

**SUPREME COURT****Respondent's Notice****IN RESPONSE TO APPLICANT'S AMENDED NOTICE OF APPEAL****which was served on the 27<sup>th</sup> of March, 2017****and dated the 10<sup>th</sup> of February, 2017**

<b>Supreme Court record number</b>	<b>2017/00015</b>
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**[Title and record number as per the High Court proceedings]**

<b>Francis Lanigan</b>	<b>V</b>	<b>Governor of Cloverhill Prison</b>
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<b>Date of filing</b>	<b>INSERT March, 2017</b>
<b>Name of respondent</b>	<b>Governor of Cloverhill Prison</b>
<b>Respondent's solicitors</b>	<b>Chief State Solicitor's Office</b>
<b>Name of appellant</b>	<b>Francis Lanigan</b>
<b>Appellant's solicitors</b>	<b>Padraig O'Donovan &amp; Co. Solicitors</b>

**1. Respondent Details**

**Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)**

<b>Respondent's full name</b>	Governor of Cloverhill Prison The other respondents were struck out of the proceedings by order of the High Court dated the 1 <sup>st</sup> December, 2016 (see paragraphs 31 – 35 of the judgment).
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The respondent was served with the application for leave to appeal and notice of appeal on date
The original application was served on the 24 <sup>th</sup> of January, 2017 and the Amended Notice was served on the 27 <sup>th</sup> of March, 2017

The respondent intends :	
<input type="checkbox"/>	to oppose the application for an extension of time to apply for leave to appeal
<input type="checkbox"/>	not to oppose the application for an extension of time to apply for leave to appeal
<input checked="" type="checkbox"/>	to oppose the application for leave to appeal
<input type="checkbox"/>	not to oppose the application for leave to appeal
<input checked="" type="checkbox"/>	to ask the Supreme Court to dismiss the appeal
<input type="checkbox"/>	to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court
<input type="checkbox"/>	Other (please specify)

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**If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.**

Details of respondent's representation are correct and complete on notice of appeal:	<input type="checkbox"/>
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Respondent's Representation

Solicitor			
Name of firm	Chief State Solicitor's Office		
Email	Hugh_dockry@csso.gov.ie		
Address	Osmond House, Little Ship Street,	Telephone no.	4176100
		Document Exchange no.	186
Postcode	Dublin 2	Ref.	
How would you prefer us to communicate with you?			
<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input checked="" type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name	Robert Barron SC		
Email	rbarron@lawlibrary.ie		
Address	Law Library, Four Courts	Telephone no.	8174570
		Document Exchange no.	816015
Postcode	Dublin 7		

Counsel			
Name	Tony McGillicuddy		
Email	tmcgillicuddy@lawlibrary.ie		
Address	Law Library, Four Courts	Telephone no.	8175980
		Document Exchange no.	810292
Postcode	Dublin 7		

**If the Respondent is not legally represented please complete the following**

Current postal address
Telephone no.
e-mail address

How would you prefer us to communicate with you?			
<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

2. Respondent's reasons for opposing extension of time

If applicable, set out concisely here the respondent's reasons why an extension of time to the applicant/appellant to apply for leave to appeal to the Supreme Court should be refused

### 3. Information about the decision that it is sought to appeal

The Respondent herein does not agree with the narrative outlined by the Applicant in the section entitled "Information about the decision that it is sought to appeal" in any respect. The said narrative is polemic in nature and does not set out "facts" to assist this Honourable Court with the matters at issue in these proceedings.

The basic fact of this appeal is that the Applicant was detained on the 4<sup>th</sup> September 2015 pursuant to a Committal Warrant issued by the High Court addressed to the Governor of Cloverhill Prison (and the Superintendent in charge of the Bridewell Garda Station), in accordance with Section 16 of the European Arrest Warrant Act, 2003, as amended (the High Court having directed the surrender of the Applicant to the United Kingdom to face trial for an offence of murder and an offence of possession of a firearm with intent to endanger life). In this application made pursuant to Article 40.4.2 of the Constitution, Governor Ronan Maher of Cloverhill Prison, certified (on 1<sup>st</sup> December 2016) this Committal Warrant of 4<sup>th</sup> September 2015 as being the basis of the Applicant's detention, subject to the bail that had subsequently been granted to the Applicant by the Court of Appeal.

The Applicant had instituted this Article 40 application before Mr. Justice Noonan in October 2015, in which he sought his release on a single ground relating to the grant of a stay on the Order for Surrender, which had been granted by the High Court (Butler, J.) on the 25<sup>th</sup> September 2015, the details of which are set out hereunder. That application was initially refused by Mr. Justice Noonan on the 15<sup>th</sup> October, 2015. He appealed that refusal to the Court of Appeal. In its judgment of the 19<sup>th</sup> October, 2016 the Court of Appeal granted leave to bring the Article 40 Inquiry on the ground that had been argued before Mr. Justice Noonan, namely in relation to the stay granted by Mr. Justice Butler in the High Court on the 25<sup>th</sup> September, 2015.

When the matter came on for hearing before Mr Justice Humphreys in December 2016 the Applicant not only pursued his arguments based on the stay granted by Mr Justice Butler but also reopened or sought to reopen arguments that had been made and rejected in earlier applications. Consequently, the written judgment of Mr Justice Humphreys delivered on the 23<sup>rd</sup> of January 2017 addresses these earlier proceedings and the issues which arose in consequence of the Applicant's approach to this application. For this reason, the Respondent now sets out information concerning each of the previous applications, together with fuller information concerning this application and appeal.

#### ***Section 16 proceedings in the High Court and uncertified appeal to the Court of Appeal:***

1. *In the High Court Ms. Justice Murphy ordered the surrender of the Applicant (the Respondent in the EAW proceedings themselves) to the issuing state pursuant to s.16 of the European Arrest Warrant Act, 2003 on the 4<sup>th</sup> September, 2015.*

2. *The High Court had delivered a preliminary judgment in the proceedings on the 17<sup>th</sup> November 2014. Following that, it had made an Article 267 Reference to the Court of Justice of the European Union and judgment was delivered by that Court on the 16<sup>th</sup> July, 2015 (Case 237/15). A further hearing took place on the 20<sup>th</sup> July 2015 in the High Court. Thereafter, the High Court delivered its further judgment on the application on the 2<sup>nd</sup> September, 2015 and dismissed all of the Respondent's objections.*
3. *The Applicant then applied for leave to appeal on the 4<sup>th</sup> September, 2015 on seven distinct questions of law, all of which were refused, and which are all attached as a schedule to the second order made by Ms. Justice Murphy on the 4<sup>th</sup> September, 2015.*
4. *Following that, the Applicant filed a Notice of Appeal on or about the 11<sup>th</sup> September, 2015 and set out 6 Grounds of Appeal on the same or similar matters for which leave to appeal had been refused by Ms. Justice Murphy in the High Court pursuant to s.16(11) of the European Arrest Warrant Act, 2003.*
5. *The Respondent's Notice, dated the 21<sup>st</sup> September, 2015, set out the grounds of opposition which included the claim that the Court of Appeal had no jurisdiction to entertain the appeal as the High Court had not certified that the case was one falling within the terms of Section 16(11) of the European Arrest Warrant Act, as amended.*
6. *On foot of that Notice, the Respondent issued a Notice of Motion on 29<sup>th</sup> September 2015 seeking to have the appeal struck out. That motion was heard on the 11<sup>th</sup> January 2016 and judgment delivered on 16<sup>th</sup> March, 2016 striking out the appeal.*
7. *In its judgment of the 16<sup>th</sup> March, 2016 the Court of Appeal recited the six Grounds of Appeal which were pleaded by the Applicant and held, at paragraph 22, that the said grounds contained no challenge to the validity of the Act or of any of its provisions. Arising from that, the Court of Appeal struck out the said appeal.*
8. *The Applicant did not seek to challenge the constitutionality of any law either in his application for leave to appeal before the High Court or in his (uncertified) Notice of Appeal to the Court of Appeal. Thus, no assertion was made in the said application(s) that any law was invalid having regard to the provisions of the Constitution.*
9. *The Applicant sought leave to appeal the decision of the Court of Appeal to the Supreme Court. That application was dismissed in a Determination dated the 27<sup>th</sup> June, 2016 with reference number [2016] IESCDET 85.*

**Article 40 proceedings before Mr. Justice Barrett and Court of Appeal:**

10. *The Applicant instituted Article 40 proceedings before Mr. Justice White on the 9<sup>th</sup> September, 2015. Thereafter, the said Inquiry was granted by Mr. Justice Hunt, to whom the matter had been adjourned, on the 11<sup>th</sup> September, 2015. A hearing date was given for the Article 40 application of the 14<sup>th</sup> September, 2015.*
11. *The said proceedings were heard by the High Court (Mr. Justice Barrett) on the 14<sup>th</sup> September, 2015 and judgment was delivered on the 17<sup>th</sup> September, 2015 dismissing the Article 40 application.*
12. *Thereafter, the Applicant's appeal was dismissed by the Court of Appeal in its judgment of the 19<sup>th</sup> October, 2016 after a hearing which took place on the 18<sup>th</sup> March 2016.*
13. *The Applicant has sought to appeal the dismissal of that appeal to the Supreme Court*

*in an application with a Record Number S:AP:2016:000141.*

14. *The said application was filed on the 1<sup>st</sup> December, 2016 and amended on the 25<sup>th</sup> January, 2017. The Respondent's Amended Notice opposing the said application was filed on the 28<sup>th</sup> February, 2017.*

***Stay application before Mr. Justice Butler in September 2015:***

15. *An Application was made before Mr. Justice Butler on 25<sup>th</sup> September, 2015 for a stay on the operation of the Section 16 Order and Mr. Justice Butler granted the following Orders:*
- (i) A stay on such part of the Order under s.16(1) of the European Arrest Warrant Act, 2003 made by the High Court (Murphy J.) on the 4<sup>th</sup> September, 2015 as directed that Francis Lanigan be surrendered to such other person as is duly authorised by the issuing State to receive him pending further Order.*
  - (ii) A stay on such part of the Order of the High Court (Murphy J.) made on the 4<sup>th</sup> September, 2015 pursuant to s.16(4)(c) of the European Arrest Warrant Act, 2003 (as reflected in (a) and (b) on page 2 of that Order) pending further Order.*
16. *The relevant section of the Order of Murphy J. of the 4<sup>th</sup> September, 2016 which is affected by Point No. (ii) in the Order of Butler J. is as follows:*

*"The Court further directs*

- (a) That if the respondent is not surrendered before the expiration of the time for surrender under s.16(3)A of the European Arrest Warrant Act 2003 as amended he is to be brought before the High Court again as soon as practicable after that expiration or*
  - (b) If it appears to the Central Authority in the State that because of circumstances beyond the control of the state or the issuing state concerned that the respondent will not be surrendered on the expiration referred to at (a) he is to be brought before the High Court again before that expiration."*
17. *No appeal has ever been taken against the Order made by Mr. Justice Butler by the Applicant herein.*

***Plenary Proceedings instituted by the Applicant in the High Court:***

18. *Separately, the Applicant issued plenary proceedings in the High Court (entitled Francis Lanigan Plaintiff -v- Central Authority, Minister for Justice and Equality, Ireland and Attorney General Defendants bearing record number 2014/6374P) on 23<sup>rd</sup> July 2014 (served on 11<sup>th</sup> December 2014), in which he, inter alia, challenged the constitutionality of provisions of the European Arrest Warrant Act, 2003.*
19. *The Defendants in those proceedings brought a motion to strike out the proceedings and same was heard by the High Court (Mr. Justice White). Judgment on that motion was delivered on the 11<sup>th</sup> November, 2016 in which the proceedings were dismissed. The costs of the action were awarded to the Respondents in those proceedings.*
20. *A separate Notice of Appeal has been filed by the Applicant in respect of those proceedings with the Supreme Court office. That Notice of Appeal has a record number S:AP: IE:2017:00014. The Respondents Notice to that appeal is to be filed in the near future.*

21. *A Notice of Appeal has also been filed with the Court of Appeal in respect of those proceedings and, again, the Respondent's Notice to that appeal is to be lodged in the near future.*

***Article 40 Proceedings before Mr. Justice Humphreys the subject matter of this appeal:***

22. *The Applicant had been admitted to bail by the Court of Appeal on the 9<sup>th</sup> November 2015 in the first Article 40 application. Upon that appeal being dismissed in the judgment delivered on the 19<sup>th</sup> October 2016, but the appeal in the second (this) Article 40 having been allowed, the Court of Appeal admitted him to bail on the same terms and conditions in this application and remitted it to the High Court for hearing.*
23. *Thereafter, the Respondent caused this matter to be listed in the Non-Jury/Judicial Review List on the 9<sup>th</sup> November, 2016 and the 16<sup>th</sup> November, 2016 to secure a hearing date for the case.*
24. *Following that, the said Article 40 proceedings were heard by the High Court (Mr. Justice Humphreys) on a number of dates in December 2016. An ex tempore judgment was delivered on the 16<sup>th</sup> December, 2016 dismissing the Article 40 application. The Order in relation to same was perfected on the 19<sup>th</sup> December, 2016.*
25. *Following that, Mr. Justice Humphreys delivered a written judgment in the application on the 23<sup>rd</sup> January, 2017.*
26. *Thereafter, the Applicant herein has filed a Notice of Appeal with this Honourable Court. An amended Application for Leave, dated the 10<sup>th</sup> February, 2017, was filed with the Supreme Court but it was only served on the Respondent on the 27<sup>th</sup> March, 2017. The within Respondent's Notice opposes the application to this Honourable Court and refers to the Amended Application for Leave of the 10<sup>th</sup> February, 2017.*
27. *The Applicant has also filed a Notice of Appeal with the Court of Appeal and a Respondent's Notice, opposing that appeal, has been filed.*

***General Information concerning the conduct of the proceedings before Mr. Justice Humphreys:***

28. *Much of the Applicant's "information" is extraneous to the issues in the proceedings. The key matter is that the Article 40 proceedings were instituted by the Applicant with the stated aim, as set out in paragraph 1 of the document "Application for Inquiry – Article 40.4" for a "Release from custody and a recommendation under the Legal Aid (Custody Issues) Scheme."*
29. *The High Court conducted that hearing on a number of dates in December 2016 as it was required to do by the Constitution. As is set out in the judgment of the High Court, under the section "Scope of an Article 40 Inquiry" the High Court granted the Applicant leave to file a further affidavit on the 7<sup>th</sup> December, 2016. That Affidavit raised arguments which were outside of those matters upon which the Court of Appeal had remitted the case to the High Court for hearing.*
30. *Furthermore, the Applicant was afforded access to the DAR recording for the hearing of the Article 40 proceedings before Mr. Justice Barrett on the 14<sup>th</sup> September, 2015 (incorrectly referred to in paragraph 44 of the judgment of Humphreys J. as the 16<sup>th</sup> September, 2016 although there is no substantive issue arising from that). However, as recorded at paragraph 44 of the judgment the Applicant did not take up the DAR*

recording and the hearing of the Article 40 Application proceeded on the 12<sup>th</sup> and 16<sup>th</sup> December, 2016 respectively.

31. *Insofar as the Applicant has referred to conditions in Maghaberry Prison arising from a report entitled Maghaberry Prison Conditions Report from November 2015, Mr. Justice Humphreys held, at paragraph 63, that "it falls significantly short of the level of real risk to the life or human rights of the applicant that would render unlawful his detention for the purposes of surrender to the UK. He will have the protection of the ECHR and Northern Irish law in order to assist in vindicating his rights in that respect. The matters set out in that report do not render Murphy J.'s order unlawful; nor do those matters require the release of the applicant."*
32. *It should be noted that the only section of that report which addresses the position of persons (prisoners) in need of protection (which was the basis of the claim made in the Section 16 proceedings that the Applicant's right to life under Article 2 of the European Convention on Human Rights would be endangered by his surrender because of former INLA and Loyalist threats against which he claimed the Northern Irish Prison Service could not protect him) states:*
- 1.23 Prisoners who needed protection from others were identified and offered support. They were accommodated in a number of different areas of the prison. Those with whom Inspectors spoke generally felt safe where they were.*
33. *As is recorded at paragraph 62 of the judgment Mr. Justice Humphreys accepted the Applicant's submission that new factual material is in principle capable of allowing the court on Article 40 to review the lawfulness of detention by virtue of a High Court order for surrender which is based on evidence available at an earlier point in time. It is further noted that Counsel for the Respondent accepted that "he could not say that Article 40 would not be available in such circumstances."*

#### 4. Respondent's reasons for opposing leave to appeal

**If leave to appeal is being contested, set out concisely here the respondent's reasons why:**

*In the case of an application for leave to appeal to which Article 34.5.3° of the Constitution applies (i.e. where it is sought to appeal from the Court of Appeal)-*

- \* the decision in respect of which leave to appeal is sought does not involve a matter of general public importance
- \* it is not, in the interests of justice, necessary that there be an appeal to the Supreme Court

## **Exceptional Circumstances**

The basis upon which the Supreme Court shall have appellate jurisdiction from a decision of the High Court pursuant to Article 34.5.4 of the Constitution is that the Court is satisfied that there are exceptional circumstances warranting a direct appeal to it. The Applicant has barely acknowledged this precondition in his Application for Leave to Appeal and to the extent that he has, he has rested on delay in what is referred to as “an already four years old dispute”.

The Respondent acknowledges that the delay in the surrender of the Applicant consequent upon his multiple overlapping applications could as a matter of logic be a factor in a determination by the Supreme Court as to whether it would permit an appeal direct to it from the High Court. That is particularly so given the fact that the underlying offence of murder alleged against the Applicant took place as far back as 31<sup>st</sup> May 1998.

But that is predicated upon two assumptions: firstly, that “exceptional circumstances” within the meaning of Article 34.5.4 of the Constitution extend to a factor of this nature; and, secondly, that having regard to the general public importance of the decision or the interests of justice it is reasonable to assume that an appeal from the judgment of the Court of Appeal will be allowed in due course.

As to the first assumption, the Respondent contends that the issue of delay is not one envisaged by the phrase “exceptional circumstances warranting a direct appeal to it”. In reading Article 34 as a whole that which warrants a direct appeal is a matter of fundamental importance in the decision itself. If it were otherwise delay in the prosecution of proceedings might ironically confer on a plaintiff an opportunity to have his or her case heard on appeal by the Supreme Court absent anything of significance in the issues determined in the High Court.

As to the second assumption, the Respondent disputes the Applicant’s specific grounds for contending that the High Court decision involves a matter of general public importance or it is in the interests of justice that the Supreme Court grant leave to appeal hereunder.

But without prejudice to those responses to the Applicant’s grounds, the Respondent contends that this is not a matter which on any basis involves a decision of general public importance

or one in which it is in the interests of justice that leave be granted. Hence, the assumption that the surrender of the Applicant (or other final disposal of this matter) would be delayed further by the appeal proceeding before the Court of Appeal would be incorrect.

There are two matters that arise from the decision of the High Court:

- (1) Whether the stay granted by the High Court on 25<sup>th</sup> September 2015 rendered the Applicant’s further detention unlawful; and
- (2) Whether by reason of any of the matters argued and determined against the Applicant by the High Court and Court of Appeal in earlier applications, his detention had been rendered unlawful.

Both the High Court in its judgment of 23<sup>rd</sup> January 2017 and the Court of Appeal (albeit obiter dicta) in its judgment of 19<sup>th</sup> October 2016 concluded that the stay was unnecessary because Section 16 of the European Arrest Warrant Act, 2003, as amended, had the effect that the Order was, in any event, stayed during the currency of any application under Article 40.4 of the Constitution. As a matter of fact, between the first and the second Article 40.4 applications, during the entire period in which the stay granted by Butler, J. has been extant, there has been an Article 40.4 application brought by the Applicant in



existence.

Consequently, the matter which arises is in the first instance one of statutory interpretation. It is only if the Court of Appeal were to decide that Section 16 did not create a statutory stay on the making of an Article 40.4 application that the question of whether the High Court could grant such a stay could arise. Otherwise, that issue is moot.

The Respondent contends that a matter of statutory interpretation is not, of itself, a matter of general public importance or otherwise every case involving any such point would have to be heard (at some stage) by the Supreme Court. Furthermore, it is important to note this situation arises only in cases where a person against whom an Order for their surrender has been made brings an application pursuant to Article 40.4. That is a procedure which affects a very small number of individuals. The effect of the stay is to preserve the status quo pending the determination of that Article 40.4 application. The stay, assuming that the High Court and Court of Appeal have been incorrect in their interpretation of Section 16 to date, ensures that the person in the position of the Applicant is not surrendered before the Article 40.4 application is determined or alternatively that the Minister is not in breach of the Order made under Section 16 by failing to surrender the person in question.

In an academic sense this may be considered a matter of interest. But it is not a matter of general importance. The rights of the Applicant in this case and the very few other similarly placed persons who bring applications under Article 40.4 are protected by the procedure adopted or the statutory stay found by the High Court (and Court of Appeal obiter dicta) to exist under Section 16 of the 2003 Act. The question of whether the High Court (and obiter dicta the Court of Appeal) was correct or not and, if not, the question of whether the granting of the stay by the High Court on 25<sup>th</sup> September 2015 rendered the Applicant's detention unlawful can be determined by the Court of Appeal. This is not a matter, whether in terms of any important legal issues that arise or the number of persons affected by the decision, that renders it one of general public importance.

The Respondent relies upon the same points concerning the argument that it would be in the interests of justice to have an appeal from the Court of Appeal on the issue of the stay.

The remaining part of the Applicant's case concerns issues that have been decided against him in other proceedings and which he contends he ought to be able to pursue again in this second Article 40.4 application without any regard to those previous decisions. Should the Court of Appeal determine this appeal against the Applicant, the fact that he may (on his case) have been deprived an opportunity of ventilating yet again arguments that have been raised and decided in other cases is not and would not make it a matter of general importance or in the public interest (indeed it would be decidedly against the public interest) to allow him a further appeal to this Court.

Put bluntly, the circumstances which have arisen in this "dispute" are peculiar to the Applicant. It does not affect other litigants. He has repeatedly refused to accept the decisions of the Courts as final and refused to accept the procedure laid down in the European Arrest Warrant Act, 2003, as amended, and Article 40.4.2 and 40.4.3 of the Constitution as being the correct procedure to litigate to finality his dispute about the lawfulness of his detention and the constitutionality of the European Arrest Warrant Act, 2003.

For these reasons the Respondent contends that the only basis for suggesting that there are exceptional circumstances in this case warranting an appeal, namely delay, is incorrect.

Without prejudice to that ground of response, the Respondent contends that neither of the alternative preconditions in Article 34.5.4 of the Constitution are satisfied in this case, being the necessity for the High Court decision to involve matters of general public importance or it being in the interests of justice that the Supreme Court had appellate jurisdiction in this case. In that respect, the Respondent repeats the general grounds set out above (in the context of responding to the contention that delay is an exceptional circumstance) and sets out its grounds of response below to the specific grounds advanced by the Applicant, not otherwise addressed in the preceding grounds of opposition.

**Interests of Justice:**

1. The Applicant's contentions, contained in paragraphs (i) – (iii) inclusive that there were "*particular injustices in the trial*" and that there was a "*material unfairness in the hearing*" are without merit, are an abuse of the process of this Honourable Court and do not constitute grounds for this Honourable Court granting leave to the Applicant on any basis whatsoever.
2. The contentions being made by the Applicant in paragraph (i) of Section 5 of his Notice under the heading "*Interests of Justice*" that the High Court did "not address" the "*actual reason why he was being asked to seek information from the requesting State's authorities concerning prison conditions in Northern Ireland*" is without any merit whatsoever.
3. The judgment of the High Court records in specific terms that it made a ruling on that point from paragraphs 60 – 64 inclusive and found that the Applicant's detention was not rendered unlawful by that report. There was no necessity to state the evidence in question where the report was referred to in clear terms in paragraph 60 of the judgment itself. There is no basis in law or in justice for allowing an appeal related to that issue where it was addressed in succinct terms by the High Court after having been argued in the Applicant's own submissions to the Court.
4. Similar considerations apply to the contention by the Applicant in paragraph (ii) of Section 5 of his Notice under the heading "*Interests of Justice*" that the High Court did "not address" the "*principal argument*" made on the proper construction of s.16 of the *European Arrest Warrant Act, 2003*. That is without any foundation whatsoever as the said argument was adjudicated upon from paragraphs 66 – 82 of the High Court judgment. It is contended, respectfully, that the Applicant's arguments to the contrary are an insult and an abuse of the process of this Honourable Court.
5. The same considerations apply to the contentions referred to in paragraph (iii) of Section 5 of his Notice under the heading "*Interests of Justice*" that the High Court did "*not give a reason*" why paragraphs 15 and 16 of Mr. O'Donovan's Affidavit did not constitute significant evidence of a fundamental denial of justice. This issue was fully dealt with in the judgment of Mr Justice Barrett, which judgment was upheld on appeal. The Applicant failed to establish either before Mr Justice Barrett (from whose decision Article 40.4.3 provides for a Case Stated to the Court of Appeal if the High Court judge considered that the detention was lawful but under a statute that was unconstitutional) or the Court of Appeal that the matters of which the Applicant complains in paragraphs 15 and 16 of Mr O'Donovan's affidavit render his detention unlawful.
6. Further the High Court did give reasons as to why those contentions did not constitute a "*fundamental denial of justice*". The Court of Appeal had

determined an appeal against the Article 40 decision of Mr. Justice Barrett and had dismissed same. This is referred to by Mr. Justice Humphreys at paragraph 59(b) of his judgment as the fundamental reason why that argument was rejected. The judgment also referred to the Applicant's failure to take up the DAR recording of the hearing before Mr. Justice Barrett.

**General Public Importance:**

7. Arising from the foregoing, there is no issue of law of general public importance that arises in this case. Neither do the interests of justice require this Honourable Court to allow a further appeal. In the circumstances the application to this Honourable Court is an abuse of process and to the extent to which the Applicant has sought to add issues extraneous to these proceedings in this application for leave to appeal that is a further abuse of the process of the Court and it should be dismissed on that basis.
8. The High Court conducted and determined the Article 40 application by the Appellant in accordance with Article 40.4.2 of the Constitution. In the circumstances the Applicant's submissions about the need to consider "*Habeas Corpus practice and procedure*", as set out in paragraph (i) of this section in his Amended Notice are mis-conceived. There is no issue of law of general importance that needs to be determined as the High Court decided the Article 40 application in accordance with the precepts of the Constitution itself which have been set down in case law.
9. For the avoidance of doubt, Mr. Justice Humphreys did not indicate any "*broad agreement*" with the U.N. General Assembly's Report of the Working Group on Arbitrary Detention in the judgment, as alleged in that paragraph and the allegations that "*other judges have made determinations that disregard it*" is an insult to the Superior Courts generally and is so lacking in particularity as to be an allegation that should be dismissed *in limine*.
10. Further, even if the High Court had accepted that the UN General Assembly's report had any relevance to the Article 40.4 enquiry, that is not an instrument of EU law. Accordingly, the contention that clarity is required on the broad parameters of Article 40.4 in light of EU obligations is unfounded.
11. There is no point arising in this case concerning "new evidence" for the purpose of a second complaint under Article 40.4 of the Constitution. The "new evidence", referred to at paragraph 60 of the High Court judgment, concerned evidence that was not available to Ms Justice Murphy during the Section 16 hearing or otherwise prior to her judgment. There is thus no point of general public importance arising from the reference to "new evidence" in this application.
12. The same applies to the assertions that it may be necessary to institute parallel proceedings where the basis for the complaint is that the legislation in question is unconstitutional. The provisions of Article 40.4.3 of the Constitution are ignored by the Applicant even though it provides for a case-stated procedure to the Court of Appeal if a person's detention is found to be in accordance with law but such law is invalid having regard to the provisions of the Constitution.
13. It is also recalled that the Applicant instituted the first set of Article 40 proceedings (dismissed by Barrett J. in September 2015 and further dismissed by the Court of Appeal on the 19<sup>th</sup> October, 2016) where the Applicant had argued constitutional grounds as part of his case and had not been prevented from doing

so. To now seek to argue that there is some lack of clarity in the Article 40 procedure flies in the face of the Applicant's own invocation of that procedure in the first Article 40 Application.

14. The point raised in paragraph (ii) concerning "*EAW practice and procedure*" and the obligation to obtain additional information from the issuing judicial authority is an attempt to argue matters about the s.16 application which were determined by Murphy J. and where the uncertified appeal in respect of same was dismissed by the Court of Appeal and, thereafter, by the Supreme Court. To attempt to argue such matters again at this stage is an abuse of the process of this Honourable Court. Without prejudice to the foregoing the circumstances and means by which the High Court can seek further information has been addressed in previous authorities, most notably in the judgment of the Supreme Court in *MJELR v Sliczynski* [2008] IESC 73, and is settled.
15. The Applicant sets out an extensive paragraph about the Respondent's position before Mr. Justice Humphreys (contained in paragraph 61 of the judgment) where it was outlined that s.16 orders under the *European Arrest Warrant Act, 2003* had been re-opened on a previous occasion where new information/evidence came to hand. The Applicant argues that there is a "*very considerable public interest*" in having that approach endorsed in this Court.
16. That is not a matter which arises in this application. Indeed, the Applicant refers to the desire to obtain an "*advisory opinion*" on this point from the Supreme Court (see part 6 of his Amended Notice). That is not countenanced by the Constitution and the reference to an "*advisory opinion*" is, in the circumstances, a concession that the point that is contended for is a moot and should not be adjudicated upon.

##### 5. Respondent's reasons for opposing appeal if leave to appeal is granted

Please list (as 1, 2, 3 etc. in sequence) concisely the Respondent's grounds of opposition to the ground(s) of appeal set out in the Appellant's notice of appeal (Section 6 of the notice of appeal):

- i. This ground of appeal is another attempt to argue the very same matter which was dismissed by the Court of Appeal in its judgment of the 19<sup>th</sup> October, 2016. On that occasion, as on this occasion, the Applicant sought to argue that there had been some failure on the part of Mr Justice Barrett in proceeding to hear and determine the first Article 40.4 application whereas the Applicant complained he did not want the application heard; he claimed he wanted it adjourned to allow his plenary proceedings to be heard. In short, he admitted that he had used the Article 40.4 procedure for an ulterior motive and he now repeats that claim, again in the form of a complaint against Mr Justice Barrett for not going along with that pretence and in fact carrying out his duty under the Constitution of determining the application before the Court forthwith. It bears noting that the Court of Appeal in its judgment stated (at

paragraph 52):-

*"I hesitate to describe such tactics as an abuse of process, but it certainly has all the appearance of seizing upon Article 40 as a life raft to assist a collateral purpose, but upon grounds that have little to say in relation to the lawfulness of detention."*

In addition, as already set out above Mr. Justice Humphreys did give reasons as to why those contentions did not constitute a "*fundamental denial of justice*". The Court of Appeal had determined an appeal against the Article 40 decision of Mr. Justice Barrett and had dismissed same. This is referred to by Mr. Justice Humphreys at paragraph 59(b) of his judgment as the fundamental reason why that argument was rejected. The judgment also referred to the Applicant's failure to take up the DAR recording of the hearing before Mr. Justice Barrett.

Further, as with all the Applicant's grounds of appeal, they overlook the fact that the "*fundamental denial of justice*" refers to the fact of the detention or imprisonment of the applicant. The Applicant's grounds of appeal are largely comprised of complaints about previous decisions without consideration of what, if anything, renders his detention (and surrender to Northern Ireland) a fundamental denial of justice. It is not a question of finding errors in the other decisions of the Courts. The Applicant's grounds do not go to the question of whether Ms Justice Murphy's judgment amounted to a fundamental denial of justice.

In the premises, the application by the Applicant is abusive of the process of the Superior Courts and/or of Article 40.4.2 of the Constitution itself insofar as that pertains to the use of the Article 40.4.2 application in this manner.

- ii. There was no error of law or fact in the finding made by the High Court that the transcripts of the High Court proceedings before Murphy J. (the surrender proceedings under the European Arrest Warrant Act, 2003) did not constitute "*new evidence*" for the purposes of an Article 40 application being made. In that regard, Mr. Justice Humphreys was correct to decide that the Applicant was there himself (as were his legal team at all times) and they could take a note of the salient matters. It is reasonable to expect that a solicitor attending on Counsel in such a case will take a detailed note.

Again, the Applicant has not identified any matter to be found in the transcripts of the hearings before Ms Justice Murphy that would or could conceivably render those proceedings and the Orders she made a fundamental denial of justice (much less explained how he is taken by surprise in finding any such matter disclosed on the transcripts).

- iii. The Applicant's arguments are mis-conceived in that the High Court had to determine if the Applicant's detention was in accordance with law or not. Having considered the report in its factual terms the High Court held, at paragraph 63, that "*it falls significantly short of the level of real risk to the life or human rights of the applicant that would render unlawful his detention for the purposes of surrender to the UK. He will have the protection of the ECHR and Northern Irish law in order to assist in vindicating his rights in that respect. The matters set out in that report do not render Murphy J.'s order unlawful; nor do those matters require the release of the applicant.*" That test was applied in compliance with the law set down in *Minister for Justice v. Rettinger* [2010] 3 I.R. 783.

Further the Applicant has not identified any provision of the Report in question which

is capable of establishing that the information provided by the Northern Irish authorities was materially misleading. He has simply engaged in making vague and general assertions both in the High Court and in his proposed Notice of Appeal.

- iv. The interpretation given to Section 16 of the European Arrest Warrant Act, 2003 (as amended) is correct and is not inconsistent with the decision of this Court in *Ó Fallúin* [2007] 3 IR 414. Irrespective of same, the continued detention of the Applicant during the currency of his two Article 40 applications does not constitute a fundamental denial of justice to him and nor does the granting of a stay (albeit one that may not have been required) have that effect.

In fact, the Applicant advised the High Court in this application that he intended to make an application for a stay on the Order for surrender in his Plenary Proceedings. In the event, he chose not to do so.

- v. There were no substantive grounds advanced for a reference to be made to the Court of Justice of the European Union under Article 267 of the Treaty. No issue of EU law has been identified in the High Court proceedings or before this Honourable Court for such a reference. Vague references were made to the *Myerscough* case and to questions that arose before the Court of Justice of the European Union in the Applicant's case when it was referred to that Court. They are not relevant to this issue and give no grounds or basis whatsoever for a reference to the Court of Justice.

There was no infringement of the Applicant's rights by virtue of the stay imposed by Mr. Justice Butler on the 25<sup>th</sup> September, 2015. Furthermore or in the alternative, the said stay was lawful as the High Court was entitled to impose such a stay (see section 6 of this Respondent's Notice hereunder).

The Applicant is seeking to re-litigate matters which have already been determined by the High Court in the EAW proceedings (the judgments of the High Court of the 17<sup>th</sup> November, 2014 and 2<sup>nd</sup> September, 2015) and seeking to re-argue matters on points where he was refused leave to appeal (4<sup>th</sup> September, 2015) and had his un-certified appeal dismissed by the Court of Appeal (March 2016) and upheld by the Supreme Court (June 2016) and, further, where his first Article 40 application was dismissed by the High Court (September 2015) and by the Court of Appeal (October 2016).

Name of counsel or solicitor who settled the grounds of opposition (if the respondent is legally represented), or name of respondent in person:

Tony McGillicuddy BL  
Robert Barron SC

6. Additional grounds on which decision should be affirmed

**Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court:**

1. The High Court order granting the stay (made on the 25<sup>th</sup> September, 2015 by Mr. Justice Butler) was in accordance with law. The Respondent relies on the judgment of McDermott J. in *Myerscough v. Governor of Cloverhill Prison* and the judgment of the Court of Appeal in *Myerscough v. Governor of Cloverhill Prison* in that regard.
2. The Appellant herein is seeking to re-argue and re-litigate matters which have already been determined in other proceedings. In the circumstances, the ventilation of those matters is an abuse of the processes of the Superior Courts, violates the principles and rules in *Henderson v. Henderson* and/or is frivolous, vexatious and is also an attempt to frustrate the operation of the relevant court orders. The Respondent refers to *Owczarz v. Governor of Cloverhill Prison* (Unreported) Court of Appeal, 14<sup>th</sup> December, 2016 in that regard.

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions?

☐

Yes

☒

No

If Yes, please give details below:

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

☐

Yes

☒

No

If Yes, please give details below:

Will you request a priority hearing?

☒

Yes

☐

No

If Yes, please give reasons below:

Given that these Article 40 proceedings are linked to EAW proceedings for which a surrender order was made by the High Court in September 2015 the Respondent is anxious that the litigation in respect of same is concluded as soon as possible where the Respondent has obligations, pursuant to EU law, to ensure the expeditious resolution of European Arrest Warrant matters.

Signed:   
(Solicitor for) the respondent

Please submit your completed form to:

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

**This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.**