THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 364

[2019/488]

Costello J.
Ní Raifeartaigh J.
Collins J.

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

AND

SEÁN PAUL FARRELL

APPELLANT

[2019/492]

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

AND

CIARAN MAGUIRE

APPELLANT

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 4th day of December, 2019

Nature of the Case

1. This is a case in which the defendants/appellants brought an application for discovery of certain materials in the context of proceedings under the European Arrest Warrant ("EAW") legislation. The application ultimately reduced itself at the appeal hearing to the net question of whether the Court should order discovery of the videotapes of interviews of the applicants conducted while they were in Garda detention and/or the memoranda of these interviews, in circumstances where the applicants claimed that such discovery was both relevant and necessary in order to enable them to properly advance a Point of Objection concerning the right to silence in the substantive EAW proceedings. The precise terms of the Point of Objection are set out below.

2. It is perhaps important to emphasise that the Court in this application is not concerned with the issue of disclosure of materials to an accused person for the purpose of defending criminal charges. No doubt such disclosure will be made in Northern Ireland in due course and one would expect that they would get the materials now sought at that future stage. The present application is concerned with discovery prior to and for the purpose of making their EAW Objection at a forthcoming hearing in the High Court, scheduled to take place on Thursday 5th December, 2019.

The alleged offences and the Garda Investigation

3. The allegation against the appellants is that they engaged in certain criminal acts (relating to the attempted placing of an explosive device under the vehicle of a PSNI officer) in Derry on 18th June, 2015 and then travelled across the border into Donegal. They were arrested by members of An Garda Síochána in Donegal on the same date and were detained, during which detention they were interviewed, samples were taken and items were seized. Those interviews were, as is normal, video-recorded and written notes were kept by the Gardaí of the interviews.

History of Court Applications

4. A European Arrest Warrant was issued by the issuing judicial authority of the United Kingdom of Great Britain and Northern Ireland in respect of each of the appellants. They are sought by authorities in Northern Ireland for the purpose of prosecuting them in respect of offences in connection with the above-described incident.

5. The appellants sought information arising from their detention in Garda stations which they apprehended would be used in the prosecutions in Northern Ireland. This request was refused by the State authorities and they brought judicial review proceedings to compel the handing over of the materials, and relied, among other things, on EU Directive 13/2012. The High Court refused their application (see judgment of Donnelly J. in *Farrell v. The Superintendent of Milford Garda Station & Anor* [2019] IEHC 67) on 11th February, 2019. Their appeal of that refusal was in turn refused by this Court (see judgment of Kennedy J. in *Farrell v. Superintendent of Milford Garda Station & Anor, Maguire v. Superintendent of Letterkenny Garda Station & Anor* [2019] IECA 278). The decisions of the High Court and Court of Appeal indicated that the appropriate procedure for litigating whether or not the appellants should receive the materials sought was by way of a discovery application pursuant to Order 98, Rule 8 of the Rules of the Superior Courts which applies to discovery in the context of EAW proceedings. Accordingly, the defendants brought the present applications by motions dated 18th November, 2019 (Mr. Farrell) and 21st November, 2019 (Mr. Maguire), grounded upon letters of request dated 11th November, 2019 (Mr. Farrell) and 14th November, 2019 (Mr. Maguire), in which they sought details of any samples taken or items seized upon arrest, copies of statements taken during investigation, and copies of any audio visual recordings during detention.

Order 98, Rule 8

6. The provisions of Order 98, Rule 8 - which apply to discovery applications in EAW proceedings - contain the usual tests of 'relevance' and 'necessity':-

> "8.(1) A party to proceedings under the 2003 Act may apply to the Court on notice for an order directing any other party or other person to make discovery of the documents which are or have been in his possession or power, *relating to any matter in question therein*.
>
> (2) On an application made under sub rule 1, the Court may, on such terms as it thinks fit, order that the party or other person from whom discovery is sought shall deliver to the opposite party a list of the documents which are or have been, in his

possession, custody or power, relating to the matters in question in such proceedings, or to such matters in question as are specified in the Court's order.

(3) *An order shall not be made* under this rule if and so far as the Court shall be of the opinion that it is *not necessary either for disposing fairly of the cause or matter or for saving costs*.

(4) An application for an order under sub-rule 1 directing any party or other person to make discovery shall not be made unless (a) the applicant for same shall, not later than 7 days before making the application, have previously applied by letter in writing requesting that discovery be made voluntarily, specifying the precise categories of documents in respect of which discovery is sought and furnishing the reasons why each category of documents is required to be discovered and (b) the party or person requested has, as of the time the application is made, failed, refused or neglected to make such discovery or has ignored such request.

Provided that in any case where by reason of the urgency of the matter or the consent of the parties, the nature of the case or any other circumstances which to the Court seem appropriate, the Court may make such order as appears proper, without the necessity for such prior application in writing." (emphasis added)

The pleadings: including the Amended Points of Objection

7. It is trite law to state that discovery must be relevant to the issues in the proceedings. The issues are defined by the pleadings. In the present case, the pleadings consist of the European Arrest Warrant, on the one hand, and the Points of Objection, on the other. As originally constituted, the Points of Objection (at least as regards Mr. Farrell) on the basis of s.37 of the European Arrest Warrants Act, 2003 appeared to focus on the question of whether prison conditions in Northern Ireland amounted to "inhuman or degrading treatment" and referred to such matters as "the conditions prevailing at the place of detention in Northern Ireland", "fundamental defects in prison conditions", and that "surrender will disproportionately interfere with his right to family life". However, a further Point of Objection was subsequently added to Mr. Farrell's case and stated as follows:

"1. The Respondent puts the Applicant on proof as to whether the European Arrest Warrant relied upon in the case of the Respondent herein is lawful:-

(a) In light of the fact that, if tried for the offences described in the European Arrest Warrant in Northern Ireland, the Respondent will be required to give evidence in his own defence, failing which, an adverse inference may be drawn by the Court based upon the Respondent's failure to give such evidence in circumstances where the Court is satisfied the prosecution case against him is sufficiently strong to clearly call for an answer from the Defendant, contrary to the Respondent's Constitutional right to trial in due course of law pursuant to the provisions of Article 38 of the Constitution of Ireland."

8. Mr. Maguire amended his Points of Objection to include an identical Point of Objection concerning the right to silence.

9. I will refer to this as the 'Right to Silence Point of Objection' in this judgment. The discovery application was based solely upon the Right to Silence Point of Objection.

The cases of the appellants as they appeared up until the appeal on the discovery motion

10. In the affidavit pf the appellant Mr. Farrell sworn on 25th February, 2019, he referred to a judgment of Belfast Crown Court dated 8th February, 2019 in respect of one Sean McVeigh, who was found guilty of offences in connection with the same matters alleged against the appellants herein. He averred that the trial judge had drawn the inference that Mr. McVeigh had planted an explosive device under the police officer's vehicle from the fact that Mr. McVeigh had failed to give evidence at the trial. Mr. Farrell made no averments about the interviews conducted with himself as part of the Garda investigation. In particular, he did not indicate what warnings or cautions he had been given, whether he had maintained his silence, and/or what the nature of the questioning was.

11. An affidavit sworn by Mr. Finucane, his solicitor, on 18th November, 2019 exhibited a portion of the judgment of the Crown Court in Northern Ireland in Mr. McVeigh's case, demonstrating that the trial judge had drawn the inference as described above. Mr. Finucane averred:

> "The above quotations taken from the judgment in *R v. McVeigh* indicate that the requesting State does not give effect to the Defendant's right to remain silent. I say that situation gives rise to consideration of the Respondent's constitutional right to remain silent *in both detention pursuant Section 30 of the Offences Against the State Act 1939 as amended in this State, and at trial in the requesting State with particular regard to any warning given to the Respondent during interview conducted under S.30 Detention.*" (emphasis added)

12. His affidavit went on to say that discovery of the items sought was required "in order to ascertain that the Respondent's constitutional right to silence has been observed in the course of his detention and that any exception to that right, either in this jurisdiction or the requesting State, has also been protected by way of an adequate warning…". Again there was no averment concerning what warnings or cautions his client had in fact been given, whether he had maintained his silence during the Garda interviews, and/or what the nature of the questioning was.

13. The application of the second appellant, Mr. Maguire, was supported by an affidavit of Mr. Robert Purcell, who set out the background to the alleged offences and the Garda investigation in respect of his client and averred that he believed he was obliged to explore the constitutionality or other legality of the procedures at the time of and subsequent to his client's arrest and detention, and that he would be expected to evidentially support any contentions made. He referred to the detention of his client on the roadside, his arrest, the samples taken, and his Garda interviews, and sought all information with regard to these on the basis that they were essential for the fair disposal

of the surrender proceedings. He averred that it was "imperative that the provenance of any evidence generated under the laws of this State and that it is sought to adduce in Northern Ireland is properly vetted prior to or at his surrender hearing in the High Court". The affidavit did not specifically address the Right to Silence issue.

Decision of the High Court (Binchy J.) on the discovery applications

14. The discovery application was heard by the High Court (Binchy J.) on 22nd November, 2019 and judgment was given on 26th November, 2019. The application was refused (see judgment of *Minister for Justice v. Maguire, Minister for Justice v. Farrell* [2019] IEHC 805). The President of the Court of Appeal directed the hearing of the appeal against refusal of discovery to be heard on 4th December, 2019. The substantive application in respect of the EAW is listed for hearing before the High Court (Binchy J.) on 5th-6th December, 2019.

The basis for the discovery sought as identified in the written submission on behalf of the appellants

15. In the written submissions filed on 2nd December, 2019 on behalf of the appellant Mr. Farrell, it was submitted that "the case made on behalf of the Appellant in the motion for discovery of documents…was that the Appellant's constitutional right to silence and *his right to be told of that right was breached, in that he was not warned in the course of his detention at Milford Garda Station in June 2015 that, should he be prosecuted in Northern Ireland for the offences for which he was being held in this jurisdiction, he would not have a right to silence at trial in that jurisdiction"* (emphasis added). Thus the appellant was plainly stating that his case would be argued on the basis of the absence of an appropriate warning relevant to his possible prosecution for offences in Northern Ireland. The submissions went on to submit that he was seeking the memos and recordings of interviews "[i]n order to establish what was said in those interviews" and that "[if] review of the memos and recordings of interviews confirms that no warning as to his right to silence at trial was given in the course of the interviews…", then there would have been a breach of the Constitution and s.37(1) of the European Arrest Warrant Act, 2003 would be engaged. There were a number of further references in the written submissions to the absence of warning and it was clear that this was the basis upon which it would be sought to argue that there was a breach of his constitutional right. Indeed, it was stated at paragraph 18 that "[i]f the State accepts that no such warning was given in the course of the interviews at Milford Garda Station in 2015, then discovery *is not necessary*…" (emphasis added).

16. In the written submissions furnished on behalf of Mr. Maguire, no particular emphasis was laid on the interviews or the Right to Silence. The submission was made in a more general way that because the investigation was entirely conducted in this jurisdiction, the appellant was entitled to have his legal team scrutinise the materials gathered in the course of the investigation before addressing the Court on issues relating to surrender in order to ensure that his constitutional rights were protected.

The case as it evolved at the hearing on 3rd December, 2019

17. At the outset of the appeal hearing on the 3rd December, 2019, two matters were clarified by counsel on behalf of Mr. Farrell:

i) that the sole basis on which the request for discovery was being put forward was in relation to the amended Point of Objection relating to the Right to Silence; and

ii) that the only items said to be relevant and necessary to the Right to Silence Point of Objection were the memoranda of interview/videotapes of interview. (Previously items seized and samples taken were within the request, but it is accordingly no longer necessary to consider these matters.)

18. The Court raised with counsel on behalf of Mr. Farrell the absence of any evidence from Mr. Farrell himself or his solicitor about what had happened during the Garda interviews, almost as if the appellant had not himself been present at the interviews. Some surprise was expressed by members of the Court as to why neither deponent had put forward any evidence at all as to what happened during the interviews and then claimed that it was necessary for the State to make available the records of the interview (videotape and written) in order for the appellants to know what had happened at the interview.

19. Further, an inquiry was made by the Court as to whether the State disputed the absence of a warning of the type referred to by counsel (i.e. a warning that the appellant might be prosecuted in Northern Ireland and as to the details of how the right to silence operated in the legal regime there). The Court asked this question on the basis that (as the appellant's submissions had expressly stated) if it was conceded by the State that no such warning had been given, there would be no necessity for the discovery sought. At this stage, counsel referred to the haste with which the written submissions had been drafted and appeared to resile from the proposition that discovery would not be necessary in the circumstances, and submitted that the reason they now wanted to have access to the videotapes and written memoranda of interviews was to be able *to review the questions put to the applicant during interview* with a view to establishing whether this might assist them in their argument relating to the Right to Silence Point of Objection at the substantive EAW hearing. In response to the Court suggesting that the applicant, Mr. Farrell, and his solicitor had been present for the interview and would therefore have been well placed to know such matters as whether he had exercised his right to silence, the general nature of the questions and what warnings had been given, it was then indicated that Mr. Finucane had prepared and sworn a further affidavit that very morning but that it had not been filed.

20. There was some discussion as to whether the Court should receive this, and it was taken in by the Court and read *de bene esse*. This affidavit asserted that, as a matter of fact, the appellant had been given no warning of the kind that it was now suggested should have been given. It also averred that the appellant had exercised his right to silence at all times during questioning by the Gardaí. Mr. Finucane averred that all advice given to the appellant in the station was based on the laws of the Republic of Ireland and that the radically different laws of the United Kingdom "would place a suspect in an Irish Garda Station in a difficult position, which would necessitate significant re-evaluation of their position in interview" and that the absence of any warning that he might be tried in Northern Ireland where the right to silence was treated differently "puts the [appellant] in

a significantly weaker position than if he had been informed of the possibility of trial in Northern Ireland and the fact that his right to silence would be limited by the laws of that jurisdiction". It may be noted that there was no suggestion in this affidavit that it was necessary for the appellant's legal team to have access to the questions put to the appellant during the interviews in order to advance the argument at the forthcoming EAW hearing; rather the whole thrust of the affidavit concerned the issue of the absence of what they considered to be the appropriate warning as to exercising his right to silence.

21. The Court asked counsel on behalf of the Minister what their attitude would be to the evidence in the latest affidavit, and the unambiguous response was that it was accepted that no warning had been given by the Gardaí about the legal regime in Northern Ireland. It was also stated that this was the first time they had been called upon to make any such admission or concession.

22. Counsel on behalf of the appellant Mr. Farrell continued to submit that the discovery of the memoranda and videotapes of interview were necessary notwithstanding the above indication given by the State and notwithstanding the express statement in their written submissions that discovery would not be necessary if this concession were made by the State. The thrust of his arguments had completely shifted to saying that he needed to know the questions asked by the Gardaí of his client (in respect of which he had maintained silence) in order to make his case on the Right to Silence Point of Objection.

23. Counsel on behalf of Mr. Maguire adopted the submissions already made on behalf of Mr. Farrell, and also emphasised to the Court that the range of materials sought was in fact quite limited in scope. He referred to the fact that the material in question had already been packaged up and sent to Northern Ireland by way of a mutual assistance request, and that it would not be disproportionate or burdensome for the same materials to be sent to the appellants in circumstances where the entire investigation had taken place in this jurisdiction, and they now wished to challenge their surrender to another jurisdiction where, given the fundamental and constitutional importance of constitutional rights, different legal rules relating to the right to silence applied.

24. Neither set of written submissions sought to engage with principles established in such cases as *Minister for Justice Equality and Law Reform v. McGuigan* [2012] IESC 17, where the Supreme Court addressed the question of laying an evidential foundation to support applications for discovery in EAW applications. Reference was made however to cases such as Larkin v O'Dea [1995] 2 IR 485, *Minister for Justice v. Buckley* [2015] 3 IR 619, and *Minister for Justice v. Rettinger* [2010] IESC 45.

25. At the conclusion of the hearing, the Court indicated that it would be refusing the application for discovery and that it would set out its reasons today. Those reasons are as follows.

Decision
The test on appeal

26. The starting point is to recall that this an appeal of a refusal of discovery motion from the High Court. The test in interlocutory cases was helpfully summarised by Irvine J. in *Lawless v. Aer Lingus Group plc* [2016] IECA 235 as follows:-

> "22. The first matter to be briefly addressed in the course of this ruling is the court's jurisdiction on this appeal. This is an appeal against an order made by the High Court judge in the exercise of her discretion in relation to an interlocutory matter. This is not a re-hearing of that application and that being so this court should afford significant deference to the decision in the High Court. It is nonetheless clear that if an appellate court can detect a clear error in the manner of the approach of the High Court judge it is of course free to interfere with that decision. Further, even if the appellant cannot identify such an error the appellate court may nonetheless allow an appeal if satisfied that the justice of the case can only be met by such an approach. The Court is able to do this because it has available to it all of the affidavit evidence that was before the High Court at the time the original interlocutory decision was made. The role of the appellate court in this regard is set out in the decision of this court in *Collins v. Minister for Justice, Equality and Law Reform* [2015] IECA 27 and by McMenamin J. in *Lismore Homes Ltd. v. Bank of Ireland Finance Ltd*. [2013] IESC 6.
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> 23. However, it seems to me that all too often parties who are somewhat dissatisfied by interlocutory orders made in the High Court seek to use this Court as a venue to re-argue their application *de novo* in the hope of persuading this court to exercise its discretion in a somewhat different fashion from that which was adopted by the High Court judge at the original hearing. That is a practice which I believe is not to be encouraged. In order for this Court to displace the order of the High Court in a discovery matter the appellant should be in a position to establish that a real injustice will be done unless the High Court order is set aside. It should not be sufficient for an appellant simply to establish that there was a better or more suitable order that might have been made by the trial judge in the exercise of their discretion."

27. The Court is not satisfied that the trial judge made an error in how he approached the discovery application on behalf of the appellants, or that any injustice would be done if his order were not set aside. This conclusion is reached for the following reasons.

Test for discovery

28. Order 98, Rule 8 provides for discovery in the context of EAW proceedings. There is no automatic right to discovery. The applicant must set out the categories of documents sought and the reasons each category is both relevant and necessary for disposing fairly of the cause or matter or for saving costs. The onus is on the applicant to show that the documents are relevant to an issue in the proceedings, and the issues in the proceedings are defined by the pleadings. The applicant must also show that the discovery is necessary.

Preliminary comments on the evidence laid before the Court

29. This is important to begin by considering two curious features of the evidence in support of the discovery motion. First, very little information about the legal regime in Northern Ireland was laid before the Court. The very limited information placed before the Court was an extract from the judgment in the McVeigh trial as described above (i.e. demonstrating that an inference had been drawn from Mr. McVeigh's failure to give evidence at his trial). The Court was not furnished with any affidavit from a legal expert setting out the relevant legal provisions and describing the usual practice in Northern Ireland. The Court was not informed about matters such as: (a) the position regarding the drawing of inferences from silence during police custody in Northern Ireland; or (b) the warnings given during police interviews in Northern Ireland; or (c) the relationship between silence during police custody and silence at trial and/or the warnings given in policy interview and at trial respectively; or (d) how the Garda interviews of the appellants might be treated in a trial in Northern Ireland. Essentially, therefore, the Court was operating in a vacuum concerning the law of Northern Ireland on the right to silence other than having been provided with a very short extract from the McVeigh trial showing that an inference had in fact been drawn from his silence *at trial*. The rules of court require that a person opposing an application for his or her surrender to a Member State of the EU on foot of an EAW must do so by delivering an Objection and affidavit(s) setting out the evidence to be relied upon at the hearing of the application. The laws of another jurisdiction are matters of fact which require to be proved just as any other fact upon which the appellants rely in these proceedings. It is necessary to prove the relevant legal provisions applicable in Northern Ireland and this court cannot infer these provisions from a judgment of a Court in Northern Ireland, the extract for which was in any event very limited in scope.

30. A second curious feature of the affidavits filed before the High Court hearing (and in the submissions of the appellants lodged prior to the appeal) was the assertion that it was necessary for the appellants and their legal teams to have sight of the memoranda and videotapes of interview in order to *know whether and what warning was given* during the interviews. But of course the appellants themselves knew at all times what had happened during the interviews, and indeed one of them (Mr. Farrell) was assisted by having a solicitor present during the interviews. This was not a situation where an appellant was, for example, asserting that he had no recollection of what warning he was given, or that he thought something had been said but wanted to make sure, or something of that kind. There was simply a complete absence of evidence from the appellants (and in the case of Mr. Farrell, from his solicitor) as to what had happened during interview. One might almost have thought that they had not been present in the interviews, if one were to read the affidavits and submissions concerning the necessity for them to have sight of the interview records. And of course, if assertions had been made on affidavit on behalf of the appellants as to what had happened during interview, the State could have responded either by confirming or denying the position regarding the giving of warnings. But it was not until the morning of the appeal that the latest affidavit of Mr. Finucane was sworn and which set out a factual account of what had happened in interviews. This is an astonishing

approach to the evidence regarding the interviews in circumstances where one of the key matters to be established in a discovery application is the *necessity* for the information sought.

31. What is now entirely clear, in any event, is that, as one might expect, no warning was given during the Garda interviews of the two appellants as to the possibility of their being tried in Northern Ireland or the parameters in which the right to silence operates in Northern Ireland. This is clear from what was stated in Mr. Finucane's affidavit and the response of counsel for the State to this affidavit, as described above. It is of course highly unusual that the Court would take into account an affidavit which had never been before the High Court judge and which was sworn only on the morning of the appeal, but in the unusual circumstances of the case where the affidavit in effect considerably narrowed the issues before the Court, the Court was prepared to take its contents into consideration in reaching its conclusions.

The Right to Silence Argument(s) to be made at the hearing of the EAW application

32. Against the backdrop of the two curious evidential features of the application described above, the Courts turns to the question of whether the discovery sought is relevant and necessary within the meaning of Rules of the Superior Courts. In this regard, a distinction may be drawn between two versions of the 'right to silence' argument which the appellants apparently intend to make at the hearing of the action.

33. The first version of the argument is what I might call the 'free-standing' right to silence argument and can be articulated as follows: that a person should not be surrendered to a jurisdiction such as Northern Ireland where a fundamental right, such as the right to silence, is treated differently insofar as adverse inferences may be drawn from the failure of an accused *to give evidence at trial* because this would be in breach of his or her constitutional right to silence under the Constitution. Indeed, this version of the argument corresponds with the wording of the Amended Point of Objection. In this iteration, the argument is a free-standing one in the sense that the argument concerns the future conduct of a trial in Northern Ireland and does not relate at all to anything that happened in Garda interviews *in the past*. That being so, it is impossible to see how discovery of the memoranda or videotapes of interview could be said to be relevant in advancing this version of the argument, as there is simply no connection at all between the material sought (records of interviews which took place in the past in the Garda station) and the argument being made (about the future conduct of a trial in Northern Ireland).

34. There is a second version of the 'right to silence' argument, however, which seeks to create a link or connection between the Garda interviews and the future conduct of the trial in Northern Ireland. If I have correctly understood this more nuanced version of the argument (as put forward on affidavit and in counsel's submission), it runs as follows: that there is a fundamental unfairness in an accused being put in a position where he was making decisions about whether or not to remain silent on the basis of warnings from the Gardai and advice from his solicitor, all of which were based on the assumption that the trial would take place in this jurisdiction, which assumption later proved to be incorrect,

and that if he had received a warning that there might be a trial in Northern Ireland with its different regime concerning the right to silence, he might have exercised his rights in Garda interview differently, but now it is too late to do so. This iteration of the right to silence argument claims that the Court's concern should not be confined to the future trial, but should take into account that certain decisions made by the appellants in the past (during Garda interviews), which cannot now be undone but may tell against the appellant in the future trial, create a connection between the past and the future, which would make his surrender unfair.

35. Whatever about the merits of that second version of the right to silence argument, which is not a matter for the Court in this discovery application, the question now is whether the discovery sought in the present application under appeal is relevant to it or necessary in order to advance it.

36. As already noted, the entire basis on which the discovery application proceeded until the date of the appeal was that the discovery sought was necessary in order to ascertain what warnings were given to the appellants, but it is now undisputed that they were *not* given the kind of warnings the appellants say they ought to have been given. Accordingly, it certainly cannot be said that the discovery sought is necessary for that particular reason (i.e. to establish as a matter of fact whether 'appropriate' warnings were given). Most if not all of the appellants' basis for the discovery sought has simply melted away.

The new reason for seeking discovery; that the legal teams need to see what questions were put to their clients during the Garda interview

37. The only remaining reason offered in support of the discovery application was the one which counsel suggested on his feet during the appeal for the first time, namely that the appellant was entitled to know what *questions* had been asked of the appellants during interview and needed the material sought to explore this. It is doubtful whether the Court should even engage with this argument, coming as it did so late in the day. However, as the Court is also of the view that this new version of the application does not stand up to scrutiny in any event, it may be helpful to set out the following. There are at least two problems with this latest reason offered for the discovery sought.

38. The first is that again, one would expect the applicants themselves (and in the case of Mr. Farrell, the solicitor who was present during interviews) to know at least the general nature of the questioning during the interviews. Again, the application is put forward on the basis that it is 'necessary' to have sight of the records of interview as if the appellants have no idea what happened during their own interviews. There is no particular line of questioning identified which might form the basis for the right to silence argument to be advanced.

39. Secondly, there is again no evidence of Northern Irish law which would assist the Court in understanding how the appellant's responses to particular questions asked in the Garda station would play out in the trial process in Northern Ireland, so as to establish that the Garda interviews (and questions asked during those interviews) are relevant to and necessary to advance the argument being made in the substantive EAW hearing.

40. In criticising the absence of evidential foundation for the application for discovery in this case, it should perhaps be made clear that the type of evidence that might have been put before the Court by the appellants has nothing to do with the substantive issues in the criminal trial, nor would putting evidence on affidavit for the purpose of discovery somehow entrench upon the presumption of innocence. What is being referred to is simply the appellant's factual description of what happened during the interviews, in circumstances where an appropriate evidential foundation must be laid by the appellants, as must any litigant, who seeks to persuade the Court that the discovery sought is both relevant and necessary. There has been no engagement either with the facts that are known to the appellants, or with the law in Northern Ireland, in order to give flesh to the generalised assertion that it is *necessary* for their legal teams to see the interviews in their totality in order to advance their right to silence objection at the forthcoming EAW hearing. On the contrary, it has all the appearance of a classic 'fishing' application, where the material is sought in the hope that something may turn up, rather than in order to substantiate something which has actually been put forward on affidavit in a reasonably specific manner.

41. Accordingly, the appellants have failed to establish that the discovery sought *is relevant* to the first version of the right to silence argument, and they have failed to establish that the discovery *is necessary* in order to advance the second version of the right to silence argument.

42. The Court therefore upholds the conclusion of the trial judge. The fundamental point made by him was that discovery may be ordered in appropriate cases, but only where the applicants "provide a link between the factual background, the pleadings and the right allegedly violated" (see judgment of *Minister for Justice v. Maguire, Minister for Justice v. Farrell* [2019] IEHC 805 at paragraph 28). This is a succinct and accurate way of describing what has to be established; and the absence of this link is precisely why the appellants' applications fell short of what was necessary to for their application to meet the appropriate threshold for discovery.