High Court of Ireland Decisions

Judgment

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THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 1662 S.S.]

BETWEEN

FRANCIS LANIGAN

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 23rd day of January, 2017

1. The present application is the fourth set of High Court proceedings relating to the applicant's proposed surrender to the UK. The matter has now been before at least nine

judges sitting in this court (Murphy J., Edwards J., Peart J., White J., Hunt J., Barrett J., Butler J., Noonan J. and myself) and, on multiple occasions, the Court of Appeal and Supreme Court, as well as, on one occasion, the Court of Justice of the European Union. At least three strands of the proceedings remain ongoing including the present Article 40 application, an application for leave to appeal to the Supreme Court in relation to the first Article 40 application, and a possible appeal to the Court of Appeal in relation to the applicant's constitutional action. Having regard to the foregoing it may be helpful to begin by setting out how the matter has evolved to this point.

EAW proceedings commence

2. The UK authorities allege that the applicant committed murder and was in possession of a firearm with intent to endanger life on 31st May, 1998, in Dungannon, Co. Tyrone. The UK authorities have stated that it was not until 2011 that they gathered sufficient evidence to charge the defendant. Charges were directed by the Public Prosecution Service for Northern Ireland on 4th May, 2012.

3. The Magistrates' court in Dungannon issued a European Arrest Warrant for this offence on 17th December, 2012.

4. The High Court (MacEochaidh J.) endorsed the EAW for execution by the Gardaí on 7th January, 2013. The applicant was arrested on 16th January, 2013.

5. EAW proceedings [2013 EXT 1] then came before the High Court, initially before Murphy J. Bail was refused by Edwards J. on 26th February, 2013. Legal aid was applied for on 3rd July, 2013, and also refused. The applicant subsequently re-applied for legal aid before Peart J. which was granted on 26th July, 2013.

6. Points of objection to surrender were put forward on 26th November, 2013. The hearing of the surrender application commenced on 30th June, 2014.

Constitutional proceedings commence - EAW process continues

7. On 23rd July, 2014, the applicant began constitutional proceedings seeking a declaration that the European Arrest Warrant Act 2003 was invalid by reference to its inquisitorial and *sui generis* procedure that allegedly permitted departure from fundamental norms of fair procedures.

8. On 17th December, 2014, Murphy J. delivered judgment on preliminary issues in the EAW proceedings.

9. On 1st December, 2014, by virtue of the commencement of legal provision to that effect, the option of referring a question to the CJEU became available in EAW proceeding generally.

10. On the same date, the applicant made a fresh bail application. On 8th December, 2014, the applicant applied to dismiss the surrender application, which was refused on the grounds that it related to the preliminary issues on which the court had already ruled. On the latter date, a further ground of objection to surrender was raised.

11. On 19th December, 2014, Murphy J. granted bail on certain conditions which the applicant could not at that point meet.

12. On 18th January, 2015, Murphy J. decided to refer a number of questions to the CJEU relating to delay in addressing the EAW request outside the time limits set out in art. 17 of the framework decision. At the same time she refused to refer a question relating to the *sui generis* or adversarial nature of EAW proceedings to the Luxembourg

court.

13. On 9th February, 2015, the High Court dismissed an application to vary the monetary terms of bail set by the court on 19th December, 2014.

14. The reference to Luxembourg was not in fact sent until 19th May, 2015. The Advocate General commented on this at para. 94 of his opinion as part of overall "*excessive lapse of time*" and "*unjustified delays in the procedure*" which amounted to provisional detention of 30 months, ten times longer than the maximum period authorised by art. 17 of the framework decision, including successive adjournments of the preliminary issues, and the "*repeated periods of inactivity on the part of the executing judicial authority, including 4 ½ months between hearing and delivering judgment on the preliminary issues and four months between the decision to make a reference to the court for a preliminary ruling and the actual order for reference*".

15. Meanwhile the applicant had appealed to the Court of Appeal in relation to bail. That court allowed the appeal on 6th July, 2015, and relaxed the bail conditions.

16. The Court of Justice gave judgment answering the referred questions, on 16th July, 2015, (*Case C-237/15 Minister for Justice and Equality v. Lanigan* [2016] QB 252).

17. On 4th September, 2015, the High Court (Murphy J.) directed the surrender of the applicant to the UK under the Act of 2003 and his detention in Cloverhill pending surrender. She refused leave to appeal. An appeal was in fact brought without leave (2015/482) but the Court of Appeal refused that appeal (*Minister for Justice and Equality v. Lanigan* [2016] IECA 91 (Unreported, Court of Appeal (Peart J. (Irvine and Mahon JJ. concurring)), 16th March, 2016). The Supreme Court refused leave to appeal on 27th June, 2016 (*Minister for Justice and Equality v. Lanigan* [2016] IESCDET 85 (Unreported, Supreme Court (Clarke, MacMenamin and Laffoy JJ.)). That decision appears to be the final decision on the execution of the EAW as far as domestic law is concerned. The 60 day period is meant to cover that between arrest (January, 2013) and final decision on execution. If the latter date was June, 2016 then the period involved was around 20 times that provided for by EU law.

18. Mr. Barron has raised the question as to whether the CJEU requires the State to also complete any consequent Article 40 applications during the period of 60 days specified for the final decision on execution of the EAW as set out in art. 17(3) of the framework decision. That would appear to be correct in that art. 23 which provides a 10 day provision for execution, would naturally only run from the date at which the legal process is at an end and the execution is free to proceed. Independently of that there is an overall obligation of urgency in relation to the execution of the warrant (art. 17(1)).

19. On 9th November, 2015, the applicant was apparently again granted bail by the Court of Appeal (2015/496) (Kelly, Irvine and Hogan JJ.) in the s. 16 proceedings [2013 EXT 1]. A fresh order for bail appeared to be required following the determination of the substantive EAW proceedings by the High Court.

The first habeas corpus application

20. On 9th September, 2015, the applicant made a first Art 40.4 application [2015 No. 1415 SS] before White J., who directed that the application for an inquiry be made on notice. That was done before Hunt J. on 10th September, 2015, who ordered an inquiry which took place before Barrett J. on 14th September, 2015. The order drawn up on that date states that the matter was adjourned, to 17th September, 2015, not adjourned for judgment. However Barrett J. in fact delivered judgment on 17th September, 2015. At the conclusion of that Article 40.4 application the applicant applied for bail and was refused. The order of Barrett J. was appealed to the Court of Appeal

(2015/488).

21. On 15th September, 2015, Butler J. ordered a stay on the order for surrender on the application of the state in the light of the proceedings before Barrett J. The order is in an unusual form in that it is entitled in both the extradition proceedings [2013 No 1 EXT] and in the first *habeas corpus* [2014 No. 1415SS, although the Court of Appeal record number 2015/488 is also cited]. Mr. Barron submits that the correct proceedings in which the order should be granted is within the 2013 extradition proceedings. He was not in a position to explain why the order was also granted in the first *habeas corpus* application.

The second habeas corpus application

22. A second article 40 application (the present case) was launched arising from the stay application. On 15th October, 2015, an *ex parte* application made to Noonan J. was refused.

23. An appeal was lodged to the Court of Appeal (2015/527) which overturned the refusal of the second *habeas corpus* inquiry by Noonan J., in a decision delivered by Peart J. on 19th October, 2016. At the same time the court upheld the order of Barrett J. refusing relief in the first article 40. The court also admitted the applicant to bail on the terms set out in the order of the High Court on 19th December, 2014, as varied by the Court of Appeal on 6th July, 2015.

24. The decision of the Court of Appeal in relation to the first Article 40 is the subject of an application to the Supreme Court for leave to appeal which is currently pending.

25. On 11th November, 2016, White J. delivered judgment in *Lanigan v Central Authority* [2014 No. 6374 P] striking out the constitutional proceedings on the ground that they had no prospect of success. It appears that the applicant is contemplating appealing this decision to the Court of Appeal.

26. On 9th December, 2016, the applicant brought an application before White J. to have the decision particularised and to have amendments dealt with as well as to have a stay on the surrender order. This is somewhat striking in that the applicant is complaining in these proceedings because of a stay on the surrender order. For whatever reason, the application for a stay was then not pursued by the applicant before White J.

27. On 16th December, 2016, I refused the application *ex tempore* on the basis that I would give more detailed reasons later. While I would have preferred to announce the decision in the context of a reserved judgment I did not take that course given the urgency required as a matter of EU law to which I have referred. I now give more full reasons for having done so.

Relief sought

28. The sole relief that can be sought in Article 40.4 proceedings is an order directing the release of the applicant (see *Owczarz v. Governor of Cloverhill Prison* [2016] IECA 388 (Unreported, Court of Appeal (Hogan J.), 14th December, 2016, para. 10). That has relevance to the question of the appropriate respondents, which I discuss further below.

Procedural matters in the course of the present application

29. The applicant was at the time of the hearing on bail in accordance with the order of the Court of Appeal but Mr. Robert Barron S.C. (with Mr Tony McGillicuddy B.L.) for the respondent accepts that that fact alone does not inhibit Mr. Michael Forde (with Mr Kieran Kelly B.L.) for the applicant from making any of his points. Mr. Forde has attacked the validity of the detention on a range of grounds in a comprehensive and

interesting submission. Before dealing with the substance of the challenge, there are a number of procedural issues that warrant attention.

30. A number of procedural issues arose on the first hearing date (1st December 2016, which was when the matter first came before me).

The appropriate respondent is the detainer

31. In an Article 40 application the appropriate respondent is the detainer (see *Knowles v. Governor of Limerick Prison* [2016] IEHC 33). There does not seem to be any basis for the Minister, Ireland and the Attorney General to be respondents or even notice parties. The Article 40 procedure does not normally envisage notice parties.

32. Mr Barron initially suggested that the Minister should stay involved because the applicant was on bail. But the Governor Ronan Maher has signed a certificate justifying the detention and he must now stand over that certificate. Mr Barron suggested that certificate in a bail case was "*to a degree theoretical*" but a certificate is just as necessary in a bail case as in any other Article 40 case because bail is not fatal to an Article 40 action. Otherwise a bail order would be self-nullifying as it would automatically bring to an end the inquiry and therefore the bail.

33. Mr Forde suggested that the Minister had an interest in the matter and thus should be at least a notice party. However that would collapse the distinction between Article 40 and judicial review or plenary proceedings if generalised to other cases. Many parties may have an interest in an Article 40 action but the onus of defending the legality of the detention falls to the detainer. The detainer must look to the Minister for assistance if necessary in justifying the detention if that became appropriate. The inquiry by the court is not in any way hampered by the lack of notice parties as the court has ample mechanisms to compel any appropriate evidence.

34. I therefore struck out the Minister, Ireland and the Attorney as parties on 1st December, 2016, without any strong objection from either party.

35. Surprisingly perhaps in the light of that latter aspect, Mr. Forde then applied on 7th December, 2016, to reinstate the Minister, Ireland and the Attorney General on the ground that the Article 40 application related to the conduct of the s. 16 proceedings and because issues of *res judicata* and *Henderson v. Henderson* (1843) 67 E.R. 313 were being litigated, those parties should be kept in. However the Minister, Ireland and the Attorney General are not detaining the applicant. It is clear that a statute or statutory instrument can be challenged in an Article 40 context (see Article 40.4.3°) and while in ordinary plenary litigation or judicial review in which such a challenge is brought, Ireland and the Attorney General and, in the event of an ECHR challenge, the Irish Human Rights and Equality Commission should be defendants or respondents, notice parties or at a minimum persons given notice of the proceedings, the rules of court do not apply to an application under Art 40.4 (see the wording of O. 84. r. 1(2) and the judgment of Walsh J. in *The State (Ahearne) v. Cotter* [1982] I.R. 188 at 200: "*The application to challenge the legality of the deprivation of someone's personal liberty is enshrined as a constitutional right in respect of which the whole procedure is set out in the Constitution itself. It is outside the competence of any rule-making authority to make any rules whatever to regulate this procedure*". Following some discussion Mr. Forde then, I think quite correctly, withdrew the application to reinstate these parties.

An applicant is entitled to time to consider a certificate

36. When the matter came before me initially on 1st December, 2016, Mr. Forde had not in fact been served with a copy of the certificate under Art 40.4 of the Constitution

dated as of that date. I directed that it be furnished to him and he then applied for an adjournment to consider it, which I granted, somewhat over Mr. Barron's objections, on the basis that an applicant must have a reasonable time to consider such a certificate and should not be ram-rodded into dealing with an Article 40 inquiry without the opportunity to consider and contemplate such a central document. It may be that the certificate on reflection and consideration does not add much to the case but any certificate requires scrutiny as to form and content; and in principle an applicant who wants time to review and consider a certificate should be afforded such time, all other things being equal.

37. As I commented in *Grant v. Governor of Cloverhill* [2015] IEHC 768 at para. 14, the inquiry must begin "*forthwith*" but that does not mean that it must conclude "*forthwith*". It may be adjourned in the interests of justice but bearing in mind the overall requirement for urgency. As explained by Barrington J. in *The State (Whelan) v. Governor of Mountjoy Prison* [1983] I.L.R.M. 52: "*It appears to me also that, on an application for habeas corpus the duty of the High Court is forthwith to enquire into the legality of the detention, but that once the enquiry is entered on, and provided the urgency and importance of the proceedings are kept in mind, the Court is entitled, after hearing the views of the prosecutor, the respondent and their legal representatives to conduct the enquiry in the manner which the Court thinks best calculated to resolve the issues of law and fact raised in the proceedings and to achieve the interest of justice*" (p. 55).

38. The present application was then adjourned to 7th December, 2016, at which point certain further procedural issues arose.

Scope of an Article 40 inquiry

39. On the 7th December, 2016, on the second day of the substantive hearing, Mr. Forde's side prepared a further affidavit which, given the wide-ranging nature of the inquiry under Article 40.4, I decided to allow in fairness to the applicant.

40. Mr. Barron submitted that the sole ground of the application before Noonan J. was the effect of the stay granted by Butler J., and insofar as that matter has been remitted to the High Court by the order of the Court of Appeal, that is the sole matter to which I am confined. Mr. Barron submitted that there would have to be something new before the court could look into anything beyond that. He submitted that Mr. Forde was obliged to "*apply to extend the Article 40 inquiry*" if he wanted to pursue new points, and required to give reasons as to why it should be extended and why the matters now being relied on could not have been raised earlier. He also objected to the affidavit as a "*Trojan horse*" which was a vehicle for a mutating form of objection to the lawfulness of the detention of the applicant.

41. However such an interpretation is inconsistent with the provisions of the system envisaged by Article 40.4 of the Constitution. The court is embarked on an inquiry under that provision rather than a purely adversarial procedure. The onus to prove the legality of the detention remains on the respondent at all times. It follows from those fundamental premises that there is no obligation on an applicant to specify all grounds of objection at the outset. At least one ground must be identified to obtain an order for the inquiry in the first place, but an applicant may reserve further grounds until the close of the respondent's case (the respondent normally being required to go first as he or she bears the burden of proof).

42. It may of course be that if a particular issue has been definitively determined by an appellate court in earlier proceedings, that matter cannot be re-opened in a subsequent *habeas corpus* application (absent some recognised ground for re-visiting a decision such as a change in the law in the meantime or the doctrine of *per incuriam*). Insofar as

issues have been substantively determined at High Court level (as opposed to the initial inquiry having been refused), similar issues may arise precluding re-opening of what has been so decided, an issue to which I will return below. But the Article 40 mechanism is intended to be a very flexible procedure and even if the application as originally launched is confined to a particular point, the inquiry may be developed to address other issues.

43. Accordingly I allowed the applicant to file a further affidavit on 7th December, 2016, but without prejudice to any argument in due course that any particular point raised is now precluded by previous decisions or indeed without prejudice to a right to reply on affidavit if such was felt to be required.

Access to the DAR

44. A related issue also arose on 7th December, 2016, as to what had happened during the vacation sitting before Barrett J. on the morning and afternoon of 16th September, 2016, when the first *habeas corpus* application was heard. In order to resolve that issue as part of the inquiry being undertaken by me and having regard to the *sui generis* nature of the Article 40.4 procedure, it seemed appropriate to allow the applicant access the DAR for that earlier date. However the applicant did not take this up.

45. The hearing proceeded and was then adjourned to 12th December, 2016, for mention and to 16th December, 2016, for further hearing.

The document authorising the detention

46. The applicant's detention is authorised on foot of a committal warrant issued by Murphy J. on 4th September, 2015, by virtue of her order for surrender pursuant to the EAW. The committal warrant commands the Governor of Cloverhill and the Superintendent, Bridewell Garda Station, to lodge the applicant in prison in Cloverhill for not less than 15 days until the date of his delivery.

47. The context therefore is that the applicant is detained under an order of a court and accordingly the test for release under Article 40 is an absence of jurisdiction, a fundamental denial of justice or a fundamental flaw (*F.X. v. Clinical Director of the Central Mental Hospital* [2014] 1 I.R. 280; *Ryan v. Governor of Midlands Prison* [2014] IESC 54 (Unreported, Supreme Court (Denham C.J.), 22nd August, 2014)).

The applicant's challenge

48. Mr. Forde helpfully summarised his challenge to the detention under four headings as follows.

49. The first point is that *res judicata* and *Henderson v Henderson* do not apply in *habeas corpus* and therefore the court can revisit previous determinations under existing accepted law; and that the detention is unlawful for reasons that were rejected in previous determinations but that I am now invited to uphold.

50. The second point is that Article 40.4 must be interpreted consistently with EU law, and therefore with the principles of the UN General Assembly Working Group on Arbitrary Detention Report on Basic Principles and Guidelines on Remedies and Procedures on the right of anyone deprived of their liberty to bring proceedings before a court (6th July, 2015), which Mr. Forde submits upholds principles in part derived from Strasbourg jurisdiction. On that argument therefore (assuming it would not otherwise do so), the Constitution must be construed as meaning that a court hearing an Article 40 application has jurisdiction to revisit previous determinations. On foot of that argument, it is suggested that I should uphold in favour of the applicant points already advanced and rejected.

51. The third point is that the grant of the stay under an inherent jurisdiction was not available because it has been ousted by legislation. This is said to render the detention unlawful because if the stay had not been granted the applicant would have been required to be brought back to the court and could have applied for release under s. 16.

52. The fourth point is that the "*extravagant delays*", which the applicant describes as "*egregious*" and puts down almost entirely to the State's litigation strategy, are such that the detention is now unlawful by virtue of blameworthy delay *per se*.

Revisiting previous decision under domestic law

53. Mr. Forde seeks to revisit four previous decisions in this case, those of Murphy J., Barrett J. and White J. and in addition the Court of Appeal decision on appeal from Barrett J. He submits that I have jurisdiction to do so under conventional principles applying to *habeas corpus.*

54. Mr. Forde submits that second or subsequent EAW applications can be brought notwithstanding *res judicata* and *Henderson (Minister for Justice and Equality v. J.A.T. (No 2)* [2016] 2 I.L.R.M. 262), and that therefore the applicant should be similarly entitled in the context of *habeas corpus*.

55. It is noteworthy that s. 14(2) of the UK Administration of Justice Act 1960 provides that, a second *habeas corpus* application shall not be made "*on the same grounds… to the same court or judge or any other court or judge unless fresh evidence is adduced in support of the application*": see Ex parte Schtraks [1964] 1 Q.B. 191, at 198-199.

56. This statute reflects the judicial approach: the right to go from judge to judge in order to make an application that has been refused on the merits by another judge has been rejected in *Re Hastings No 2* [1959] 1 Q.B. 358.

57. Dr. Costello's book cites two unreported authorities for the proposition that "*an applicant will not be permitted to challenge on a second application grounds which have previously been rejected in a previous hearing*" (citing *Re Charles Wilson (No. 1)* (Unreported, Supreme Court, 11th July, 1968), and *Junior v. Clifford* (Unreported, High Court, 17th December, 1993)). Hogan J. upheld such a conclusion in *Joyce v. Governor of the Dóchas Centre* [2012] 2 I.R. 666, holding that the substantive decision on the legality of a detention was the decision of the High Court, and accordingly that an unsuccessful applicant's only remedy on foot of such a decision was an appeal.

58. Mr. Forde submits that *Attorney General v. Abimbola* [2008] 2 IR 302 is to the contrary, but on p. 315 of that decision, MacMenamin J. states that "[i]*t may be that issue estoppel might arise in the event of a second inquiry under Article 40.4 being brought seeking to raise the same issues"*. There is no contradiction between *Joyce* and *Abimbola*.

59. The errors allegedly made in the course of previous decisions are submitted by Mr. Forde to be as follows:

> a. Murphy J. allegedly erred in failing to defer making the order in the light of the constitutional action (the applicant's application being to defer the order rather than hear the two matters together); Mr. Forde also goes through her judgment and picks out possible appeal points particularly regarding evidential matters. It is submitted that the detention order is unlawful as a result. Unfortunately that theory would authorise a form of appeal process by way of Article 40 application to a judge of co-ordinate jurisdiction which is impermissible in our system; doubly so where the legislature has seen fit to restrict the right of appeal in EAW matters and

where there is an EU law obligation of expedition. Article 40.4 is a flexible remedy but it is not so flexible as to permit a *habeas corpus* court to re-open the correctness of a final order of a court of co-ordinate jurisdiction on a question of law and procedure absent a fundamental denial of justice. No such fundamental denial of justice has been shown. The best Mr. Forde can really say is that he contends that the decision was incorrect but that is not sufficient. I deal separately below with the question of whether there is now new evidence not available to Murphy J.

b. Barrett J.'s error allegedly was to decide the merits of the first Article 40 in circumstances where the only application was by the applicant to adjourn the proceedings. The applicant has hampered an understanding of that question by failing to take up the DAR. While of course the burden of proof is on the respondent, the applicant's conduct here is significantly relevant. Mr. O'Donovan's affidavit complaining about the hearing therefore, albeit uncontradicted, falls short of the significant evidence required to establish a fundamental denial of justice. More fundamentally still, that point has already been considered by the Court of Appeal. The applicant has appealed the decision of Barrett J. to the Court of Appeal which considered his point about unfairness of the hearing and which has dismissed that appeal, albeit without the benefit of the DAR. Even under the flexible remedy of *habeas corpus*, the decision of the Court of Appeal determines the issue of the lawfulness of Barrett J.'s order as far as this court is concerned, at the very least absent new evidence.

c. White J.'s alleged error was, it is said, to misunderstand the applicant's case and then wrongfully conclude that the proceedings were bound to fail. That is a matter for the Court of Appeal if an appeal is brought. It is not a determination I could re-open in this case absent some form of fundamental denial of justice going well beyond an allegation of the type made. Common or garden error (even if one assumes *arguendo* that such a case could be made) is far short of the required level of fundamental failure of justice, even assuming which I do not accept that the due disposal of the plenary proceedings goes to the validity of the detention at this stage.

d. The Court of Appeal's judgment on appeal from Barrett J. also comes in for criticism from Mr. Forde but again relying on basic established law, that is not something I can re-visit (absent exceptional circumstances (such as an intervening change in legislation) which do not arise here).

60. To advance the argument that previous decisions can be re-opened, the new evidence that the applicant says he has since Murphy J.'s order is the report of an inspection in Maghaberry Prison dated November, 2015, as well as transcripts of the hearing before Murphy J. I do not consider that the transcripts can seriously be called new evidence as the applicant was there and could have taken a note of what happened as it was happening. The inspection report however could in principle constitute new evidence.

61. In principle it seems to me that the most convenient remedy in respect of new evidence between the making of an order for surrender and the actual surrender would be an application to the judge who made the original order. Mr. Barron informs me that in one previous case Peart J. set aside a s. 16 order he had made in such circumstances, and in another case where it emerged that the foreign conviction was in fact made in abstentia, the State adopted a similar course and likewise applied to set aside the s. 16 order.

62. However given the imperative to protect the constitutional, ECHR and EU right of the individual to personal liberty, I accept Mr. Forde's submission that new factual material (such as the prison inspection report here) is in principle capable of also allowing the court on Article 40 (as opposed to the court that made the original order) to review the lawfulness of detention by virtue of a High Court order for surrender which was based on evidence available at an earlier point in time. Mr. Barron very fairly accepted that he could not say that Article 40 would not be available in such circumstances.

63. However on reviewing the report regarding Maghaberry prison I am of the view that it falls significantly short of the level of real risk to the life or human rights of the applicant that would render unlawful his detention for the purposes of surrender to the UK. He will have the protection of the ECHR and Northern Irish law in order to assist in vindicating his rights in that context. The matters set out in that report do not render Murphy J.'s order unlawful; nor do those matters require the release of the applicant.

Does EU law render Article 40 more flexible than currently interpreted?
64. Mr. Forde makes the submission that EU law incorporating ECHR and UN standards has priority over judicial interpretations of the Constitution, and the latter must be adjusted to accommodate the former. At the level of high generality that is a fair point but at the level of detail, that proposition does not "bite" in any meaningful way in the present case. Mr. Forde has not pointed to anything in the report of the UNGA Working Group on arbitrary detention that would require a significant, or any, change to the law as laid down most recently in *Joyce* by Hogan J.

65. Para. 82 of the UN report states that *"[a]fter a court has held that the circumstances justify the detention, the individual is entitled to take proceedings again on similar grounds after an appropriate period of time has passed, depending on the nature of the relevant circumstances*". However that appears to be in the context of factual circumstances that are open to change and review from time to time. It is not a declaration that the right to personal liberty requires an ongoing entitlement to revisit a decision on a particular issue of law or procedure on the merits, still less to require a final order at appellate level to be revisited in an ongoing manner.

Did the grant of a stay on surrender render the detention unlawful?
66. The factual chronology and legal argument in the present case appears to illustrate some uncertainty as to the application of s. 16. That is not helped by the slightly turgid drafting of the section and its significant partial revision (as opposed to complete substitution) by amendment following original enactment. Such matters arise from general drafting policy rather than being the responsibility of the individual drafters concerned. One might be forgiven for hoping that in the interests of the integrity of the statute book, perhaps policies favouring plain English, clearly chronological and sequential flow of material, and repeal and re-enactment rather than piecemeal amendment, could be given more focus in future.

67. It seems to me that the correct procedure and sequence of events for the operation of that section is as follows.

68. Firstly the court must make an order for the surrender of the person under either sub-s. (1) (endorsement of an EAW) or (2) (Schengen alert) of s. 16.

69. On making the order for surrender, the court must also inform the person of their rights and direct that the person be brought back to the court if the person is not surrendered before the expiration of the time for surrender under sub-s. (3A) (see sub-s. (4)).

70. The order for surrender generally takes effect 15 days after it is made (sub-s. (3).

Unless *habeas corpus* or appeal proceedings are brought, the taking effect of the order for surrender triggers the start of a 10 day period in which the surrender needs to be effected (see sub-s. (3A)).

71. If the person is not surrendered within that 10 day period, the person should be brought back to the High Court (sub-s. (4)(c)) and the court may on certain conditions fix a new date for surrender (sub-s. (5)) or may discharge the prisoner.

72. The time at which the person needs to be brought back to the High Court by reason of the expiry of the 10 day period under sub-s. (3A) is not (as it might have appeared originally in this case), 10 days after the surrender order takes effect, but 10 days after that order takes effect "*subject to subsectio[n] … (6)*", in other words 10 days after any appeal or Article 40 application is concluded.

73. Sub-s. (6) reflects recital 12 which reserves for each member state the right to apply its own constitutional rules as to fundamental rights. The right to apply for *habeas corpus* is also reflected in art. 5(4) of the ECHR and art. 47 of the EU Charter.

74. To that extent I respectfully agree with the obiter comment of Peart J. at para. 64 of the decision of the Court of Appeal in the first *habeas corpus* action, that *"this … provision [ie. sub-s. (5)] was not intended to apply in a situation where the only reason why surrender did not take place within the prescribed timeframe was because the person to be surrendered commenced proceedings under Article 40.4 prior to surrender"*.

75. On that logic, there was never any need to apply to Butler J. for a stay, because the 10 day period never got rolling for the simple reason that that period was subject to sub-s. (6) and therefore subject to the possibility of applying pursuant to Article 40.4.

76. It is only when an Article 40 application has been finally disposed of that the 10 day period in sub-s. (3A) beings to run, and only 10 days after that that an obligation to bring the person back to court under sub-s. (4)(c) as specified in the surrender order would arise.

77. In my view, on the logic and structure of the section, and having regard to the Court of Appeal decisions in this case and in Owczarz, the application for a stay to Butler J. was unnecessary.

78. McDermott J. seemed to think such a stay was permissible in *Myserscough v. Governor of Arbour Hill* [2016] IEHC 333 (Unreported, High Court, 14th June, 2016, paras. 51 and 52). The context was that he said at para. 52 that "*I am not satisfied that the statutory provisions in relation to the time limits applicable to surrender and the applications which must be brought in relation to the extension of such periods are relevant in the context of an application under Article 40*". That appears to mean that the time requirement does not run and that a stay is not necessary, a proposition I respectfully agree with. Nonetheless, he did not seem to have had a difficulty with a stay having been granted in that case, although the court does not seem to have been addressed on the specific questions of statutory interpretation which I consider here. In addition McDermott J.'s decision relies on Noonan J.'s refusal of leave in the present case, at a time prior to that decision having been overturned by the Court of Appeal. A view of the authorities overall reinforces my view that the stay application was unnecessary because it was unnecessary (in that it duplicated the stay arising statutorily from the fact that the time for surrender under the 2003 Act had not arrived) it did not infringe any rights of the applicant.

79. In *Myerscough v. Governor of Arbour Hill* [2016] IECA 357 (Unreported, Court of

Appeal, 25th November, 2016) Edwards J. held that stays in similar circumstances were "*lawfully granted in order to comply with Irish domestic statute law*" (para. 59). Thus even if the stay was over-cautious, it was not unlawful.

80. Mr. Forde submits that the stay removed the protection of the supervision of the High Court by virtue of sub-s. (5) which comes into play when a person is brought back under that provision. However there was no "*removal of protection*" by the stay because sub-s. (5) never applied to the applicant in the first place by reason of the ongoing Article 40 proceedings. It would only be when those proceedings were over, and if the consequent surrender was not effected within the following 10 days, that the person would have to be brought back and the protections, such as they are, of sub-s. (5) would apply. Pending that time, the applicant is not entitled to those protections but he is not disadvantaged because he has the benefit of close supervision and conduct of his Article 40 proceedings by the High Court and where applicable appellate courts. Indeed the stay granted by Butler J. has never kicked in because the statutory stays under s. 16(3) and (6) have been in effect at all times.

81. The consequence of this approach would seem to be, as suggested by Peart J. at para. 72 of his judgment, that the order as to a stay should be lifted.

82. Having said that however I note that Peart J also suggests, *obiter*, at para. 72, that the stay should be lifted now and the applicant should be informed that that reason was because of the Article 40 proceedings, "*so that the matter might be re-entered at the conclusion of the Article 40 proceedings for the purpose of fixing a new date for surrender with the agreement of the issuing state as provided for in [the] new s. 16(5) of the Act*". I hope I can very respectfully venture the view that the precise way in which that obiter comment is worded could be seen on one view as ambiguous in that it could leave open an interpretation that could be slightly at variance with the main thrust of the overall judgment of Peart J. on this issue. The logic of the approach outlined above is that s. 16(5) does not (at least in the first instance) apply to a person who launches an Article 40 application, because the time just never begins to run until the conclusion of such application. Therefore after the Article 40 is completed, there is no need to apply under s. 16(5) for a new date of surrender at that point. The time for surrender simply commences in accordance with sub-s. (3) and (3A), after any appeal and Article 40 application is finally determined. The provisions of s. 16(5) would only apply to such a person if they are not surrendered within 10 days after that point.

83. A complicating factor (complicating factors seem to go hand in hand with the present case) is the existence of the plenary constitutional proceedings challenging the validity of the 2003 Act. Are those proceedings challenging the validity of the execution of the EAW as envisaged by art. 17(3) of the framework decision? One can certainly say that the proceedings are not encompassed within sub-s. (6) which is confined to an appeal of the surrender order, or an application under Article 40.

84. The relief actually sought in the plenary proceedings (apart from damages, further and other relief and costs under the Legal Aid (Custody Issues) Scheme) relates to declarations that the 2003 Act is unconstitutional or contrary to the EU Charter on Fundamental Rights. Mr. Forde complains that the plenary proceedings should have been heard before the s. 16 order, but that is water under the bridge. The question now is, what would be the effect of ultimate success in the plenary proceedings on the validity of surrender?

85. Mr. Forde submits that he would need to apply to amend the Statement of Claim in the plenary action to have the surrender order set aside on foot of the court's inherent jurisdiction. He may have left it a bit late to do that seeing as his action has been struck out without that application having been made. The alternative and perhaps more

obvious approach would be to apply under Article 40 of the Constitution for the applicant's release on the ground that the underlying statute is invalid. Because the constitutional action was commenced prior to the surrender order, the problem in *A. v. Governor of Arbour Hill* [2006] 4 IR 88 does not apply and the applicant is not precluded from making such a case.

86. Mr. Forde accepts ultimately that there is currently no pending application before any court that directly impugns the effectiveness of the surrender order other than the present Article 40 application and an application for leave to appeal to the Supreme Court in relation to the first Article 40 application.

87. Under those circumstances the plenary proceedings do not seem to me to be proceedings going to the executability of the EAW as envisaged by art. 17(3) and therefore are not part of the "final decision" referred to in that provision.

88. On that logic, there is nothing contrary to the framework decision in the situation that plenary proceedings challenging the validity of a statute do not "*stop the clock*" for the purposes of sub-s. (3A). Thus the 10 day period would run from the end of any Article 40 applications even if plenary proceedings were ongoing. Would there then be a basis for a stay on the surrender order? Mr. Barron rather fatalistically submits that if such a situation arose, the applicant would seek a stay, so one might as well pre-empt that by having the State seek a stay at this stage.

89. Even if, *arguendo*, one were to accept such an approach, the logic of that position is that the stay application was at best premature because a situation where all Article 40 applications had been disposed of but the plenary matter remained outstanding has not yet arisen, and indeed may never arise.

90. Fundamentally, I accept Mr. Barron's submission that even if the stay order was unnecessary, inappropriate or even hypothetically invalid, that does not matter to the validity of the detention. The applicant is detained under a court order; thus a fundamental flaw or fundamental injustice or a lack of jurisdiction is required (*Ryan, F.X.*); and there is no such infirmity. An unnecessary stay granted in error does not amount to a fundamental injustice.

Alleged egregious delays

91. The EU framework decision requires considerable expedition, which, as noted by the Advocate-General, does not seem to have occurred. Multiple court proceedings, as here, also pose something of a challenge in that regard. However one cannot be complacent about that issue albeit that it requires measures at a more systemic level than those capable of being put in place by any individual judge. The present *habeas corpus* matter first came before me on 1st December, 2016, and I delivered an *ex tempore* decision dismissing the proceedings on 16th December, 2016, which was about as expeditious as the complexity of the case permitted, especially given the application for an adjournment by the applicant. The postponement of a written judgment to the far side of the vacation into January, 2017 did not delay matters in that it did not prevent the applicant from appealing to the Court of Appeal in the meantime. Some of the delays in this case are of the applicant's own making. But such the delays as have occurred do not render the detention unlawful. The applicant is not, in justice or as a matter of EU or constitutional law, entitled to a windfall benefit because the State has not complied with the time limits in the framework decision.

Request for CJEU reference

92. No CJEU reference is necessary or appropriate on any of the applicant's points because, for the reasons stated above, the complaints made are either matters of domestic law or, to the extent that EU law applies, are issues where no real doubt

arises.

Order

93. For the foregoing reasons, the order I made on 16th December, 2016 was:

a. that the application to refer issues to CJEU be refused;

b. that the Article 40 application be dismissed;

c. that the existing bail be continued until 21st December, 2016, to permit the applicant to apply to the Court of Appeal to extend the bail in the context of any appeal that may be brought before then; and

d. that there be a recommendation under the Legal Aid Custody Issues Scheme for the costs of the applicant, to include two counsel and solicitors.