

SUPREME COURT

Application for Leave and Notice of Appeal (as amended)

For Office use:

Supreme Court record number of this appeal

Subject matter for indexing

Leave is sought to appeal from The High Court

HIGH COURT
Record no. 2015 1662 SS

Between:-

FRANCIS LANIGAN

Applicant/Appellant

-and-

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

Respondents

Date of filing : **10th day of February 2017**

Name(s) of Applicant(s)/Appellant(s) : **Francis Lanigan**

Solicitors for Applicant(s)/Appellant(s) : **Pádraig O'Donovan & Co., Solicitors**

Name of Respondent(s) : **Governor of Cloverhill, The Minister for
Justice and Equality, Ireland and the
Attorney General.**

Respondent's solicitors: **The Chief State Solicitor**

Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?

Yes.

An application for leave to appeal in related proceedings: Court of Appeal 2015 482 was rejected by this Court on 27th June:- [2016] IESCDET 85, an application for leave to appeal from the Court of Appeal 2015 488 was filed on 1st December 2016 S:AP:2016:000141 and amended on 25th January 2017 and an application for a "leap-frog" appeal from High Court proceedings: 2014 No. 6374P was filed on 18th January. [S:AP:IE:2017:00014]

Are you applying for an extension of time to apply for leave to appeal? **No.**

1. Decision that it is sought to appeal

Name(s) of Judge(s) **High Court.
Humphreys J.**

Date of order/Judgment **Order of 16th December 2016;
Judgement of 23rd January 2017**

2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name: **Francis Lanigan**

Original status **Applicant/Appellant**

Solicitor

Name of firm **Pádraig O'Donovan & Co., Solicitors Company,**

Email: **info@podonovansolrs.com**

Address: **Abberley Law Centre, Tallaght, Dublin 24.**

Telephone no: **01 4610250 086 8221262**

Document Exchange no. **104012**

Postcode: **Dublin 24.**

Ref.

How would you prefer us to communicate with you? **E-mail**

Counsel

Name: **Michael Forde SC**

Email; **catherinefordebl@gmail.com**

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Postcode: **Dublin 7.**

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Email: **kierankelly@lawlibrary.ie**
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Telephone no: **01 8175340 / 087 2359307.**
Document Exchange no. **811134**
Postcode: **Dublin 7.**

3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Respondent's full name: **Governor of Cloverhill, The Minister for Justice and Equality, Ireland and the Attorney General.**

Original status **Respondent.**

Solicitor **Hugh Dockry**

Name of firm: **Chief State Solicitor**

Email: **hugh_dockry@csso.gov.ie**

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Telephone no: **01 4176129**

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How would you prefer us to communicate with you? **E-mail**

Counsel

Name: **Robert Barron SC**

Email: **rbarron@lawlibrary.ie**

Address: **Law Library, Four Courts, Dublin 7.**

Telephone no: **01 817 4570**

Document Exchange no; **816015**

Postcode: **Dublin 8.**

Name: **Tony McGillicuddy BL**

Email: tmcgillicuddy@lawlibrary.ie

Address: **Distillery Building, Church Street, Dublin 7.**

Telephone no: **01 817 7823**

Document Exchange no; **818100**

Postcode: **Dublin 7.**

4. Information about the decision that it is sought to appeal

It is sought to appeal the entire decision - the rejection of this statutory Art.40.4 application, the failure to seek further information from the requesting judicial authority and the refusal to make an Art. 267 reference to the Court of Justice.

This is another phase related to the proceedings commenced against the intending Appellant (hereinafter “the Appellant”) on 7th January 2013 under the European Arrest Warrant (or “EAW”) Acts, for his surrender to the U.K./Northern Ireland for trial on charges of murder and firearms offences. The claim being made is mainly of statutory unconstitutionality, in respect of which Murphy J. in the s. 16(1) application had been requested to defer ordering his surrender, until it had been determined in what was intended to be concurrent plenary proceedings. Notwithstanding, on 4 September 2014 the judge, having earlier refused to make an Art. 267 reference to the Court of Justice on particular relevant questions, ordered his surrender and refused leave to appeal.

There are two other closely related leave to appeal applications by this Appellant pending in this Court – one from the Court of Appeal filed on 1st December 2016 (now amended) and the other from White J. filed on 18th January 2017.

To avoid unnecessary repetition, the Court is referred to the “information concerning” parts of those two applications for the background to these proceedings and also to paras 15-36 of the opinion of the Advocate General in *Minister for Justice and Equality –v- Lanigan* (Case 237/15 PPU) [2016] Q.B. 252, which gives an account up to mid 2015.

What immediately gave rise to this second Art. 40.4 application was, on 15 September 2015, the Minister obtained a stay on those parts of Murphy J.’s order of 4th September 2015 requiring the Appellant to be detained, as specified, and that, unless surrendered within the prescribed time limit, he should be brought back to the High Court where it could be ordered that he be released. On 15th October 2015, his application for leave to bring this complaint was refused by the High Court (Noonan J.). On 19th October 2016 the Court of Appeal granted leave and remitted the matter for hearing. It was heard by Humphreys J. on 15th and 16th December 2016 who, in an ex tempore judgement, rejected the complaint.

When this application was first filed there was no judgement that would enable us to ascertain particular clear reasons for that rejection. The principal reason that was anticipated was the inappropriateness of the Art. 40.4 procedure as a process for litigating the questions herein. However, that was not a basis for rejection. But the judgement raises several important questions about Art. 40.4 procedure, the determination of several of which the Appellant accepts. There also is a question of interpretation of a part of s. 16 of the EAW Act that gave rise to difficulties in the past, leading to its amendment, but continues to cause difficulties in the courts below. There as well is an issue about seeking further information under Art. 15(2) of the Framework Decision and also an issue about the ad hoc legal aid scheme.

Orders and findings

High Court : Dismiss application/Refuse habeas corpus.

5. Reasons why the Supreme Court should grant leave to appeal

Interests of justice

The principal interests of justice here are the same as in the two related pending leave applications. The particular injustices in the trial are that the judge

- i. did not address the actual reason why he was asked to seek information from the requesting State's judicial authority in Dungannon concerning prison conditions in Northern Ireland;
- ii. did not address the principal argument made on the proper construction of the relevant parts of s. 16 of the EAW Act 2003, as amended, which were predicated on the reasoning of this Court in *Ó Fallúin* [2007] 3 I.R. 414
- iii. did not give a reason for why paras. 15 and 16 of Mr. O'Donovan's affidavit did not constitute significant evidence of a fundamental denial of justice; there is not even an indication of what that uncontradicted and unchallenged evidence was.

For these reasons, there was a material unfairness in the hearing. Arguments made should be addressed and, where significant evidence is being rejected, at minimum it should be stated briefly what that evidence was. This is the approach that the High Court regularly adopts when judicially reviewing the decisions of administrative agencies (e.g. in the Immigration list) and at minimum that Court should abide by the very standards it requires of less skilled and experienced adjudicators. Because EAW proceedings involve EU law, they must comply with fair procedures required by Arts 5(4), 6(1) and 13 of the European Convention on Human Rights – *inter alia* address the arguments made (here *inter alia* in carefully drafted written submissions) and give reasons for rejecting those arguments and related evidence rather than bald assertions that the point is not convincing.

Further, because the Appellant has been detained for far longer than the maximum period permitted by statute and/or by the Framework Decision and/or because the orders for his surrender and review have been indefinitely “stayed,” a question arises as to the lawfulness of his detention under EU law as well as the EU Act. It is in the interests of justice that this Court considers the practice of the Central Authority obtaining unconditional “stays” on surrender and review orders and then failing to bring persons back to the High Court for a review of their extended detention for an unspecified duration.

General Public Importance

Regarding general public importance, because this is another phase in the dispute that is the subject of the two related leave applications, the same considerations of general importance should apply here. The following particular issues have general application and several are not confined to EAW/extradition cases. Additionally, some of the determinations below agreed with the Appellant’s contentions but would appear to be of sufficient far above the average significance to warrant consideration at this level. These are principally-

- i. *Habeas Corpus practice and procedure*: On account of the “conforming interpretation” obligation and as is explained by the Advocate General in the *Lanigan case* [2016] Q.B. 252 at paras. 147 and following, the application of Art. 40.4 of the Constitution must conform with Arts. 5(4), 6(1) and 13 of the European Convention and, we contend in consequence, with the *U.N. General Assembly’s Report of the Working Group on Arbitrary Detention*, (U.N.doc WGAD/CRP.1/2015) 55 I.L.M. 365 (2016). The trial judge was in broad agreement with this principle. Yet other judges/courts have made determinations that disregard it. Clarity is required on the broad parameters of Art. 40.4 in light of E.U. obligations. One of the points arising here is what constitutes “new evidence” for the purposes of a second complaint being made. Another is whether (as the judge held) there cannot be notice parties to Art. 40.4 applications. This may have considerable practical importance where the basis for the complaint is that the legislation under which the detainee is being held is unconstitutional. If correct, then it may be necessary in such cases to institute parallel plenary proceedings where the Attorney General is a party. But recent decisions of the Court of Appeal (e.g. *Lanigan I* and *Owczarz*) appear to suggest that deploying Art. 40.4 in this manner is some kind of “abuse” where a provision of the EAW Act is being challenged. Those Court of Appeal decisions did not engage in any in depth analysis of the relevant case law or practice to date. Clarification is required of this broad issue as, on numerous occasions, this Court has stressed that the appropriate process for mounting a challenge of statutory unconstitutionality is plenary proceedings.
- ii *EAW practice and procedure* : Three particular aspects call for consideration. One is when should a judge seek additional information from the requesting

judicial authority, as envisaged in art. 15(1) of the Framework Decision on an EAW. This was broadly clarified by the Court of Justice in *Aranyosi & Căldăraru* (cases 404 and 659/15 PPU) [2016] Q.B. 921 and see commentary in 53 Comm. Mkt. L. Rev. 1675 (2016). Further clarification of the position here, as the CMLR commentary would suggest, may have E.U.-wide ramifications.

Another EAW point, closely related to Art. 40.4, is the obligation to bring the prisoner promptly back to the court when it appears that the initially specified surrender date cannot be complied with: the conjunction of ss. 16(1), (4)(c), (5) and (6)(b). Different judges have expressed varying views on how exactly this should operate. And in the *Lanigan* case [2016] Q.B. the Advocate General explained why a comparable obligation applies at the pre-surrender order stage. One aspect of this is whether the inherent jurisdiction of courts to stay their own orders has been pre-empted by the unqualified obligation in s. 16(4)(c) of the EAW Act. For on several occasions the Minister has sought to evade (we contend) this obligation by securing unconditional and indeterminate stays of this nature. This in itself is an aspect of the much broader issue of when does a specific statutory procedure preempt or displace what has been an inherent power of courts to manage their processes in all types of procedures.

A final EAW point, not part of the appeal, is what the State appear to accept in para 61 of the judgement. If indeed this entirely novel remedy is equally available to Respondents in EAW proceedings, as the judgement suggests, there is a very considerable public interest in having it endorsed in this Court. For example, in the underlying dispute here, application could have been made to Murphy J. in December 2015 to re-consider her decision in light of the Maghaberry report – had such a procedure been known to exist then. A similar application could have been made to Barrett J., explaining that the only application before him on the day was for an adjournment. The possibility of making such applications most likely would have rendered unnecessary the multiple litigation instituted since then to avoid surrender to where, on the evidence, his life was at risk. Why did the Minister not make that suggestion before now and indicate that she would not resist making such applications? Doing so would have saved extensive valuable court time, resources and expense. It should be noted that in most other systems of civil procedure (including before the ECHR and the CJEU), a process exists where a trial court can be asked to “review” its decision on the basis of a fundamental error being made rather than (as here) appealing it or applying to have it set aside, as being obtained by fraud. Until now, it has been thought that no such process exists in Irish civil procedure for losing parties. Para 61 of the judgement suggests that such process exists in EAW cases. Confirmation that this is so will align Irish civil procedure with that in most countries, other than the U.K., and may prevent bringing what truly should be avoidable appeals.

Exceptional circumstances warranting a direct appeal.

As for appealing directly to this Court, there already are two closely related leave applications by this Appellant pending determination that it would almost be an abuse to now go to the Court of Appeal with this case, thereby adding probably another year to an already four years old dispute.

6. Ground(s) of appeal which will be relied on if leave to appeal is granted

As the above account shows, the issues in dispute are what is envisaged by a “fundamental denial of justice” and what is “new evidence” in Art. 40.4. proceedings, whether a request should have been made to the Dungannon judge and the operation of the EAW Acts s. 16(4)(c). But as summarised above, there are two other issues that, if within the jurisdiction of this Court, an “advisory opinion” would be beneficial to litigants in many different types of proceedings and not just in EAW cases: that of notice parties to Art. 40.4 cases and the novel request to “review” its own judgement procedure.

The learned trial judge erred in law and/or in fact:-

- i. Holding (para 59b) that there was no denial of fundamental justice without clarifying what evidence for this the Appellant had relied on, let alone furnishing a reason why that evidence about the earlier processes was deemed to be deficient in this respect (other than the conclusion of the Court of Appeal).

Elaboration: The unchallenged and uncontradicted evidence was that, on 14th September 2014, the Applicant’s request for an adjournment of the Art. 40.4, to be heard in conjunction with the plenary proceedings, was not refused, nor did the duty judge direct that the trial of that Art. 40.4 should proceed forthwith on that day and, consequently, the hearing of that adjournment application cannot be treated as the trial of those proceedings.

- ii Holding (para 60) that the transcripts in other proceedings obtained subsequent to 14th September 2015 could not constitute “new evidence” for a second Art. 40.4 application.

Elaboration: With the availability of wholly reliable DAR recordings, it is unreasonable to expect solicitors in attendance to take detailed notes of every single submission made and replying observation, and further to have them exhibited in an affidavit ready to be served on the jailor almost the instant the return is made to an Art. 40.4. complaint. If such meticulous diligence is expected of solicitors, this reinforces why the High Court should show equivalent diligence in addressing comprehensively all submissions made by counsel on the law and evidence.

- iii Not addresssing (para 63) the reason given why information should be requested from the Dungannon judge.

Elaboration: The reason was to show that the glowing account of prison conditions in the letters (that could not be cross-examined) considered by Murphy J. in the s. 16(1) proceedings were materially misleading, and not to show a prevailing continuing risk to the Appellant's life. The *Aranyosi & Căldăraru* case [2016] Q.B. 921 suggests that the information sought ought to have been so requested.

- iv Holding (paras 66 and following) that, on account of s. 16 (3A)'s reference to subs. (5) and (6), that rendered the continued detention lawful.

Elaboration: This flies in the face of what this Court decided in *Ó Fallúin* [2007] 3 I.R. 414, Fennelly J. p. 418, para. 17: that under s. 16 questions of detention and surrender are entirely different matters. Had s. 16 (4) been made subject to s. 16(6) of the Act, the position might be as found by the judge. But s. 16(4) is not so qualified and Art 5(4) of the Convention as expounded in *Lanigan* coupled with the *expressio unius* maxim supports the Appellant's case here.

- v Holding that an Art. 267 reference was not necessary;

Kieran Kelly BL
Michael Forde SC

7. Other relevant information

Neutral Citation of judgement appealed against: **[2017] IEHC 23**

8. Order(s) sought

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

What order are you seeking if successful? **Set aside Order of the High Court dismissing the habeas corpus, order release and a recommendation under the Legal Aid (Custody Issues) Scheme.**

Order being appealed: **Order of 16th December 2016 (perfected 19th December)**
Judgement of 23rd January 2017

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution.

If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention.

Because the European Convention on Human Rights Act 2003 does not extend to judicial proceedings, a declaration that the procedures in the High Court contravened the Convention cannot be sought under the Act. The Appellant's only mode of redress is an application to the Strasbourg Court.

Are you asking the Supreme Court to: depart from (or distinguish) one of its own decisions? **No**

make a reference to the Court of Justice of the European Union? **Yes**

Appropriate questions have been requested in the two pending leave applications (S:AP 2016 000141 and S:AP 2017 00014). In addition to these, there is the question about failure to comply with the obligation on the Central Authority, highlighted by the CJEU in the *Lanigan* case (at the pre-surrender order stage), to bring the person back again to the Court for it to review his continuing detention – a question that also arises in the envisaged leave application in *Myerscough*. There also is the question about seeking further information under Art. 15(2) of the Framework Decision from the Dungannon Judge in light of the Maghaberry prison report.

Will you request a priority hearing? **Yes**

If Yes, please give reasons below:

This is a four years old EAW case and there have been enormous delays so far in progressing it, for which the Appellant cannot be faulted. Also the Appellant was in custody for over two and a half years and presently is on bail on very strict terms. He has sought priority in his other two leave to appeal applications.

Signed: _____

Pádraig O'Donovan

Solicitor for the applicant/appellant

Please submit your completed form to:

**The Office of the Registrar of the Supreme Court
The Four Courts
Inns Quay
Dublin 7.**

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal. This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.