[2020] IEHC 77

THE HIGH COURT

[2017 No. 58 EXT]

BETWEEN

MINISTER FOR JUSTICE & EQUALITY

APPLICANT

AND

CIARAN MAGUIRE

RESPONDENT

THE HIGH COURT

[2017 No. 59 EXT]

BETWEEN

MINISTER FOR JUSTICE & EQUALITY

APPLICANT

AND

SEAN PAUL FARRELL

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 14th day of February, 2020

1. By these applications, the applicant seeks the surrender of each of the respondents pursuant to European Arrest Warrants dated 10th March, 2017 ("the EAWs") for the purpose of the prosecution of each of the respondents arising out of the same events that occurred in Northern Ireland on 18th June, 2015, in which it is alleged that each of the respondents played an active part.

2. The hearing of the applications commenced on 5th December, 2019, and concluded on 6th December, 2019. However, further submissions were received by the Court on 17th December, 2019 in light of further information provided, to which I refer below. The identity of the respondents is not in dispute and I am satisfied that the persons before the Court are the respondents named in the EAWs.

3. The issuing judicial authority ("IJA") in each case is stated, at para. I of the EAWs, to be the District Judge (Magistrates' Court) sitting at Laganside Court, Belfast Magistrates' Court. The EAWs were both endorsed by this Court on 20th March, 2017.

4. In each case it is stated that two warrants of arrest have been issued (for each respondent) in respect of one offence of attempted murder and one offence of possession of explosives with intent. For the offence of attempted murder, the IJA has in each case ticked the box for "*murder, grievous bodily injury*" at para. E (1) of the EAWs. There was no dispute about this, and accordingly it is not necessary for the applicant to demonstrate correspondence in relation to these offences. In relation to the offence of unlawful and malicious possession and control of an explosive substance, the applicant submits that on the facts of this case (which I address below) the offence corresponds to an offence under s. 3(1)(b) of the Explosive Substances Act, 1883 (as amended by s. 4 of the Criminal Law (Jurisdiction) Act, 1976 and s. 36 of the Criminal Justice Act, 1999) which provides:-

"3(1) A person who in the State or (being an Irish citizen) outside the State unlawfully and maliciously –

(a) *…*

(b) *Makes or has in his possession or under his control an explosive substance with intent by means thereof to endanger life, or cause serious injury to property, whether in the State or elsewhere, or to enable any other person so to do,*

Shall, whether any explosion does or does not take place, and whether any injury to person or property is actually caused or not, be guilty of an offence and, on conviction on indictment [shall be liable to a fine or imprisonment] for a term not exceeding 20 years and the explosive substances shall be forfeited."

5. It was not argued on behalf of the respondents that the actions allegedly undertaken by the respondents as set forth in the EAWs do not correspond to this offence. I am satisfied that the actions, if committed in this jurisdiction (or indeed outside the State if committed by an Irish citizen) would indeed constitute an offence under Irish law and accordingly correspondence is established as regards this offence.

6. The EAWs state that the offence of attempted murder is subject to a sentence of imprisonment for life, and possession of explosives with intent is also subject to a sentence of imprisonment for life. Accordingly, minimum gravity is established in relation to each offence.

7. At the hearing of these applications, I was satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the European Arrest Warrant Act 2003 (as amended) (the "Act of 2003") arise, and that the surrender of the respondents is not prohibited for any of the reasons set forth in any of those sections.

Description of actions of respondents as set forth in EAWs

8. At paragraph E of the EAWs it is stated that on 18th June, 2015, at approximately 02.45 hours, a serving police officer in Northern Ireland awoke and looked out her bedroom window to see a male on the ground at the driver's door of her husband's vehicle. Her husband is also a serving police officer. She knocked at the window causing the male to flee and then called the police. At the scene police found a device underneath the police officer's car, which was found to be an improvised explosive device.

9. Police officers travelling to the scene observed two vehicles driving in convoy at high speed from the direction of the town of Eglinton. These vehicles travelled across the border, but in the meantime the Police Service of Northern Ireland ("PSNI") had passed on descriptions of the vehicles to An Garda Síochána, and a Garda vehicle identified one of these vehicles passing through the village of Killygordon (15km from Lifford) and gave chase to the vehicle. The vehicle was a Volkswagen Passat and matched the description of one of the vehicles given by the PSNI to An Garda Síochana. The Gardaí successfully apprehended the Passat which had three male occupants. All three were arrested on suspicion of membership of an illegal organisation. The driver of the Passat is alleged to

be one of the respondents, Mr. Maguire. The other occupants were the other respondent, Mr. Farrell, and the third is stated to be Mr. Seán McVeigh.

10. The EAW relating to Mr. Farrell states that he was taken to Milford Garda Station where he was interviewed by Gardaí after caution and subsequently released without charge. Mr. Farrell was found to have in his possession a Toyota car key. The other car observed travelling in convoy with the Volkswagen Passat was a Toyota. The registration number of both the Passat and the Toyota had been noted and both vehicles were identified as having been stolen. The Toyota key taken from Mr. Farrell was tested on the Toyota (which was later recovered) and it successfully worked in the door locks and ignition. Car mats from the vehicles were both found to have explosive residue. Forensic examination of the DNA profile recovered from the Passat matched Mr. Farrell's DNA.

11. Mr. Maguire was taken to Letterkenny Garda Station where he was also interviewed by Gardaí (after caution) and released without charge. His DNA profile was recovered from a different pair of gloves found in the vehicle. A low quantity of explosive material was detected in one of the gloves, and also on jeans and a Wrangler hooded coat seized from Mr. Maguire.

12. Importantly, during the course of this hearing it was acknowledged by the applicant that while in custody, each of the respondents received the standard form of caution that they would receive in this jurisdiction to the effect that they were not obliged to say anything but that anything that they might say would be taken down in writing and might be given in evidence. It is common case that this is the extent of the caution given to the respondents while detained by the Gardaí for questioning, and that the caution did not extend to warning them that, if they remained silent in custody, inferences might be drawn from that silence in the event that they were surrendered to Northern Ireland for trial in that jurisdiction. It is also common case that both respondents elected to exercise their right to remain silent and that neither made a statement of any kind to the Gardaí.

13. It is relevant at this juncture also to record that prior to the hearing of this application, the respondents had each issued judicial review proceedings against the applicant whereby they sought orders of mandamus requiring the applicant to respond to requests for information in relation to and arising out of their detention by the Gardaí, and further sought an order of mandamus requiring the applicant herein to provide information requested by the applicant, purportedly pursuant to the provisions of Directive 2012/13/EU of the European Parliament and of the Council of 22nd May, 2012, on the right to information in criminal proceedings ("the Directive"). The reliefs sought were refused both in the High Court by Donnelly J. in a decision delivered on 11th February, 2019, and, subsequently, in the Court of Appeal in a decision delivered by that court (Kennedy J.) on 1st November, 2019. This latter decision in particular has some relevance to these proceedings in the context of the reliance placed by both respondents on the Directive, in opposition to this application.

14. In its decision in the judicial review proceedings, the Court of Appeal also indicated that judicial review was not the appropriate mechanism for seeking orders for delivery of the

documentation and other materials that they sought, and that the appropriate application was for an order of discovery of the same. Accordingly, the respondents each then moved applications for discovery before this Court, which applications were dismissed in a decision delivered by this Court on 26th November, 2019. The respondents then appealed that decision, and that appeal was dismissed in a judgement of the Court of Appeal delivered on 4th December, 2019.

15. A decision was taken by the Director of Public Prosecutions not to try the respondents in this jurisdiction for the offences for which their surrender is sought in Northern Ireland. Materials gathered by the Gardaí in the course of their investigation have been handed over to the authorities in Northern Ireland. Although, as will be seen, the respondents contend that there was a violation of their constitutional rights while in custody, no allegation was made that these materials were obtained unlawfully by the Gardaí.

Points of objection
In the case of Ciaran Maguire

16. Points of objection were first filed on behalf of Mr. Maguire on 3rd May, 2017. Seven objections were raised, but just one of these was pursued at the hearing of the application i.e. that the surrender of the respondent is prohibited by s. 37 of the Act of 2003, because it would be in breach of his constitutional rights and in particular those rights guaranteed by Article 38 and 40 of Bunreacht na hÉireann. Specifically, it is pleaded that:-

    (i.) Evidence taken in violation of his constitutional rights would be tendered against him at his trial.

    (ii.) That if surrendered to Northern Ireland he would not enjoy the constitutional protection of his life, liberty and health as guaranteed by Bunreacht na hÉireann.

17. A further point of objection was filed on behalf of Mr. Maguire on 6th March, 2019. By this objection, it is pleaded that, if tried for the offences described in the EAW, he will be required to give evidence in his own defence, failing which an adverse inference may be drawn by the court based upon his failure to give such evidence in circumstances where the court is satisfied that the prosecution case against him is sufficiently strong to require an answer from the defendant. This objection arises out of Articles 3 and 4 of The Criminal Evidence (Northern Ireland) Order 1988 ("the 1988 Order"), and it is claimed that this is contrary to Mr. Maguire's constitutional right to trial in due course of law pursuant to the provisions of Article 38 of Bunreacht na hÉireann.

18. In their written submissions, counsel for Mr. Maguire also submitted that he was not adequately warned, while in Garda custody, of a real and serious risk of an unconstitutional intrusion of his right to silence in the trial process in Northern Ireland.

19. At the commencement of the hearing of this application, counsel for Mr. Maguire put forward a further objection on his behalf for the first time. While counsel for the applicant submitted that it was too late for the respondents to advance new objections, he

conceded that the applicant would not be prejudiced if the objection were allowed, and accordingly I allowed the objection to be made on behalf of Mr. Maguire. As far as the formal pleadings are concerned, counsel for Mr. Maguire submitted that this new objection fell within a general objection made by Mr. Maguire in his points of objection of 3rd May, 2017, where it is pleaded that the EAW does not contain all of the information or details required by the Act of 2003. Specifically, however, it was now asserted on behalf of Mr. Maguire that the EAW does not contain the information required by the Directive. Article 1 of the Directive provides:-

Subject matter

This Directive lays down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. It also lays down rules concerning the right to information of persons subject to a European Arrest Warrant relating to their rights."

20. Article 3 of the Directive then deals with the entitlement to information about rights of suspects or accused persons, and although it is not stated, these by implication are rights upon arrest, such as the right of access to a lawyer and the right to remain silent. Article 4 of the Directive provides that Member States shall ensure that suspects or accused persons who are arrested are provided with a written letter of rights, as well as, *inter alia*, the right of access to the materials of the case.

21. Article 5 is headed *"Letter of Rights in European Arrest Warrant Proceedings*" and is the only article that deals specifically with such proceedings in the Directive. It was not contended by the respondents or argued on their behalf in these proceedings that they did not receive their rights under Article 5 of the Directive.

22. Article 6 of the Directive deals with the right to information about the accusation, and Article 7 sets out the rights of access to the materials of the case. Article 7.1 provides:-

> *"Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or their lawyers."*

This right is expanded upon and set out in greater detail in sub articles 7.2 – 7.5.

23. Counsel for Mr. Maguire, in advancing this argument, accepts that the Court of Appeal, in the judicial review proceedings, has already addressed the entitlement of persons arrested pursuant to a European Arrest Warrant, to information pursuant to the provisions of the Directive in this regard it is helpful to set forth the conclusions of Kennedy J. on the issue at paras. 74 – 77 of her decision:-

> *"74. Article 1 of the Directive addresses the subject matter of the Directive. The terms of the article draw a clear distinction between the rights of suspects or accused persons relating to criminal proceedings and to the accusation against them and the*

right to information of persons subject to a European Arrest Warrant. Article 7 which concerns the access to documents does not have application to a person arrested on foot of a EAW. The provision under the Directive which concerns EAW proceedings is limited to that of Article 5 which provides for a letter of rights. Annex II sets out a model letter of rights as provided for in Article 5 whereas the model for rights to be provided for in terms of Article 4 which concerns suspects or accused who are arrested or detained is set out in Annex I. It is therefore clear that the provisions of Article 7 do not apply to a person arrested on a EAW.

75. The appellants are not facing criminal proceedings in this jurisdiction and therefore cannot rely on the provision of Article 6 or Article 7. Article 5 applies to those who are arrested for the purpose of the execution of a European Arrest Warrant. Those persons must be provided promptly with an appropriate letter of rights in terms of Annex II but cannot rely on the provisions of Article 6 or 7.

76. In my view there is no basis to distinguish the decision in EP on the basis that the appellants are seeking information from the authorities in this jurisdiction rather than from the issuing state. Donnelly J. interpreted the Directive and the rights of the Directive provides for persons arrested on criminal charges and arrested on a EAW. The interpretation is not therefore based on whether the information sought from the requesting State or the issuing State.

77. In the circumstances I am satisfied that the trial judge was correct in finding that there was no evidence that the appellants' rights under the Directive would not be available to them in the requesting State should they be surrendered."

24. Counsel for Mr. Maguire, while acknowledging the decision of the Court of Appeal in the judicial review proceedings as regards the interpretation of the Directive argues that that decision was in a particular context, and that the context is not the same when this Court is giving consideration to the application to surrender a person on foot of a European Arrest Warrant. He submits that there is more at stake than what was sought in the judicial review proceedings and that in an application such as this, the issue is about the obligations of the issuing state to ensure that when somebody is arrested elsewhere in Europe pursuant to a European Arrest Warrant, that person is informed of the basis for the arrest and provided with relevant information about the arrest, and in particular is provided with information as regards his/her right to appeal or to challenge in the issuing state the underlying domestic arrest warrant on which the issue of the European Arrest Warrant depends. He argued also that the principle of equivalence in European law requires that persons arrested on foot of a European Arrest Warrant should receive equivalent treatment to those arrested pursuant to national arrest warrants, and it would be anomalous and contrary to that principle if those arrested pursuant to a European Arrest Warrant did not enjoy the full range of rights and entitlements provided by the Directive.

25. In advancing these arguments, counsel for Mr. Maguire relied upon a recent reference made by a court in Bulgaria to the Court of Justice of the European Union ("CJEU"), in

which the Bulgarian court posed questions as to the applicability of the Directive and in particular Articles 4, 6 and 7 of the Directive, to a person who has been arrested on the basis of a European Arrest Warrant. This reference appears to have been procured through an internet search and the precise status of the reference is unknown. However, that is not to doubt that such a reference has been made. Counsel for Mr. Maguire submits that notwithstanding the decision of the Court of Appeal as regards the limited relevance of the Directive to European Arrest Warrant proceedings, this Court should defer a decision on this application pending a decision of the CJEU on the reference by the Bulgarian court, or alternatively that this Court should make a similar reference to the CJEU.

26. In this regard, counsel for Mr. Maguire further argues that the Court should have regard to recent decisions of the CJEU concerning the entitlement of public prosecutors to issue European Arrest Warrants. Initially, counsel referred to cases such as OG (C 508/18), PI (C 82/19 PPU) and PF (C 509/18). These cases address issues arising out of the issue of European Arrest Warrants in some Member States by prosecutors, rather than by judges, and focus on the requirement under the Framework Decision that the issuance of a European Arrest Warrant must be subject to a dual level of protection, the first being at the stage of issue of a national arrest warrant , and the second being at the point of issue of a European Arrest Warrant. They consider how this dual level of protection may be achieved where it is a prosecutor issues the European Arrest Warrant.

27. Because it was indicated to the Court that there were still further decisions of the CJEU awaited, in which these matters are also addressed, and which were due to be delivered on 12th December, 2019 and which might be of relevance to the within proceedings, the proceedings were adjourned further to 17th December, 2019. The decisions which were awaited were indeed delivered on 12th December, 2019, although no official translations were available in English. In any case, counsel for Mr. Maguire produced supplemental submissions arising out of those decisions on the basis of unofficial translations. In the case of XD (C-625/19 PPU), in a passage relied upon by the respondents, the CJEU stated, as regards effective judicial protection in European Arrest Warrant applications that:-

> *"The Framework Decision 2002/584 forms part of a comprehensive system of guarantees relating to the effective judicial protection provided for by other Union rules, adopted in the field of judicial cooperation in criminal matters, which contribute to facilitating the exercise of the rights of the persons sought on the basis of a EAW even before he or she is handed over to the Member State of programme."*

(The use of the words "*of programme"* are not understood and may be a translation error.)

28. An identical paragraph appeared in another decision delivered on the same date in the case of YC (C-626/19 PPU) at p. 7 thereof. In these cases, the CJEU held that it is permissible for the second level of protection in the issue of a European Arrest Warrant to

be provided by means other than judicial oversight in the issue of the warrant, such as by providing a mechanism to appeal or otherwise challenge the issue of the European Arrest Warrant, either before or after the surrender of the requested person (see para. 70 of the decision in YC), or alternatively by affording the requested person the opportunity to challenge the national arrest warrant, which formed the basis for the issue of the European Arrest Warrant, as in XD. In both judgments the CJEU, in the course of its judgment made reference to the provisions of another Directive, Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings (the "2013 Directive"). At para. 73 in YC it is stated:-

> *"73. Article 10 of Directive 2013/48/EU of the European Parliament and of the Council of the 22nd October, 2013, on the right of access to a lawyer in criminal proceedings and in proceedings relating to the warrant of European judgment, on the right to inform a third party upon deprivation of liberty and on the right of persons deprived of their liberty to communicate with third parties and with consular authorities…, requires the competent authority of the executing Member State to inform, without undue delay after deprivation of liberty of the persons whose surrender is requested, that they have the right to assign a lawyer in the issuing Member State."*

29. Neither Ireland nor the United Kingdom have adopted the 2013 Directive. Counsel argued that the fact that Ireland has not done so serves to emphasise the importance of the applicability of the Directive in European Arrest Warrant proceedings. It is submitted that the EAWs are invalid and defective, since they did not contain information on the availability, under the laws of the issuing state, of challenging the lawfulness of the issuing of the EAWs, and nor was such information otherwise provided to the respondents.

In the case of Sean Paul Farrell

30. Points of objection were first delivered on behalf of Mr. Farrell on 5th May, 2017. Four objections were raised by this notice, but just one of these objections was pursued at the hearing of this application. By this objection, Mr. Farrell puts the applicant on full proof that the EAW relating to Mr. Farrell is compliant with the Act of 2003, and that the surrender of Mr. Farrell would be in accordance with the Act of 2003 and the Council Framework Decision of 13th June, 2002, on the European arrest warrant and the surrender procedure between Member States (2002/584/JHA) (the "Framework Decision").

31. A further point of objection was delivered on behalf of Mr. Farrell on 27th February, 2019. This is in identical terms to the further point of objection delivered on behalf of Mr. Maguire on 5th March, 2019, which I have set out above.

32. Mr. Farrell also adopted the objection advanced, for the first time, on behalf of Mr. Maguire at the commencement of the hearing of this application, as summarised at para. 19 above.

33. Each of Mr. Farrell and Mr. Maguire adopted the objections made by the other. All of the objections pursued by them at the hearing of the application are summarised above; in response to a specific question from me, counsel for the respondents confirmed that they were not pursuing any of the other objections made by them in their points of objection.

The Criminal Evidence (Northern Ireland) Order 1988

34. Since they are so central to these proceedings I set out below the provisions of Articles 3 and 4 of the 1988 Order:-

> *"Circumstances in which inferences may be drawn from accused's failure to mention particular facts when questioned, charged, etc.*
>
> *3.— (1) Where, in any proceedings against a person for an offence, evidence is given that the accused—*
>
> *(a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or*
>
> *(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, paragraph (2) applies.*
>
> *(2) Where this paragraph applies—*
>
> *(a) the court, in determining whether to commit the accused for trial or whether there is a case to answer;*
>
> *(b) a judge, in deciding whether to grant an application made by the accused under*
>
> *(i) Article 5 of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 (application for dismissal of charge where a case of fraud has been transferred from a magistrates' court to the Crown Court under Article 3 of that Order); or*
>
> *(ii) paragraph 4 of Schedule 1 to the Children's Evidence (Northern Ireland) Order 1995 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under Article 4 of that Order); and*
>
> *(c) the court or jury, in determining whether the accused is guilty of the offence charged,*
>
> *may—*

(i) draw such inferences from the failure as appear proper;

(2A) Where the accused was at an authorised place of detention at the time of the failure, paragraphs (1) and (2) do not apply if he had not been allowed an opportunity to consult a solicitor prior to being questioned, charged or informed as mentioned in paragraph (1).

(3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.

(4) This Article applies in relation to questioning by persons (other than constables) charged with the duty of investigating offences or charging offenders as it applies in relation to questioning by constables; and in paragraph (1) "officially informed" means informed by a constable or any such person.

(5) This Article does not—

(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from this Article; or

(b) preclude the drawing of any inference from any such silence or other reaction of the accused which could be drawn apart from this Article.

(6) This Article does not apply in relation to a failure to mention a fact if the failure occurred before the commencement of this Article.

Accused to be called upon to give evidence at trial

4.—(1) At the trial of any person (other than a child) for an offence paragraphs (2)and (4) apply unless—

(a) the accused's guilt is not in issue; or

(b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to... give evidence;

but paragraph (2) does not apply at the conclusion of the evidence for the prosecution, his legal representative informs the court that the accused will give evidence or, where he is unrepresented, the court ascertains from him that he will give evidence.

(2) Where this paragraph applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment conducted with a jury, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can,

if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.

(4) Where this paragraph applies, the court or jury, in determining whether the accused is guilty of the offence charged, may—

(a) draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question;

(5) This Article does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.

(6) For the purposes of this Article a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless—

(a) he is entitled to refuse to answer the question by virtue of any statutory provision, or on the ground of privilege; or

(b) the court in the exercise of its general discretion excuses him from answering it.

(7) Where the age of any person is material for the purposes of paragraph (1), his age shall for those purposes be taken to be that which appears to the court to be his age.

(8) This Article applies—

(a) in relation to proceedings on indictment for an offence, only if the person charged with the offence is arraigned on or after the commencement of this Article;

(b) in relation to proceedings in a magistrates' court, only if the time when the court begins to receive evidence in the proceedings falls after that commencement."

Further Information

35. On my direction the central authority here made a request for further information of the IJA by letter of 20th December, 2019, as follows:-

"1. Is it open to a trial court in the Issuing State (Northern Ireland) to draw inferences pursuant to article 3 and/or article 4 of the Criminal Evidence (Northern Ireland) order 1998 in connection with interviews outside the territory of the Issuing State (Northern Ireland), specifically those conducted in Milford and Letterkenny Garda stations with the two respondents?"

36. A reply to this request for information was received from District Judge Fiona Bagnall, presiding District Judge at Laganside Courts, by letter dated 10th January, 2020. In this reply, District Judge Bagnall divided the question asked into two questions, as follows:-

1) Is it open to a trial court in the Issuing State (Northern Ireland) to draw inferences pursuant to Article 3 and/or Article 4 of The Criminal Evidence (Northern Ireland) Order 1988 in connection with interviews outside of the territory of the Issuing State (Northern Ireland). Specifically, those conducted in Milford and Letterkenny Garda Stations with the two respondents?

2) Is it open to a trial court in Northern Ireland to draw inferences pursuant to Article 4 of The Criminal Evidence (Northern Ireland) Order 1988 in connection with interviews outside the territory of the issuing state, specifically those conducted in Milford and Letterkenny Garda Stations with the two respondents?

37. In reply to question 1, District Judge Bagnall stated:-

"In an interview conducted in Northern Ireland, the suspect is cautioned in accordance with Article 3 of the Criminal Evidence (NI) Order 1988 as follows:

'You do not have to say anything but I must caution you if you do not mention when questioned something which you later rely on in court it may harm your defence. If you do say anything it may be given in evidence.'

` *In the circumstances of this case, where the Garda interviews have been conducted without the caution under Article 3 being administered, the prosecution would not ask the court to draw inferences pursuant to Article 3 of the 1988 Order and it is not considered an adverse inference could be drawn by the trial court of its own volition."*

38. In answer to the second question posed, District Judge Bagnall replied as follows:-

"It is open to a court to draw an adverse inference under Article 4 of the 1988 Order if either accused does not give evidence on his own behalf at trial. However this is an entirely separate matter to their decision not to answer questions during Garda interview. Their position adopted at interview is not relevant to the inference that can be drawn under Article 4. It should be noted that the ECHR in Murray v. U.K. has found that the provisions of the 1988 Order did not constitute a violation of Article 6 (1) of the Convention."

Affidavits of Sean Devine BL

39. Affidavits of laws were sworn on behalf of Mr. Farrell by Sean Devine BL, a member of the Bar of Northern Ireland who has practiced in that jurisdiction continuously since 2007. He is also a member of the Bar of Ireland. He deposes as to the possible impacts of Articles 3 and 4 of the 1988 Order on the trial of Mr. Farrell. The first affidavit was sworn on 4th December, 2019, in advance of these proceedings, and his second affidavit was filed on 29th January, 2020, in order to address the response received by this Court from the IJA

to the request for additional information made by this Court pursuant to s. 20 of the Act of 2003 referred to above.

40. In his first affidavit, Mr. Devine states, at para. 20, inter alia:-

> *"In my opinion, having regard to the various statutory provisions relating to the drawing of inferences from failure to answer questions, it is unlikely that the prosecution would succeed in persuading a trial judge to draw adverse inferences from the failure of Mr. Farrell to answer questions during Garda interview. Regarding the jurisdiction of the trial judge to draw an adverse inference from the silence of the accused at trial, it is highly likely, in my opinion, that any trial judge in Northern Ireland would accede to an application by the Crown to draw such inferences, based on the evidence adduced at trial other than his failure to answer questions asked by Gardaí. However, I cannot say, as a matter of law, that the trial judge would not be entitled to take into account the opportunity Mr. Farrell had to offer explanations to Gardaí, which said opportunity was declined by him. Indeed, the Crown will be likely to invite the Court to look at 'all of the circumstances' when deciding whether to draw such inferences (and the extent of those inferences) and that could include his decision not to respond to Gardaí questioning."*

41. In relation to the adverse inferences which may be drawn under Article 4 of the 1988 Order, Mr. Devine avers, at para. 31:-

> *"The judge must tell the jury that the burden of proof remains upon the prosecution throughout and that the defendant is entitled to remain silent. An inference from failure to give evidence cannot on its own prove guilt. Therefore, the jury must be satisfied that the prosecution have established a case to answer before drawing any inferences from silence. Importantly, and perhaps surprisingly, the judge should not go further and say that the case is not strong and they should therefore be less ready to draw an inference against him. The rationale being that this would involve the judge making an assessment at the strength of the prosecution case which would pre-empt the jury's role."*

42. In his second affidavit, Mr. Devine addresses the additional information provided by District Judge Bagnall. In relation to Article 3 of the 1988 Order, he avers that while he does not take issue with the response given by District Judge Bagnall, nonetheless he believes "*that the Crown will have a wide discretion as to how it puts its case and it is highly likely that they will place before the Court a detailed exposition of Mr. Farrell's known movements and activities in the time immediately after the events that form the subject of the charges in this case*." At paras. 14 and 15 of his second affidavit he avers:-

> *"14. I say that the explanations from the parties about the fact that the interviews took place in Milford Garda station and that, for example, no reliance is placed upon those interviews as the 'incorrect' warning was given (i.e. a warning which would*

not trigger the use of Article 3) could or would probably lead to judicial questions concerning the wording of the warning that was given.

15. I say that the precise impact of this is difficult to quantify but I believe that any impact could only be detrimental to an accused, even in the absence of a statutory adverse inference under Article 3. I say further that this is especially so within the context of trial proceedings in Northern Ireland, where practitioners and Courts are conditioned to the fact that silence during interview can have very significant and harmful effects upon an accused's defence at trial, due to the existence of the 1988 Order for such a long time. I say that any trial Court in Northern Ireland would expect the defence to be keen to adduce an exculpatory account, if given during interview, and so the absence of such an account would inevitably lead to a presumption that the accused remained silent. In my opinion, this could only accrue to the detriment of the accused."

43. At para. 17 of his second affidavit he avers:-

"I say that the UK response dated 10th January 2020, composed with the kind assistance of the PPSNI, is couched in suitably and appropriately qualified terms. That is, it states that "it is considered that" the trial court could not, of its own motion, take silence in the Garda Station into account in deciding the nature of the adverse inference from silence in the trial. I would tend to agree with this proposition, subject to the discussion above in terms of the fact that the existence of these interviews will inevitably be a significant degree of focus upon Mr. Farrell's arrest and detention for a period of time which was consistent with him being interviewed by police. Under normal circumstances, these interviews would, at the very least, be referred to."

44. While each of the respondents filed their own points of objection, at hearing each adopted the objections of the other to the application. The points of objection formally served by each of the respondents each contain objections that were not pursued at the hearing of the application, and which counsel for the respondents confirmed were not being relied upon by the respondents. This decision, therefore, is concerned only with those objections argued on behalf of the respondents at the hearing of the application, which I address below.

Discussion and decision

45. I will first address the arguments made as regards the entitlement to information pursuant to the Directive. The respondents accept that the Court of Appeal has already ruled, in the judicial review proceedings, on the interpretation and application of the Directive to these proceedings. However, they seek to distinguish that decision and the application that was then before that court from the arguments that they are making in these proceedings that their clients have an entitlement to information under the Directive. It is suggested that there is some distinction to be drawn between what is described as a "*disclosure matter*" in the judicial review proceedings and the information required to be given at the time of arrest on foot of the European Arrest Warrant.

46. It is correct to say that the respondents, in seeking the reliefs they sought in the judicial review proceedings relied on more than just the Directive, such as statutory regulations, fair procedures and due process (see paras. 7-11 of the decision of Donnelly J. in this Court). Also, some of the materials they sought by way of those proceedings were, arguably, outside the scope of the Directive, even if the Directive was found to be applicable, but there is no need to consider that possibility in any detail. I mention it only because for these reasons there may be some subtle distinction to be drawn between the context in which the Directive was invoked in the judicial review proceedings and the context in which it is invoked in these proceedings. But if there is, it is so subtle as to be insignificant.

47. In para. 6 (ii) of her decision, Donnelly J. records that the respondents were seeking an order of mandamus requiring the first respondent (in those proceedings) to provide the information requested by the applicant pursuant to the provisions of EU Directive 13/2012. Both Donnelly J. and, on appeal the Court of Appeal ruled very clearly that the provisions of the Directive which the respondents are seeking to invoke in these proceedings are provisions which only have application when a person is arrested, in the ordinary course of proceedings, to face charges in the same Member State in which that arrest takes place, as distinct from upon arrest pursuant to a European Arrest Warrant. The respondents are not charged with any criminal offence in this jurisdiction. In so far as there was a criminal investigation here, it ended with the decision of the DPP not to proffer charges against them. The Court of Appeal has clearly ruled that, in European Arrest Warrant proceedings, the entitlement of arrested persons is restricted to Article 5 of the Directive. Furthermore, Donnelly J. had previously handed down a decision to precisely the same effect in *Minister for Justice Equality and Law Reform v. E.P.* [2015] IEHC 662. This Court is bound by those decisions.

48. So far as the reference by the Bulgarian court to the CJEU is concerned, very little is known about the status of that reference. There is nothing to indicate that it has been accorded the expedited procedure. No authority was opened to this Court as to the approach to be taken when a court is informed that questions that might be of relevance to the deliberations of a court in one Member State, have been sent for consideration to the CJEU by the courts of another Member State. However, in the particular circumstances of this case, and having regard to:-

    1) The uncertainty as to whether or not the reference of the Bulgarian Court has been accorded the expedited procedure;

    2) The objectives of the Framework Decision to provide a simplified and expeditious system of surrender, between Member States, of persons wanted for prosecution of offences or serving sentences handed down by a Member State;

    3) The fact that this issue has already been the subject of two detailed judgments of this Court, and one of the Court of Appeal.

It is my view that it would be both incorrect and undesirable for this Court to defer decision on this application pending a decision from the CJEU on the reference made by the Bulgarian court, or for this Court to make any reference of its own to the CJEU.

49. While counsel for Mr. Maguire argued that, since neither Ireland nor the United Kingdom have adopted the 2013 Directive, this lends even greater force to the argument that the respondents should be entitled to receive the information provided for under the Directive, I cannot accept this argument. The fact is that the 2013 Directive has not been adopted by either the issuing state or the executing state in this application. It is, quite simply, irrelevant to these proceedings. Moreover, the fact that it has not been adopted either by this State or by the United Kingdom, cannot be used for the purpose of overturning or in some fundamental way changing the interpretation of the Directive by the Court of Appeal. The fact that this State has elected not to adopt one directive, cannot be a basis to alter the meaning or interpretation of another.

50. Insofar as reliance has been placed upon recent decisions of the CJEU, these cases were all concerned with problems arising from the issue of European Arrest Warrants by prosecutors. In the cases referred to above, the CJEU held that the possibility of challenging the issue of a national arrest warrant or a European Arrest Warrant in the issuing state can offer a solution to this problem. It appeared to take some comfort from Article 10 (4) of the 2013 Directive, which deals with the right of access of a requested person to a lawyer in the issuing state, presumably because that might help to fulfil the rights of a requested person to challenge the validity of the national arrest warrant or the European Arrest Warrant. I might add that it is notable that Article 10(6) of the 2013 Directive provides that the right of a requested person to appoint a lawyer in the issuing state is stated to be without prejudice to the time limits set out in the Framework Decision. In any case, it is clear that those recent decisions of the CJEU only have practical application in those Member States in which the European Arrest Warrant is issued by a prosecutor and not by a court. That does not arise in these proceedings. The respondents have been accorded their dual level of protection through judicial oversight in the issue of both the national arrest warrants and the EAWs.

51. Finally, insofar as arguments were advanced on the basis of the principle of equivalence, they were not developed in any meaningful way and no authorities were opened to the Court as to its application in these circumstances. The principle of equivalence, in general terms, is concerned with the obligation of Member States to ensure that the law of the European Union is applied and enforced by Member States in a manner equivalent to the domestic law of those states. It does not seem to me to be engaged at all in these proceedings. There is no question of not applying either the Directive or the Framework Decision in any manner that is less effective than domestic law. The fact that a person arrested on foot of a European Arrest Warrant is not entitled to receive the same information that he or she is entitled to receive if arrested on foot of a national arrest warrant in respect of the same matters is in no way incongruous. The European Arrest Warrant is the mechanism by which persons are surrendered in order to face charges (or, as the case may be, to serve sentences) that are the subject of a national arrest warrant.

It is entirely logical that it is only upon the surrender of the person concerned to face those charges that he or she will then be entitled to receive the information required by the Directive. If these rights were to be engaged at the time that a person is arrested pursuant to a European Arrest Warrant, it would, as I said above, frustrate the time limits which are a key feature of the Framework Decision.

52. For all of these reasons, I consider that the points of objection that have been raised on the basis of the Directive or the reference made by the Bulgarian court to the CJEU, the 2013 Directive and the recent decisions of the CJEU must be rejected.

53. I turn now to address the objections to surrender advanced on behalf of the respondents as regards the entitlement of a trial court in Northern Ireland to draw inferences pursuant to the 1988 Order. The first of these objections arises out of the possible application of Article 3 of the 1988 Order, particulars of which are set out above. It is first necessary to consider the opinion of Mr. Devine, counsel retained for Mr. Farrell, but relied upon also by Mr. Maguire in relation to this objection. This opinion is expressed over the course of two affidavits, the second being in response to the additional information received from the IJA. As regards Article 3 of the 1988 Order, the most relevant parts of Mr. Devine's opinion are set out in the passages quoted from the affidavits of Mr. Devine at para.s 40, 42 and 43 above. Para.s 42 and 43 set forth passages from Mr. Devine's second affidavit. Para. 40 quotes from a passage of Mr. Devine's first affidavit which was sent to the IJA with the request for additional information. In its response of 10th January, 2020, to that request, the IJA stated as regards this issue:-

> *"In the circumstances of this case, where the Garda interviews have been conducted without the caution under Article 3 being administered, the prosecution would not ask the court to draw inferences pursuant to Article 3 of the 1988 Order and it is not considered an adverse inference could be drawn by the trial court of its own volition."*

54. The IJA then addressed whether or not adverse inferences might be drawn under Article 4 of the 1988 Order by reason of the failure on the part of the respondents to answer questions at interview:-

> *"It is open to a court to draw an adverse inference under Article 4 of the 1988 Order if either accused does not give evidence on his own behalf at trial. However, this is an entirely separate matter to their decision not to answer questions during Garda interview. Their position adopted at interview is not relevant to the inference that can be drawn under Article 4…"*

55. Mr. Devine addresses the additional information provided by the IJA in his second affidavit. He addresses the matter at paras. 12 and following as follows:-

> *"12. I say that the trial judge would be likely to be made aware that the accused was arrested and detained for two days. Furthermore, I say and believe that, even if the Crown did not seek to adduce the fact that Mr. Farrell was interviewed, the*

court could ask whether he was interviewed. In those circumstances, it would not be open to the parties to mislead the court and so the likely and natural outworking of this would be some judicial questioning in terms of the product of those interviews.

13. I say and believe that a court in this jurisdiction would be naturally interested in the accused's responses to police questioning and would be accustomed to an interview being a key part of the investigation. This would be the case even in the context of a 'no comment' interview.

14. I say that the explanations from the parties about the fact that the interviews took place in Milford Garda Station and that, for example, no reliance is placed upon those interviews as the 'incorrect' warning was given (i.e. a warning which would not trigger the use of Article 3) could or would probably lead to judicial questions concerning the wording of the warning that was given.

15. I say that the precise impact of this is difficult to quantify but I believe that any impact could only be detrimental to an accused even in the absence of a statutory adverse inference under Article 3. I say further that this is especially so within the context of trial proceedings in Northern Ireland, where practitioners and courts are conditioned to the fact that silence during an interview can have very significant and harmful effects upon an accused's defence at trial, due to the existence of the 1988 Order for such a long time. I say that any trial court in Northern Ireland would expect the defence to be keen to adduce an exculpatory account, if given during interview, and so the absence of such an account would inevitably lead to a presumption that the accused remained silent. In my view this could only accrue to the detriment of the accused.

16. I say and believe that there is a prohibition on references to such interviews under the law and Constitution of the Republic of Ireland, other than by way of formula such as, 'the accused was interviewed but nothing of probative value emerged'.

17. I say that UK response dated 10th January, 2020, composed with the kind assistance of the PPSNI, is couched in suitably and appropriately qualified terms that is, it states that 'it is considered that' the trial court could not of its own motion, take silence in the Garda station into account in deciding the nature of the adverse inference from silence in the trial. I would tend to agree with this proposition, subject to the discussion above in terms of the fact that the existence of these interviews will inevitably be a significant degree of focus upon Mr. Farrell's arrest and detention for a period of time which was consistent with him being interviewed by police. Under normal circumstances these interviews would, at the very least be referred to."

56. The provisions of the 1988 Order are both detailed and clear. Article 3(1)(A) refers to an accused being questioned, under caution by a constable. It is clear that neither of the respondents was so questioned. They were questioned in this jurisdiction, by the Gardaí,

following a caution that is significantly different in its terms to that required for the purposes of Article 3 of the 1988 Order.

57. The argument that is being advanced on behalf of the respondents is to the effect that, while it is not open to the trial court to draw inferences under Article 3 of the 1988 Order, it might nonetheless draw adverse inferences from the silence of the respondents during questioning by Gardaí when looking at "*all of the circumstances*". Mr. Devine's opinion does not appear to me to be based so much on an interpretation of Articles 3 and 4 of the 1988 Order, as on his experience as a practicing barrister in criminal trials in Northern Ireland. This has led him to conclude that notwithstanding the clear and express provisions of Articles 3 and 4 of the 1988 Order, and the further information provided by the IJA in its letter of 10th January, 2020, a court might well draw adverse inferences from the silence of the respondents at Garda questioning, simply because the courts are used to drawing such inferences where accused persons are questioned, following the appropriate caution, in accordance with the provisions of the 1988 Order.

58. This opinion places very little faith in the courts of the issuing state to distinguish between two very different sets of circumstances. It follows that if this Court were to accept Mr. Devine's opinion on the issue, it would be failing to accord to the authorities in Northern Ireland, and in particular to the judiciary in that jurisdiction, the trust and confidence which this Court is obliged to accord to those institutions pursuant to the express terms of the Framework Decision, and s. 4A of the Act of 2003, which provides "*It shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown.*" In my opinion, it is unthinkable that adverse inferences can be drawn from the silence of the respondents in Garda custody at a trial in Northern Ireland and I am obliged to have trust and confidence in the judiciary of Northern Ireland that no such inferences will be drawn, as indicated in the letter received from the IJA dated 10th January, 2020.

59. It is further submitted on behalf of the respondents that this application should be refused because they were not warned, while being questioned in this jurisdiction, that they would not have an absolute right to silence at trial in Northern Ireland, and that adverse inferences might be drawn (at trial in Northern Ireland) from their failure to answer questions while in Garda custody. It is submitted that, in failing to so warn the respondents, there has been a violation of the constitutional rights of the respondents such that their surrender to Northern Ireland is prohibited . Reliance is placed upon the decision of the Supreme Court in *Larkin v. O'Dea* [1995] 2 IR 485.

60. The respondents further rely on the decision of the Court of Criminal Appeal in the matter of *The People (DPP) v. Coddington* [2001] 5 JIC 3101, in which the court held that the direction given by the trial judge was inconsistent with the duty of a trial judge to instruct the jury that the onus to establish its case, including inferences, beyond reasonable doubt, remains at all times with the prosecution. The court held:-

> *"While the trial judge may remind the jury of the fact that the accused had, as is his right, not given evidence in the trial they must be expressly instructed not to*

draw any inference from the exercise of that right. In this case, the learned trial judge not only recalled that the accused had not given evidence but did so in the context of the failure of the defence to provide evidence of an innocent explanation for the presence of the money and without any direction that no inference was to be drawn from his failure to give evidence."

61. It is submitted that there has been an egregious violation of the respondents' constitutional rights in failing to inform them in this jurisdiction of the difference between their rights to silence at trial in this jurisdiction and that which prevails in the requesting state. It is also submitted that the fact that the respondents will be denied their constitutional right to silence at trial in Northern Ireland is apparent from the judgment of the Crown Courts sitting in Belfast in the matter of R v. McVeigh [2019] NICC 8. Those proceedings involved the trial of Mr. Seán McVeigh, who was tried and found guilty of the offences the subject matter of the EAWs.

62. It is submitted by the respondents that the right to be presumed innocent includes the right to silence at trial and is not confined to the boundaries of the State. Article 4 of the 1988 Order will result, therefore, in an egregious breach of the constitutional rights of the respondents, such as that referred to by Murray C.J. in *Minister for Justice and Equality v Brennan* [2007] 3 IR 732 and O'Donnell J. in *Minister for Justice v. Balmer* [2016] IESC 25, referred to below. Moreover, there are substantial grounds for believing that there is a real risk that the constitutional rights of the respondents will be violated at trial in Northern Ireland, such as to meet the test for refusal of an application for surrender, as identified in *Minister for Justice, Equality & Law Reform v. Rettinger* [2010] IESC 45, and again more recently, in *Minister for Justice and Equality v. Celmar* [2019] IESCDET 45.

63. I will first address the argument based on the warning given in custody. It is not in dispute that the respondents received the appropriate caution from Gardaí prior to commencement of interviews in Milford and Letterkenny, and that they exercised their right to silence at interview. There is no obligation on Gardaí to provide separate cautions of the kind to which they are entitled in the issuing state (upon their surrender), whether the United Kingdom or any other state, or as may be appropriate in that state. In fact the Gardaí were not even to know that the respondents would eventually be sought for trial in Northern Ireland, although they may well have surmised as much. Moreover, this is an entirely novel proposition, and if accepted would be quite unworkable. As counsel for the applicant submitted, it would place the Gardaí in a situation where two parallel interviews might be required, depending on the response of those being questioned to the different cautions. The reliance placed by the respondents in *Larkin v O'Dea* is misplaced. In that case the surrender of the respondents was refused because the court found that evidence taken from the applicant in that case which was to be used at trial in Northern Ireland was found to have been obtained, in this jurisdiction, in violation of his constitutional rights. It follows therefore that he could not be sent to face a trial in which that evidence would be used against him. While it is also the case that materials obtained by the Gardaí following upon the arrest of the respondents has been sent to Northern Ireland and is

likely to be used against them at their trial, no argument has been advanced that this evidence was improperly obtained. For these reasons, this argument must be rejected.

64. I turn next to address the argument that, at the conclusion of their trials, inferences adverse to the interests of the respondents may be drawn by the court if, having been warned by the court in the terms required by Article 4 of the 1988 Order, the respondents either do not give evidence or, that if they do so, they fail to answer any question without good reason. It is contended on behalf of the respondents that such inferences amount to an egregious breach of their constitutional rights in this jurisdiction, such that their surrender should be refused.

65. The right to silence under Irish law and its status as a constitutionally protected right is well established and recognised in decisions relied upon by the respondents such as *Heaney v. Ireland* [1994] 3 IR 593 and *The People (Director of Public Prosecutions) v. Finnerty* [1999] 4 IR 364, in which case, Keane J. (as he then was) stated:-

> *"It follows that the right of suspects in custody to remain silent, recognised by the common law, is also a constitutional right and the provisions of the Act of 1984, must be construed accordingly. Absent any express statutory provisions entitling a court or jury to draw inferences from such silence, the conclusion follows inevitably that the right is left unaffected by the Act of 1984, save in cases coming within ss. 18 and 19, and must be upheld by the courts."*

66. It is clear from this decision, and in *Heaney*, that the right to silence, while enjoying constitutional protection, is not unqualified and may be abridged by statute. Indeed, counsel for the respondents acknowledge that the right is not unqualified, but submit that if it is to be abridged in any way, the person in detention should be warned of any power that exists allowing adverse inferences to be drawn from a failure to answer questions or give evidence at trial. In this case, it is submitted that the abridgment of the right to silence (at trial) under the 1988 Order, coupled with the fact that the respondents were not informed whilst in custody in this jurisdiction that they would not have a right to silence at trial, amounts to an egregious breach of the constitutional rights of the respondents.

67. Throughout the European Union, Member States operate different procedures at trial. The fact that procedures will vary from one Member State to another is no bar to surrender. If it were otherwise, the entire system of surrender provided for in the Framework Decision, as implemented in the Act of 2003 in this jurisdiction, would collapse. This was recognised in *Minister for Justice v. Brennan* [2007] 3 IR 732. In those proceedings, which were concerned with an argument that provisions in United Kingdom law imposing a mandatory minimum sentence, which did not take into account the particular circumstances of the respondent in those proceedings, violated his rights under the Constitution. At paras. 35-40 of his judgment, Murray C.J. stated as follows:-

> *"[35] There is no doubt that the operation of the process for surrender as envisaged by the Act of 2003, as amended, is subject to scrutiny as to whether in any particular*

case it conforms with constitutional norms and in particular due process so that, for example, the respondent in such an application has an opportunity to be duly heard in the proceedings.

[36] However the argument of the respondent goes much further. He has contended that the sentencing provisions of the issuing State, in this case the United Kingdom, did not conform to the principles of Irish law, as constitutionally guaranteed, governing the sentencing of persons to imprisonment on conviction before our Courts for a criminal offence.

[37] The effect of such an argument is that an order for surrender under the Act of 2003, and indeed any order for extradition, ought to be refused if the manner in which a trial in the requesting state including the manner in which a penal sanction is imposed, does not conform to the exigencies of our Constitution as if such a trial or sentence were to take place in this country. That can hardly have been the intention of the Oireachtas when it adopted s. 37(1) of the Act of 2003 since it would inevitably have the effect of ensuring that most requests for surrender or extradition would have to be refused. And indeed if that were the intent of the Framework Decision, which the Act of 2003 implements, and other countries applied such a test from their own perspective, few, if any, would extradite to this country.

[38] Indeed it may be said that generally extradition has always been subject to a proviso that an order for extradition, as with any order, should not be made if it would constitute a contravention of a provision of the Constitution. I am not aware of any authority for the principle that the extradition or surrender of a person to a foreign country would contravene the Constitution simply because their legal system and system of trial differed from ours as envisaged by the Constitution.

[39] The manner, procedure and mechanisms according to which fundamental rights are protected in different countries will vary according to national laws and constitutional traditions. The checks and balances in national systems may vary even though they may have the same objective, such as ensuring a fair trial. There may be few, if any, legal systems which would wholly comply with the precise exigencies of our Constitution with regard to these matters. Not all for example will provide a right to trial by jury in exactly the same circumstances as our Constitution does in respect of a trial for a non-minor offence. Rules of evidence may differ. The fact that a person would be tried before a judge and jury in this country for a particular offence could not, in my view, be a basis for refusing to make an order for surrender solely on the grounds that in the requesting State he or she would not be tried before a jury. The exceptions which we have to the jury requirement, as in trials before the Special Criminal Court, acknowledges that a fair trial can take place without a jury even though it is constitutionally guaranteed for most trials in this country.

[40] That is not by any means to say that a Court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may well be egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting State where a refusal of an application for surrender may be necessary to protect such rights…"

68. Similarly, in *Minister for Justice v. Balmer* [2016] IESC 25, O'Donnell J., having referred to a number of cases, including *Minister for Justice v. Brennan*, said, at para. 31:-

"[31] These cases are all examples of circumstances where objections under s. 37 have failed. In each case, even assuming that the impugned foreign provision would have been found to be incompatible with the Irish Constitution if enacted in Irish law, the court in each case nevertheless found that the surrender of such a person was not prevented by s. 37, or, indeed by the Constitution of its own force. The undesirability and inappropriateness of scrutinising foreign laws by reference to Irish constitutional standards is itself consistent with the approach taken in The People (DPP) v. Robert Campbell [1983] 2 Ferwen 131 where, notwithstanding the fact that the trial occurred in the jurisdiction of the courts, the court did not apply Irish constitutional standards to the detention of suspects in Northern Ireland. Even though these cases are individual instances, they form a broadly consistent line of authority. They illustrate an approach which is, moreover, compatible with the observations of Murray C.J. in Minister for Justice v. Brennan [2007] IESC 21, [2007] 3 IR 732 and, indeed, both the observations made and the decision in Nottinghamshire County Council v. KB [2011] IESC 48, [2013] 4 IR 662."

69. The applicant relies upon the decisions above and also the decision of the Supreme Court in the case of *Minister for Justice v. Buckley* [2015] 3 IR 619. In that case, the surrender of the respondent was sought to face conspiracy charges in the United Kingdom. The respondent contended that certain provisions of the Police and Criminal Evidence Act, 1984 in the United Kingdom, which permitted the introduction into evidence of materials that would prove that other persons had been convicted of certain offences, gave rise to a risk of a violation of his rights guaranteed under Article 38 of the Constitution. In a passage relied upon by the applicant in these proceedings, O'Donnell J. held as follows, at para. 28:-

"[28] I would, therefore, summarise matters this way. First, the case advanced by the respondent is hypothetical, in that its actual or likely impact on the respondent is unclear, and certainly not capable of being characterised as a defect in the system of justice of the requesting state. Second, even if, hypothetically, ss. 74 and 75 of the Act of 1984 are not in accordance with the values found in Article 38, it is immaterial, if the respondent cannot show that what would be at issue would be, or is likely to be, an "egregious" departure amounting to a denial of fundamental or human rights (per Murray C.J. in Brennan [2007] IESC 21, [2007] 3 IR 732 at para. 40, p. 744). There would have to be significantly more: a real and substantive

defect in the system of justice, where fundamental rights were likely to be placed at risk, or actually denied. As Murray C.J. pointed out in Brennan, rules of evidence "may differ" between states, and that alone does not at all lead to the necessary conclusion that there is a breach of fundamental rights in the requesting state. Finally, and again as held in Minister for Justice v. Brennan [2007] IESC 21 and Nottinghamshire County Council v. KB [2011] IESC 48, [2013] 4 IR 662, the reach of Article 38, save in exceptional circumstances, goes no further than the boundaries of the State. There is nothing in Article 38 to suggest anything beyond that. What is in question, then, is the lawfulness of the surrender of the respondent in this jurisdiction. I would, therefore, answer the first question in the negative."

70. It follows that it is necessary to consider whether or not Articles 3 and 4 of the 1988 Order are likely to give rise to an egregious departure amounting to a denial of the respondents' fundamental or human rights. In considering this, it is useful at this juncture to refer to the decision of the European Court of Human Rights (the "ECtHR") in the case of *John Murray v. the United Kingdom* (30 EHRR CD 57), a decision of that court of 8th February, 1996. In those proceedings, the ECtHR was required to consider, inter alia, whether or not Articles 3 and 4 of the 1988 Order violated Article 6 of the European Convention on Human Rights (the "Convention"). At paras. 45 and 46 of its decision, the court stated:-

"45. Although not specifically mentioned in Article 6 (art. 6) of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (art. 6) (see the Funke judgment cited above, loc. cit.). By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6 (art. 6).

46. The Court does not consider that it is called upon to give an abstract analysis of the scope of these immunities and, in particular, of what constitutes in this context 'improper compulsion'. What is at stake in the present case is whether these immunities are absolute in the sense that the exercise by an accused of the right to silence cannot under any circumstances be used against him at trial or, alternatively, whether informing him in advance that, under certain conditions, his silence may be so used, is always to be regarded as 'improper compulsion'.

47. On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.

Wherever the line between these two extremes is to be drawn, it follows from this understanding of 'the right to silence' that the question whether the right is absolute must be answered in the negative."

71. The court then went on to consider the specific proceedings and noted that while the proceedings were without a jury, the trier of fact was an experienced judge. It further noted that the drawing of inferences under the 1988 Order is subject to an important series of safeguards designed to respect the rights of the defence and to limit the extent to which reliance can be placed on inferences. It noted at para. 51:-

"In the first place, before inferences can be drawn under Articles 4 and 6 of the Order appropriate warnings must have been given to the accused as to the legal effects of maintaining silence. Moreover, as indicated by the judgment of the House of Lords in R. v. Kevin Sean Murray the prosecutor must first establish a prima facie case against the accused, i.e. a case consisting of direct evidence which, if believed and combined with legitimate inferences based upon it, could lead a properly directed jury to be satisfied beyond reasonable doubt that each of the essential elements of the offence is proved (see paragraph 30 above).

The question in each particular case is whether the evidence adduced by the prosecution is sufficiently strong to require an answer. The national court cannot conclude that the accused is guilty merely because he chooses to remain silent. It is only if the evidence against the accused 'calls' for an explanation which the accused ought to be in a position to give that a failure to give any explanation 'may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty'. Conversely if the case presented by the prosecution had so little evidential value that it called for no answer, a failure to provide one could not justify an inference of guilt (ibid.). In sum, it is only common-sense inferences which the judge considers proper, in the light of the evidence against the accused, that can be drawn under the Order.

In addition, the trial judge has a discretion whether, on the facts of the particular case, an inference should be drawn. As indicated by the Court of Appeal in the present case, if a judge accepted that an accused did not understand the warning given or if he had doubts about it, 'we are confident that he would not activate Article 6 against him'… Furthermore, in Northern Ireland, where trial judges sit without a jury, the judge must explain the reasons for the decision to draw inferences and the weight attached to them. The exercise of discretion in this regard is subject to review by the appellate courts."

72. The court then went to analyse the application of the 1988 Order to the specific circumstances of the case, and having done so it did "*not consider that the criminal proceedings were unfair or that there had been an infringement of the presumption of innocence".* Accordingly, there was no violation of Article 6 of the Convention.

73. However, the ECtHR also concluded that there had been a violation of the applicant's rights under Article 6 of the Convention by reason of the fact that the applicant did not have access to his solicitor from the outset of his interview by the police, which right was of particular importance given Article 3 of the 1988 Order, and the implications for the applicant if he chose to remain silent during questioning .On the basis of this finding, the respondents argue that, although the respondents in these proceedings at all times had access to a solicitor, that was in this jurisdiction, and they therefore did not receive the appropriate advices as regards the 1988 Order. However, as I have already determined above, there was no obligation on the Gardaí to provide the respondents with any caution other than the caution that they are obliged to provide in this jurisdiction. Furthermore, as I have also determined above, on the basis of the evidence before me, and in particular the response to further information received from the IJA, and also having regard to my obligation to have trust and confidence that the fundamental rights of the respondents will be respected upon their surrender, this argument does not advance the respondents' case.

74. Somewhat unusually, in this case, it is possible to see how the court in Northern Ireland dealt with a person charged with the same offences (arising out of the same alleged acts) with which it is intended to charge the respondents, and how the court applied Articles 3 and 4 of the 1988 Order in those proceedings. In his written decision in *R v. McVeigh* [2019] NICC 8, the judge, HH Fowler QC, reminded himself of the principles to be applied in deciding whether or not the prosecution proved its case, particularly having regard to the fact that he was acting as a judge alone, without a jury. He reminded himself that the burden of proof lies on the crown; that the prosecution must prove the defendant guilty beyond a reasonable doubt; that the court must decide the case only on the evidence established before it. He noted that the prosecution case depended on circumstantial evidence, and the principles applicable in considering circumstantial evidence. He reminded himself that he must consider all of the evidence and guard against distorting the facts or the significance of the facts to fit a certain proposition and that he must be satisfied that no explanation other than guilt is reasonably compatible with the circumstances.

75. He then went on to conduct a detailed analysis of all of the facts and the forensic evidence. At paras. 109 and 110 of his judgment, under the heading "*Defendant's failure to give evidence"*, he stated:-

> *"[109] At the conclusion of the Crown case the court addressed counsel for the Defendant in the usual terms stating that if the Defendant chose not to give evidence the court may draw such inferences as appear proper from their failure to do so. I enquired if the Defendant intended to give evidence and if not had he been advised about the inferences which might be drawn if he chose not to do so. Mr Pownall QC stated that his client did not intend to give evidence and stated that his client had been advised about the inferences which might be drawn from his failure to do so.*

[110] The Defendant is entitled not to give evidence, to remain silent and to make the prosecution prove his guilt beyond reasonable doubt. Two matters arise for him not giving evidence. The first is that the case is tried according to the evidence. The Defendant has given no evidence at his trial to undermine, contradict or explain the evidence given by the prosecution witnesses. Secondly, the law is that the court may draw such inferences as appear proper from the failure on the part of the Defendant to give evidence. The court must decide whether it is proper to hold the Defendant's failure to give evidence against him in deciding whether he is guilty. The court may only draw an adverse inference against the Defendant for failing to go into the witness box to give an explanation for, or an answer to, the case against him if the court considers that it is a fair and proper conclusion for the court to reach. The court must first be satisfied that the prosecution case is sufficiently strong to clearly call for an answer by the Defendant. Secondly it must be satisfied that the only sensible explanation for his silence is that he has no answer or none that would bear examination. I remind myself that the courts should not find the Defendant guilty only or mainly because he did not give evidence. But the court may take into account as some additional support for the prosecution case the fact that the Defendant has not given evidence when deciding whether the Defendant's case is true or not."

The judge then proceeded to give his conclusions by reference to the evidence and drew inferences against the defendant on the basis of the evidence, and the fact that the defendant had chosen to say nothing in relation to the case against him which the judge held "cries out for an explanation".

76. In addition to relying upon the affidavit evidence of Mr. Devine, the respondents rely upon the case of *R v. McVeigh* in support of their argument that, if the respondents exercise their right to silence at trial in Northern Ireland, this is likely to result in adverse inferences being drawn by the trial judge, such as occurred in the case of Mr. McVeigh. While it is acknowledged that in this jurisdiction there is legislation that permits the drawing of adverse inferences in the context of the failure of an accused person to answer certain questions under questioning from Gardaí at the investigation stage, there is no legislation that permits the drawing of inferences from the failure of an accused to give evidence at his own trial. That, it is submitted, goes beyond the bounds of what is permissible under the Constitution, and taken together with the fact that the respondents received no warning, when being questioned by the Gardaí, that such inferences are likely to be drawn if the respondents are placed on trial in Northern Ireland, would constitute an egregious violation of the respondents' constitutional rights.

77. In considering whether or not Articles 3 and 4 of the 1988 Order will give rise to an egregious violation of the constitutional rights of the respondents, it is useful to refer to the observations of the Supreme Court in the case of *Rock v. Ireland [*1997] 3 IR 484 in its consideration of the constitutionality of the legislation impugned in those proceedings. At page 501 of the judgement, Hamilton C.J. stated:-

"It is the opinion of this Court that, in enacting ss. 18 and 19 of the Act of 1984, the legislature was seeking to balance the individual's right to avoid self-incrimination with the right and duty of the State to defend and protect the life, person and property of all its citizens. In this situation, the function of the Court is not to decide whether a perfect balance has been achieved, but merely to decide whether, in restricting individual constitutional rights, the legislature have acted within the range of what is permissible. In this instance, this Court finds they have done so, and must accordingly uphold the constitutional validity of the impugned statutory provisions. While it is true that ss. 18 and 19 could lead to an accused being convicted of a serious offence in circumstances where he or she might otherwise have been acquitted, there are two important, limiting factors at work. Firstly, an inference cannot form the basis for a conviction in the absence of other evidence. As the learned trial judge pointed out:—

> *"...there is no doubt a strengthening of the State's case but in no sense is it final and in neither event is the accused required to exculpate himself."*

Secondly, only such inferences "as appear proper" can be drawn: that is to say, an inference adverse to the accused can only be drawn where the court deems it proper to do so. If it does not, then neither judge nor jury will be permitted to draw such inference."

78. On the basis of these safeguards, the Supreme Court in *Rock* considered the impugned provisions to be constitutional. Substantially the same safeguards are to be found in Article 4 of the 1988 Order. Although it is not expressly stated in Article 4 that, before Article 4 is triggered the prosecution must have established that the defendant has a case to answer, on the respondents' own case this is a requirement. These safeguards were relied upon by the ECtHR in its conclusion that Article 4 of the 1988 Order did not violate Article 6 of the Convention. If those safeguards were sufficient for the Supreme Court to conclude that the impugned provisions in *Rock* did not give rise to a violation of the plaintiff's constitutional rights in that case, then it is difficult to see how Article 4 of the 1988 Order can be said to give rise to an egregious violation of the respondents' constitutional rights.

79. Drawing all of the above together, the following is established:-

1) The right to silence in this jurisdiction is recognised under the Constitution and is accorded protection accordingly. It is not, however, unqualified, and may be abridged in a manner that is proportionate to the objectives.

2) While there are certain statutory provisions in this jurisdiction that qualify or abridge the right to silence, there is no equivalent to Articles 3and 4 of the 1988 Order. To that extent, it is possible that the respondents, if they exercise their right to silence at trial in Northern Ireland, may suffer a prejudice that they would not suffer if they were put on trial in this jurisdiction.

3) That however, does not necessarily constitute a violation of their constitutional rights. The protection afforded by Article 38 of the Constitution does not extend beyond the boundaries of the State, unless the matters complained of would give rise to an egregious violation of the constitutional right asserted.

4) Articles 3 and 4 of the 1988 Order do not violate Article 6 of the European Convention on Human Rights. While the rights protected by the Convention and the Constitution are not identical, in this fundamental respect they are unlikely to be very much different.

5) There is no evidence that the manner in which Articles 3 and 4 are invoked in Northern Ireland is such that would give rise to any cause for concern that the constitutional rights of the respondents are likely to be violated egregiously, or in contravention of the principles enunciated in *Rock*. On the contrary, the application of Article 4 of the 1988 Order in *R v. McVeigh* demonstrates the application of the safeguards necessary to avoid such an outcome.

6) There is a statutory presumption that an issuing state will comply with the requirements of the Framework Decision which, at Article 1.3, requires Member States to respect the fundamental rights and principles enshrined in Article 6 of the Treaty on European Union. Moreover, there is a duty on this Court, pursuant to the terms of the Framework Decision to have trust and confidence in the issuing Member State that the respondents' fundamental rights will be respected.

7) It follows from all of this that the arguments of the respondents that their surrender to Northern Ireland will give rise to an egregious violation of their constitutional rights must be rejected. Since all other objections to their surrender have also been rejected, the Court must order the surrender of the respondents pursuant to s. 16 of the Act of 2003. For the avoidance of any doubt, I should add that I have been fully satisfied that there has been full compliance with the Act of 2003 as regards the form and content of the EAWs.