

SUPREME COURT

Application for Leave and Notice of Appeal

For Office use:

Supreme Court record number of this appeal

Subject matter for indexing

Leave is sought to appeal from The High Court.

THE HIGH COURT

2014 No. 6374P

Between

FRANCIS LANIGAN

Plaintiff

and

**CENTRAL AUTHORITY
MINISTER FOR JUSTICE AND EQUALITY
IRELAND, ATTORNEY GENERAL**

Defendants

and

**HUMAN RIGHTS COMMISSION,
COMMISSION OF THE EUROPEAN UNION**

Notice Parties

Date of filing :

day of January 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) :

**Central Authority
Minister For Justice And Equality
Ireland, 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 determined 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 000141 and a further "leap-frog" appeal application is envisaged from High Court proceedings: 2016 No. 1662 SS

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
White J.**

Date of order/Judgment **9th December 2016 (Perfected 23rd December)**

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 **Plaintiff (Respondent in strike-out Motion)**

Solicitor

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

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.**

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

Respondents' full name: **Central Authority, Minister For Justice And Equality Ireland, Attorney General.**
Original status **Defendants (Applicant in strike-out motion)**
Solicitor **Hugh Dockry**
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How would you prefer us to communicate with you? **E-mail**

Counsel

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Postcode: **Dublin 7.**

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

It is sought to appeal the entire decision – to strike-out the plenary action, not to allow the proposed amendments and the costs order.

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 in these proceedings are mainly of statutory unconstitutionality, in respect of which Murphy J. had been requested to defer ordering his surrender under s. 16(1) of the EAW Act until they had been determined. Notwithstanding, on 4 September 2014 the judge having earlier refused to make an Art. 267 reference to the Court of Justice on particular questions, ordered his surrender and refused leave to appeal.

The background to this case is summarised by the Advocate General in in *Minister for Justice and Equality v Lanigan* (case 237/15, P.P.U.) [2016] Q.B. 252 at paras. 15-36 and also in pending leave to appeal application, *Lanigan*, S:AP 2016 000141. Its main focus is on para 45 of the “preliminary ruling” of Murphy J. of 17th November 2015 and her subsequent decision to treat as decisive, against the Appellant, information contained in letters from police and prison officials in Northern Ireland, that were not obtained from the issuing judicial authority there, nor even exhibited in an affidavit and were incapable of being tested in cross-examination. Relying on these and notwithstanding unchallenged affidavit evidence to the contrary, Murphy J. held that there was no significant threat to the Appellant’s life if he were surrendered. But after she so ordered, in November 2015 there was published a report of an inspection into Maghaberry prison, where long-term

prisoners are held, that largely supports the Appellant's evidence and contradicts what is contained in the letters that Murphy J. relied on.

The central issue here concerns the interpretations that Murphy J. had placed principally on s. 20 of the E.A.W. Act, as amended. It is contended by the Appellant *inter alia* that those interpretations rendered the EAW Act unconstitutional in part and contravened E.U. law because *inter alia*, they were reached without entertaining argument on the points, and they deprived the Appellant of his right to cross-examine material concerning a risk to his life. He filed an uncertified appeal against her order for surrender. On 16 March 2016, that was rejected by the Court of Appeal and, on 27th June 2016, this Court refused leave to appeal [2016] IESC Det. 85. The last sentence of the "discussion" there observes that these "*issues in any event are apparently being pursued by the Appellant in the 2014 plenary proceedings.*" This appeal relates to these proceedings, where the Appellant seeks to litigate the very issues of unconstitutionality that Murphy J. expressly declined to deal with.

On 2nd December 2014 the statement of claim was delivered, with a slightly amended version on 12th December. Between January and May 2015 several written requests for a defence were ignored. On 16th July 2015 a defence was delivered. On 20th July Murphy J. was requested, if minded to do so, to defer making a surrender order until these proceedings were determined (transcript pp 19-20). On 24th July a reply was served. The Defendants were notified that an application would be made to the President in late August for an early hearing date. On 21st August they issued a motion to have the proceedings struck out as an abuse, unarguable etc. On 4th September, Murphy J. was again reminded of these proceedings but made it clear that they were no concern of her (transcript pp. 22 and 23) and proceeded to order surrender.

The strike-out motion was heard by White J. over four days between 10th March and 19th April 2016. On 11th November he gave judgement striking out the proceedings. On 9th December he clarified that he had thereby rejected two of the proposed amendments not referred to in his judgement, that he also had rejected the application for an Art. 267 reference and was awarding costs against the Appellant notwithstanding that the claim related to proceedings envisaged by the Framework Decision on a EAW.

White J.'s principal reason for striking out the claim was the *Henderson –v- Henderson* principle: that the claim of statutory unconstitutionality and E.U. law incompatibility was argued before Murphy J. or ought to have been argued before she admitted the unsworn letters as purported evidence. But Murphy J.'s "ruling" and subsequent judgement make no reference to e.g. *In re Haughey, Maguire –v- Ardagh, Bovale, Horncastle* and other patently relevant authorities on cross-examination. And White J.'s written judgement makes no reference to the uncontradicted evidence adduced to him concerning what was submitted to Murphy J. and her response *inter alia* on 20th July and 4th September 2015, as summarised above. Nor does it deal with the critical point that, because the Attorney General was not a party to the EAW s. 16 application and the Minister there never served an R.S.C. Order 60 notice, issues of statutory unconstitutionality could not have been determined by Murphy J. even if she had been willing to entertain them. In his judgement there are no findings of relevant facts and the submissions by the Appellant are not addressed at all.

White J. also

- i. rejected as unstateable a contention that part of s. 16(11)'s mode of regulating appeals from the High Court was unconstitutional and/or contravened the E.U. Charter;
- ii. refused to permit amendments to the statement of claim and rejected, apparently as unstateable, three of them, two of which are not even mentioned in the judgement.

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

Had Murphy J. deferred ordering surrender, pending the outcome of these proceedings, as requested, this appeal and the multiple other related applications would not have been necessary. Similarly, had the Minister served an Order 60 notice in the EAW proceedings. The following are the reasons why leave should be granted:-

Interests of justice as between the parties.

The consequences of the Appellant not obtaining leave are that

- i. he will be surrendered to a foreign country where it has been found there is credible evidence that there is a risk to his life even if being held in prison;

- ii his claim that this question should be resolved on the basis of ordinarily admissible evidence, critical parts of which can be tested in cross-examination, would have been rejected before it could even have been argued;
- iii his entitlement to a reference under Art. 267 would have been refused.

General Public Importance

It is of general public importance that this Court hears this appeal. To demonstrate this requires consideration of the main legal issues in the appeal. Taking these in turn

- i. A reserved written judgement that contains no findings of fact nor addresses the propositions of law contended for by the losing side. It is vital to the proper administration of justice generally to know whether and, if so, to what extent, this mode of fact-free and law-free adjudication in the High Court is permitted and, in cases involving issues of E.U. law, is consistent with due process guaranteed by the Charter in conjunction with the Convention.
- ii. Similarly with applying the *Henderson –v- Henderson* principle. It appears that the lower courts too readily and uncritically reject claims on a misunderstanding of the principle. The broad circumstances when it should not be applied call for clarification, since this issue can arise in every type of civil litigation and even in several administrative proceedings.
- iii The central substantive issues the Appellant raises go to fundamentals in constitutional and E.U. law and, even if his case did not involve persuasive evidence of a risk to his life, ought to be determined by this Court and/or by the Court of Justice under Art. 267, since not *acte clair* against him. These include the following:-
 - The view that the procedure required by the EAW Acts and R.S.C. Order 98 is “inquisitorial and non-adversarial,” and that applications under s. 16(1) of this Act are not “trials” of the issues raised in them.

Especially because the inquisitorial mode of adjudication has been almost universally repudiated in favour of an adversary procedure, even in countries that traditionally adopted a form of inquisitorial approach (e.g. in continental Europe), parties in EAW and also extradition proceedings need clarity on (a) exactly what provision[s] of the EAW and Extradition Acts require that approach and (b) what conventional rules of evidence, practice and procedure are disappplied by that approach; (c) what if any replacement exists for these. Without clarity on these questions, trials in cases such as these will resemble playing a game for which there is no enduring rules – a recipe for confusion and injustice. At a minimum, this Court's decision in *Sliczynski* [2008] IESC 73 should be clarified as to how far it applies from its particular facts, so that parties to EAW proceedings may know when and when not the inquisitorial/non-adversarial procedure will apply.

- As of now, especially as leave to appeal to this Court was refused [2016] IESCD 85, Murphy J.'s interpretations of the EAW Act represent the law. Accordingly, a judge is entitled *inter alia*
 - to decide critical issues of procedure in a case, without any advance notice to the potential prejudiced party, of being minded to so decide and inviting submissions on the point;
 - treat documentary material as decisive evidence even though it is not even exhibited in an affidavit and cannot be tested in cross-examination;
 - order surrender to a foreign country even though the constitutionality of the statutory regime enabling that order to be made is being challenged in carefully drafted plenary proceedings in which the principal pleadings had closed.

That this state of the law can be arrived at by side-wind, without the EAW Act even in terms purporting expressly to over-ride long-established concepts of fair procedure, which E.U. law requires to be respected in proceedings of this nature, calls for consideration. At minimum, they warrant being tried rather than rejected as entirely unarguable.

- iv A separate issue relevant to all E.A.W. and several other categories of proceedings is the procedure in s.16(11) of the EAW Act for regulating appeals from the High Court, considered by McKechnie J. in *O'Sullivan v Chief Executive Irish Prison Service* [2010] 4 I.R. 562. This raises important questions of constitutional and E.U. law that at a minimum warrant being tried, at least for the purpose of an appeal hearing on them, rather than being rejected out of hand as unarguable.
- v The law as implicitly determined by White J. in respect of the three proposed amendments also calls for clarification at the appellate level and, if necessary, by the Court of Justice, since not *acte clair* against the Appellant. The propositions of law that must be derived from his decision in this regard are: *inter alia* -
- where an order is made in proceedings based on “mutual trust and confidence” but later significant impeccable evidence comes to hand that would appear to undermine the trust and confidence afforded (here the Maghaberry report) for making the order, it is an abuse of process to simply commence proceedings to have the order made on that basis set aside;
 - where it is alleged that a court wrongly refused to make an Art. 267 reference to the Court of Justice, it is an abuse of process to simply commence proceedings for damages arising therefrom, such as is authorised by the *Kobler* case (224/01) [2003] E.C.R. 1209, exemplified in the *Cooper case* [2011] Q.B. 976;
 - where it is alleged that a person was denied bail in breach of his entitlement under the EU Charter, as contended for in this particular instance by counsel for the E.U. Commission before the CJEU In July 2015, it is an abuse of the process to simply commence proceedings for damages arising therefrom under *Francovich* (Case 6 and 9/90) [1991] E.C.R. 5357.

Because the right to life is protected by Arts. 2 and 3 of the European Convention and because the *Kobler* remedy and the *Francovich* remedy are central to EU procedural law, the public interest in determining whether and if so on what basis and to what extent they are repudiated by Irish law calls for consideration, as it has ramifications for many types of litigation involving issues of EU law. Even more significant is how these fundamental principles appear to be overridden without any express provision to that effect in the Constitution or in litigation. Has the High Court a general discretion in inquisitorial/non-adversarial proceedings to simply disregard these rights and remedies?

- vi It also ought to be clarified that the preliminary strike-out tactic such as adopted by the State here also can be abused, and re-emphasised that it should be sparingly acceded to. Here, for example, the strike-out application lasted four days. Had the underlying issues been tried, the case would hardly have lasted much longer. This is an important procedural issue that has consequences for the ever-expanding backlog of appeals from the High Court and applications for leave to this Court. That is Respondents/Defendants either resisting the grant of leave or applying to strike-out otherwise properly commenced proceedings, as a means of preventing adjudication of the underlying dispute. Often applications of this nature can last as long as the trial of the action, had it been allowed to proceed. Sometimes where the Respondent initially succeeds, his order is set-aside on appeal and 12-18 months later, if not longer, the matter is again before the first instance court, whose decision probably will be appealed. Thus, the dispute may well involve four court hearings (and briefs) instead of two – and even more if the matter comes to this Court. We suggest that this case is a perfect example of a party's improper resort to the preliminary strike-out strategy, especially where personal liberty is involved, that calls for evaluation by this Court.

Exceptional circumstances warranting a direct appeal.

There are exceptional circumstances warranting a direct appeal to this Court: One is the expedition required in EAW cases: an appeal to the Court of Appeal might not be heard and determined for another 12 months and, regardless of the outcome, application most likely would be made to appeal to this Court. This case has now been on-going for four years and, on current form with delays in lists, could last for another 2-3 years. Secondly, the central substantive issues concern fundamentals in constitutional and E.U. law and, even if his case did not involve persuasive evidence of a risk to his life, ought to be determined by this Court and/or by the Court of Justice under Art. 267, since not *acte clair* against him. Additionally, there now are several other leave applications before this Court or, once orders are perfected, will be before it, that along with this application deal with similar and overlapping aspects of the EAW procedure and in aggregate raise the following questions *inter alia*:

- What exactly is involved in EAW proceedings being “inquisitorial and non adversarial”, which raises a major issue of constitutionality and also how far may this Court’s *Sliczynski* [2008] IESC be extended beyond its particular facts.
- The extent to which courts in EAW cases are permitted not to make any findings of fact, to disregard relevant evidence and when giving judgement apparently to pay no heed to arguments summarised in carefully drafted written submissions that are designed to minimise actual court time devoted to oral argument?
- Is it compatible with E.U. law to refuse to make an Art. 267 reference in an EAW case without either permitting argument on such application and/or giving no or a meaningless reason for that refusal? (*Myerscough* also).
- Whether an issue of the constitutionality of a provision of the EAW Act may be litigated in conjunction with an application under the national law equivalent of Art. 5(4) of the Convention on Human Rights? (*Owczarcz* also).

- Is it permissible in such application, i.e. under Art. 40.4, to require the Applicant to present his case almost the instant after the requisite certificate has been furnished to him by the jailor and refuse any, or any longer than one hour's, adjournment to prepare his case? (*Myerscough* also).
- Is continuing custody lawful when the prescribed deadlines for surrender have expired and the mandatory requirement that the prisoner be brought back again before the High Court, has been stayed by it without even stipulating how long the stay should last? (*Myerscough* also).
- Is it at least arguable that s. 16(11) of the EAW Act, insofar as it permits the trial judge to determine conclusively if his decision may be appealed, is unconstitutional and/or contravenes the Charter? (*Owczarcz* also).
- Is it permissible for the Court to refuse legal-aid under the present ad-hoc non-statutory scheme where the party complied with all the requirements stipulated in that scheme but, once the case has been heard and determined, the Court may impose additional requirements not in the scheme as a precondition of making the appropriate recommendation? (*Myerscough*).
- Where plenary proceedings are brought to challenge a provision of the EAW Act for unconstitutionality and/or breach of E.U. law and the moving party ordinarily would be entitled to legal-aid under the present ad-hoc non-statutory scheme in proceedings under s. 16 of that Act, is it compatible with the Framework Decision to deny him legal aid (e.g. not to award costs based on the legal-aid criteria) because the mode of pleading is not one referred to in the present ad-hoc legal-aid scheme.
- Does Irish law permit proceedings seeking damages under *Kobler* (Case 224/01) [2003] ECR 1209, for refusal to make and Art. 267 reference and/or under *Francovich* (Cases 6 and 9/90) [1991] E.C.R. 5357 for denying bail in circumstances where EU law required it to be granted?
- Should further information be requested from the requesting judicial authority where there is evidence of significant risk to the person's life if surrendered?

We suggest that each of the above issues standing alone are of general public importance and also that it is in the interests of justice as well as of obvious practicality, that the appeals in the cases dealing with all of these issues be heard concurrently, given the considerable overlap in them. If questions are to be referred to the Court of Justice, all the relevant questions could be sent to there in one issue paper. We are the counsel in the several proceedings listed above, and have drafted applications for leave to appeal to this Court in them. There may be other pending appeals raising similar or related issues.

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

In holding that all of the claims in the plenary proceedings and in the proposed amendments were so unstateable as there was no possibility of success in them, the learned trial judge erred in fact and/or in law as follows:-

- i. Not making a single finding of fact on the disputed issues, even though extensive documentary evidence was adduced: the very minimum required of a trial judge is to make findings of relevant facts, in fairness to the parties and to ease the burden of an appeal tribunal;
- ii By inference, rejecting the uncontradicted evidence that Murphy J. had been requested to defer ordering surrender until the constitutionality issues had been determined and that on numerous occasions she made it clear that she would not deal with those issues in the proceedings of which she had seisin;
- iii Not addressing the arguments on the facts an/or the law advanced for the Appellant in written submissions or orally; the other minimum required of a trial judge is to address propositions of law advanced and furnish a minimally coherent reason why each of those not accepted is being rejected, in fairness to the parties and to ease the burden of an appeal tribunal;
- iv By inference, rejecting the contention that, when issues of statutory unconstitutionality are raised in proceedings to which the Attorney General is not a party and the moving party does not serve the R.S.C. Order 60 notice, those issues cannot be determined in those proceedings
- v. Holding that the case for statutory unconstitutionality was made, properly or otherwise, before Murphy J. gave her preliminary ruling in November 2013 or, if not, ought to have been made to her before then,

and by inference, that she had held and so ordered the relevant parts of the EAW Act not to be unconstitutional nor as contravening E.U. law. The text of the two written judgements and the transcripts demonstrate that this conclusion is plainly wrong;

vi Not just rejecting the propositions on their merits, with reasons but finding it unarguable that

- the *Henderson –v- Henderson* principle did not bar the present proceedings advancing a claim of statutory unconstitutionality;
- the procedure adopted by Murphy J., in giving decisive effect to the letters from Northern Ireland officials, was not permitted in light of this Court’s decision in *Sliczynski* [2008] IESC 73;
- even if that procedure was so permitted, it was unconstitutional or contravened the Framework Decision and the Charter (constitutionality never having been argued in *Sliczynski*);
- part of s. 16(11) of the EAW Act, as amended, was unconstitutional or contravened the Framework Decision and the Charter;
- Murphy J.’s order for surrender should be set aside in light of the evidence instanced by the Maghaberry Prison inspection report and such additional evidence as may be adduced, under the jurisdiction instanced by *Tassan Din* [1991] I.R. 569.
- damages could be recovered in proceedings under:
 - *Kobler* (Case 224/01) [2003] ECR 12909 for failing to seek the Art. 267 reference that Murphy J. was requested to make, concerning the inquisitorial/non-adversarial process in EAW Act cases;
 - under *Francovich* (Cases 6 and 9/90) [1991] E.C.R. 5357 for resisting the Appellant’s several endeavours to secure reasonable bail terms,

compounded by the reserved written judgement making no reference whatsoever to what was submitted orally and in writing in regard to *inter alia* those points.

- vii Awarding costs against the Appellant and not ordering that he be paid costs on the legal-aid basis.
- viii Refusing to make an Art. 267 reference to the Court of Justice.

Michael Forde SC
Kieran Kelly BL

7. Other relevant information

Neutral Citation of judgement appealed against: **[2016] IEHC 682**

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 High Court and remit to the High Court for plenary hearing together with an order for costs in accordance with the applicable legal-aid scheme and a stay on surrender pending the final determination of these proceedings.

Order being appealed: **Order of the High Court (White J.) of 9th December 2016 as perfected on 23rd December.**

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.

Such part of the EAW Act 2003, as amended, in particular s. 20 insofar as they permit an “inquisitorial and non-adversarial” procedure, as such process is generally understood, and authorise the process adopted by Murphy J. being put in issue in this appeal. This was the issue indirectly raised in the earlier uncertified appeal for which leave was refused [2016] IESCDET 85.

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 procedure before Murphy J., Barrett J. and/or White J. contravened the Convention cannot be sought under the Act. The Appellant’s 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, but to clarify that Sliczynski [2008] IESC 73 does not authorise an inquisitorial/non-adversarial procedure, as such process is generally understood, in EAW cases; otherwise that process is unconstitutional.**

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

Appropriate questions arise from what is set out above concerning the process adopted by Murphy J. and by White J. and also concerning several other aspects of E.U. law, e.g. the *Kobler* and *Francovich* claims, and challenging surrender where “mutual trust and confidence” is undermined.

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

If Yes, please give reasons below:

This is connected to an EAW case that has been ongoing for the last four years and wherein there is at least another application for leave to appeal pending before this Court: *Lanigan (S:AP 2016 000141)*, and a further leave application by this Appellant about to be filed, (from High Court 2015 1662 SS).

Signed: _____

Pádraig O'Donovan & Co., Solicitors.

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.