

THE HIGH COURT

[2013 No. 1 EXT.]

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

FRANCIS LANIGAN

RESPONDENT

Preliminary Ruling of Ms. Justice Murphy delivered the 17th day of November 2014

Introduction

1. This is a preliminary ruling arising from various procedural and evidential issues which arose in the course of the section 16 hearing which took place over three days in July 2014.

2. The respondent is the subject of a European Arrest Warrant issued by the UK (Northern Ireland) authorities on the 17th December, 2012. The European Arrest Warrant was endorsed by the High Court on the 7th January, 2013, and the respondent was arrested on the 16th January, 2013. The respondent does not consent to his surrender to the United Kingdom authorities and the court is being asked by the applicant to order the surrender of the respondent and the applicant contends that all relevant and necessary conditions for an order under s. 16 of the 2003 Act are satisfied. Further it is contended by the applicant that there is no basis to refuse a surrender of the respondent either on the basis of the points of objection filed or at all. The primary ground of objection raised on behalf of the respondent is that his life would be endangered by the surrender sought. It was argued on behalf of the respondent that the proceedings before the court are adversarial; that the Court is obliged to determine the issue on the pleadings before it; that the uncontroverted evidence is that the life of the respondent would be endangered; that there is no admissible evidence to the contrary and accordingly the Court is obliged to refuse the surrender sought.

Background

The European Arrest Warrant in this case was issued on the 17th December, 2012, by John Meehan District Judge, it is a prosecution warrant. The offences in respect of which the respondent's surrender is sought is one offence of murder and one offence of possession of a firearm with intent to endanger life. Both alleged offences carry a maximum penalty of imprisonment for life. In relation to the alleged offence of murder, the issuing judicial authority has ticked the box of murder, grievous bodily injury; in the list of offences set out at part E1 of the warrant. The second alleged offence is not a "tick box" offence and accordingly correspondence must be shown in accordance with s. 5 of the European Arrest Warrant Act 2003, as amended. The European Arrest Warrant was endorsed by the High Court on the 7th January, 2013, (MacEochaidh J.) and the respondent was arrested by Garda Sean Fallon on the 16th January, 2013 at Whitehall Road, Dublin 12 and he was brought before the High Court on

the same day. He has been remanded in custody since that date. Points of objection were initially filed on the 26th November, 2013, by Pdraig O'Donovan and Company, solicitors for the respondent. Eleven grounds of objection to the respondent's surrender are set out therein. The only ones of significance to this ruling are those which relate to the risk to the Respondent's life. This is set out in ground 1 with references to the risk being particularised in other grounds. Ground 1 states:

"1. The surrender of the respondent on the two matters, the subject of the European Arrest Warrant herein that issued under the hand of District Judge John Meehan of the Magistrates Court in Dungannon in the County of Tyrone on the 17th December, 2012, and as endorsed by this Honourable Court on the 7th January, 2013, should not be ordered as the surrender of the respondent would pose an unacceptable risk to the life and health of the respondent;

3. A grounding affidavit in support of his objection was sworn by the respondent on the 16th December, 2013. At para. 2 of the affidavit he verifies the points of objection insofar as they relate to his own acts and deeds and states that he believes the truth of the remaining allegations contained therein. The portion of the affidavit relevant to this ruling is as follows:

"I was born in Belfast on the 5th March, 1964. I joined Na Fianna at 16 years of age, at 17 I joined the Provisional Irish Republican Army (PIRA) and at or about 19 I joined the younger National Liberation Army (INLA). During my teens and arising from my political outlook I came into regular contact with her majesty's security services.

In March 1984, I was arrested and taken to Castlereagh interrogation centre. Over six days there I was repeatedly tortured. Whenever I complained to my solicitor about my treatment and he raised the issue with the police, I got beaten even more. In 1990 I received £15,000 sterling as damages for my torture.

In 1984, I was convicted of being part of an INLA active service unit (ASU) was sentenced to ten years imprisonment and was detained in the Republican H Block. On being released in 1990 I rejoined the INLA.

By 1991, my then friend Gino Gallagher was released from prison and we both became significant members of the INLA. I was then living in Lenadan Estate in West Belfast. The RUC advised me that my personal details were in the hands of Loyalists and changed my daily lifestyle ie. changed the times I routinely went to places. At that time attacks by loyalists were on the increase; the Johnny Adair (C) Company UFF was very active and personal acquaintances of mine, men and women were being murdered even though they were not in any way politically or otherwise connected.

Around then, the INLA began targeting RUC, UDR, British army and also the loyalist terror members with whom UK state agents had aligned and were cooperating. This was a crazy time in Belfast. Nobody knew who would be killed next. At this time I was working part time in Pat's Barbers, Lower Falls. I also worked part time at the Donegal Celtic nightclub. On the 7th September, 1993, Adair's UFF group tried to murder me. Their main gunman

(McKeag) who is now deceased, entered what he thought was my place of work and there he shot the barber several times killing him.

Things continued at a frenetic pace for months and there were a lot of INLA attacks on British forces and loyalists and vice versa. I was starting to burn out from the pace of things. I wore body armour every day and I could not live a normal life. Most of my friends who were active INLA members were reluctant to do operations without me, asking "will Frank be there?" I believe it is because of my increased stature in that community that my relationship with Gino Gallagher began to disimprove. I believe it was thought that I was getting "too big for my boots". I faced an INLA court martial and as a result I was shot in the leg. However, the punishment was carried out by my friend Mark McNeill and I actually helped him and I just received a slight wound.

I then started to relax and began socialising more. I still stayed in touch with my INLA mates and I also had IRA friends. But on the 1st December, 1995, the INLA tried to kill me at my mother's home. Two gunmen entered the house and shot me in the head and arm. I was taken to the Royal Hospital in Belfast. My friend Sal Devine came to visit me in the hospital, but the next day he was shot dead by D.A.A.D. the IRA cover name, Direct Action Against Drugs. I was released from hospital thinking I would be the next to be shot. By then on the INLA feud was intensifying after on (sic).

In January 1996, Gino Gallagher was shot dead and the RUC immediately arrived at my door. Gino and I had been sending messages to each other via the RUC: he was going to kill me and I was going to kill him. The INLA Belfast brigade tried to kill anyone involved in the feud who was a member or even an associate of members of INLA GHQ with which I was associated. In January 1996, in an attack on Kevin McAlorum's home the INLA fired shots in through the window killing Kevin's little sister. John Fennell was killed in Donegal in March 1996, Dessie McCleary was shot in Belfast in May 1996 and in September 1996, Hugh Torney was shot dead in Lurgan.

In 1997, the INLA was able to get guns in the Maze prison and "Crip" McWilliams shot and killed the loyalist LVS boss, Billy Wright. I believe that raises (sic) credible concerns about the security systems that allowed that to happen given the previous incident involving McWilliams and guns in Maghaberry prison some months earlier. In such circumstances there must be serious concerns for my safety if surrendered to Northern Ireland.

I knew that the INLA and also loyalist gangs were targeting me. In February 1998, Brendan Campbell was killed outside a Lisburn Road restaurant. I believe the IRA operating under the title DAAD were responsible and I believe were thrown out of the peace process on a temporary basis. In April 1998, the RUC contacted my solicitor, Deery McGuinness & Co. to inform that I was to be murdered in a hotel by loyalist elements. That was followed up with a formal written warning and a copy of that warning is exhibited. It says:

'Dear Sir, your client Francis Lanigan, I am aware that you are acting on behalf of Francis Lanigan of 31 Knockmore Square, Lisburn. Your letter of the 17th February, 1998, Reference number ADMKCRMLFOO1/25 refers.'

Note this letter is not exhibited. The letter from the Royal Ulster Constabulary proceeds:

'Police have received information concerning Mr. Lanigan's safety and have been endeavouring without success to pass on the information to him.' Information in police possession suggests loyalist elements intend to murder Studs Lanigan. Attack to take place at the Beach Lawn Hotel as it is believed he frequents that location.

The need to contact Mr. Lanigan quickly is obvious and any assistance you can give in either advising Mr. Lanigan of the threat or in advising him to contact Lisburn police would be appreciated. Our telephone conversation of the 6th April, 1998, refers. Thank you for your assistance in this matter and will you please confirm if you have been successful in contacting Mr. Lanigan.'

The copy of the letter exhibited is a poor copy and the name of the officer writing the letter is not clear. The affidavit continues:

In May 1998, I was attacked outside the Glengannon Hotel and, arising from that, John Knocker lost his life. Whereas some particulars of that incident are included in the European Arrest Warrant, it is not a forthright account. I am seeking the production of the CCTV evidence and in light of the admitted and proven collusion of the Northern Ireland state officials with loyalist paramilitaries; I believe that this Honourable court should have regard to that in considering the European Arrest Warrant.

I came south in the aftermath of that incident to protect my life and safety. If my presence here was known to the authorities, I do not understand why, if my surrender was to be requested, it was not sought in 1998 or shortly thereafter, particularly as Nuala Delaney and Gregory Fox, the others mentioned in the warrant were prosecuted in the year 2000.

I was still good friends with Kevin McAlorum and in 2002, he rang me after he had been released under the Good Friday Agreement. He told me that an attempt had been made on his life: that gunmen had entered his home and he hid in a cupboard. His wife, Cathy was there and they told her they would kill him. In 2004, I met Kevin in Dublin. Two weeks later whilst dropping his boy to school Kevin was dead, killed by the INLA because of Gino.

After I came to Dublin I changed my name for safety reasons and I moved on with my life. Under the name of Ciaran McCrory I was working as a self employed barber in the Ben Dunne at the Carlisle centre. I was and I am in a relationship with Sylvia Doherty and we have a daughter together. I got a PPS number and I made tax returns.

However, on the 17th January, 2013, I was arrested and these proceedings were put in train. I do not wish to return to Northern Ireland under the warrant as I believe I am

likely to be murdered there, either by persons associated with the INLA, IRA or some loyalist gang.

4. A further affidavit was sworn on behalf of the respondent by a retired solicitor Aidan Deery on the 19th February, 2014. Having recited the fact that he qualified as a solicitor in 1977 and had practised in the firm of Deery McGuinness & Co., 179/181 Victoria Street, Belfast and the fact that by virtue of a serious sporting injury sustained in August 2008, he has been retired since the end of that year he endorses as it were, the contents of the affidavit of Francis Lanigan. He then goes on to state:

"I believe if he is surrendered to Northern Ireland under the European Arrest Warrant or otherwise, the life and health of Francis Lanigan would be placed in serious risk and I am not at all satisfied that he can be protected by security forces or prison authorities. I am aware that there is a serious deterioration in the security situation and peace process in Northern Ireland and I am aware of credible threats to his life. I say and believe that Francis Lanigan should not be surrendered to Northern Ireland."

Further steps taken by the applicant

5. Arising from the points of objection and the affidavits set out above, the central authority wrote to the central authority in the UK seeking further information on two issues. By letter dated the 9th April 2014, the central authority wrote to the National Crime Agency, P.O. Box 800, London SE 11 5 EN seeking further information on the ability of the Northern Irish Prison Service (NIPS) to protect the respondent in the event of his surrender. On the 16th April 2014 the central authority wrote to SOCA Fugitives Unit P.O. Box 800, London SE 11 5 EN seeking an explanation for the delay in issuing the EAW. The latter request is of little significance to this ruling other than it shows that the central authority in this jurisdiction wrote to two different agencies when seeking additional information.

6. The information sought by the central authority in respect of the ability of Nips to protect the respondent was as follows:

"(1) The respondent contends that if incarcerated in Northern Ireland prison system, there is a real risk to his life from loyalist and republican dissidents as the prison authorities would be unable to protect him. Please request the Northern Ireland Prison Service to provide a detailed statement setting out the procedures which the NIPS deploys when dealing with prisoners who are perceived as being under a significant degree of threat. This was provided in the case of MJE v. Liam Adams and it is anticipated that the High Court will require this issue to be addressed in this case also.

A letter purporting to be from the Northern Ireland Prison Service and dated the following day, the 10th April, 2014, was put before the court. Respondent's counsel objected to its admissibility. The letter is headed "Procedures deployed Northern Ireland Service (NIPS) for dealing with prisoners under threat:

The NIPS has experience of holding in custody prisoners, both individuals and within groupings that are under threat or perceive themselves to be under threat.

The reasons that prisoners come under threat vary, but can be related to their offence or alleged offence, their public or medial profile, affiliation to a proscribed organisation related to the affairs of Northern Ireland, affiliation to criminal gangs and cooperation or perceived cooperation with the police under this Serious Organised Crime and Police Act (SOCPA) arrangements. Within NIPS structures there are processes for staff to report concerns regarding the safety of individuals and for these concerns to be acted upon. There are also effective communication processes with the police service of Northern Ireland so that information regarding threats can be reported and assessed for veracity.

The NIPS has set out our commitment to 'serve the community by keeping in secure humane custody those committed by the courts . . .' in our mission statement. Consequently there are well embedded measures in place for those who come under threat. All such cases will be individually assessed and a specific plan will be put in place to best address the safety concerns and any other related management problems. This specific plan will be formulated after relevant staff, agencies and the prisoner have contributed to a multi disciplinary case conference. The views of the prisoner's legal representative will be similarly taken and factored into any plan.

A specific plan may dictate that housing a person in the general prison population is not possible and all NIPS establishments include areas that are set apart to provide safe accommodation while providing a full and productive regime.

Without the full knowledge of any particular case it would not be possible to describe the specific and custody plan for any individual."

7. The core objection to surrender advanced by counsel for the respondent is that if surrendered to the UK and in particular the Northern Ireland authorities, there is a substantial risk that he will be murdered. The evidence of that risk contained in the respondent's own affidavit and the affidavit of a retired solicitor, Mr. Deery is he contends, uncontroverted by any admissible evidence, and therefore must be accepted by the court. The letter presented to the court from the Northern Ireland Prison Service (NIPS) according to counsel for the respondent, has not been properly proved in accordance with Irish law and is therefore not admissible. In the context of what he contends are adversarial proceedings the court must therefore refuse to surrender the respondent.

Nature of proceedings under EAW 2003 as amended

8. On behalf of the respondent it was contended that the framework decision and the Act giving effect thereto does not alter the practice, procedure and rules of evidence which apply in a Member State. It was pointed out to the court that at recital 12. Of the Framework Decision, it is specifically states:-

"This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process . . ."

9. Thus it was contended that absent statutory provision the normal rules for the conduct of litigation in this State apply. It was submitted that the hearing upon which the court was

engaged was an adversarial hearing based on pleadings: the pleadings of the applicant being the European Arrest Warrant and the pleadings of the respondent being the points of objection. It was submitted that the court had to determine the matter on the basis of those pleadings and any admissible evidence adduced in the course of the hearing. In relation to evidence, it was submitted that the normal rules of evidence apply. On that basis it was argued the court could not take account of the information contained in the letters put before the court, the most significant of which in the context of this argument is the letter from NIPS. In further support of this argument, counsel for the respondent relied on the Rules of the Superior Courts O. 98, r. 7 which stipulates:-

“Evidence at the hearing fixed for the purposes of section 16 of the 2003 Act shall be adduced on affidavit save where the Court, in urgent cases or if the interests of justice so require, otherwise directs.”

10. Reliance was also placed on the Rules of the Superior Courts O. 40, r. 4 which states:-

“Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof.”

11. Insofar as the State sought to rely on s. 20(2) of the European Arrest Warrant Act 2003, as amended, it was submitted by counsel for the respondent that s. 20(2) says absolutely nothing about whether or to what extent information of the kind in this documentation is to be admissible. It was suggested that had the Oireachtas intended to provide for the admission of information without formal proof it would have said so. Examples of the formula of words to render admissible documentation emanating from foreign public authorities were given to the court. Criminal Law (Jurisdiction) Act 1976, s. 11(3):-

“A statement of evidence . . . shall . . . be admissible . . . as evidence of any fact stated therein of which evidence would be admissible at the trial or appeal.”

12. The Extradition Act 1965, s. 37(1) (amended in 2012):-

“A document supporting a request for extradition shall be received in evidence without further proof if it purports to be signed, sealed, certified etc.”

13. Criminal Justice (Mutual Assistance) Act 2008, s. 102(1):-

“A document purporting to be (a request or order signed etc.) is admissible without further proof as evidence of the matters mentioned in the document.”

14. International Criminal Court Act 2006, s. 63(1):-

“A document purporting to be . . . is admissible without further proof as evidence of the request or document and of the matters mentioned in it.”

15. Child Abduction and Enforcement of Custody Orders Act 1991, s. 5(2):

“The original or copy of any such document as is mentioned in Article 8 of the (Hague) convention shall be admissible, insofar as it consists of a statement of fact as evidence of that fact . . .”

16. European Arrest Warrant Act 2003, s. 12(8):-

“A document that purports to be . . . shall be received in evidence without further proof.”

and s. 45A(11):

17. “A fingerprint palm print etc. shall be received in evidence without further proof.” It was further contended by Counsel for the respondent that the admission of such information is unfair to his client because *inter alia* he has no opportunity to test the information by cross examination.

18. Counsel for the applicant contested the characterisation of the proceedings as ‘adversarial’. She submitted that the Framework Decision and the legislation transposing it into Irish law and the jurisprudence emanating from the superior courts all confirm that the process created by the framework decision is a distinct regime designed to simplify the procedures for surrender between member states.

Decision on the nature of the process

19. Despite counsel for the respondent’s repeated insistence that this is a trial in which the court is the arbiter between the two parties and in which the full rights of due process attaching to a trial are engaged, the court is satisfied that this is not a trial. The outcome of this hearing will not determine the guilt or innocence of the respondent of the offences for which his surrender is sought. The process on which the court is engaged is a distinct process created by the Council Framework Decision of the 13th June, 2002, providing for surrender procedures between Member States of the European Union. The framework is predicated on the principle that each Member State respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the charter of Fundamental Rights of the European Union. The system is further predicated on mutual trust and confidence between member states. The system is designed to favour surrender. This is reflected in our legislation by the insertion of various presumptions as to the conduct of requesting states. The requirement that the final decision on surrender be taken by a judicial rather than an administrative authority is to ensure proper scrutiny of the operation of the system, which in turn engenders faith in the propriety of the process. The Framework decision envisages the exchange of information upon which the issuing and receiving states can act. This is a novel concept in our jurisprudence. Our courts are conditioned to act on ‘evidence’ not ‘information’. It is not surprising that it has taken time for our common law system to adjust to such a concept. The Framework decision encourages communication between member states and their differing legal systems .

20. The court in scrutinising the process is not concerned with the guilt or innocence of the respondent. That is a matter for the member state in whom we have trust and confidence. By virtue of the legislation transposing the framework decision into our domestic legislation, the

court's sole function is to ascertain whether the conditions set out in s. 16 of the European Arrest Warrant Act 2003, as amended have been met and if so that the court is not required to refuse surrender under s. 21A, 22, 23 or 24 and/or that the surrender of the person is not prohibited by part 3 of the Act.

21. In conducting that assessment, the court is not limited to the material placed before it by the parties as the court would be in an adversarial hearing. The court is specifically entitled by s. 20 of the Act, to seek additional information or documentation from either the issuing judicial authority or the issuing state, if the court is of the opinion that what is before it is not sufficient to allow the court to perform its functions under the Act. The court must be satisfied regardless of the urgings of the parties before making a decision to surrender. Save as specifically provided for by statute all material to be placed before the court must be on affidavit as provided for in Order 98 rule 7. The court will return to the proper construction of s.20 later in this ruling.

Presumption pursuant to Section 4A of the EAW 2003 as amended.

22. S 4A of the EAW provides a presumption that an issuing state will comply with the requirements of the framework decision, unless the contrary is shown. It is a presumption designed to give effect to the mutual trust and confidence which member states repose in each other. The presumption is rebuttable. The next question which therefore arises for determination is whether or not there is sufficient evidence before the court to rebut the presumption contained in s. 4A of the European Arrest Warrant Act 2003. If the presumption stands rebutted, the court must then consider whether there is sufficient material before it to show that the risk to life can be averted. In this context, the applicant relies on the information received from the Northern Ireland Prison Service, its capacity to and procedures for dealing with those who are or who perceive themselves to be under threat. The respondent challenges the admissibility of that information. Is that information admissible in the form in which it was originally presented to the court or alternatively, is it admissible as an exhibit in the affidavit of John Davis sworn on behalf of the central authority produced to the court on day 3 of the trial? In the event that the court holds it to be admissible as an exhibit in the affidavit of John Davis, then the respondent has applied for liberty to cross examine John Davis and to seek discovery of all interactions passing between the central authority in this jurisdiction and the central authority in the issuing state.

Section 4A presumption

23. It is well established in this jurisdiction that in order to rebut a presumption contained in the European Arrest Warrant Act 2003, as amended, clear and cogent evidence must be adduced. Mere speculation or uncorroborated assertion is not sufficient. Section 27(1)(a) provides that a person shall not be surrendered under this Act if:

- (a) his surrender would be incompatible with the State's obligations under
 - (i) the Convention, or
 - (ii) the protocols to the Convention,
- (b) his or her surrender would constitute a contravention of any provision of the Constitution other than for the reason that the offences specified in the European Arrest Warrant as an offence to which s. 38(1) (b) applies."

24. Both the Convention at Article 2 and the Constitution recognise that the most fundamental right of all, is the right to life. If the evidence establishes that there are substantial grounds for believing that the person if surrendered would face a real risk of being murdered, then his surrender would be prohibited unless his right to life pursuant to the Constitution and to Article 2 of the European Convention on Human Rights is protected so far as is practicable by the Northern Ireland authorities. In other words if the evidence establishes that there are substantial grounds for believing that there is a real risk of a threat to his life then his surrender is prohibited unless the requesting state takes appropriate steps to safeguard his life. The court holds that the appropriate test is the test set out in *MJELR v Rettinger* [2010] IEHC 206. While that case deals with Article 3 rights it is equally in the court's view applicable to the right to life enshrined in Article 2. The process to be engaged in by the High Court was set out by Denham J. at para. 27 of her judgment:-

"Thus I would apply the following principles:-

- (i) A court should consider all the material before it, and if necessary material obtained of its own motion.*
- (ii) A court should examine whether there is a real risk, in a rigorous examination.*
- (iii) The burden rests upon an applicant, such as the appellant in this case, 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 a real risk of being subjected to treatment contrary to Article 3 of the ECHR. (In this case insert Article 2 of the ECHR)*
- (iv) It is open to a requesting State to dispel any doubts by evidence. This does not mean that the burden has shifted. Thus, if there is information from an applicant as to conditions in the prisons of a requesting State with no replying information, a court may have sufficient evidence to find that there are substantial grounds for believing that if the applicant were returned to the requesting state he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the ECHR. On the other hand, the requesting State may present evidence which would, or would not dispel the view of the court.*
- (v) The court should examine the foreseeable consequences of sending a person to the requesting State.*
- (vi) The court may attach importance to reports of independent international human rights organisations, such as Amnesty International, and to governmental sources, such as the US State Department.*
- (vii) The mere possibility of ill treatment (death threat) is not sufficient to establish an applicant's case.*
- (viii) The relevant time to consider the conditions in the requesting state is at the time of the hearing in the High Court. Although, of course, on an appeal to this Court an*

application could be made, under the rules of court, seeking to admit additional evidence, if necessary."

This is the test which the court proposes to apply.

In the instant case, the evidence of the respondent is uncontroverted. It consists of his affidavit and an affidavit of a retired solicitor, Aidan Deery. In his affidavit, the contents of which are set out above, the applicant gives the history of his involvement with and participation in the activities of various paramilitary organisations from 1980 until 1998 when he came south of the border following the incident at the Glengannon Hotel which is the subject of the European Arrest Warrant. He also avers that while a prisoner in Castlereagh interrogation centre in 1984, he was repeatedly tortured over a period of 6 days. He avers that whenever he complained to his solicitor about his treatment and the solicitor raised the issue with the police, he got beaten even more. In 1990 he received £15,000 sterling as damages for his torture.

25. The general history given is of internecine lethal feuding between the INLA and the PIRA as well as attacks on British forces and loyalists carried out during that period. He exhibits a letter from the RUC dated April 1998, which appears to have been in response to an inquiry from his solicitors Deery McGuinness & Co. indicating that at stage the RUC were aware of a loyalist plan to kill him. He only instances one event post 1998 and that is the murder of his friend Kevin McAlorum who was murdered by the INLA in 2004, two weeks after he had met the respondent in Dublin. His evidence is that following his move to the Republic he changed his name to Ciaran McCrory for safety reasons - *"I do not wish to return to Northern Ireland under the warrant as I believe I am likely to be murdered there either by persons associated with the INLA, IRA or some loyalist gang"*.

26. His evidence in this regard is supported by an affidavit from a retired solicitor named Aidan Deery who states at para. 1 of his affidavit that he has *"continued to take an interest in political, legal and current affairs in Northern Ireland and consider myself well informed"*. He states at para. 3:

"I believe if he (Francis Lanigan) is surrendered to Northern Ireland under the European Arrest Warrant or otherwise, the life and health of Francis Lanigan would be placed at serious risk and I am not at all satisfied that he can be protected by security forces or prison authorities. I am aware that there is a serious deterioration in the security situation and peace process in Northern Ireland and I am aware of credible threats to his life."

While Mr. Lanigan's affidavit is short on detail of an ongoing threat to his life and Mr. Deery's affidavit does not specify the nature of the current "credible threats" the fact is that the evidence of a threat to his life is capable of belief and is unchallenged. The court must therefore accept that there *are substantial grounds for believing that if he were returned to the requesting country he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the ECHR.* (In this case Article 2 of the ECHR)

27. In such circumstances before a surrender can be ordered, the court must be satisfied that his right to life under our Constitution and Article 2 of the European Convention on Human Rights will be protected so far as is practicable. The jurisprudence of the European Court of Human Rights under Article 2 of the European Convention on Human Rights has recognised the positive obligations on States to take appropriate steps to safeguard the lives of those within its jurisdiction. In *Osmon v. United Kingdom*, the court held that Article 2(1) "*enjoins the State not only to refrain from the intentional and the unlawful taking of life, but also to take appropriate action steps to safeguard the lives of those within its jurisdiction*". This means that state authorities must do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. In the same case the court recognised, however, that this obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.

28. Having found that there is sufficient evidence to rebut the presumption the court is put on inquiry as to whether or not there is sufficient evidence/information before it to allow it to conclude that appropriate steps will be taken by the Northern Ireland authorities to protect the respondent's right to life. The applicant relies on a letter from NIPS dated the 10th April, 2014. The letter outlines NIPS awareness of the complexity of the threats which may arise among its prison population and sets out the procedure adopted by it to counteract such threats. The first issue which arises is whether it is admissible in the form in which it was presented to the court. The applicant contends that the provision of information in this manner is authorised by s. 20(2) of the European Arrest Warrant Act as interpreted by the Supreme Court in *Sliczynski*. The respondent contends that its admission would flout the established rules of procedure in our adversarial system and that if the court found it admissible under s. 20(2) of the European Arrest Warrant Act, then s. 20(2) is unconstitutional.

29. Insofar as the applicant relied on *Sliczynski* [2008] IESC 73, as entitling the applicant to place information before the court, upon which the court could act, the respondent argued that *Sliczynski* was relevant only to the interpretation of s. 20(1) of the European Arrest Warrant Act 2003, as amended. That decision was informed by Article 15(2) and (3) of the Framework Decision. Those Articles specifically provide at (2):

"If the executing authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and the Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limit set in Article 17."

And at (3) of the same Article it states:-

"The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority."

30. It was submitted that there is nothing in the framework decision to underpin a similar interpretation of section 20(2). Counsel for the respondent also pointed to the fact that in

Sliczynski the information received from the judicial authority was exhibited to the court by way of affidavit.

The Sliczynski Decision

31. In the *Sliczynski* case, the Supreme Court considered *inter alia* the provisions of s. 20 of the European Arrest Warrant act 2003, as amended. The complaint of the respondent in that case was that letters received by the central authority from the issuing judicial authority in Poland had been improperly admitted by the High Court as the letters constituted inadmissible hearsay. The same claim is made by the respondent in this case in respect of the Nips document put before the court by the applicant and the respondent makes the additional claim that its admission is unfair because he cannot cross examine the author as to their contents.

32. In the *Slizenski* case at p. 7 of his judgment, Murray C.J. as he then was stated:-

"In my view s. 20(1) and (2) (emphasis added) of the Act of 2003, as amended, are provisions by which the Oireachtas sought to give effect to the system of surrender envisaged by the Framework Decision so as to ensure that information could be furnished by the requesting Judicial Authority to the executing judicial authority, the High Court. If further information is transmitted by the requesting Judicial Authority either on its own initiative or following a request it is the function of the central authority to transmit it to the executing judicial authority, in this country, the High Court. Section 20 must be interpreted in the light of the objectives of the Framework Decision and its provisions. In my view it specifically gives effect to Article 15(2) and (3) of the Directive. In so providing I am satisfied that the Oireachtas intended, consistent with the obligations of the State pursuant to the Framework Decision, that the High Court would have available to it the information provided by the issuing judicial authority and would have full regard to that information, in addition to information provided in the European Arrest Warrant itself, for the purpose of deciding whether a person should be surrendered on foot of a European Arrest Warrant. Moreover to interpret the provisions of the Act otherwise would render them meaningless since if direct evidence had to be given of the information concerned every Judge or member of the issuing judicial authority providing information would either have to give evidence personally or swear an Affidavit of matters within their own knowledge. If that were the case the provisions referred to would serve no purpose. Clearly in my view they were intended to ensure that the High Court would have, where required, information from the judicial authority concerned in addition to that already contained in the arrest warrant itself.

Before the High Court can receive and take into account such information it must be established that the information communicated emanates from the judicial authority of the requesting State. In this case that has been established by the express averments in the Affidavits lodged on behalf of the applicant in the High Court. In any event the source of the information has not been put in issue."

While focusing on s. 20(1) which was the provision in issue in that case it is clear from the excerpt quoted that the Supreme Court encompassed s.20(1) **and (2)** (emphasis added) in its decision.

33. It is clear from the *Sliczynski* decision that judicial authorities in Member States may provide information to the executing judicial authority in this State and so long as the executing authority in this State is satisfied that the information communicated has emanated from the judicial authority it may receive and take into account that information.

34. Amended section 20

Section 78 of the Criminal Justice (Terrorist Offences) Act 2005, amended s. 20 by widening the category of authorities from whom additional documentation or information might be sought. From the date of amendment, the High Court and the Central Authority were empowered to seek additional documentation and information from the issuing state as well as from the issuing judicial authority. "Issuing state" is defined in s. 2 of the Act and means, in relation to a European Arrest Warrant, a Member State designated under s. 3, a judicial authority of which has issued that European Arrest Warrant. A designated state is defined in s. 3(1). "for the purposes of this Act, the Minister for Foreign Affairs may, by order, designate a Member State that has under its national law, given effect to the framework decision". By Statutory Instrument No. 4/2004 entitled European Arrest Warrant Act 2003 (Designated Member States) Order 2004, the United Kingdom of Great Britain and Northern Ireland were designated a Member State for the purpose of the Act.

This extension of the power to seek additional documentation and information from the issuing State is in conformity with the objectives of the framework decision. The court points to Article 15 (2) of the Framework Decision which states:

*If the executing authority finds the information communicated **by the issuing Member State** (emphasis added) to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and the Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limit set in Article 17."*

34 The amended S.20 also gives effect to Article 10(5) of the Framework Decision which provides:-

*"All difficulties concerning the transmission or the authenticity of any document needed for the execution of the European Arrest Warrant shall be dealt with **by direct contacts** (emphasis added) between the judicial authorities involved, or where appropriate, with the involvement of the central authorities of the Member States."*

The amended S. 20 also advances the objectives set out at Recitals 1 and 5 of the framework decision, namely:-

Recital 1

". . . formal extradition procedure should be abolished among the Member States in respect of persons who are fleeing from justice after having been finally sentenced and extradition procedures should be speeded up in respect of persons suspected of having committed an offence."

Recital 5

"The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further the introduction of a new simplified system of surrender of sentence of suspected persons for the purposes of execution or prosecution of criminal sentence makes it possible to remove the complexity and potential for delay inherent in the present extradition procedure. Traditional cooperation relations which have prevailed up to now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters covering both pre-sentence and final decision within an area of freedom security and justice.

35. This extension of the statutory provision facilitates that simplification. It was submitted by counsel for the respondent that any such communication must come from the UK's designated agency for inter state interaction. Such an interpretation would make a nonsense of the entire framework procedure as set out in the framework decision and transposed into our law by the European Arrest Warrant Act 2003, as amended. The decision in *Creaven v Criminal Assets Bureau* [2004] 4 I.R. 434, relied on by the respondent has absolutely no relevance to the system of surrender created by the framework decision and the legislation transposing same into Irish law.

36. It is the court's view that the amended s. 20 empowers the central authority as well as the High Court to seek additional documentation or information from either the issuing judicial authority or the issuing state. In either case, it transmits its request through either the central authority in that state or if there is none the issuing judicial authority.

37. The extension of the power to seek additional information and documentation from the issuing state is a rational and logical one. Surrender can be resisted on a number of grounds which involve matters of which the issuing judicial authority may have no particular knowledge, but the state authorities would. The most obvious example is the case where surrender is resisted on the grounds of prison conditions. The issuing judicial authority could not be expected to have the in depth knowledge necessary to deal with complaints about prison conditions, but the issuing state does possess such knowledge.

38. Applying the rationale of the *Sliczynski* decision to the amended s. 20, and having regard to the recitals and articles of the Framework Decision set out above, I am satisfied that the Oireachtas intended consistent with the obligations of the State pursuant to the framework decision, that the High Court would have available to it where required, information provided by the issuing state and is entitled to have full regard to that information, in addition to information provided in the European Arrest Warrant itself, for the purpose of deciding whether a person should be surrendered on foot of a European Arrest Warrant. Furthermore, I adopt the reasoning of Murray C.J. in finding that information from an issuing judicial authority could be placed before the High Court and apply the same rationale for the placing of information obtained from an issuing state before the High Court. He said:-

“Moreover to interpret the provisions of the Act otherwise would render them meaningless since if direct evidence had to be given of the information concerned every Judge or member of the issuing judicial authority providing information would either have to give evidence personally or swear an affidavit of matters within their own knowledge. If that were the case the provisions referred to would serve no purpose. Clearly in my view they were intended to ensure that the High Court would have, where required, information from the judicial authority concerned in addition to that already contained in the arrest warrant itself.”

39. Counsel for the respondent has argued that the admission of such information is unfair to his client because *inter alia* he has no opportunity to test the information by cross examination. If this were a trial, either civil or criminal then that complaint would be well founded. However, despite counsel for the respondent’s repeated insistence that this is a trial in which the court was the arbiter between the two parties and in which the full rights of due process attaching to a trial were engaged, the court for the reasons already stated, is satisfied that this is not a trial.

How is information to be placed before the court?

40. In this case, the applicant presented to the court a letter sent by the central authority to the UK central authority informing it that the respondent was contending that if incarcerated in the Northern Ireland prison system, there would be a real risk to his life from loyalist and republican dissidents as the prison authorities would be unable to protect him. A detailed statement was requested setting out the procedures which the NIPS deploys when dealing with prisoners who are perceived as being under a significant degree of threat. The letter goes on to state ‘*This was provided in the case of MJE v. Liam Adams and it is anticipated that the High Court will require this issue to be addressed in this case also.*’ The letter was addressed to the National Crime Agency PO Box 800, London SE 11 5 EN and was dated the 9th April, 2014. Next a letter was presented to the court, which on its face is stated to come from the Northern Ireland prison service dated the 10th April, 2014, addressed to the National Crime Agency, PO Box 800, London SE 11 5 EN which letter sets out the procedures deployed by Northern Ireland prison service for dealing with prisoners under threat. The applicant contends that it is permissible under the Act to place information which it says was obtained from the issuing state, in this manner. The respondent on the other hand, contends that the information contained in the letters from NIPS is inadmissible. He pointed to the fact that in the case of *Minister for Justice v. Adams* [2012] I.R. 140, the applicant provided the court with an affidavit from Mr. Simpson Q.C. and also relied upon an affidavit of Mr. Alan Craig, a Governor in the Northern Ireland prison service. In the case of the *Minister for Justice v. Stapleton* [20--] I.R. 669, the applicant filed an affidavit sworn by a retired member of the Lincolnshire Police Force, a Mr. Derek Canton relating to his dealings with the respondent in and about the investigation of fraudulent activity. In the case of *Minister for Justice v. SMR* [2008] 2 I.R. 242, the applicant filed an affidavit of law from a Ms. Eskeil.

41. In the court’s view for the reasons already stated, it is not essential that information emanating from a judicial authority or an issuing state be exhibited on affidavit, eventhough, in many cases that is how the applicant has chosen to put the information before the court. What is essential is that the court be satisfied as to the provenance and authenticity of the

information. This is relatively simple when the information is being sought from the issuing judicial authority. The court can see the letter which is sent by the Central Authority to the issuing judicial authority and the reply received. The matter is more complex when information is being provided by the issuing state, because that information can come from a wider variety of sources. It is therefore necessary to establish that the central authority sought the relevant information, that on foot of that request, the central authority or judicial authority in the requesting state in turn sought that information from a relevant state agency (in this case NIPS and the Crown Prosecution Service re delay) and that the information before the court is the response received.

42. On the papers initially presented to the court, the chain of correspondence relating to the ability of the prison service to protect the respondent in custody and to explain the delay in issuing the warrant, is not clear. The first letter dated the 9th April, 2014, dealing with prison protection is sent to the National Crime Agency and the second letter dated the 16th April, 2014, asking for an explanation for delay is sent to SOCA Fugitives Unit. While it is clear that the letters sent come from the central authority in this jurisdiction it is not clear which of the two bodies is the central authority in the UK responsible for transmission of European Arrest Warrants. The letter purportedly sent by NIPS which addresses prison systems in Northern Ireland, is addressed to the National Crime Agency, while the letter from the Crown Solicitors office in Belfast on the issue of delay is addressed to SOCA Fugitives Unit. On the basis of the papers initially presented, the court has no explanation for this discrepancy nor does it know specifically what information was requested by the issuing state from NIPS, nor indeed that the letter from NIPS relates to the case of Mr. Lanigan at all. The letter from NIPS dated the 10th April 2014 has the appearance of a circular which has been prepared to be deployed in all situations in which the ability of the prison services to protect prisoners is in issue. The alacrity with which it was furnished (the following day) adds to this impression. In the court's view, where it is asked to rely on additional information or documentation provided, pursuant to s. 20(2) of the Act, the central authority must establish the process by which it was obtained so as to show that it is information that emanates from the relevant statutory body of the issuing state and that it relates to the respondent.

43. On the third day of the hearing being the 4th July, 2014, the applicant furnished an affidavit from Mr. John Davis of the Central authority. The court has considered the affidavit and the exhibits contained therein, and notes that there is an explanation for the two different names used on the letters from the central authority in the issuing state and further notes that emails sending back the information requested to the central authority are exhibited. What is not however, exhibited is the request that was sent to NIPS, nor the request that was sent to the Crown Prosecution solicitor by the Central Authority in the issuing state. It appears to the court that to complete the chain of information so as to satisfy the court of the provenance and authenticity of the information and that the information is case specific, those requests should be before the court. The court therefore rules that the provenance and authenticity of the additional information requires to be established in the manner set out.

44. Upon the production of the affidavit of Mr. John Davis on the 4th July, Counsel for the respondent immediately sought leave to cross examine Mr. Davis on his affidavit. He made it

clear that he wished to conduct a wide ranging examination touching on all interactions between the issuing state and this state concerning the respondent. At that juncture, the court ruled that the application was premature in that whether or not such an application could be entertained was dependent upon the view which the court took on the necessity for affidavit evidence in the first place. In view of the court's finding that information does not have to be laid before the court by way of affidavit, the court does not accede to that application. Even if it were disposed to do so, any such cross-examination would be limited to the provenance and authenticity of the information. The wide ranging examination envisaged by the respondent's counsel is not permissible in the context of a European Arrest Warrant Application.

45. The Court now requires that the applicant engage with the, to date, uncontroverted, evidence of the respondent that in the event of his surrender his life would be at risk. The court seeks information addressing the specific concerns expressed. The information may be presented to the court otherwise than in affidavit form but it must be presented in a way that the court can be satisfied of the provenance and authenticity of the information and that the information relates to this specific case.

46. The court will defer its consideration of the other points of objection until such time as the additional information sought, has been furnished.