



THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 278

Record Number: 2019 85; 2019 86

**Birmingham P.
Edwards J.
Kennedy J.**

BETWEEN/

SEAN FARRELL

APPELLANT

- AND -

SUPERINTENDENT OF MILFORD GARDA STATION

- AND-

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

BETWEEN/

CIARAN MAGUIRE

APPELLANT

- AND -

SUPERINTENDENT OF LETTERKENNY GARDA STATION

- AND-

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of the Court delivered on the 1st day of November 2019 by Ms. Justice Kennedy.

1. These two appeals have the same factual background and raise the same issues so they may be conveniently dealt with in the same judgment. The appellants seek to appeal against judgments and orders of the High Court (Donnelly J.) dated 11th February 2019 refusing to grant relief by way of judicial review.

Background

2. The relevant factual background is set out fully in the High Court judgment, but the salient facts are as follows: The appellants were arrested on March 23rd 2017 on foot of a European Arrest Warrant (EAW) issued for the purposes of prosecuting them for the alleged offences of attempted murder of a member of the PSNI and possession of explosive substances with intent to endanger life.
3. The EAW states that these offences are alleged to have been committed on 18th June 2015 in Northern Ireland. It further alleges that the perpetrators of the offences were disturbed at the scene and that two vehicles were observed by the police in Northern Ireland travelling away from the scene at high speed. Later that same night the appellants were arrested in Killygordon, Co. Donegal pursuant to s.30 of the Offences Against the State Act, 1939 on suspicion of membership of an unlawful organisation. Mr Maguire was taken to Letterkenny Garda Station and Mr Farrell was taken to Milford Garda Station. The appellants' clothing was seized, and photographs, fingerprints and

buccal swabs were taken. The appellants were interviewed and later released without charge.

4. On 10th March 2017, the European Arrest Warrant was issued by an issuing judicial authority of the United Kingdom of Great Britain and Northern Ireland and the appellants were subsequently arrested. The proceedings under appeal came about as the appellants sought disclosure of information gathered during their detention on 18th June 2015 including, *inter alia*, details of any samples taken or items seized, copies of statements made during the investigation and any audio or video recordings made in the course of detention, in order to advance their opposition to the EAW proceedings. It is the appellants' case that the Northern Ireland prosecution is predicated, at least in part, on this information.
5. Following a refusal to grant this information, the appellants sought leave to proceed by way of judicial review on July 25th, 2017. Leave was granted and the hearing proceeded in December 2018. The appellants sought the following reliefs before the High Court: -
 - (i) An order of *mandamus* requiring the first respondent to reply to the applicant's request for information in relation to and arising from his detention in Milford Garda Station/Letterkenny Garda Station on 18th/19th June, 2015 and to furnish him with information to which he is entitled.
 - (ii) An order of *mandamus* requiring the first respondent to provide the information requested by the applicant pursuant to the provisions of EU Directive 13/2012.

Decision of the High Court

6. In her written judgment of 11th February 2019, Donnelly J. refused the reliefs sought by the appellants.
7. The trial judge considered the submissions of the appellants under three headings, namely;
 - a) Fair procedures and right to information;
 - b) EU Directive 13/2012 and;
 - c) Interference with the proceedings.

Summary of the arguments advanced

8. The primary argument on behalf of the appellants is that the evidence garnered in this jurisdiction during the appellants' detention pursuant to s.30 of the Offences Against the State Act, 1939 will be used, at least in part, at trial in Northern Ireland. The appellants contend that only the courts in this jurisdiction can protect their constitutional rights. While no reference is made to a violation of any specific constitutional right during the detention under s.30, the argument is made that in order to vindicate their constitutional rights, disclosure of the information is essential. The appellants assert that the information sought may permit issues to be raised concerning the arrest and detention pursuant to s.30 in the context of objection to surrender on foot of the EAW.

9. The appellants assert an entitlement to the information sought as a matter of fair procedures and moreover, contend that withholding the information sought occasions a breach of Articles 6 and 7 of Directive 2012/13/EU of 22nd May 2012 regarding the Right to Information in Criminal Proceedings.
10. Mr Farrell contends that certain of the materials about which information was sought were transferred to the requesting State following a mutual assistance request pursuant to the European Convention on Mutual Assistance in Criminal Matters 1959. These items were furnished in the course of the judicial review proceedings without notice to the appellant who claims that such transfer was inappropriate in the circumstances.
11. In short, the appellants' claim is that they are entitled to receive all the information sought for the purposes of opposing surrender under the European Arrest Warrant.

The judgment of the High Court

The recordings of interview

12. The trial judge noted that a discrete argument arose regarding the recordings of interview sought by the appellants. This concerned section 56 of the Criminal Justice Act, 2007 which provides as follows: -

“(1) Where a person is before a court charged with an offence, a copy of any recording of the questioning of the person by a member of the Garda Síochána while he or she was detained in a Garda Síochána station, or such questioning elsewhere, in connection with the investigation of the offence shall be given to the person or his or her legal representative only if the court so directs and subject to such conditions (if any) as the court may specify.

“(2) A recording referred to in subsection (1) of the questioning of a person shall not be given to the person by the Garda Síochána except in accordance with a direction or order of a court made under that subsection or otherwise and Regulation 16 of the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997 (S.I. No. 74 of 1997) is hereby revoked.”

13. The trial judge was satisfied that access to the recordings of interview could only be granted in accordance with this section and therefore the Gardaí were not legally entitled to furnish the videotapes in the absence of a court order.
14. Secondly, on this discrete issue, the Court found that s.56(1) only applies to a person before a court charged with an offence; the appellants were not in such a position and thirdly, the judge found that the appellants had no entitlement as of right to demand the recordings. She was satisfied that if a request was made in the course of the EAW proceedings, such an application could then be determined.
15. She concluded that in the judicial review proceedings the applicants were not entitled to an order of *mandamus* for access to the recordings as there was no duty on the respondents to provide them.

Access to other information

16. In relation to the other information sought, the trial judge accepted the submission of the respondent that when seeking an order of mandamus, the Court must apply the general principles: -

'As stated in Civil Proceedings and the State (2nd Ed. Thompson Round Hall, Collins & O'Reilly 2004) at para. 438 "mandamus lies to command the performance by a public body of a legal duty of a public nature". The authors went on to state that "an applicant must show that there was an explicit and unambiguous duty imposed upon the body against whom the order is sought."

17. The judge did not accept that *Larkin v. O'Dea* [1995] 2 IR 485 could be relied upon by the appellants because the appellants' case was strikingly different. Donnelly J. accepted that *Larkin v. O'Dea* [1995] 2 IR 485 is authority for the proposition that there is a duty on the courts to protect and vindicate constitutional rights by refusing extradition where extradition would violate those rights but in the present case the appellants' arguments were entirely speculative as they failed to establish, at a minimum, a real risk that their constitutional rights would be violated if they were surrendered. The trial judge concluded in the following terms: -

"EAW proceedings are designed, under the terms of the Framework Decision on the European arrest warrant to be a simplified form of extradition between Member States of the European Union. The 2003 Act sets out a list of grounds upon which surrender maybe refused. Included in those grounds under s. 37 are where the surrender would constitute a contravention of any provision of the Constitution. Surrender has been prohibited where to do so would place a person at real risk of a breach of a provision of the European Convention and Human Rights or indeed of the Constitution. Examples of these arise where claims of violations of rights under Article 3 of the Convention or Article 40 of the Constitution with regard to the right not to be subjected inhuman or degrading treatment. A requested person is entitled to submit in the course of the EAW proceedings that there is such a real risk. The rules of Superior Courts provide for discovery to be made in the course of the European Arrest Warrant case. In an appropriate case, discovery could be ordered. It is striking that in the present EAW proceedings, the respondent has not even pleaded any particular or specific breach of s. 37 concerning a real risk that his extradition would violate a provision of the Constitution arising from his arrest and detention in this jurisdiction in June 2015.

52. *Section 37 therefore provides a basis for this applicant to claim that his surrender is violated on the basis that to do so would violate a provision of the Constitution. The Supreme Court dealt with the proofs requires by, and the procedural implications of, the provisions of s. 37 of the Act of 2003 in the case of Minister for Justice v Rettinger [2010] IESC 45. The Supreme Court (Denham J as she then was) set out a number of principles in the assessment of whether such a breach has occurred. Of particular relevance are the following: that the courts should examine whether there is a real risk in a rigorous fashion, that a burden rests with the applicant to*

adduce evidence capable of proving that there are substantial grounds for believing that if he or she were returned to the requesting country, he or she would be exposed to the real risk of being subjected to treatment in breach of the Convention, that the mere possibility of (a breach of a right) is not sufficient to establish a case. Those principles have been applied in cases where breaches of constitutional rights are claimed (see A.G. v Marques [2015] IEHC 798).

53. *If the applicant's contention that he must have this information in advance of formulating points of objection to the EAW proceedings is correct, this would mean that he is not bound by the provisions of s. 37 of the European Arrest Warrant Act of 2003 as amended in advancing his case against surrender. Thus the principles for the testing of s. 37 claims as set out in Rettinger would no longer apply to him, merely because he claimed that information might be forthcoming to assist him in formulating such a claim. That would mean that there would no longer be an onus on him as a requested person to adduce cogent evidence that would raise a real risk of a breach of fundamental rights. This Court does not accept that is the law.*
54. *On the contrary, this Court is satisfied that the applicant's claim as to a breach of his rights is entirely speculative and indeed is entirely unrelated to any particular claim that his surrender is prohibited in accordance with the Act of 2003. This claim of entitlement to be given information for the purpose of advancing a case he might possibly be able to make after considering that information is one that has no basis in the provisions of the Act of 2003. Given that these judicial proceedings are directed towards gaining information for the apparently purpose of defending the application for surrender in accordance with the provisions of the Act of 2003, the said Act of 2003 provides no legal foundation for such a claim. His claims of breach of due process or equality of arms have been advanced in a legal vacuum, which takes no account of the requirements (and indeed protections) of the procedures set out for the determination of applications for surrender under the provisions of the Act of 2003.*
55. *Leaving aside his claims under the EU Directive 13/2012, the Court can find no explicit and unambiguous duty on the respondents to provide him with that material in advance of arguing his EAW case. To hold that there is an entitlement to obtain information about potential evidence obtained in this jurisdiction, outside of and prior to the surrender proceedings taking their course, would amount to an unwarranted interference with the simplified procedures set out in the European Arrest Warrant Act, 2003. It would also permit a requested person to delay and obstruct the EAW proceedings without putting forward any legal or factual basis as to why his surrender should be prohibited. He has an entitlement to object to surrender on the grounds set out in the Act, but he must bring himself within the parameters of the prohibited grounds. His claims, if any, of breach of rights can be dealt with procedurally and substantively within the context of the surrender proceedings."*

EU Directive 13/2012

18. Donnelly J. considered the appellants' submission that there was an entitlement to the information sought under EU Directive 13/2012 ("the Directive"). In refusing to accept the appellants' submission that *Minister for Justice & Equality v. EP* [2015] IEHC 662 could be distinguished on the basis that the present proceedings involved material in the possession of this State rather than the requesting State, the trial judge held as follows: -

"In the view of this Court such an argument must be rejected. The provisions of the Directive must apply to all arrests under European Arrest Warrants. They cannot be dependent upon a consideration such as whether there is a link to the offence in the requesting state. The Framework Decision on European arrests warrants contemplate the possibility of extraterritorial offences and therefore the possibility that a person may be wanted by a requesting Member State for an offence physically committed in the requested Member State. Or, as here, where there is an alleged offence in the requesting Member State but a subsequent arrest and detention in the issuing Member State. The Directive itself makes no distinction between an arrest on an EAW for an alleged offence for which the requested person had already been arrested and questioned in the executing State. There is therefore no basis for distinguishing the case of Minister for Justice v E.P.

62. *Furthermore, it is clear that there are no criminal proceedings in being in this jurisdiction. In his grounds upon which relief is sought the applicant stated that he could not enforce disclosure of the information he sought in Northern Ireland and will thus be deprived of factual matters related to his defence. The applicant has not put any evidence before the Court to substantiate that ground. Indeed, at oral hearing it was conceded that his case was not about the lack of due process in Northern Ireland, but only about the courts being able to protect his constitutional rights in this jurisdiction. Furthermore, the fact that the items of evidence about which information was sought were handed to the Northern Ireland police pursuant to a mutual assistance request, would also appear to have changed the factual position i.e. they would be present in Northern Ireland and by that fact would be physically available there for examination. In the circumstances, there is no evidence before this Court that his rights under the Directive will not be available to him in the requesting State should he be surrendered on foot of the European Arrest Warrant.*

63. *In this jurisdiction, on his arrest on the EAW, the applicant received his rights to information which included, inter alia, a copy of s. 15 of the European Arrest Warrant Act, 2015. The applicant has made no specific complaints about the lack of information provided to him on arrest under the European Arrest Warrant, his complaint in this regard has been directed towards the information concerning matters arising from his arrest in June 2015."*

Interference with proceedings

19. Finally, the trial judge considered the submission that the transfer of evidence pursuant to the mutual assistance requests to the Police Service of Northern Ireland amounted to an

unconstitutional interference with the proceedings and an interference with the supervisory jurisdiction of the Court. The trial judge rejected the appellants' reliance on *Buckley v. Attorney General* [1950] I.R. 67 and *State (Quinn) v. Ryan* [1965] I.R. 110. and stated that there could be no similarity between those cases and the facts at hand. The trial judge went on to state as follows: -

- “72. *In the present case, the transfer of the items to the Police Service of Northern Ireland was carried out purportedly in accordance with existing legislation. The Criminal Justice (Mutual Assistance) Act, 2008 as amended provides for, inter alia, material already in the custody of An Garda Síochána to be transmitted to a requesting authority of a designated state on request and provided certain conditions are met. The transfers have not been challenged in these or other proceedings as being unlawful or invalid. The Court is entitled to accept the evidence of the Inspector that the transfer was made pursuant to the provisions of s. 75 of the said Act of 2008.*
73. *Knowledge of the existence of those mutual assistance provisions is imputed to the population at large. In particular, however, the Court is entitled to have regard to the fact that the applicant's solicitor practices within the field of criminal law and would be expected to have knowledge of the existence of those provisions. Despite the existence of these provisions, no application was made for any interim or interlocutory order which would prevent any of this material from being sent abroad pursuant to that legislation or otherwise.*
74. *In the absence of any injunction against either the Minister or the Gardaí, those public bodies are entitled to proceed to carry out their functions in accordance with law. It is not accepted, that the mere fact that proceedings are in being is sufficient to interfere with the right, and indeed the duty, of the state authorities to abide by their commitments under international agreements and/or national legislation. If it were otherwise, the mere issuing of proceedings and in the context of judicial review proceedings such as the present, the fact that one has persuaded a judge of the High Court that there is an arguable case, would amount of itself to a stay on the carrying out of other duties in accordance with law. No authority was provided by the applicant to substantiate such an argument. In light of the provision in law, including in respect of judicial review proceedings, for the granting of interim/interlocutory injunctions, I am satisfied that there is no such legal provision.*
75. *Moreover, in the present case, the nature and extent of the interference with the supervisory jurisdiction of this Court that is complained of, has not been clearly articulated. In particular, there has been no real attempt to explain how the information that was required, namely the copy of the custody record, copies of statements made, details of any samples taken or items seized and any video or audio recordings, would be affected by the transfer to Northern Ireland.*

76. *In effect, what this applicant actually sought was information about these items, to allow him construct some sort of opposition to the European Arrest Warrant proceedings. Even if it could be construed that what he had sought was examination of those items, it is not clear how examination of those items would demonstrate that a constitutional right had been violated. It is not a res ipsa loquitor situation, there must be at least some basis for showing that the alleged interference, i.e. actual loss of the opportunity for physical examination could demonstrate a breach of a constitutional right. Examination of that kind of material is much more likely to be required for the purpose of defending a criminal trial rather than for the purpose of articulating a constitutional argument. Suffice to say that no such constitutional argument was identified and/or substantiated."*

Grounds of appeal

20. The fundamental issue to be decided on appeal is whether the appellants are entitled to have access to the materials sought.

Submissions of the appellants

21. The appellants make a number of similar arguments regarding, *inter alia*, their entitlement to the materials and information as a matter of fair procedures and under the Directive, the potential infringement of the right to silence and the entitlement to recordings under s.56 of the Criminal Justice Act 2007. In order to avoid repetition, these submissions have not been duplicated.

Submissions of Sean Farrell

22. It is submitted that the trial judge erred in concluding that the recordings of interviews could not be the subject of an order under s. 56 in the context of judicial review proceedings. The appellant submits that the trial judge erred in otherwise not engaging with the appellant's request made in the course of the proceedings to order the disclosure of the recordings.
23. The appellant submits that the Directive provides the right to be informed as to the contents of the EAW and this right must include the right to examine documentation gathered in the course of arrest in the jurisdiction when the fact of that arrest is relied upon as part of the rationale upon which surrender is sought in the warrant. The appellant submits that without access to the information sought, the right to be informed about the contents of the EAW, has no meaningful function.
24. It is submitted that a challenge to the lawfulness of arrest or detention in this jurisdiction in the context of the contents of the EAW requires sight of and access to the information requested by the appellant in the judicial review proceedings. On that basis the appellant's request for information is clearly distinguishable from that of the applicant in *Minister for Justice & Equality v. EP* [2015] IEHC 662 who sought information from the requesting State. In the appellant's case the requesting State did not have the information when he made the request. The requesting State did not have the information when he sought leave to proceed by way of judicial review. The requesting State took possession of the information in the course of the judicial review proceedings without notice to the appellant or the Court. The appellant seeks information regarding the arrest

referred to in the EAW in order to assert the protections contained in the Constitution and in the provisions of Section 30 of the Offences Against the State Act. Where such a challenge can only be effective within this jurisdiction, he clearly requires the documentation requested and as provided for in his right to be informed about the contents of the warrant as provided for in the Directive and as set out in the model letter provided at Annex II. He asserts that it was inappropriate to transfer the material without notice to him or to the court.

25. The appellant submits that fundamental protections contained within s. 30 of the 1939 Act, including his right to remain silent, may be at issue if he is surrendered for prosecution in Northern Ireland. He refers to *DPP v. Quilligan (No. 3)* [1993] 2 I.R. 305 and to the judgment in *R v. McVeigh* [2019] NICC 8 wherein Sean McVeigh was tried and convicted for the same offences for which the appellant is now sought. He submits that the Belfast Crown Court did not give effect to the right of Mr McVeigh to remain silent in that it appears to have drawn inferences from his silence. He submits that he needs access to the materials sought in order to ascertain the extent to which he was warned about his right to silence.

Submissions of Ciarán Maguire

26. The appellant summarises the specific issues for this Court as being: (i) whether there is an obligation on state bodies to reply and/or to engage with reasonable requests and to give reasons for any refusal; (ii) in the event of a failure to so reply, can a citizen seek to compel a reply; and (iii) is a citizen entitled to seek information in relation to his arrest and detention in this state where that is germane to offences for which his surrender is sought?
27. The appellant submits that the High Court judge misconstrued the application before her and erred in refusing the application on the basis of, *inter alia*, the inadequate pleading of his objections to the substantive EAW proceedings.

The appellant submits that the High Court judge erred in dismissing the appellant's claim for lack of specificity regarding the violation of his constitutional rights. The appellant submits that the right to the information sought must necessarily be a freestanding right because if the appellant is obliged to present evidence of unconstitutionality before the duty of the Court to "defend and vindicate" is triggered then it must follow that he has an entitlement to consider the full factual matrix.

28. The appellant submits that he cannot properly be deprived of the opportunity to challenge his surrender by reason of the respondent's reluctance to provide him with pertinent information secured in this State. He was arrested and detained here, and it is in this State that the material was generated. In the circumstances the respondents' unreasoned refusal cannot be sustained.

Submissions of the respondent

29. As a preliminary point the respondent submits that the trial judge was correct in her assertion that the appellants' claims are entirely speculative. The majority of the appellants' arguments are predicated on a claimed entitlement to investigate potential

infringement of their constitutional rights during their detention in order to ground a challenge to the lawfulness of their arrest or detention but no basis for this challenge has been identified in these proceedings or in the proceedings in relation the EAW. It is submitted that the height of Mr Farrell's claim is a reference in his affidavit of 18th April 2018 that access to the information sought "may permit me to raise issues concerning my Section 30 arrest and detention in the European Arrest Warrant proceedings." Mr Maguire is in a similar position, referring only to an "intended reliance." No actual argument has been made by the appellants and no breach has been identified, despite the fact that the appellants are the persons best placed to identify whether their rights have been in any way violated.

30. In the absence of any real basis for seeking the information, there is no legal entitlement to same.

Submissions in relation to Stephen Farrell

31. The respondent submits that Donnelly J. was correct in her interpretation of section 56 cited above. It does not provide an entitlement as of right to demand a recording from an Garda Síochána and it is submitted that the appellant has failed to engage with the finding of the Court that even in the context of the criminal proceedings there would be no entitlement to disclosure of such and therefore since there is no duty on the respondent to provide the recordings, an order of *mandamus* cannot be obtained.
32. The respondent submits that the appellant has failed to establish whether the Directive applies at all in his situation given that the appellant is no longer the subject of a criminal investigation in this jurisdiction. The respondent refers to Art. 2 which provides as follows: -

"This Directive applies from the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the criminal offence, including, where applicable, sentencing and the resolution of any appeal."

The temporal limits of the Directive are clearly shown here and therefore the only rights of the appellant start and end with Article 5 which provides: -

- "1. Member States shall ensure that persons who are arrested for the purpose of the execution of a European Arrest Warrant are provided promptly with an appropriate Letter of Rights containing information on their rights according to the law implementing Framework Decision 2002/584/JHA in the executing Member State.*
 - 2. The Letter of Rights shall be drafted in simple and accessible language. An indicative model Letter of Rights is set out in Annex II"*
33. In addition, it is submitted that the EAWs for both appellants outline summaries of the allegations against them for the purposes of s.11 of the European Arrest Warrant Act,

2003 and the appellants are, therefore, well aware of the nature of the allegations faced in the issuing State if they are surrendered. The respondent contends that the appellants' rights under the Directive, such as they are under Article 5, are protected and upheld by the relevant provisions of the European Arrest Warrant Act, 2003 and in the information provided in the EAWs issued against both appellants. Their rights under the Directive start and end at that point.

34. It is submitted that the interpretation in *Minister for Justice & Equality v. EP* [2015] IEHC 662 is in line with the simplified system for surrender envisaged by the EAW framework and accords with the wording of the Directive. Therefore, Donnelly J. was correct in holding that there is no distinction between arrests under EAW on the basis suggested by the appellants.
35. The respondent submits that the information sought by the appellant goes beyond the "information about the content" of the EAW and extends to information to which the appellants have no right under the Directive. As such, there is no clear and unambiguous duty on the Garda authorities and their claim for *mandamus* must fail.
36. The respondent submits that the case of *R v. McVeigh* [2019] NICC 8 does not change the nature of the current appeals. The respondent submits that the fact that adverse inferences may or may not be drawn in the proceedings in Northern Ireland does not support the appellants' claim. This is particularly so when the case has not been made that anything occurred which breached their right to silence and both appellants received the opportunity to avail of legal advice.
37. Finally, there is no argument that the appellants will not have access to the relevant materials in the event that they come before the Northern Irish Court. It is submitted that any issue of fairness of admissibility of the relevant evidence can be dealt with at that stage.
38. In relation to the transfer of materials without notice, the respondent submits that it cannot be asserted that the first respondent was incorrect in complying with a mutual assistance request pursuant to the European Convention on Mutual Assistance in Criminal Matters. The respondent submits that the actions of the first respondent were done lawfully and on a statutory basis in the absence of an injunction.

Submissions in relation to Ciarán Maguire

39. The respondent submits that Mr Maguire's claim to the information on the basis of supporting his opposition to surrender in the EAW proceedings is without substance in the same way of Mr Farrell and constitutes a mere fishing expedition in the hope that a point of objection will emerge from the information.
40. The respondent submits that the questions raised by the appellant before this Court, can all be answered in the negative. The respondent submits that there can be no obligation on State bodies to engage with all requests and to give reasons for any refusal. While the

situation may be different where the person making the request has a statutory or legal entitlement to such, there is no such entitlement in this case.

41. The respondent submits that the appellant's lack of legal entitlement to the materials sought undermines the appellant's reliance on the principles of fair procedures, equality of arms, the requirement to seek out and preserve evidence, and the duty of the courts to defend and vindicate constitutional rights.
42. The respondent submits that Donnelly J. was correct in holding that *Larkin v. O'Dea* [1995] 2 IR 485 is not authority for the proposition that the appellants are entitled to the information sought. The essential finding underpinning that decision-the breach of the requested person's rights- is absent on the facts of this case.
43. Like Mr Farrell, the respondent submits that Mr Maguire cannot successfully argue an entitlement to the materials sought in the absence of any reference to a violation of a right. Both appellants received legal representation and no complaint has been made in a meaningful manner in the two years since their detention.

Access to information and fair procedures

44. The essence of the arguments advanced on behalf of the appellants is that each seek the requested materials in order to assess whether their constitutional rights were breached while detained pursuant to s.30 of the Offences Against the State Act, 1939. Should it transpire that there was a breach, this would then be used in opposition to the EAW proceedings.
45. Neither appellant has stated that any specific right has been breached. This has not been addressed in the respective statements grounding the application for judicial review and neither has there been any attempt to specify a violation of a constitutional right in the in the EAW proceedings. On the contrary, each appellant has, albeit in different forms, suggested that potentially they may rely on, or issues may be raised regarding their arrest and detention under s.30 of the 1939 Act. In other words, each appellant hopes something will turn up should they have the opportunity to assess the materials sought.
46. There is, however, no suggestion that any issues arose during the respective arrests or detention, and, as a consequence, the only possible conclusion is that there may be some unknown situation or event which transpired during the arrest and/or detention which could give rise to an argument that there was a violation of the appellants' constitutional rights. This suggestion is entirely built on supposition and conjecture. Should there have been even the merest suspicion of an issue in the course of arrest and detention, one would have thought that such would be apparent to those in detention and/or to their legal advisors. Moreover, Mr Farrell was represented by the same solicitor while in detention as in these proceedings.
47. In Mr Maguire's case, he contends that the reason for his arrest was not properly explained to him "at the time". The trial judge observed that it was unclear if this meant at the time of his arrest or at the time of detention. She then addresses the issue of

whether he was legally represented while in detention and concludes that as the appellant never stated in the instant proceedings or in the EAW proceedings that he was unrepresented, nor did he claim that he was not informed of his entitlement to legal representation, she was satisfied that he had deliberately chosen not to raise any claim that his constitutional right of access to a solicitor had been violated.

48. The fact that neither appellant has averred to or formulated, even in a tangential manner in any proceedings, a breach of any constitutional right, serves to underline the conclusion; that the foundation of the argument is entirely speculative and misconceived.
49. In my view, the High Court judge did not err in finding that the facts in both of the present cases differed from those in *Larkin v. O'Dea* [1995] 2 IR 485. In that case, a statement was obtained from applicant in circumstances where the District Court order authorising his arrest was invalid. The High Court, and on appeal the Supreme Court, found that were a court to allow the applicant's extradition, in circumstances where evidence gathered in violation of his constitutional rights would be relied on at trial, such would amount to a failure to vindicate his constitutional rights.
50. In the present cases, the facts and the issues are quite different. Each appellant seeks the information for the purpose of trying to demonstrate a breach of an unspecified constitutional right which, if there was such a breach, evidence obtained as a result may be tendered at trial in Northern Ireland. Thus, resulting in a failure to protect their constitutional rights. Each contend that the Irish courts must determine whether there has been a violation of their constitutional rights while in detention, as only an Irish court can protect their rights under the Constitution.

Protection of Rights

51. The European Arrest Warrant Act 2003, s.37(1) provides that surrender should be refused where the surrender would be incompatible with the State's obligations under any provision of the Convention, or the Protocols to the Convention or if surrender would constitute a contravention of any provision of the Constitution. In other words, a court may refuse surrender on the basis of a real risk that an individual's fundamental rights may be infringed.
52. Neither appellant pleaded any specific breach of s.37 so as to give rise to a real risk that his surrender would violate a provision of the Constitution. The trial judge referred to the principles stated by Denham J. in *the Minister for Justice v. Rettinger* [2010] IESC 45 regarding the assessment of whether such a breach has occurred and in particular cited the following:

"That the courts should examine whether there is a real risk in a rigorous fashion, that a burden rests with the applicant to adduce evidence capable of proving that there are substantial grounds for believing that if he or she were returned to the requesting country, he or she would be exposed to the real risk of being subjected to treatment in breach of the Convention, that the mere possibility of (a breach of a right) is not sufficient to establish a case."

53. The trial judge found that the appellants had failed to engage with those tests. She concluded that there was no evidence of a breach of a constitutional right. As I have said, the suggestion of a breach of a constitutional right was entirely speculative. There was simply no evidence of any specified breach.

Conclusion

54. The purpose of seeking the materials was not in order to provide an evidential basis for objection to surrender, but in the hope that some material or information would emerge from the detention under s.30 which would lead to a possible objection on the basis of a breach of an unspecified constitutional right.
55. In circumstances where there is no evidential basis or indeed any claim of a breach of either appellant's constitutional or legal rights, the appellants' claim is entirely speculative. There has been no engagement with the tests stated in the *Minister for Justice v Rettinger* regarding the assessment of whether a breach had occurred in terms of s.37 of the 2003 Act, the breach of their rights is premised on speculation and is unrelated to any specified claim that the surrender is precluded by virtue of s. 37 of the 2003 Act. There is no basis for suggestion that either appellant has a right to the material under the 2003 Act in advance of the proceedings to formulate objections to the proceedings.
56. I am satisfied that the trial judge was entirely correct in finding that the appellants had not demonstrated that there was an explicit and unambiguous duty on the respondents to provide the information to the appellants on the grounds of fair procedures in advance of arguments to be advanced of the EAW proceedings.
57. The appellants' claim that the request for information is predicated upon obtaining information to oppose the application for surrender is without foundation in terms of the 2003 Act and in terms of alleged breach of due process or of equality of arms.

I am wholly satisfied that the trial judge did not err in her findings on this issue.

The recordings of interview

58. The trial judge carefully scrutinised the provisions of s.56 of the Criminal Justice Act 2007 and it is clear that s.56(1) of the Act provides that a copy of the recording of interview with an individual shall only be given to that individual or his legal advisors where a court so directs. This is in circumstances where the person is before a court charged with an offence. Therefore, the application for the recording can only be made in those particular circumstances, which is entirely logical in my view. As the appellants did not satisfy the requirements, the judge was correct in finding that there was no legal basis for the Gardaí to make the recordings available. Indeed it would have been contrary to the statute to do so.
59. S.56(2) of the 2007 Act provides that a copy of the recording shall not be given to the person, except where there is a court order for its provision in terms of s.56(1) of the Act. I am satisfied that the trial judge was correct in interpreting subsection 2 in this manner. The wording of the statute is clear and unambiguous.

60. Finally, in relation to s.56(2) the trial judge found that a court other than the court where the person stands charged with an offence may order that the recording referred to in s.56(1) be provided and she so found in light of the words in the subsection "or otherwise". She therefore was of the view that if a request were made in the course of the EAW proceedings for the recordings, then that could be determined by the court hearing those proceedings. However, it is quite clear from the section that there is no entitlement as of right to be provided with the recordings and with this I agree.

EU Directive 13/2012

61. The appellants rely on the Directive as conferring a right to the information sought. It is contended that the failure to provide the information led to a breach of Articles 6 and 7 of the Directive.

62. Article 1 of the Directive provides as follows: -

"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."

63. Article 2 states: -

"This Directive applies from the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the criminal offence, including, where applicable, sentencing and the resolution of any appeal."

64. Article 5 provides: –

- "1. Member States shall ensure that persons who are arrested for the purpose of the execution of a European Arrest Warrant are provided promptly with an appropriate Letter of Rights containing information on their rights according to the law implementing Framework Decision 2002/584/JHA in the executing Member State.
2. the Letter of Rights shall be drafted in simple and accessible language. An indicative model Letter of Rights is set out in Annex II".

65. Article 6 provides: –

1. Member States shall ensure that suspects or accused persons are provided with information about the criminal act they are suspected or accused of having committed. That information shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.

2. Member States shall ensure that suspects or accused persons who are arrested or detained are informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed.
3. Member States shall ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person.
4. Member States shall ensure that suspects or accused persons are informed promptly of any changes in the information given in accordance with this Article where this is necessary to safeguard the fairness of the proceedings."

66. Article 7 provides: –

- "1. 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 to their lawyers.
2. Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence.
3. Without prejudice to paragraph 1, access to the materials referred to in paragraph 2 shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court. Where further material evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be considered.
4. By way of derogation from paragraphs 2 and 3, provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review.
5. Access, as referred to in this Article, shall be provided free of charge."

67. The trial judge rejected the appellants' submission that there had been a breach of Articles 6 and 7 of the Directive.
68. Counsel advanced the argument that the appellants' situation could be distinguished from the case of the *Minister for Justice, Equality & Law Reform v. EP* [2015] IEHC 662, which case dealt with the application of the Directive where a person is arrested on foot of a European Arrest Warrant and concluded that Article 7 did not apply to a person so arrested. Counsel sought to distinguish that case on the basis that the requested material in these proceedings were in fact in the possession of this State rather than in the possession of the requesting authority. This was rejected by the trial judge who found no basis for distinguishing the case of *EP*.
69. Article 1 of the Directive clearly applies to a suspect's rights in criminal proceedings and to the accusation against them. It is readily apparent that there are no criminal proceedings against the appellants in this jurisdiction. The criminal investigation on foot of the arrest on suspicion of membership of an unlawful organisation has concluded with the Director of Public Prosecutions' decision not to prefer criminal charges against the appellants.
70. Article 2 of the Directive is clear in its times in that the Directive applies from the time persons are aware that they are suspected or accused of having committed a criminal offence until those proceedings have concluded. It is readily apparent that this points to the institution of criminal proceedings.
71. Article 5 of the Directive applies specifically to the Letter of Rights in European Arrest Warrant proceedings. The provision makes it clear that those who are arrested for the purpose of the execution of a European Arrest warrant must be provided promptly with a letter of rights containing information on their rights according to the law in the executing Member State.
72. On a person's arrest on foot of an EAW, a person receives rights to information. In the present cases, the applicants made no complaints regarding a lack of information provided on foot of an arrest under the EAW. The complaints pertain specifically to the failure to provide information arising from the arrests pursuant to section 30 of the Offences Against the State Act, 1939.
73. The trial judge rejected the claim made that the information sought by the appellants should be provided to them pursuant to the provisions of the Directive.

Conclusion.

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 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 provisions 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 upon the provisions of Articles 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 is 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.

Transfer of Materials without Notice.

78. It is contended that the transfer of evidence pursuant to mutual assistance requests to the PSNI resulted in an interference with the proceedings which was unconstitutional. The transfer of certain pieces of material was effected in the course of the judicial review proceedings. It transpired that the items sent to the Northern Irish authorities were samples of DNA and the original memoranda of interview. It is contended on behalf of Mr Farrell that he has now been prevented from examining these original items of evidence in this jurisdiction.
79. Mutual assistance requests were made pursuant to the European Convention on Mutual Assistance in Criminal Matters 1959. Items of evidence were furnished to the PSNI on divers dates. The items were provided in accordance with the Criminal Justice (Mutual Assistance) Act 2008. The argument advanced by the respondents is that there was compliance with a lawful request.
80. The trial judge found that there was no correlation between the facts in the case of *Buckley v. Attorney General* [1950] I.R. 67 and the instant case. That case represented a direct interference with ongoing proceedings whereas in the present case the transfer of the evidential items to the Police Service of Northern Ireland was carried out in accordance with existing legislation, specifically the 2008 Act. The Court accepted the evidence on affidavit that the transfer of the evidential items was made in accordance with the provisions of section 75 of the Act of 2008.

81. No proceedings were taken by way of injunctive proceedings against the Minister or the Gardaí. The trial judge found as follows: -

“It is not accepted, that the mere fact that proceedings are in being is sufficient to interfere with the right, and indeed the duty, of the state authorities to abide by their commitments under international agreements and/or national legislation.”

82. With this conclusion, I am in entire agreement. Moreover, the contention that the original items cannot be examined in this jurisdiction pertains only to the samples of DNA. There is nothing to prevent the appellant from seeking to examine the samples in the context of the criminal prosecution in Northern Ireland. Nor is it possible, where copies of the memoranda of interview are retained in this jurisdiction, to see how this can impact on the appellant in any negative way. Should he be surrendered to Northern Ireland, he may then apply, should he wish to do so, to examine the original memoranda of interview.

83. I'm satisfied that there is no merit to this submission made on behalf of the appellant. Accordingly, the appeal of both appellants is dismissed.