

THE HIGH COURT

Record Nos. 2012/225 Ext.

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

Between/

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

-AND-

DEREK ANTHONY O'DONNELL

Respondent

Judgment of Mr Justice Edwards delivered on the 11th day of March 2014

Introduction:

The respondent is the subject of a European arrest warrant dated the 13th of April, 2012 on foot of which the United Kingdom of Great Britain and Northern Ireland seeks his surrender for the purpose of prosecuting him in respect of three offences particularised in Part E of the warrant. The warrant was endorsed for execution in this jurisdiction on the 24th of July, 2012, and it was duly executed on the 22nd of February, 2013. The respondent was arrested by Sergeant Sean Fallon on that date, and he was brought before the High Court on the same day pursuant to s.13 of the European Arrest Warrant Act 2003 (hereinafter "the Act of 2003"). In the course of the s.13 hearing a notional date was fixed for the purposes of s.16 of the Act of 2003 and the respondent was remanded on bail to the date fixed. Thereafter the matter was adjourned from time to time, ultimately coming before the Court for the purposes of a surrender hearing.

The respondent does not consent to his surrender to the United Kingdom of Great Britain and Northern Ireland. Accordingly, this Court is now being asked by the applicant to make an order pursuant to s.16 of the Act of 2003 directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him.

Uncontroversial issues

The Court has received an affidavit of Sergeant Fallon sworn on the 17th of June, 2013 testifying as to his arrest of the respondent and as to the questions he asked of the respondent to establish the respondent's identity. When these are compared with the information in Part A of the warrant they can be seen to correspond. In addition, counsel for the respondent has confirmed that no issue arises either as to the arrest or as to identity.

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

I am satisfied following my consideration of these matters that:

- (a) The European arrest warrant was endorsed for execution in this State in accordance with s. 13 of the 2003 Act;
- (b) The warrant was duly executed;
- (c) The person who has been brought before the Court is the person in respect of whom the European arrest warrant was issued;
- (d) The warrant is in the correct form;
- (e) The warrant is a prosecution type warrant and the respondent is wanted in the United Kingdom for the purposes of prosecuting him for the three offences particularised in Part E of the warrant.
- (f) The underlying domestic decision on which the warrant is based is a warrant of arrest issued in respect of the respondent on the 12th of May, 2011 at Dover Magistrates' Court.
- (g) The nature and classification of the offences alleged under the law of the issuing state are: one instance of "[b]eing knowingly concerned in the importation of a controlled drug of Class A, namely 14.8 grams of cocaine", contrary to s. 170(2)(b) of the Customs and Excise Management Act 1979, one instance of "Being knowingly concerned in the importation of a controlled drug of Class B, namely 1.026 kilograms of herbal cannabis", contrary to s. 170(2)(b) of the Customs and Excise Management Act 1979 and one instance of possession of a prohibited weapon (a weapon designed for the discharge of CS gas) contrary to s. 5(1)(b) of the Firearms Act 1968.
- (h) The issuing judicial authority has invoked paragraph 2 of article 2 of Council Framework Decision the 13th June 2002 on the European arrest warrant and the surrender procedures between Member States, (2002/584/JHA) OJ L190/1 18.7.2002 (hereinafter referred to as "the Framework Decision") in respect of the two drugs offences listed in Part E by the ticking of a boxes in Part E.I of the warrant, namely that relating to "illicit trafficking in narcotic drugs and psychotropic substances". Accordingly, subject to the Court being satisfied that the invocation of paragraph 2 of article 2 is valid (i.e. that the minimum gravity threshold is met, and that there is no basis for believing that there has been some gross or manifest error), it need not concern itself with correspondence in respect of those offences;
- (i) The minimum gravity threshold in a case in which paragraph 2 of article 2 of the Framework Decision is relied upon is that which now finds transposition into Irish domestic law within s. 38(1)(b) of the Act of 2003, as amended, namely that

under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than three years. It appears from Part C of the warrant that the offence involving importation of a Class A drug carries up to life imprisonment, and the offence involving importation of a Class B drug carries a maximum sentence of up to fourteen years imprisonment. Accordingly, the minimum gravity threshold is comfortably met in respect of those two offences;

(j) The Court has considered the description of the circumstances in which the two drugs offences are said to have been committed as set out in Part E of the warrant. Having done so it has no reason to believe that the ticking of the box relating to "illicit trafficking in narcotic drugs and psychotropic substances" was in error;

(k) The description of the circumstances relating to the third offence as set forth in Part E of the warrant is very brief. It appears that when customs officers searched the cab of a lorry stopped within the United Kingdom control zone at the Channel Tunnel, Coquelles, France, of which the respondent was the driver, they found a CS gas canister as well as the cannabis which is the subject matter of one of the importation charges. For completeness, it should be stated that the cocaine, which is the subject matter of the other importation charge, was found upon the person of the respondent in his jacket pocket.

(l) The Court is invited to find correspondence with an offence in Irish law of possession of an unauthorised firearm contrary to s.2 of the Firearms Act 1925 as amended. Counsel for the respondent has indicated that he accepts that correspondence can be demonstrated with this offence, and the Court agrees.

(m) In so far as minimum gravity is concerned, the relevant threshold is that provided for s. 38 (1)(a)(i) of the Act of 2003, namely that there is a potential penalty of at least 12 months imprisonment or deprivation of liberty in respect of the offence in question under the law of the issuing state. It is apparent from Part C of the warrant that the offence of possession of a prohibited weapon, contrary to s. 5(1)(b) of the Firearms Act 1968 carried a maximum penalty of up to 10 years imprisonment. Accordingly, the minimum gravity threshold is comfortably met.

(n) As the respondent is wanted for prosecution no issue as to trial *in absentia* arises in the circumstances of this case.

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

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

The objection to surrender

Although objections were initially pleaded under a number of headings, only one objection was ultimately proceeded with, namely an objection pursuant to s. 37 of the Act of 2003, and in particular a contention that any surrender of the respondent would be in breach of this State's obligation under the European Convention on Human Rights (hereinafter the ECHR) contrary to s. 37(1)(a) and/or would be in breach of the respondent's rights under the Constitution of Ireland.

The objection was pleaded in the following terms:

"The surrender of the Respondent is prohibited by section 37 (1)(a) and/or section 37 (1)(b) of the European Arrest Warrant Act, 2003, as amended, and/or under the Framework Decision as the Respondent believes that if surrendered to the Issuing State there is a real risk that he would suffer treatment constituting a breach of his rights under the Constitution and/or the European Convention on Human Rights as the Respondent holds a well-founded fear, that in the event of surrender, he would be sentenced to a Travel Restriction Order (TRO) pursuant to the Criminal Justice and Police Act 2001 in respect of the offences and each of them contained in the warrant.

By virtue of the imposition of a Travel Restriction Order the Respondent would be prohibited from leaving the Issuing State for a minimum of two years following his release from custody in the Issuing State. The aim and rationale of such an Order is to prevent the commission of further offences and in the circumstances such an Order is contrary to the scheme and order envisaged by the Constitution.

Given the foregoing, the imposition of such an Order would be a breach of, and/or a disproportionate interference with, the Respondents rights as particularised hereunder:

- (a) The Right to Travel within the State pursuant to the Constitution;
- (b) The Right to Travel outside the State pursuant to the Constitution;
- (c) The Right to Liberty pursuant to Article 40.4.1 of the Constitution;
- (d) The Right to Liberty pursuant to Article 5 of the European Convention on Human Rights;
- (e) The privacy, private life, home and/or family Rights of the Respondent and/or his family's rights pursuant to Article 8 of the European Convention on Human Rights;
- (f) The Right to Freedom of Movement pursuant to Article 2 of Protocol 4 to the European Convention on Human Rights;
- (g) Free Movement of persons pursuant to the laws of the European Union."

The evidential basis for the objection

The Court has been furnished with an affidavit of the respondent sworn on the 25th of October, 2013 in which he states (*inter alia*):

"2. I say that I am an Irish Citizen and I do not hold dual citizenship with the requesting state or any other state.

3. I say at the time of the alleged offences contained in the European Arrest Warrant I suffered from serious substance abuse problems. With the help and support of my family I managed to suppress my addictions. I fear that in the event that I am surrendered to the United Kingdom and sentenced to a Travel Restriction Order, without the support of my family, and stable accommodation, my prior substance problems will resurface. Moreover, I fear that without a proper support network I will have difficulty surviving in a foreign jurisdiction without my family and accommodation.

4 I say that I have no academic qualifications, no trade and no means and if sentenced to a Travel Restriction Order I fear that I will not be in a position to support myself and become destitute.

5. I say that I previously worked in haulage; however, in the event that I am convicted of the alleged offences outlined in the European Arrest Warrant, it is unlikely that I would obtain employment in this area. Moreover, I say that in the event that I am convicted it would be more difficult to obtain employment in the United Kingdom, this would be exacerbated by the fact that I would not be allowed to travel outside the United Kingdom if sentenced to a Travel Restriction Order.

6. I say that I have never lived in the United Kingdom and am unaccustomed to the welfare system in place for persons such as myself. I say that I have never been employed by a United Kingdom based or registered entity.

7. I say that I have a cousin in the United Kingdom living south of London and it is theoretically possible that I could stay with him if I was sentenced to a Travel Restriction Order. However I have not discussed this matter with him as the matter is of some embarrassment and I await the outcome of the within proceedings prior to doing so. However, my knowledge of his ability to provide me with accommodation or any other support is limited as I am not in regular contact with them.

8. I say that my main support comes from my father and mother, neither of whom are working and both rely on social welfare. Neither would be in a position to assist me if I was sentenced to a Travel Restriction Order and would even struggle to travel to the United Kingdom to visit me. While the lack of contact with my mother and father would be detrimental to this Deponent it would also effect my family as they care about my wellbeing.

9. I suffer from addiction problems, have low self esteem and would not be described as a self starter. For me the prospects of being forced to exist in the United Kingdom against my will without my family or the prospect of travelling to see them makes me very anxious. I do not believe that I will be able to survive a period such as two years in the United Kingdom under a Travel Restriction Order."

The respondent further relies upon two affidavits of laws sworn by a Mr. Robert Dalling, Barrister at Law, who is a member of the Bar of England and Wales since 2003 and who has also been a member of a London set of chambers specialising in criminal law since 2004.

In his first affidavit, sworn on the 21st of June, 2013, Mr. Dalling deposes to the following (*inter alia*):

"8. Since 2002 English courts when sentencing offenders for certain drugs offences to four years' imprisonment or more are obliged to consider whether it is appropriate also to impose a travel restriction order; if the court does not impose such an order, it must state its reasons. If an order is imposed, its effect is to prevent the offender from leaving the United Kingdom for at least two years after his release from custody.

9. The court's powers are set out at sections 33-37 of the Criminal Justice and Police Act 2001. I beg to refer to the said sections of the Act, which pinned together and marked with the letters and numbers "**RD01**" I have endorsed my name prior to the swearing hereof.

10. Section 33(l)(a) makes reference to a "post-commencement drug trafficking offence". By section 34(l)(d)(iii), the first two charges faced by Mr O'Donnell are "drug trafficking offences", since the importations are in connection with prohibitions having effect by virtue of section 3 of the Misuse of Drugs Act 1971, which relates to controlled drugs (as defined by section 2 and Schedule 2) including cocaine and cannabis. I beg to refer to the said Sections and Schedule of the Misuse of Drugs Act, 1971, which pinned together and marked with the letters and numbers "**RD02**" I have endorsed my name prior to the swearing hereof.

11. The offences with which Mr O'Donnell is charged are "post-commencement" offences within the meaning of section 33(6)(a), since they are alleged to have been committed after the coming into force of section 33 on the 1st April 2002. I beg to refer to the Criminal Justice and Police Act 2001 (Commencement No. 4 and Transitional Provisions) Order 2002 and in particular Article 3 thereof, which pinned together and marked with the letters and numbers "**RD03**" I have endorsed my name prior to the swearing hereof.

12. The duty to consider imposing a travel restriction order is triggered if the sentencing court passes a custodial sentence of four years or more in respect of the relevant drug trafficking offence.

Likely sentence

13. The Sentencing Council's Definitive Guideline for Drug Offences applies to all offenders sentenced after February 2012, regardless of the date of the offence. I beg to refer to the said guidelines, which pinned together and marked with the letters and numbers "**RD04**" I have endorsed my name prior to the swearing hereof.

14. English courts must follow any relevant Sentencing Guidelines when sentencing offenders, unless it would be contrary to the interests of justice to do so. This appears from the relevant guidelines at page 2 thereof.

15. According to the guidelines, the quantity of cocaine in question falls between Categories 3 and 4 for importation offences (page 4). If treated as a Category 3 case, the starting-points would be 8.5 years, 6 years or 4.5 years (page 5), depending on whether the court considered Mr O'Donnell to have played a leading, significant or lesser role (page 4). Even the lowest sentences in the available ranges are 6.5 years, 5 years and 3.5 years respectively, the upper ends being 10 years, 7 years and 5 years.

16. It should be noted that these starting-points are based on offenders without previous convictions after a trial. An upward adjustment would be made for those with previous convictions, especially of a similar nature; and credit of up to one third is given for a guilty plea, depending on the stage in the proceedings when it is tendered.

17. As to the cannabis charge, the guidelines at page 6 indicate that starting points of 4 years, 2 years or 1 year (Category 3) would be appropriate, depending on role. However, any sentence imposed in respect of the cannabis charge would very likely be concurrent to that imposed for the cocaine.

18. The prohibited weapon charge would probably attract a consecutive sentence, most likely of up to six months' imprisonment. However, the four-year minimum requirement provided for by section 33(l)(c) Criminal Justice and Police Act 2001 must be fulfilled by a sentence imposed for a single qualifying drugs offence, not by a combination of consecutive sentences (*R v Alexander* [2011] 2 Cr App R (S) 52, CA). I beg to refer to the said case of *R v Alexander*, which pinned together and marked with the letters and numbers "RD05" I have endorsed my name prior to the swearing hereof.

Relevant case law

19. The relevant principles to be followed by a court exercising its powers under section 33 of the Criminal Justice and Police Act 2001 were set out by the Court of Appeal in the case of *R v Mee* [2004] 2 Cr App R (S) 81. In particular, it was said that the discretion under section 33 of the Criminal Justice and Police Act 2001 had to be exercised for the purpose for which it was granted, namely to prevent or reduce the risk of reoffending after the defendant's release from prison. Cases of importation were likely to be most apt for the court to consider such an order (paragraph 8). I beg to refer to the said case of *R v Mee*, which pinned together and marked with the letters and numbers "RD06" I have endorsed my name prior to the swearing hereof.

20. Newman J went on to say that the mere fact that a defendant had imported drugs would not necessarily give rise to the risk that upon release he would engage in such activity again (paragraph 10). The assessment of the risk would depend upon the facts of the case (paragraph 11).

21. If a risk was identified, and an order was needed, a proportionate approach to length was required, recognising the fact that a person's freedom to travel is a significant aspect of modern life (paragraph 12).

22. In another Court of Appeal decision (*R v Fuller* [2006] 1 Cr App R (S) 8) it was held that the sentencing court ought to have considered the position of the very young child of a woman who had imported cocaine into the UK (paragraph 7). The five-year travel restriction order would operate so as to prevent the child from seeing his grandparents and other relatives in Jamaica for a substantial period of time, since he could realistically travel there only with his mother, and his relatives were unlikely to be able to afford to visit the boy in the UK. I beg to refer to the said case of *R v Fuller*, which pinned together and marked with the letters and numbers "RD07" I have endorsed my name prior to the swearing hereof.

Other considerations

23. By section 36 of the Criminal Justice and Police Act 2001 it is a criminal offence, punishable by up to five years' imprisonment, to leave the United Kingdom in breach of a travel restriction order.

24. Section 37 of the Criminal Justice and Police Act 2001 provides that a travel restriction order will not prevent the removal of the offender from the United Kingdom, for example by deportation. It is thus clear that section 33 applies to offenders who are not citizens of the United Kingdom, as well as to those who are.

Opinion

25. For the reasons set out at paragraph 15, I am of the view that it is virtually inevitable that if Mr O'Donnell were to be convicted of the first offence in respect of which his surrender is sought the sentencing court would have to consider imposing a travel restriction order.

26. As to whether a sentencing court would in fact impose such an order, it would depend primarily on an assessment of the risk of Mr O'Donnell engaging in the importation of controlled drugs following his release. It is perhaps noteworthy that two different controlled drugs are said to have been found in the lorry driven by Mr O'Donnell, and that the cannabis was concealed in a relatively sophisticated manner underneath the cab. Not knowing anything about Mr O'Donnell's family circumstances, I cannot say whether *Fuller*-type considerations might apply in his case. Based on my experience, I am of the view that there is a reasonable likelihood that a travel restriction order would be imposed upon him, though probably not one of a length much greater than the statutory minimum.

27. Any such order would plainly act as a restriction on Mr O'Donnell's liberty insofar as it would prevent him from leaving the United Kingdom, whether to travel to his home country or elsewhere. As the case of *R v Mee* demonstrates, such an interference with Mr O'Donnell's freedom would have to be based upon a finding that there was a risk that he would re-offend upon release from custody; and the sole purpose of the interference would be to prevent such re-offending."

The Court has considered and taken account of the various documents exhibited by Mr. Dalling. As he has fairly summarised their nature and effect, it is unnecessary to specifically review them in this judgment.

The Court also has a second affidavit of laws from Mr. Dalling, sworn by him on the 22nd of November, 2013. In it, he further states (*inter alia*):

"2. The imposition of a Travel Restriction Order ("TRO") is not automatic. The duty on the Court (when passing a sentence of four years or more) is not to pass a TRO, but to consider doing so. The court has a discretion as to whether or not to pass a TRO, but the court would have to exercise the discretion with the following factors in mind. First, the question as to whether a TRO should be passed must be answered with a view to satisfying the statutory purpose of such orders, namely the prevention of further offending. This is separate from the statutory aim of reducing crime by deterrence, which the Court would have to bear in mind when fixing the length of the custodial sentence. Second, the statute itself contains what might be termed a "legislative steer" in favour of the passing of a TRO, in that it requires a court to set out its reasons where such an order is *not* made.

3. The sentencing Court would be obliged to hear submissions from Mr O'Donnell's advocate in relation to his personal circumstances and the circumstances of the offence. I have seen the affidavit of Mr O'Donnell dated 25 October 2013, and I would expect the sentencing Court to take into consideration *inter alia* the fact that Mr O'Donnell has virtually no ties to the jurisdiction, and no academic or professional qualifications. This would make it more difficult for him to obtain

employment during the currency of any TRO and lead a law-abiding life. Further, his relative lack of means makes it less likely that he could afford reasonable accommodation, and this, coupled with his history of drug use, might make him more likely to re-offend. On the other hand, a sentencing judge might take the view that Mr O'Donnell's lack of employment in Ireland increases the risk of his committing a drug-trafficking offence within the UK in any event. On balance, I respectfully adhere to the opinion I have previously expressed, that there is a reasonable likelihood that a TRO would be imposed on Mr O'Donnell.

4. The Court ought to take into account all matters put before it in mitigation. In the (unusual) event that some matter is disputed by the prosecution, the court ought to require evidence to be given, assuming it is of sufficient importance.

5. I am not aware of any mechanism allowing a court to require, or a Defendant to give, a formal undertaking to leave the jurisdiction at the completion of a suspended or immediate custodial sentence. In the circumstances I do not believe that the sentencing Court would take into account the fact that he would be willing to leave the jurisdiction if a TRO was not imposed."

The Court's Analysis

In the course of oral submissions, counsel for the respondent sought to apply analogous reasoning to that applied by this Court in *Minister for Justice and Equality v. Gavin Nolan* [2012] IEHC 249 (Unreported, High Court, Edwards J., 24th May, 2012). He argued that a travel restriction order (hereinafter TRO) imposed not as a punishment, but for crime prevention purposes, would, for the reasons set out in *Nolan*, breach his client's constitutional right to personal liberty as guaranteed under Article 40.4.1 of the Constitution of Ireland; and that it would also breach his client's unenumerated constitutional right to freedom of movement within the State (first identified by Kenny J. in a dictum in *Ryan v. Attorney General* [1965] I.R. 294 at 313), and his client's unenumerated constitutional right to travel outside the State (as identified by Finlay P. in *The State (M) v. Attorney General* [1979] I.R. 73 at 81.)

In addition to the judgments in the cases of *Nolan*, *Ryan* and *The State (M)* just mentioned, the following further judgments were also opened to the Court by one or other counsel: *The People (Director of Public Prosecutions) v. Alexiou* [2003] 3 I.R. 513; *The People (Attorney General) v. O'Callaghan* [1966] I.R. 501; *Caffrey v. Governor of Portlaoise Prison* [2012] 1 I.R. 636 (judgment of Fennelly J, (diss)); *Lynch & Whelan v. Minister for Justice, Equality and Law Reform* [2012] 1 I.R. 1; *R v Mee* [2004] 2 Cr App R (S) 81; *Miażdżyk v. Poland* (Application No. 23592/07, European Court of Human Rights, 24th January, 2012) and *Minister for Justice, Equality and Law Reform v. Brennan* [2007] 3 I.R. 732.

In the Court's view this respondent's case can be materially distinguished from the case of *Minister for Justice and Equality v. Gavin Nolan* in very many respects, and his situation and that of Mr. Nolan are not legitimately comparable. First and foremost, Mr. Nolan's case concerned an indeterminate sentence for public protection (hereinafter "IPP sentence") which involved a deprivation of liberty (in the narrow and usual sense in which it is deployed in the criminal justice context, i.e., as connoting incarceration, imprisonment or close confinement) for purely preventative purposes. It was a preventative detention type situation four square within that which has been pronounced as being unacceptable in this jurisdiction by virtue of *Bunreacht na hÉireann*, in cases such as *The People (Attorney General) v. O'Callaghan* [1966] I.R. 501; *Lynch & Whelan v. Minister for Justice, Equality and Law Reform*; *Ryan v. Director of Public Prosecutions* [1989] I.R. 399; and *The People (Director of Public Prosecutions) v. Bambrick* [1996] 1 I.R. 265. Moreover, as the Supreme Court has recently pointed out in *Minister for Justice and Equality v. Kelly (aka Nolan)* [2013] IESC 54 (Unreported, Supreme Court, December 13th, 2013), IPP sentences have also fallen foul of the European Court of Human Rights in the case of *James, Wells and Lee v. the United Kingdom*, (Application Nos. 25119/09, 57715/09 and 57877/09) (Unreported, European Court of Human Rights, 18th September, 2012) where they were regarded, in the circumstances of those cases, as arbitrary and on that account unlawful and contrary to Article 5 ECHR. The situation of the respondent in the present case is completely different. It is not apprehended that he will receive an IPP sentence or any other form of indefinite sentence. The concern relates solely to an apprehension that he may be made the subject of a TRO at the end of what ever finite sentence might be imposed upon him assuming he is convicted. The two situations are not remotely comparable.

Secondly, even accepting for the purposes of the exercise the argument that a TRO would represent a restriction upon the respondent's right to liberty in its widest sense (i.e., as embracing all aspects of freedom of action and self determination) and a restriction upon his right to travel both within and without the jurisdiction, it is not at all clear that the Constitution requires vindication of the affected aspects of such rights in the manner suggested by the respondent. The Court would require to be persuaded that the people in enacting *Bunreacht na hÉireann* intended that each and every aspect of a citizen's right to liberty, and/or the related unenumerated rights to movement and travel, were to be cherished in exactly the same way, and at all times, both within and without the national territory, and that the imposition of a TRO 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.

In the judgment of O'Donnell J. in *Nottinghamshire County Council v. B and Others* [2011] IESC 48 (Unreported, Supreme Court, 15th December, 2011), a number of potentially relevant considerations are identified. One consideration is that sufficient proximity requires to be demonstrated between the proposed surrender and the apprehended harm that will or may arise. It is clear the focus of the Court's enquiry should be on the act of surrender itself. In this regard, it must be asked whether what is apprehended as being likely to happen in the issuing state would be sufficiently proximate to any surrender order this Court might make as to justify this Court in intervening. The respondent in the present case is wanted for trial. He is presumed innocent. He may or may not be convicted. Even if he is convicted the sentencing judge would have a range of options open to him. He might or might not also impose a TRO to come into effect upon the respondent's release from prison (assuming he were to receive a custodial sentence). The judge would have a discretion in that regard. He is not obliged to impose one. His only obligation is to consider whether or not the imposition of a TRO would be appropriate. There is no reason to believe that the respondent would not be entitled to be heard on this issue, either personally or through counsel. Moreover, before imposing a TRO the judge would have to be in fact satisfied that it was appropriate to do so. It is therefore by no means certain that the respondent will be subjected to a TRO. It is no more than a possibility, and one that is dependent on several contingencies coming to pass. Furthermore, there is no evidence to suggest that, if a TRO were in fact to be imposed, the respondent could not seek to have the appropriateness of its continuation reviewed, or to have it lifted, in the event of a material change in his circumstances. Taking all of this into consideration it is this Court's view that the respondent has not demonstrated that the harm that he apprehends will arise at all, but even if it is accepted to be a possibility that he has also failed to demonstrate sufficient proximity between his proposed surrender and the harm that he apprehends may arise.

A second important consideration is whether what is asserted to be possible in the requesting jurisdiction is something which the Irish Constitution forbids absolutely or permits in certain circumstances. It is important to remark that neither the right to liberty, nor the related rights to travel and free movement in and out of the country, are absolute rights. There are numerous circumstances in which

they may be lawfully abrogated in the public interest, e.g., conditions associated with the binding of an individual to keep the peace; restriction on movement orders made under s. 101 of the Criminal Justice Act 2006 or under s. 133 of the Children Act 2001; electronic tagging under s.102 of the Criminal Justice Act 2006 (admittedly not yet in operation, but it is provided for in law); conditions of a suspended sentence as in *People (Director of Public Prosecutions) v. Alexiou* [2003] 3 I.R. 513; bail conditions involving curfews or exclusion zones; post release (restrictions on certain activities) orders made under s. 26A of the Criminal Justice Act 2007 as inserted by s. 14 of the Criminal Justice (Amendment) Act 2009; the notification requirement under the Sex Offenders Act 2001, to list but some of the available measures that interfere, or may interfere, to a greater or lesser extent with a person's rights to liberty (in the widest sense) and self determination. There are certainly limits to the extent to which there may be interference with the right to liberty in the narrow sense (i.e., in the sense of subjecting a person to incarceration, imprisonment or close confinement) but we are not talking about that in this case. A TRO is an non-custodial and ancillary sentencing measure, imposed not as a punishment but for public protection purposes. The Court is not persuaded that the interference with a person's liberty that might arise from the imposition by a court in another country of such a measure, upon a citizen of Ireland convicted before the courts of that other country, and in accordance with the laws of that other country, is something that would offend against Irish constitutional law principles, or that it would breach the respondent's rights under the Constitution to surrender him in the circumstances of this case.

To the extent that the Irish Constitution forbids preventative detention, the focus of the prohibition is upon the near total denial of personal freedom and self determination that is associated with incarceration, imprisonment or close confinement, such conditions of "detention" being emblematic of, and synonymous with, punishment for offending in most cases. The principle that is protected is that interferences with liberty, certainly of this profoundly intrusive type, should only be imposed for proven, as opposed to anticipated, offending. While it is true that this principle has been reversed in relation to bail by the sixteenth amendment to the Constitution, it remains fully intact in relation to sentencing. However, heretofore it has never been suggested that this principle extends to non-custodial and ancillary measures, operating to curtail liberty at a lower and less intrusive level than incarceration, imprisonment or close confinement, imposed by a court as part of the sentencing process and in the interests of state security, public order or health.

In the Court's view the respondent has failed to demonstrate that the harm that he apprehends would in fact breach his constitutional rights, or that it involves a measure which would be such a direct consequence of the Court's order, and depart so markedly from the essential scheme and order envisaged by the Constitution, as to justify non surrender. The respondent has also failed to demonstrate that his proposed surrender would breach the right guaranteed to him by Article 5 of the ECHR; the Right to Freedom of Movement pursuant to Article 2 of Protocol 4 to the ECHR; or his right to free movement of persons as guaranteed under E.U. law. None of these rights are absolute, and they may be abrogated in the legitimate public interest. The respondent has not demonstrated that a TRO, if imposed, would be arbitrary and unjustified in pursuit of a legitimate aim.

Finally, in so far as a case is made that to surrender the respondent would breach his right to respect for family life under Article 8 of the ECHR, the Court rejects that contention as manifestly unfounded. There is a clear and strong public interest in this respondent's extradition. The offences with which he is charged are serious, and involve significant quantities of drugs, and he faces significant penalties if convicted. The Court has taken due account of the private law considerations identified in the respondent's affidavit, including his concern about an open ended TRO, but does not consider that he would be so profoundly affected by any surrender as to render it a disproportionate measure. His private interests do not outweigh the strong public interest in his extradition, and his surrender would not breach his rights under article 8 of the ECHR.

In the circumstances the Court is not disposed to uphold the respondent's objections, and will make an order under s. 16(1) of the Act of 2003 surrendering the respondent in respect of all of the offences to which the European arrest warrant relates to such person as is duly authorised by the issuing state to receive him.