was taken in relation to extradition cases under Part III of the Extradition Act 1965 in the context of an attempt by the requested person to mount a collateral attack on his conviction. At the end of the day, however, the decision rested upon an evidential deficit rather than any statement of constitutional principle. Costello J., at first instance, had declined to enter upon a consideration of the merits of the conviction and suggestions that it had been obtained in breach of the applicant's constitutional rights. His reasoning was upheld by Finlay C.J. who said at pp. 235 to 236:

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

110. More recently, applying *Nottinghamshire County Council* principles, this Court held in *Shannon*, referred to above. that the right to a fair trial guaranteed in Article 38 could not be invoked to prevent a respondent from being surrendered for trial to the U.K. simply because the U.K. courts are prepared in certain circumstances to allow evidence of an accused's previous convictions to go to a jury as evidence of propensity. This was so notwithstanding strong judicial statements by various Courts in this jurisdiction disapproving of, and deprecating, attempts to adduce evidence of this type (other than as provided for by the Criminal Justice (Evidence) Act 1924) as being inconsistent with the presumption of innocence, contrary to fair procedures and the notion of trial in due course of law. The Court held in effect that the Article 38 right to trial in due course of law relates to a trial before a court in Ireland, and accordingly the challenge was misconceived. I stated that:

> '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."

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:

> "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."

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.)

113. Sixthly, the Court may also consider and have regard to whether what i s asserted to be possible, probable or certain in the requesting jurisdiction is something which the Irish Constitution forbids absolutely or permits in certain circumstances.

Application of these Principles to the Present Case

114. The respondent's case is that if he is surrendered now in circumstances where he has already served the punitive element of the IPP sentence imposed upon him he will inevitably be subjected to preventative detention, and that this will breach his right under Article 40.4.1 ° of the Constitution not to be deprived of his personal liberty save in accordance with law. In the circumstances there is a clear identification of the right allegedly in issue. (The Court will consider separately below the applicant's counter-contention that the right at issue is not in fact the right under Article 40.4.1 ° , but rather the right under Article 38 to have one's presumption of innocence respected and not to be "punished" without having been tried and convicted in due course of law.)

115. In so far as he bases his claim upon his Irish constitutional rights his case i s, if the Court understands it correctly, that the reference to "law" within Article 40.4.1 of the Constitution must mean "law" that is not in its terms or effect repugnant to the provisions of the Constitution of Ireland. Therefore the issue must be approached on the basis that to be lawful under Article 40. 4.1 ° a deprivation of liberty must be in accordance with some law or corpus of laws, though not necessarily a law or laws of this State, that allows one party to deprive another party of his or her liberty in a manner that is acceptable in terms of Irish constitutional law. Accordingly, it is no answer to the respondent's claim to say that the respondent's deprivation of liberty would be in accordance with law simply because s. 225 of the U.K. Criminal Justice Act 2003 provides for the imposition of IPP sentences and a Court in the U.K. has seen fit to impose such a sentence. For such a deprivation of liberty to be in accordance with law the "law" relied upon would have to be one that passes muster in terms of what is permissible under our Constitution. The case made by the respondent is that s. 225 of the U.K. Criminal Justice Act 2003, certainly in the manner in which it will apply to the respondent in the event of him being surrendered, does not do so.

116. This begs the question as to what is the focus of application of the right declared in Article 40.4.1° of the Constitution, namely the right not to be deprived of one's liberty save in accordance with law. Can it be said to have been intended to have extra-territorial effect, particularly in circumstances where its defence and vindication may be very difficult, if not often impossible, in circumstances where the deprivation of liberty will take place outside of the territorial limits of the State?

117. The right not to be deprived of one's liberty save in accordance with law as declared in Article 40.4.1 ° is an enumerated personal right. Because of its status as a personal right it is difficult to see how it could only exist intra-territorially. It might indeed be problematic to defend and vindicate a personal right such as liberty where its breach, or its apprehended breach, is extra-territorial. However, that fact that one is deprived of one's liberty other than in accordance with law outside of the territorial limits of the State does not mean that one's personal right not to be subjected to that evaporated while crossing the twelve mile limit on the boat to Holyhead or Cherbourg.

118. In the Court's view the difficulty in defending and vindicating the right in cases where the deprivation of the right occurs, or may occur, extra-territorially is somewhat beside the point. It is important to appreciate that Article 40.4.1 ° is merely declaratory of the right. The guarantees in respect of the right arise primarily under Article 40.3.1 ° which contains express commitments that "the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen." While it might be problematic to defend and vindicate a personal right such as liberty where its breach, or its apprehended breach, is extra-territorial, it is presumably for this reason that the guarantees of defence and vindication provided by the State are not absolute and are confined to it doing so by its laws "as far as practicable". The most obvious and practical manifestation of this commitment are the remedies of *habeas corpus* / constitutional inquiry provided for within the Constitution itself under Articles 40.4.2° - 4 °, but clearly these can only be effective where the detention is to take place within the national territory. However, laws such as s. 37(1)(b) of Act of 2003, or Article 20 of the Hague Convention as incorporated in Irish law by means of the Child Abduction and Enforcement of Custody Orders Act 1991 are further evidence of that commitment. These laws enable the State "as far as practicable" to defend and vindicate relevant personal rights of the citizen that might be breached if the citizen (or in the Hague Convention scenario, a child) is forcibly removed from this jurisdiction to a foreign state, whether by extradition or rendition, or returned pursuant to the Hague Convention. These laws enable intervention while the person is still within this State, and the taking of action aimed at preventing the removal of the relevant person from the State so as to pre empt the apprehended breach of rights.

119. The Court is further reinforced in its view that the right in Article 40.4.1 ° is a truly fundamental right that is intended to benefit a citizen both within and without the national territory, by the fact that rights framed in a broadly analogous way are also guaranteed both by Article 5 of the ECHR and Article 6 of the Charter of Fundamental Rights of the European Union. However, the right to liberty is guaranteed in somewhat stronger terms under Article 40.4.1 °, or perhaps it is more correct to say that it is less heavily circumscribed. It is presumably for this reason that counsel for the respondent has focused the entirety of his argument on Article 40.4.1 °, notwithstanding that a nominal claim is made in the pleadings that the proposed surrender of his client must also be regarded as being incompatible with the State's obligations under the ECHR, and in particular Articles 5 and 14 thereof, and is therefore prohibited under s. 37(1)(a) of the Act of 2003.

120. It seems to this Court that the respondent has convincingly demonstrated both that it is certain that he will be subjected to preventative detention in the event that he is surrendered, and also that he has satisfied the proximity requirement in as much as the Court is satisfied that the apprehended event is inextricably linked with, and will arise as a direct consequence of, any order of surrender that this Court may make in the respondent's case.

121. The Court has considered the nature and degree of the differences between the law of the requesting state and the law in Ireland in so far as preventative detention is concerned. I am satisfied that the differences are deeply rooted in principle and philosophy, and that they are not matters of mere detail, or the product of some superficial dissimilarity. Moreover, it seems to me that preventative detention in the criminal justice context is something that the Irish Constitution forbids absolutely (though of

course it is permitted in the health protection context, but that is a completely different matter)

122. It is necessary at this point to engage with counsel for the applicant's contention that preventative detention offends against Article 38.1, rather than Article 40.4.1°, of the Constitution. To rehearse again what he has submitted in that regard, his case is that if one looks at the rights identified as being engaged in the various cases relied upon by the respondent in relation to the concept of preventative detention (*viz., O 'Callaghan, Ryan, Bambrick* and that whole line of authority) one sees both Article 40.4.1° and Article 38.1 invoked time and time again, but mainly and in reality Article 38.1. Counsel for the applicant contends that Article 38.1 is invoked more frequently because what the Irish Courts have considered to be so problematic about the concept of preventative detention is not the detention itself but rather the failure to respect the presumption of innocence. He contends that the presumption of innocence is an aspect of the right to trial in due course of law guaranteed by Article 38 and what is objectionable about preventative detention is that in anticipation that one might commit further offences one can be detained in accordance with law but without having been charged, tried, convicted or sentenced in respect of any crime. Such detention therefore disrespects a person's presumption of innocence and right not to be punished (by deprivation of liberty) save where one has been convicted and sentenced to such penalty following a trial in due course of law.

123. While the Court does not disagree with the contention that the authorities in question focussed to a major extent on the fact that preventative detention disrespects the presumption of innocence, it considers that the fallacy in counsel for the respondent's argument is that it fails to afford to the presumption of innocence its proper status. The respondent's argument requires that application of the presumption be corralled within the parameters of Article 38.1, treating it as a mere procedural trial right without any existence or *raison d'etre* separate from Article 38.1

124. In the Court's view the presumption of innocence, though it is certainly deployed and finds application within the scope of what is guaranteed by Article 38.1, is in itself a higher legal principle of universal application. It is now well established that when Article 40.4.1° of the Constitution speaks of no citizen being deprived of his personal liberty "save in accordance with law", the word "law" is not to be construed in a positivist way but as referring to the fundamental norms of the legal order postulated by the Constitution. Cases such as *O'Callagan*, previously discussed. *In re Article 26 and the Emergency Powers Bill 1976* [1977] I.R.159 and *King v. The Attorney General* [1981] I.R. 233 all illustrate, and testify to this. In the course of criticising the provision of the Vagrancy Act 1824 that was the subject of a constitutional challenge in *King*, Henchy J. said at p. 257:

> " It violates the guarantee ...that no citizen shall be deprived of personal liberty save in accordance with law - which means without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution."

125. This Court is satisfied that one of those fundamental norms is the presumption of innocence. It is much more than a mere procedural trial right. It is recognised in the vast majority of the world's legal systems as being a fundamental principle of the justice to which every person is entitled as an aspect of their humanity. It is as old as the hills. Its provenance and origins were described at length by the U.S. Supreme Court in *Coffin v. U.S.* 156 U.S. 432 (1895), where White J. stated at p. 453:

> "The principle that there is a presumption of innocence in favour of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law. It is stated as unquestioned in the textbooks, and has been referred to as a matter of course in the decisions of this court and in the courts of the several States."

126. Having cited a long list of cases to illustrate his point, White J. continued:

> "Greenleaf [in *On Evidence*, pt 5, 29 note] traces this presumption to Deuteronomy, and quotes Mascardius Do Probationibus to show that it was substantially embodied in the laws of Sparta and Athens... Whether Greenleaf is correct or not in this view, there can be no question that the Roman law was pervaded with the results of this maxim of criminal administration, as the following extracts show: ..."

127. Having provided a long list of references to Roman law, he then noted that while there was some uncertainty as to when the presumption was, in precise words, stated to be a part of the common law there did not appear to be express mention of it much before the early 19th century. He went on to observe, however, that:

> "Whether this statement is correct is a matter of no moment, for there can be no doubt that, if the principle had not found formal expression in the common law writers at an earlier date, yet the practice which flowed from it has existed in the common law from the earliest time''.

128. He then goes on to cite examples recorded in the works of Fortesque (*De Laudibus Legum Angliae*, Amos Translation, 1825) ; Lord Hale (2 Hale P.C. 290) and Blackstone (2 B1 Comm c.27, marg. P. 358, *ad finem*).

129. Moreover, as every modern day lawyer will have learned as a student, the presumption of innocence was characterised by Viscount Sankey in *Woolmington v. D.P.P.* [1935] A.C. 462 as the "golden thread" running through the web of the criminal law.

130. Yet another important point in regard to the presumption of innocence is the fact that it is one of the means by which the State seeks by its laws "to protect as best it may from unjust attack and, in the case of injustice done, vindicate the ...good name... of every citizen", as guaranteed in Article 40.3.2° of the Constitution. This was recognised and explicitly stated by Gannon J. in the *State (O'Rourke and White) v. Martin* [1984] I.L.R.M. 333.

131. Accordingly, in addition to being a fair trial right to be afforded to an accused in this State as an aspect of his right to trial in due course of law under Article 38.1, the presumption of innocence is also a higher principle of law in its own right and as such it is inextricably bound up with the fundamental right not to be deprived of liberty save in due course of law guaranteed in Article 40.4.1° and also with the right to one's good name as guaranteed under Article 40.3.2.°

132. In the Court's view because of the presumption's status as a principle of higher law, any measure affecting the personal liberty of the citizen that fails to respect it must be regarded as being repugnant to the Constitution, and specifically Article 40.4.1 ° thereof, notwithstanding the fact that Article 38 does not have extra territorial effect.

133. I am therefore satisfied in all the circumstances of this case that the respondent has sustained his contention that 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 would be so proximately connected with any Order of surrender that this Court might make, that any such surrender would be prohibited by the Constitution.

Conclusion
134. It is not appropriate that the Court should Order the surrender of the respondent in the circumstances of this case, and I decline to do so.