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| **Judgment**   |  |  | | --- | --- | | **Title:** | Minister for Justice and Equality -v- O'Connor | | **Neutral Citation:** | [2015] IECA 227 | | **Court of Appeal Record Number:** | 2015 48 | | **Date of Delivery:** | 23/10/2015 | | **Court:** | Court of Appeal | | **Composition of Court:** | Ryan P., Irvine J., Hogan J. | | **Judgment by:** | Ryan P. [Link to judgment](http://www.bailii.org/ie/cases/IECA/2015/CA227.html#judge1) | | **Status:** | Approved | | **Result:** | Dismiss | | **Judgment by:** | Hogan J. [Link to judgment](http://www.bailii.org/ie/cases/IECA/2015/CA227.html#judge2) | | **Status:** | Approved | | **Result:** | Dismiss | |  |  | | **Judgment by:** | Irvine J.[Link to judgment](http://www.bailii.org/ie/cases/IECA/2015/CA227.html#judge3) | | **Status:** | Approved |  |  |  |  |  | | --- | --- | --- | --- | | |  |  | | --- | --- | | |  | | --- | |  | |  |  | | --- | | **THE COURT OF APPEAL**  Neutral Citation Number: [2015] IECA 227  **Appeal No. 2015/48**  **Ryan P.** **Irvine J.** **Hogan J.** **Between/**  **MINISTER FOR JUSTICE AND EQUALITY**  **APPLICANT/RESPONDENT**  **AND**  **THOMAS O’CONNOR**  **PLAINTIFF/APPELLANT**  **JUDGMENT of the Court delivered by the President on 23rd October 2015**  **Introduction** 1. The European arrest warrant is a function of an EU Framework Decision that was intended to streamline extradition among Member States by replacing inter-State requests with enforcement of court orders from one country to another. The scheme is founded on trust in the systems of justice in the participating States. Cumbersome rules of procedure were replaced by a standard unified process that applied across the European Union. Strict time limits were laid down so that the process of transmitting a wanted person from where he was arrested to the requesting State court would operate smoothly and efficiently. Some of the old rules were dispensed with because they were thought to be unnecessary in the new community of trust in common precepts of substantive and procedural justice. The system was implemented in this country by the European Arrest Warrant Act 2003.  2. In the case of Mr. Thomas O'Connor, the reality has not matched the expectation. The warrant was issued on 13th June 2011 and seeks his surrender to serve sentences for tax fraud that were imposed in 2007, and to face the charge of absconding and breaching his bail conditions. The first application failed and this case is concerned with a second warrant.  3. The High Court ordered Mr. O'Connor's rendition, but gave him leave to appeal and thus the matter comes to this Court. There are, in fact, two proceedings and two appeals, but essentially, the same issue arises in them. One appeal is the extradition request and the other is a separate action by Mr. O'Connor seeking to have the legislation declared invalid having regard to the Constitution.  4. Mr. O’Connor’s resistance to the request for an order that he be surrendered pursuant to the 2003 Act was based on the argument that the Attorney General’s Scheme - now called the Legal Aid (Custody Issues) Scheme - which is available to provide for payment of legal representation in EAW cases, is not compliant with the Framework Decision underpinning the European Arrest Warrant Scheme. As it applied at the relevant time, s. 10 of the European Arrest Warrant Act 2003 provided that the wanted person should, subject to and in accordance with the provisions of the Act and the Framework Decision, be arrested and surrendered to the issuing State. The section was amended to remove the reference to the Framework Decision but as it applied at the time, the section had the reference to the Decision. It is Mr. O’Connor’s contention in this case that the payment scheme provided for legal assistance under the Custody Issues Scheme is in conflict with the Framework Decision because it is provided on an administrative and discretionary basis and not by way of a formal binding and statutory right to free legal assistance provided in accordance with law.  5. The application for the enforcement of the warrant was heard by the High Court together with plenary proceedings by Mr. O’Connor based on the same factual circumstance. He claimed that the absence of a statutory scheme of legal aid, by contrast with provisions for qualified persons in criminal cases and for civil legal aid, constituted a breach of his constitutional rights, specifically, equality before the law under Article 40.1.  6. The High Court rejected Mr. O’Connor’s challenge to the European Arrest Warrant proceedings and dismissed his plenary proceedings. The Court held that it should therefore proceed to make an order for the surrender of Mr. O’Connor. The Court subsequently refused an application for a reference to the Court of Justice of the European Union under Article 267 TFEU because it held that such a procedure was not available when the Court had already made its decision in a case, even if it had not actually delivered its judgment setting out the reasons, which was the situation in this case. The Court did, however, certify a point of law of exceptional public importance which it was desirable in the public interest to be the subject of appeal, applying s. 60(11) of the European Arrest Warrant Act 2003. The certified question was:  Is it correct that Article 11.2 of the Framework Decision (on the European Arrest Warrant) in conjunction with Article 47 of the EU Charter and the general principles of EU law imposes no obligation to provide legal aid, whether as of right or otherwise for indigent respondents in EAW cases who do not have the skill to represent themselves?  7. Mr. O’Connor’s challenge to the adequacy of the Custody Issues scheme arises in the context of what is required by the European Arrest Warrant Act 2003 and Council Framework Decision 2002/584/J.H.A.A. of 13th June 2002 on the European Arrest Warrant and the surrender procedures between Member States: O.J. L.190/1 18.7.2002. The relevant provision is in Article 11 which is as follows:  “1. When a requested person is arrested, the executing competent judicial authority shall, in accordance with national law, inform that person of the European Arrest Warrant and of its contents, and also of the possibility of consenting to surrender to the issue in judicial authority.  2. A requested person who was arrested for the purpose of execution of a European Arrest Warrant should have the right to be assisted by a legal Counsel and by an interpreter in accordance with the national law of the executing Member State.”  8. In his judgment in the High Court, Edwards J. cited the case *Minister for Justice, Equality and Law Reform v. Olsson* [2011] 1. I.R. 384 in which the Supreme Court analysed the meaning and effect of Article 11.2 of the Framework Decision. The judge considered an argument that the Supreme Court authority was not binding, in that the interpretation of Article 11.2 was not part of the *ratio decidendi* of the case and was, rather, obiter dictum which was a contention advanced by Counsel for Mr. O’Connor in the High Court and which was repeated in this Court. Edwards J. considered that such debate was arid because even if he was to consider the case not to be binding, the views of O’Donnell J. speaking for the Supreme Court coincided with the analysis of the Article that he himself had made.  9. Mr. Forde S.C. for Mr. O'Connor does not dispute the applicability of the judgment in *Olsson* to the issue now arising but argues that the reasoning is not binding on this Court because it was *obiter* and we are free to decide not to follow that precedent. If the decision is a binding precedent, Counsel candidly acknowledges that that is the end of Mr. O’Connor’s appeal in this Court. In that event, he must go elsewhere in search of a ruling that will save him from rendition. Counsel asks this Court to refer the point he raises to the Court of Justice of the European Union under Article 247 TFEU. Failing that, he proposes to ask the Supreme Court to receive the case and either allow the appeal or refer the question to Luxembourg. A party in the final national Court is entitled to have a matter of Union law referred under the Article unless it is *acte clair*.  10. On one view this Court could confine its consideration of the appeal to the question of the precedential status of the admittedly relevant Supreme Court judgment in *Olsson's* case. However, having regard to the submissions filed by both sides that would not be satisfactory. The Court does of course know the arguments because we have the judgment of the High Court in which all the submissions are canvassed.  11. We are therefore concerned first with the issue of compliance with the Framework Decision and, secondly, with Mr. O’Connor’s challenge to the European Arrest Warrant Act, 2003.  **Olsson’s Case** 12. The headnote in Olsson’s case records the Supreme Court as holding as follows:  “1. That the Framework Decision imposed no obligation on a requesting State to provide legal aid. It merely provided for a right of representation and then only in accordance with the national law of the executing Member State. This right was vindicated in the present case.  2. That s. 13(4) of the Act of 2003 did not require the provision of legal assistance as of right. It required that information be provided to a requested person as to the nature and extent of his right to legal assistance and, if necessary, for such legal assistance to be provided to him. The Act was complied with once the respondent was informed of the circumstances in which he was entitled to benefit from the Attorney General’s Scheme and of the limitations on that Scheme.  3. That there were aspects of the Attorney General’s Scheme which were enforceable, such as the right to make an application for legal assistance and the right to have one’s application considered.  4. That as applications for legal assistance under the Attorney General’s Scheme in European Arrest Warrant cases were only ever decided in the requested person’s favour (under the terms of the Scheme itself and on foot of assurances given to the Court on affidavit), the Attorney General had no residual discretion in such cases and where legal assistance was so provided it was provided as of right.  5. That despite having been represented throughout the proceedings, the respondent still had *locus standi* to argue that legal assistance had not been provided to him as of right as required by the Act of 2003. Further, as he was not merely seeking declaratory relief but was instead arguing that non-compliance with the Act prevented the Court from surrendering him, it could not be said that a finding in his favour would confer no substantial benefit.  . . .  *Obiter dictum:* criminal legal aid was not a statutory entitlement but a constitutional right, albeit a right subject to criteria which limited its scope. A trial on a serious charge without such legal assistance would fall short of the constitutional standards guaranteed by Articles 38.1 and 34.1 of the Constitution.”  13. In his judgment for the Supreme Court, O’Donnell J. said that “the point argued in this appeal is limited to the contention that the provision of legal assistance under the terms of the Scheme falls short of what is required by law for a person whose return is requested pursuant to a European Arrest Warrant”. He went on to say in the next paragraph that “The respondent’s case in this appeal depends on an interpretation of the Framework Decision and Act of 2003, as amended”. Interpreting Article 11.2, the judgment proceeds at para. [11]:  “The Framework Decision therefore imposes no obligation on the requested State to provide legal aid, whether as of right, or otherwise. It merely provides for a right of representation, and then only in accordance with the national law of the executing Member State. That right, and more, has unequivocally been vindicated in the present case”.  14. The High Court expressly agreed with the reasoning of O’Donnell J. in the *Olsson* case, holding that for a person arrested under a European Arrest Warrant, “effective access to justice is in fact afforded by the guarantees provided in s. 13(4) of the Act of 2003, coupled with the possibility, which exists for persons unable to fund legal representation from within their own resources, of seeking a recommendation under the Attorney General’s Scheme/The Legal Aid (Custody Issues) Scheme that such representation should be paid for by the State. The evidence given in this Court by Mr. Gilheaney, which mirrors that given to the Supreme Court by Mr. Jevon Alcock in the *Olsson* case, was that where a judicial recommendation is granted the Legal Aid Board invariably follows that recommendation. In reality, the discretion, such as it is, is only ever exercised, that is in favour of the applicant under the Scheme . . .”  15. The Court held that there was no requirement for the Scheme to be a statutory scheme or otherwise established in law. It rejected the argument that the phrase “in accordance with national law” had to be given the narrow construction that it must be in legislation. In that connection, the Court rejected the argument that there was analogous authority in England in the case of *R. v. Secretary of State, ex p Fire Brigades Union* [[1995] 2 A.C. 513](http://www.bailii.org/uk/cases/UKHL/1995/3.html" \o "Link to BAILII version). The facts of the case were wholly different and inapplicable to the present controversy.  16. Edwards J. also rejected the other arguments put forward on Mr. O’Connor’s behalf. In particular, he held that the requirement to provide legal aid in certain cases which is contained in Article 47 para. 3 of the Charter of Fundamental Rights, even assuming that it was applicable in the present case, was based on the need to ensure effective access to justice. That did not specify the form in which the legal aid was provided and the essential requirement was for effective access to justice. That was available in the present case under the Custody Interest Scheme. That approach was also the basis for the High Court’s rejection of the argument grounding Mr. O’Connor’s plenary action. Edwards J. went on to hold as follows:  “The Act of 2003 enjoys the presumption of constitutionality, and the respondent/plaintiff bears the burden of rebutting that which is presumed. In this Court’s view, there is simply no evidence before it that the Act of 2003 is constitutionally deficient in any respect, or that it permits of any unconstitutional discrimination; or for that matter that the Act of 2003 fails to respect EU law and in particular the principle of equivalence. Accordingly, the presumption of constitutionality has not been rebutted with respect to the Act of 2003, and the Court has no reason to believe that the Act of 2003 is constitutionally deficient in any respect, or that it breaches the principle of equality before law as guaranteed in Article 40.1 of the Constitution.”  17. Mr. Forde sought to distinguish *Olssen* from this case, saying that there were three fundamental differences, namely:  a. *Olssen* was, he said, invited to apply for the scheme and was told that the recommendation would not be opposed and there is an affidavit from a Civil Servant saying that the recommendation will be honoured if made. That is one contrast because it has not happened in the O’Connor case.  b. Mr. Olssen was represented at al stages by solicitor and Counsel.  c. Counsel says that if it was intended to be binding, O’Donnell J. would have conducted a very detailed analysis of the provision by examining the French version of the Framework Decision and the preparatory materials, the ICC statute. In the circumstances, therefore, the Court said that this was moot; it was an academic argument.  18. Mr. Forde suggests that there would be little point in having the right expressed as it is unless it was intended that there would be provision for legal assistance when a requested person could not afford to pay for it himself. He cited the European Convention on Human Rights Article 6(1)(c) in support. It could not have been intended that the requested person would be deprived of legal assistance in a matter of potentially great complexity such as extradition.  19. In his submissions, Mr. Shane Murphy S.C. adopts the analysis of Edwards J., in which he held that the proper interpretation of Article 11.2 was central to the decision in the *Olsson* case. The High Court considered questionable the suggestion that Article 47 para. 3 of the Charter of Fundamental Rights actually applied to European arrest warrant cases. Even if it did, the Court was satisfied that the important point was the service provided to the person involved and not the mode of provision thereof. The judge rejected the submission that the expression “in accordance with national law” demanded provision by legislation and that some other method such as the non-statutory scheme in question amounted to a contravention of that requirement.  20. In my view, the High Court judge was correct and this submission is valid. The points of difference proposed by Counsel for Mr. O’Connor do not actually distinguish the cases. Indeed, the evidence as to the operation of the existing scheme was to the same effect. None of the features affects the principle that is clearly and unequivocally stated by the Supreme Court. The Supreme Court addressed the precise issue that is in question here. The judgment given by O’Donnell J. represented the unanimous view of the members of the Court. The judgment identifies the specific question and deals with it in the clearest of terms. In the circumstances, it is unavoidable that the decision in *Olsson* is binding on this Court.  21. Incidental confirmation of the conclusions of the Supreme Court and Edwards J. is to be found in recent developments in the European Union, although it appears that they will not apply in Ireland or the United Kingdom. The EU has been endeavouring to find a mode of provision of free legal aid in cases of EAW, as well as in criminal proceedings generally. There are wide variations in the different Member States’ methods of providing legal aid. Some progress has been made since 2009 towards harmonising procedural safeguards in criminal cases: there are Directives on translation of proceedings, on provision of information and on the right to legal representation itself. A Directive was proposed in late 2013 and is under discussion with the Parliament which would require provision of legal aid for persons the subject of European Arrest Warrant proceedings: Council Document 6603/15. Such Community legislation would not be necessary if the Framework Decision already required free legal aid to be available for wanted persons. It also follows that there is at present no Community provision as to the means whereby legal aid is to be provided. That has been left to the national regimes of the Member States.  22. There is Community law recognition of the right of a wanted person to get legal assistance. It is the method of payment for such services that has not been harmonised to date. The right to representation is reflected in the Framework Decision but that is substantially short of provision of legal aid for wanted persons in warrant cases.  23. This was the context of the decision of the Supreme Court in *Olsson*. The Court held in unequivocal terms that the Framework Decision does not provide a right to have assistance at the State’s expense. Of course, the particular State may provide legal aid and that may be considered to be a legal or Constitutional right under national law. *Olsson* does not deny such entitlement; it rejects the proposition that the Framework Decision provides for or requires legal aid in its terms.  24. The significance is that if EU law does not itself require this service, it follows that Mr. O’Connor cannot invoke Community law principles whereby to challenge the method of supply of legal aid under our national law.  25. The Custody Issues Scheme of legal aid is therefore not in conflict with EU law generally or the Framework Decision specifically. These recent developments in the Community legislative process provide incidental confirmation of the Supreme Court’s analysis of the Framework Decision.  26. Mr. Forde applies to the Court in the event that it is of the view that the Supreme Court decision in *Olsson* is binding to make a reference to the Court of Justice of the European Union under Article 267 TFEU. That possibility exists now because the time period in which such references were not permitted has now expired. That would not, however, be an appropriate course to adopt even if this Court were minded to take a different view of the issue than that of the Supreme Court. While it is always prudent in these matters to eschew absolute rules, it would not be proper for this Court to seek to overturn a Supreme Court decision that was binding otherwise by referring the matter to the Court of Justice in hope of securing a different result. That would be inconsistent with the Constitutional structural relationship and the comity of the courts and is not something that this Court would be prepared to consider otherwise than in wholly exceptional circumstances. Nothing of that kind arises here.  **Mr. O’Connor’s Plenary Proceedings** 27. The High Court rejected the submission by the Minister and the other defendants that Mr. O’Connor did not have standing to make his challenge in this case. There is a cross-appeal against that ruling. In my judgment, the claim in this action cannot succeed for other reasons which make it unnecessary to embark on this question. The point will be clearer when I have discussed this part of the appeal.  28. The claim in Mr. O’Connor’s statement of claim is that he would be eligible because of his limited means to obtain legal aid under either the statutory criminal provision or the civil scheme. That is his right. Article 11(2) of the Framework Decision requires that there be a statutory scheme for subjects of EAW applications. The 2003 Act does not provide for legal aid and is therefore invalid, having regard to the provisions of the Constitution. That is for two reasons as claimed: first, because it is in conflict with the State’s obligations under Community law, which is discussed above. Secondly, it contravenes the guarantee of equality in Article 40.1 of the Constitution. Since legal aid is available on such formal basis for persons encountering legal process in comparable circumstances or in matters of lesser consequence for the individual, the absence of similar facility in statutory form in extradition represents an unlawful distinction that is contrary to the right to equality. The statement of claim instances by comparison and contrast a minor criminal offence and a matter coming under the International Criminal Court Act 2006, to demonstrate affairs at different ends of the spectrum which carry with them statutory legal aid entitlement. It may immediately be noted that the Rome Statute and the enacting legislation specify the availability of legal aid.  29. Mr. O’Connor’s claim, as stated, does not make it apparent how it could render the 2003 EAW Act invalid, which is the relief it seeks. That Act does not inhibit access to legal assistance. It does not provide that an individual is limited to access to a discretionary scheme. The argument by Mr. O’Connor’s Counsel seeks the invalidation of the Act because of what it does not contain. The claim refers to the whole Act, despite declaring that the Act is, in the specified circumstances of alleged discrimination, “unconstitutional . . . to that extent”. This must mean at least that all of the provisions relating to rendition of the subject of the warrant are to be condemned as invalid. There is no halfway house in this area. If the legislation is infirm because of non-compliance with the Constitution, then it must be declared invalid.  30. Under s. 13 (4) of the Act, “A person arrested under a European arrest warrant shall, upon his arrest, be informed of his right to (b) obtain, or be provided with, professional legal advice . . .” Section 29.—(1) is as follows:-  “A person shall not be surrendered under this Act if —  (a) his or her surrender would be incompatible with the State's obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms done at 20 Rome on the 4th day of November, 1950, as amended by Protocol No. 11 done at Strasbourg on the 11th day of May, 1994,  (b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason 25 that the offence specified in the European arrest warrant is an offence to which section 30(1)(b) applies).”  31. The Act itself protects a person who is the subject of a warrant from being surrendered if their human rights are infringed. It must obviously also be the case that a person could not be extradited on foot of a European arrest warrant because the legislation providing for the implementation of the system was itself to be declared unconstitutional.  32. It seems to me that there is a failure of constitutional logic in Mr. O’Connor’s case for invalidity. He is asserting a constitutional right to a scheme of legal aid for him and persons in his situation to be available as of right on a statutory basis. The only relevance of the 2003 Act is that it is the vehicle by which the EAW decision was implemented in the State. There is nothing in its provisions to which Mr. O’Connor actually objects. He is claiming a right that is separate and distinct from the provisions of the Act. The Act has nothing to say to his objection.  33. In my judgment, this claim cannot succeed as an independent case seeking to invalidate the Act for what it does not contain. It is impossible to know how much of the Act would be condemned or whether the entire legislation would fall, assuming Mr. O’Connor’s claim were to succeed.  34. The claim here may be contrasted with the issue that arose concerning s. 2 of the Criminal Justice (Legal Aid) Act 1962 in *Carmody v Minister for Justice* [[2010] 1 ILRM 157](http://www.bailii.org/cgi-bin/redirect.cgi?path=/ie/cases/IESC/2009/S71.html). The section empowered the District Court to certify for representation by a solicitor in the case of indigent persons charged with offences when justice so required. It permitted provision for Counsel only in murder cases, and so, by necessary implication, excluded any right to Counsel in other cases. The Supreme Court held that the absence of a right to apply for legal aid, including Counsel in appropriate cases, represented a failure by the State, but the limited provision in s. 2(1) did not mean it was repugnant to the Constitution. In the circumstances of the failure by the State as found, the Court granted a declaration that the plaintiff had a constitutional right to apply for appropriate legal aid prior to his trial.  35. It is not in issue in this case that legal assistance at public expense is available to Mr. O’Connor if he cannot afford to pay for it himself. Neither is there any question as to the quality of the representation that is available to a requested person under the Custody Issues Scheme.  36. It seems to me that even if this Court took the view that there was some substance in the issue raised by Mr O’Connor, it would still not be appropriate or procedurally legitimate In my view, there is no basis on to consider making a Carmody-type declaration. It is not sought in the statement of claim or in the submissions, and neither is it discussed in the judgment of the High Court, nor is it mentioned in the notices of appeal.  37. Could Mr. O’Connor have sued the State, claiming the right to a statutory scheme, but without seeking to invalidate the provisions of the 2003 Act? The Court does not have to express a view on this because it was not claimed or argued. The claim if made, might have been met by a defence that the State was satisfied to provide for appropriate legal aid as certified or recommended by a Court. It seems to me that the issue of standing would more directly and immediately and relevantly arise in that context. The present litigation consists of the process of the enforcement of the warrant in addition to Mr. O’Connor’s own claim. Whatever the merits of the case, it is impossible to propose that he lacks standing to contest the compliance of the Irish arrangements with the Framework Decision. In my view, his plenary action although misconceived for the reasons I have explained, is inextricably entwined with his resistance to the enforcement of the warrant. I prefer, therefore, not to rule on the question of standing as a separate issue in the appeal and to leave the question to another occasion.  38. In conclusion, I adopt the summary of Edwards J. as follows:  “The Act of 2003 enjoys the presumption of constitutionality, and the respondent/plaintiff bears the burden of rebutting that which is presumed. In this Court’s view, there is simply no evidence before it that the Act of 2003 is constitutionally deficient in any respect, or that it permits of any unconstitutional discrimination; or for that matter that the Act of 2003 fails to respect EU law and in particular the principle of equivalence. Accordingly, the presumption of constitutionality has not been rebutted with respect to the Act of 2003, and the Court has no reason to believe that the Act of 2003 is constitutionally deficient in any respect, or that it breaches the principle of equality before law as guaranteed in Article 40.1 of the Constitution.”  **JUDGMENT of Mr. Justice Gerard Hogan delivered on 23rd day of October 2015**  1. Where a Framework Decision confers the right to legal assistance in European Arrest Warrant (“EAW”) proceedings “in accordance with the national law of the executing Member State”, does this mean that the person whose surrender to another EU Member State is thereby sought is entitled to be provided where necessary with such legal assistance from public funds and, if so, whether such an obligation is discharged by means of the provision of such assistance through the mechanism of an administrative scheme? Independently of this, does the failure to place this scheme on a statutory basis amount to a breach of the equality provisions of Article 40.1 of the Constitution in circumstances where other accused persons enjoy such a statutory entitlement? These essentially are the issues which this Court is required to consider in the appeal from the decision of the High Court (Edwards J.) delivered on 4th December 2014: see *Minister for Justice and Equality v. O’Connor* [[2014] IEHC 640](http://www.bailii.org/ie/cases/IEHC/2014/H640.html" \o "Link to BAILII version).  2. As it happens, the result in the case was announced on 2nd December 2014 and the judgment itself was made available to the parties on 4th December 2014 (albeit in draft form). In the interval between the 2nd December 2014 and 4th December 2014 the Court was asked to make a reference pursuant to Article 267 TFEU to the Court of Justice concerning the interpretation of the Framework Decision. Prior to 1st December 2014 no Irish court had jurisdiction to make such a reference. Article 10(3) of Protocol No. 36 to the Treaty of Lisbon provided for such a jurisdiction after a five year transitional period. The Lisbon Treaty entered into force on 1st December 2009 and the transitional period expired on 1st December 2014. In a separate judgment delivered on 12th January 2015 Edwards J. declined to make such a reference on the ground that he was now *functus officio* and that he had no jurisdiction to make such a reference: *see Minister for Justice and Equality v. O’Connor (No.2)* [[2015] IEHC 26](http://www.bailii.org/ie/cases/IEHC/2015/H26.html).  3. Returning now to the main judgment, Edwards J. heard two separate sets of proceedings together and delivered one single judgment on the principal issues raised. The first set of proceedings arises out of the European Arrest Warrant Act 2003 (“the 2003 Act”). In those proceedings the respondent is the subject of a European arrest warrant issued by the United Kingdom of Great Britain and Northern Ireland on the 13th June, 2011. That warrant seeks the surrender of Mr. O’Connor so that he can serve the two concurrent sentences of four years and six months respectively for tax fraud which had been imposed by Blackfriars Crown Court on 29th January 2007 following his conviction on 26th October 2006. The warrant further seeks Mr. O’Connor’s surrender to face trial on the charge that he failed to hold honour his bail in the interval between his conviction and sentence, contrary to the provisions of the (UK) Bail Act 1976.  4. In the second set of proceedings Mr. O’Connor is the plaintiff in which he challenged the constitutionality of the failure to make provision of a statutory based system of legal aid for requested persons under the 2003 Act, contending that this was contrary to Article 40.1 of the Constitution. The Minister, Ireland and the Attorney General were all named as defendants in these plenary proceedings (“the plenary proceedings”).  5. The UK warrant was endorsed by the High Court for execution in this jurisdiction on the 22nd June, 2011, and it was duly executed on the 27th March, 2012. The respondent was brought before the High Court (Sheehan J.) pursuant to s.13 of the 2003 following his arrest. The respondent was advised of his rights in the course of the s.13 hearing, including his right to obtain or to be provided with professional legal advice and representation, and a notional date (the 16th April, 2012) was fixed for the purposes of s. 16 of the Act of 2003. The respondent was remanded on bail to the date fixed. The respondent was legally represented at the s. 13 hearing. No indication was given of an intention on the part of the respondent to apply for a recommendation under the Attorney General’s Scheme.  6. Those proceeds were adjourned from time to time to enable points of objection to be filed by the respondent, Mr. O’Connor. In the end, only one objection was ultimately proceeded with, namely that pleaded in the following terms:  “The grounds of objection to the application for Mr. O’Connor’s surrender to the U.K. are -  1. Mr. O’Connor would qualify for statutory legal aid. But there is no statutory-based provision of legal aid, as required by Art. 11(2) of the Framework Decision (‘in accordance with national law’ contrast Art.5 (2) ‘under the law or practice’) as made part of national law by s.10 of the 2003 Act (‘subject to and in accordance with the Framework Decision’). On account of the nature of this objection, it should be heard and determined before any other objection is considered. Further, because the 2003 Act (as amended) makes no provision for legal aid, it is to that extent repugnant to the Constitution and, in particular, the State's obligations under E.U. law.”  7. As the respondent did not consent to his surrender to the United Kingdom, it fell to the High Court to consider whether the requirements of s.16 of the 2003 Act have been satisfied. Edwards J. observed that the Court’s jurisdiction to make an order directing that the respondent be surrendered was dependant upon a judicial finding that they had been so satisfied. He found, however, that all the relevant statutory prerequisites (such as, for example, the identity of the requested person, the minimum gravity threshold and the correspondence of the offence with an offence under Irish law) had all been satisfied. This left the sole question of whether this State had complied with the requirements of the Framework Decision by failing to provide for a right to legal aid for requested persons on a statutory basis.  8. It is clear from the pleadings and the evidence - all of which is helpfully recounted in elaborate detail in the main judgment of Edwards J. - that the State has, in fact, established a system of legal aid for requested persons, save that this scheme is established on an administrative rather than a statutory basis. That scheme was previously known as the Attorney General’s Scheme, but in 2012 it was re-named the Legal Aid (Custody Issues) Scheme (“the Scheme”) and it took effect in that form from 1st January 2013.  9. While it is accepted that the scheme is generally an ex gratia one in that the Attorney General does not feel bound to honour every recommendation made thereunder, the evidence which was given in the High Court in both the *Olsson* case *(Minister for Justice, Equality and Law Reform v. Olsson* [[2011] IESC 1](http://www.bailii.org/ie/cases/IESC/2011/S1.html), [[2011] 1 I.R. 384](http://www.bailii.org/ie/cases/IESC/2011/S1.html)) and in this case confirmed that a special rule applies in the case of recommendations made by the court in cases arising under the 2003 Act so that these recommendations are, in fact, regarded as binding.  10. In the present case, the Minister responded to a request for particulars concerning the operation of the Scheme by referring to the evidence which had been given in *Olsson* by a Mr. Jevon Alcock, then a solicitor in the Chief State Solicitor’s Office, which was to the effect that all recommendations for legal aid made in EAW cases arising under the Scheme were automatically honoured.  11. Similar evidence was given in the present case by Mr. Patrick Gilheaney, an assistant director of the Legal Aid Board. His principal task was to administer the Scheme. He confirmed that despite the re-naming of the Scheme in 2012, the essentials of the Scheme remained the same. He confirmed that the Scheme applied to all persons arrested under the 2003 Act, but that the question of whether the Scheme should in fact apply in any given case was dependent on an application by the requested person and the making of a judicial recommendation.  12. Mr. Gilheaney agreed that the Scheme was an *ad hoc* administrative scheme which had not been placed on a statutory footing. He confirmed the evidence which had been given in *Olsson* to the effect that payment thereunder was not regarded as discretionary in cases of recommendations made in respect of 2003 Act cases. He said that perhaps some 400 payments per annum were processed regularly under the Scheme following a judicial recommendation. Mr. Gilheaney further observed in response to a question posed by Edwards J. that the Scheme contained no formal financial eligibility thresholds, but that “the decision was made that it would rest with the Court in its wisdom to decide upon a person’s financial eligibility or otherwise.” Mr. Gilheaney agreed that in practice this amounted to an assessment by the Court as to whether the requested person’s financial means were sufficient “for a person to retain legal counsel.”  13. Mr. Gilheaney also pointed to the extensive publicity which had been given to the existence of the new Scheme and the steps which were taken to draw the attention of legal professionals to its existence.  **The High Court judgment** 14. In a very comprehensive judgment Edwards J. held that so far as the 2003 Act proceedings were concerned he should follow the decision of the Supreme Court in *Olsson* regarding the interpretation of Article 11(2) of the Framework Decision, irrespective of whether of the comments of O’Donnell J. in that case should strictly be regarded as part of the *ratio decidendi* or were simply in the nature of *obiter dicta*.  15. So far as the discrimination argument based on Article 40.1 in the plenary proceedings was concerned, Edwards J. stated:  “That approach provides the answer to the respondent / plaintiff’s suggestion that under the Act of 2003 there is an unconstitutional, alternatively illegal, discrimination and disparity in terms of the legal assistance available to a person in the respondent’s position compared with that provided to certain persons requiring such assistance in other contexts. It was contended that because there is statutory legal aid in domestic criminal cases, and for certain civil cases, and for cases based on a warrant from the International Criminal Court, and for certain Coroner’s Court matters, and for persons who might be made the subject of an [anti-social behaviour order], there is a disparity in how persons in the same or similar class are treated, and that this constitutes discrimination There might well be a disparity in terms of the mechanism employed to legally assist persons in the categories identified, compared with the mechanism employed to legally assist persons who are wanted on foot of a European arrest warrant, but there is equivalence with respect to the fundamental principle that requires to be respected, namely that all such persons are provided with effective access to justice.”  16. It will be seen that this conclusion proceeds in part on the basis that Edwards J. concluded that Article 11(2) of the Framework Decision conferred no right to legal aid and was simply concerned with the right to legal representation.  **Article 11 of the Framework Decision** 17. Article 11 of the Council Framework Decision of 13 June 2002 (2002/584/JHA) provides as follows:  "1. When a requested person is arrested, the executing competent judicial authority shall, in accordance with national law, inform that person of the European arrest warrant and of its contents, and also of the possibility of consenting to surrender to the issuing judicial authority.  2. A requested person who is arrested for the purpose of execution of a European arrest warrant shall have the right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State.”  18. As has already been indicated, two issues now fall immediately for consideration in respect of the Article 11(2) issue. First, does Article 11(2) confer a right to legal aid in cases involving requested persons? Second, if there is such a right, is it satisfied by a non-statutory scheme? It may be convenient if these questions were to be considered in reverse order.  **Has the right to assistance been provided “in accordance with the national law of the executing Member State?”** 19. It is clear from the language of Article 11(2) the right to legal assistance must be in accordance with “the national law of the executing Member State.” This pre-supposes that the rights and entitlement of the requested person to assistance must not only be determined in a manner which is legally binding and contains clear rules, but the entitlement must be governed by law. So far as the present appeal is concerned, the only right (or, more accurately, claimed right) which is at stake is the right to legal assistance.  20. If there is such a right, then it is clear that this Member State does not provide for that right in accordance with its national law. With the exception of a common law right (which does not arise in the present case), a requirement that a right is to be provided in accordance with national law must refer to a right prescribed by an Act of the Oireachtas.  21. It is not, of course, disputed but that the Scheme is extra-statutory in nature. It is plain, moreover, that the commitment given on behalf of the Minister under the Scheme that *every* judicial recommendation for assistance arising under the 2003 Act will be faithfully honoured without qualification could, in principle, be enforced by virtue of the doctrine of legitimate expectations.  22. This still does not mean, however, that the Scheme was being provided in accordance with national law. The Scheme could be still by “its nature” be changed “at the whim of the authorities”: see Case 145/82 *Commission of the European Communities v. Italian Republic* [1983] E.C.R. 711, para. 10. It is for this reason that the Court of Justice has consistently held that administrative practices of this kind were insufficient to give legal effect to a Directive and to satisfy the requirements of Article 249 TFEU. As Costello J. remarked in the (admittedly different) context of administrative circulars regulating the education sector in *O’Callaghan v. Meath Vocational Education Committee*, High Court, November 20, 1990:  “These [administrative] measures are not, of course, illegal. But they have no statutory force and the sanction which ensures compliance with them is not a legal one but the undeclared understanding that the Department will withhold financial assistance in the event of non-compliance.”  23. Contrary to the views which Edwards J. expressed on this point, for my part I do think it is significant that Article 5(2) of the Framework Decision does refer to “law or practice of the issuing Member State.” While I fully agree with Edwards J. that the context of this reference is entirely different from that of Article 11(2) - since it refers to the guarantees which an executing Member State may require of an issuing Member State in cases where the surrendered person is required to serve the balance of a life sentence - what is significant is that the Union legislator has used the term “law or practice of the issuing Member State” elsewhere in the Framework Decision. In other words, if the rights guaranteed by Article 11(2) could properly have been vouchsafed by national *practice* - as distinct from national law - the Framework Decision could readily have said so.  24. Judged from the perspective of national constitutional law, it is all too plain that the only method whereby the Scheme could be established in accordance with law in this State is where the Oireachtas enacted legislation for this purpose in accordance with Article 15.2.1 and Article 20 of the Constitution. It is true that Dáil Éireann has voted supply by means of a financial resolution and this appropriation doubtless appears as a line item in the annual Appropriation Acts. But the Scheme nonetheless lacks the quality of publicly accessible and generally applicable legal principles, standards and rules which are the hallmark of a public general Act enacted by the Oireachtas.  25. The fact that Article 20 of the Constitution proscribes the method whereby legislation is to be enacted - or, for that matter, amended - is not something which can be blithely ignored. The deliberative process involved in the entire parliamentary system was plainly regarded by the drafters of the Constitution as an essential pre-requisite in a democracy to the legitimacy of legislation.  26. The extra-statutory nature of the Scheme is not, of course, illegal and nor does it render it in any way unlawful as a matter of domestic constitutional law. It is nonetheless not one provided “in accordance with national law” in the sense in which that term is used in Article 11(2) of the Framework Decision.  **Does Article 11(2) of the Framework Decision confer a right to publicly funded legal assistance?** 27. We may now turn to the first question: does Article 11(2) of the Framework Decision confer a right to publicly funded legal assistance? This is a matter which was at heart of the Supreme Court’s decision in *Olsson*. In that case the requested person had been legally represented at all stages of the European Arrest Warrant procedure, but neither solicitor or counsel had sought a recommendation under the Attorney General’s Scheme. It was contended instead that the Scheme itself did not comply with the requirements of the Framework Decision. As O’Donnell J. put it ([[2011] 1 I.R. 384](http://www.bailii.org/ie/cases/IESC/2011/S1.html), 389-390):  “Accordingly the point argued in this appeal is limited to the contention that the provision of legal assistance under the terms of the Scheme falls short of what is required by law for a person whose return is requested pursuant to a European arrest warrant.  The respondent’s case in this appeal depends on an interpretation of the Framework Decision and Act of 2003, as amended. Article 11(2) of the Framework Decision provides that a requested person has a “right to be assisted by a legal counsel … in accordance with the national law of the executing Member State”….The Framework Decision therefore imposes no obligation on the requested state to provide legal aid, whether as of right, or otherwise. It merely provides for a right of representation; and then only in accordance with the national law of the executing Member State.”  28. At the hearing of the appeal in the present case, counsel for the appellant, Dr. Forde S.C., sought to argue that this passage from the judgment was merely *obiter* and that this Court were not bound by these observations. He contended that, shorn of the constraints of precedent, we should look afresh again at the interpretation of Article 11(2) of the Framework Decision. Why, he argued, would the Union legislator express the right in these terms if it was not intended to provide for legal assistance in respect of those cases - quite possibly a majority of cases - where the requested person could not otherwise afford legal representation?  29. Given that all the Member States themselves adhered to the European Convention of Human Rights (with the concomitant obligation to provide legal aid contained in Article 6(1)(c) of the Convention), it might seem curious that the Union legislator would simply effectively state the obvious, namely, that the requested person had the right to legal counsel, if it was not also intended to provide for legal aid in appropriate cases as well.  30. This was especially so given the hugely technical and difficult issues - often involving a comparison of the criminal procedure and criminal law of different Member States - which can so often arise in proceedings under the EAW procedure. Could it have been intended that the Union legislator would have been prepared to deny legal aid to persons who might face a request for surrender on very serious charges to distant parts of the European Union where the individual concerned might be totally unfamiliar with the language or the nature of the legal system or had no family ties with the requesting State, while conversely such a person would have had the right to legal aid had he or she been facing more or less identical charges in their own domestic legal system?  31. This is a potentially attractive argument to which, had the matter been res integra, this Court would have been obliged to give close consideration. Indeed, in other circumstances, it might well have been appropriate to exercise the new freedom to make an Article 267 reference to the Court of Justice of the European Union on this very question of the proper interpretation of Article 11(2) of the Framework Decision following the ending of the transitional period.  32. At the same time it would have to be acknowledged that the very fact that the present common consensus among European legislators is that Article 11(2) does not confer such a right itself must be regarded as strong indicator that *Olsson* is correct and that Article 11(2) does not bear the interpretation for which the plaintiff contends. This is underscored by the proposed legislative changes at EU level to which Ryan P. has referred in his judgment. If there was already a pre-existing right to legal aid which had been conferred by the EAW Framework Decision, then legislative proposals to vest accused with such a right would be entirely superfluous and unnecessary.  33. For my part, however, I do not think that the issue is, in fact, *res integra*. The question of the proper interpretation of Article 11(2) of the Framework Decision was squarely before the Supreme Court in *Olsson* and it clearly ruled that this right dealt with legal representation and not with legal aid. I consider that this Court is bound by *Olsson* to rule adversely to this aspect of the appellant’s claim. I accept, of course, that the Supreme Court did not then - although it would now - have the freedom to make an Article 267 reference at the time it decided Olsson in January 2011, but this in itself cannot take from the authoritative nature of the decision itself.  34. It is also true that, strictly speaking, this Court also enjoys the freedom as a matter of EU law to make an Article 267 reference, irrespective of any views which the Supreme Court may have expressed on the point in *Olsson*. In my view, however, having regard to the hierarchical system of our legal system and the importance of precedent in that legal system, it would inappropriate for this Court to take a step which might be thought indirectly to impeach the authority of *Olsson* by making an Article 267 reference to the Court of Justice.  **The constitutional argument** 35. There remains for consideration the constitutional argument which arises in the plenary proceedings. It should be recorded that was not an issue which previously arose in Olsson. That case is, accordingly, not an authority so far as this constitutional point is concerned. The Supreme Court has expressly confirmed that just because the validity of a statute has been upheld by reference to one ground, there is no bar to a subsequent challenge to that statute on another (and novel) ground: see *The State (Quinn) v. Ryan* [1965] I.R. 70, 120, *per* Ó Dálaigh C.J. *and Laurentiu v. Minister for Justice* [[1999] 4 I.R. 26](http://www.bailii.org/ie/cases/IESC/1999/47.html), 59, *per* Denham J. This principle doubtless applies a fortiori to a challenge to the validity of an administrative scheme.  36. In the accompanying plenary proceedings the appellant contends that the failure by the Oireachtas to place the Scheme on a statutory footing amount to a violation of Article 40.1 of the Constitution in that he is placed at a disadvantage compared with similarly situated persons whose entitlement to legal aid is governed and regulated by statute. It is submitted that these include persons facing criminal trials for precisely the same offences (or corresponding offences) under domestic law (whose entitlement is governed by the Criminal Justice (Legal Aid) Act 1962)(“the 1962 Act”) or who are facing surrendering under the International Criminal Court Act 2006 (“the 2006 Act”).  **Whether the constitutional argument is properly before the Court** 37. The first question to be considered under this heading is whether this constitutional argument is properly before the Court and, if it is, whether this Court can appropriately grant a declaration to the effect that, by virtue of a *lacuna* in the 2003 Act, the failure to put the legal aid scheme for persons facing surrender under the 2003 Act on a statutory footing amounts to a breach of Article 40.1 of the Constitution. As this is a matter on which the Court is unfortunately divided, I propose first to address the question of whether the constitutional issue is properly before the Court.  38. The plenary proceedings (2012, 11958P) were commenced in November 2012. Paragraphs 9 and 10 of the general endorsement of claim are in the following terms:  “9…..because one or other of the said Legal Aid schemes have been made applicable to other proceedings, which are comparable to or where what is at stake for the affected individual is in no way as serious as in [European Arrest Warrant] proceedings. The EAW Act is unconstitutional to that extent, contravening, *inter alia*, the guarantee in Article 40 s.1 of equality before the law: for instance, s. 23(5) and s. 23(6) of the International Criminal Court Act 2006 and s. 118 of the Criminal Justice Act 2006 (“civil” anti-social behaviour orders) as well as an extensive range of other civil proceedings.  10. Accordingly, since the plaintiff would at the time be eligible for legal aid under the aforesaid regimes but neither the EAW Act or other legislation or statutory instrument applies one or other of these regimes to the EAW proceedings, the EAW Act is unconstitutional and contravenes E.U. law to that extent, a consequence of which the plaintiff’s surrender under the aforesaid EAW Act is not permitted.”  39. The plaintiff then simply claimed “a declaration accordingly” in the prayer for relief. These claims were repeated in the statement of claim delivered on 23rd November 2012. Paragraphs 12 and 13 of the State’s defence delivered on 13 October 2013 are in the following terms:  “11. It is denied that the European Arrest Warrant Act 2003 as amended is unconstitutional due to the availability of legal aid in respect of other proceedings which are comparable or less serious for the individual than proceedings under the European Arrest Warrant Act 2003 as amended.  12. It is denied that the European Arrest Warrant Act 2003 as amended contravenes the guarantee in Article 40.1 of the Constitution of equality before the law.”  40. The plaintiff’s High Court written submissions dated 29th May 2014 clearly raise these issues. While it is unnecessary to reproduce these submissions in this judgment, it is perhaps sufficient to state that these submissions contend that the 2003 Act was unconstitutional to the extent that it failed to provide legal aid when such a right was available to similarly situated litigants. The plaintiff further contended that legislation could be unconstitutional “to the extent that it fails to make provision for certain entitlements.” The plaintiff then referred to other cases dealing with the application of Article 40.1 to the extradition/surrender of accused persons such as *McMahon v. Leahy* [1984] I.R. 525 and *O’Sullivan v. Irish Prison Service* [2010] 4 I.R.562.  41. The written submissions of the State dealing with the constitutional issue focussed first on the application of *Cahill v. Sutton* [1980] I.R. 269 and the plaintiff’s alleged lack of locus standi to challenge the absence of a statutory entitlement to legal aid. It should be said that this particular objection was rejected by Edwards J. as he found that the plaintiff’s financial circumstances were “unhappy” and that he would “most likely qualify for legal aid under the Criminal Justice (Legal Aid) Act 1962 if he were facing a criminal charge in this jurisdiction.” The State has not sought in this appeal to disturb that finding of fact.  42. The balance of the State’s arguments on the constitutional issue were directed - in admittedly relatively brief terms - to the substance of the Article 40.1 claim. Relying on the dicta in cases such as *Minister for Justice, Equality and Law Reform v. Sliczynski* [[2008] IESC 32](http://www.bailii.org/ie/cases/IESC/2008/S32.html) which stressed that proceedings under the EAW procedure were sui generis, the State contended that measures such as the 2006 Act dealing with the International Criminal Court were accordingly not an appropriate comparator for this purpose.  43. The constitutional issue was fully addressed in the main judgment of Edwards J. at paras. 54-57 of that judgment. He rejected the Article 40.1 arguments for reasons I will separately and presently consider. It is true that the question of the form of a declaration is not addressed in the judgment of Edwards J., but since, of course, he rejected the argument on its merits the issue of a potential remedy simply did not arise for consideration.  44. The plaintiff’s notice of appeal of 5th March 2015 from that decision of Edwards J. seeks “a declaration of unconstitutionality and/or incompatibility with EU law” insofar as “the European Arrest Warrant Act 2003, as amended, does not provide for the type of legal aid being contended for.” The plaintiff’s written submissions of 31st March 2015 address the merits of the Article 40.1 issue under the headings of equivalence/equality with sub-headings dealing with appropriate comparators and whether these distinctions were justifiable. The written submissions of the State dated 13th April 2015 also address these arguments, specifically stating (at para. 58) that there is no basis “in European Law or in the Constitution requiring an equivalent scheme to provide for legal representation in differing situations.”  45. These submissions were repeated by counsel on both sides in the course of the hearing. The transcript of the hearing before this Court makes it clear that counsel for the plaintiff was relying on the equality argument independently of any argument based on *Olssson.* Counsel for the State also addressed the Court on the equality issue, stressing that there was no “invidious discrimination” and that the plaintiff had not “identified how he has been treated differently to any group of people who are in an equally comparable position to himself.”  46. In my view, the Article 40.1 issue was squarely before the Court. It is true that neither counsel elected not to make any submissions on the precise form of remedy in the event that a breach of Article 40.1 was disclosed, but I do not think that either side realistically contend that they did not have fair notice that this issue might arise were the Court to arrive at a conclusion that Article 40.1 had been infringed. The State defendants plainly faced the possibility that the 2003 Act might be declared unconstitutional and they were on full notice of this. The grant of a declaration identifying a constitutional breach by reason of the legislative lacuna while at the same time refusing to declare the 2003 Act unconstitutional is surely less intrusive so far as the State is concerned as compared with a more broad ranging declaration of constitutional invalidity which might otherwise have been granted.  47. In these circumstances I consider that I am entitled to consider the merits of the constitutional argument.  **The merits of the constitutional argument** 48. As I have already noted, a key part of the plaintiff’s argument is that the failure to provide a statutory scheme of legal aid in the case of persons facing surrender under the 2003 Act amounts to an unconstitutional discrimination contrary to Article 40.1.  49. One of the immediate comparators relied on for this purpose is that of persons facing surrender under the International Criminal Court Act 2006. In the latter case, s. 23(5) and s. 23(6) of the 2006 Act provide:  "(5) The Court shall order that legal aid be provided for the arrested person if it appears to it that the person's means are insufficient to enable him or her to obtain such aid.  6. On the making of such an order the arrested person shall be entitled to free legal aid in the proceedings and for that purpose s. 3 of the Criminal Justice (Legal Aid) Act 1962 shall apply, with the necessary modifications, in relation to the person as if he or she had been granted a legal aid (trial on indictment) certificate under that section.”  50. In the High Court Edwards J. rejected the argument that the 2006 Act provided an appropriate comparator noting that “a requirement to provide legal aid is created by Article 55 and Article 67 the Rome Statute of the International Criminal Court.” Article 55 deals with legal aid at the questioning stage and Article 67 deals with legal aid at the trial of the accused before the International Criminal Court itself. While Part IX of the Rome Statute deals with the surrender of accused persons by the requested state, contrary to what Edwards J. appears to have suggested, there appears to be no entitlement to *legal aid in respect of the actual surrender process itself before the national authorities*. This simply serves to make the comparison between the 2003 Act and the 2006 Act even more apt so far as the plaintiff is concerned.  51. It is true, of course, that there are significant differences between all three regimes. In particular, the 1962 Act is directed to persons facing criminal trial in this State. Likewise, the circumstances in which the request procedure under the 2006 Act might be invoked would, in practice, be confined to quite exceptional cases. Whereas surrender requests under the 2003 Act are routine, there seems to be no recorded case where the 2006 Act procedures have been invoked to date.  52. One might also observe that the practical effects of the differing treatment as between the different regimes may not be great, especially if - as was confirmed in *Olsson* - any judicial recommendation for legal aid is honoured by the Minister as a matter of invariable practice and not simply as a question of gratuitous benevolence. There are nevertheless real differences between the Scheme and a statutory entitlement under, *e.g.*, the 1962 Act or the 2006 Act. These differences were summarised thus by Edwards J.:  “• Application to avail of the scheme has to be made at the very outset, often when the individual or a solicitor may have no inkling of how difficult or protracted the case may be or the person's prospect of success.  • Although an application is made at the outset, it is only when the case concludes that a recommendation may be made. At the conclusion, a recommendation may be refused by the court, but there are no available criteria as to how this discretion is to be exercised; different judges may have radically different approaches to this. The Court is invited to contrast the position under the two existing statutory legal aid schemes created by the Criminal Justice (Legal Aid) Act 1962 and the Civil Legal Aid Act 1995.  • In terms of the critical question of financial eligibility, there are no available criteria concerning assets or income, which will disqualify a person from benefiting under the scheme. A court is left entirely at large, and different judges may have radically different approaches to this. Again, the Court is invited to contrast the position under the two existing statutory legal aid schemes created by the Criminal Justice (Legal Aid) Act 1962 and the Civil Legal Aid Act 1995.  • Requiring a court to deal with all disputes about financial eligibility, even if threshold criteria existed, offends against the separation of powers, since this is an entirely administrative function that can be discharged by the Legal Aid Board, as it is under the Civil Legal Aid Act 1995.  • The present scheme has never been amended to make it clear that the ‘discretion is exercised only in one way’ in European arrest warrant cases.”  53. The Scheme thus lacks the detailed, legal criteria of a kind to be expected in a statutory provision, not least the all important criteria dealing with financial eligibility.  54. In this respect, it is impossible to avoid the conclusion that persons whose surrender is requested under the 2003 Act are not in this respect treated equally before the law in the manner required by Article 40.1 so far their entitlements to legal aid is concerned. In the case of persons whose surrender is sought under the 2003 Act, their entitlement to legal aid rests on the operation of an extra-statutory scheme as leavened by judicial practice and commitments given by State officials, whereas in other essentially similar cases the entitlement is governed and regulated by law, i.e., legislation enacted for this purpose by the Oireachtas.  55. It is also undeniable that both the extra-statutory nature of the Scheme and the fact that the person facing surrender must wait until the conclusion of the hearing for a judicial determination - which itself is not based on any fixed criteria - as to eligibility and the making of a recommendation dilute the position of the client. In contrast to the position under the 1962 Act, the requested person is thus placed at a greater disadvantage in securing appropriate legal services and, indeed, for that matter, subtly weakens his or her right to object or complain if dissatisfied with the level of legal services actually provided.  56. It must equally be concluded that, so far as this issue is concerned, there are no real differences of substance between the cases of persons facing trial in a domestic court or facing surrender under the 2006 Act on the one hand and those facing surrender under the 2003 Act on the other. It could hardly be correct that, for example, the legal aid entitlements of a requested person facing surrender to London on fraud charges should rest on the terms of a purely administrative scheme with all its attendant uncertainties (even if - as must be accepted - that scheme is invariably applied in a positive manner once there is a judicial recommendation to this effect) whereas such a person facing trial in Dublin on exactly the same charges would have a statutory entitlement to legal aid in the manner specified by the 1962 Act.  57. No meaningful distinction, moreover, can be drawn for this purpose between surrender requests made under the 2003 Act and those made under the 2006 Act. Indeed, it may be noted that this is tacitly acknowledged by Article 16(4) of the Framework Decision when, dealing with multiple requests for surrender, it provides that:  “This Article shall be without prejudice to the Member States’ obligations under the Statute of the International Criminal Court.”  58. In this respect, it must be recalled that the Supreme Court has confirmed that the principle of equality in Article 40.1 is engaged by the differing treatment of requested persons in extradition proceedings: see *McMahon v. Leahy* [1984] I.R. 525. Nor can these differences be properly viewed as reflecting what Ó Dálaigh C.J. regarded in *The State (Hartley) v. Governor of Mountjoy Prison*, Supreme Court, 21st December 1967 as a “diversity of arrangements” in respect of the differences in the extradition regime governed by Part II and Part III respectively of the Extradition Act 1965.  59. In *Hartley* the Supreme Court found nothing objectionable in the fact that extradition arrangements to the United Kingdom (in Part III) were significantly different than similar arrangements with other countries. There was plainly an objective justification for such differences, since our relations with the UK in terms of history, tradition, language, culture, legal system, free movement of persons and, not least, geographical propinquity are such as would justify special arrangements for the extradition of suspects to our nearest neighbour as compared with all other countries.  60. It is, of course, absolutely correct to state that surrender under the EAW procedure is *sui generis*. To the extent, therefore, that the substance of the procedure under the 2003 Act is governed by EU law it would be inappropriate to import purely national rules regarding evidence and pre-trial procedure into that system: see, *e.g., Minister for Justice, Equality and Law Reform v. Sliczynski* [[2008] IESC 73](http://www.bailii.org/ie/cases/IESC/2008/S73.html), per Macken J.  61. It is also correct to state that the EAW procedure provides for a system of surrender based within the European area of justice and home affairs which system is in turn based on mutual trust and respect. To that extent the surrender procedure cannot properly be compared with the system of extradition to third countries: see *O’Sullivan v. Chief Executive of the Irish Prison Service* [[2010] IEHC 301](http://www.bailii.org/ie/cases/IEHC/2010/H301.html), [2010] 4 I.R. 301, *per* McKechnie J. This, indeed, was one of the reasons why McKechnie J. rejected Article 40.1 arguments advanced by the applicant in that case regarding the more limited rights of appeal afforded to a respondent in EAW proceedings as distinct from the right of appeal afforded to persons facing extradition requests under the Extradition Act 1965 (“the 1965 Act”). McKechnie J. took the view that the EAW was not a proper comparator and, moreover, “any differences which do exist between the two systems are entirely justified given the ultimate objectives of the EAW Scheme under the Framework Decision.”  62. While fully accepting the differences as articulated by McKechnie J. in *O’Sullivan* between surrender under the EAW procedure as compared with the extradition arrangements contained in the 1965 Act, I do not think that these differences are dispositive so far as the equality issue presented in this case is concerned. It is one thing for the Oireachtas to prescribe different appellate procedures in the case of surrender applications under the 2003 Act as compared with extradition under the 1965 Act. It is quite another to have starkly different arrangements regarding the legal aid entitlements of persons who, depending on their circumstances, are facing either trial in the State or surrender under the 2003 Act or the 2006 Act or extradition under the 1965 Act. The legal aid entitlements of the accused persons or the persons facing surrender goes to the substance of the entire fairness of the relevant legal procedures and these arrangements have considerable implications for personal liberty.  63. No similar objective justification has really been advanced in the present case for this differing treatment. It is, frankly, difficult to see why a statutory scheme has been put in place for one group of persons facing criminal trial either at home (under the 1962 Act) or surrender abroad to the International Criminal Court (under the 2006 Act), while at the same time another group facing surrender under the 2003 Act are required to be content with an administrative scheme. While as injustices caused by unfair differentiation go, the practical impact of this differentiation is probably modest, even if it is nonetheless real in some cases. Specifically, the difference rests between an enforceable legal right based on clear criteria contained in statute on the one hand and something slightly less than that contained in an administrative scheme. It is nevertheless telling that the Scheme does not contain firm financial guidelines regarding eligibility and the final decision as to whether a recommendation will be made comes only at the end - and not at the start - of what may be a hugely complex High Court hearing lasting several days and may depend on the application of essentially subjective factors made by the individual judge.  64. Nor can it be satisfactory that the actual *operation* of the Scheme rests on assurances given by public servants given in the course of litigation as distinct from the actual wording of the Scheme itself. It is true that such a commitment given publicly in this fashion - and recorded in the Supreme Court judgment in *Olsson* - very probably gives rise to a legitimate expectation which could be positively enforced in litigation. Yet, as the case-law on legitimate expectations itself shows (see, *e.g., Curran v. Minister for Education and Science* [2009] IEHC 378, [2009] 4 I.R. 300), the State’s capacity to escape from the constraints of a formal promise or invariable practice of this nature is somewhat greater than if the commitment were to be embodied in legislation which can only be altered or amended by the Oireachtas.  65. The differences between the statutory and the non-statutory arrangements accordingly cannot be dismissed as being purely theoretical, even if they are likely to be modest in practice. In these circumstances there is nevertheless, to adopt the language of Henchy J. in the extradition case of *McMahon v. Leahy* [1984] I.R. 525, 541, an “unequal treatment…of citizens who, as human beings, are in equal condition in the context of the law involved.” Moreover, irrespective of whether such arrangements are classified as either extradition or surrender, the substance of the matter is that a person facing surrender under the 2003 Act has, objectively speaking, the same need for legal aid as if he were facing trial on similar charges in the State or facing surrender under the 2006 Act.  66. In these circumstances the conclusion that the fundamental precept of equality before the law contained in Article 40.1 has been breached is accordingly unavoidable.  **To what remedy is the appellant entitled in respect of this breach of Article 40.1?** 67. In the plenary proceedings the plaintiff has claimed a declaration that the 2003 Act is unconstitutional “insofar as the European Arrest Warrant Act 2003 (as amended) does not provide for the type of legal aid being contended for.” Accordingly, therefore, the real source of complaint is not so much what the 2003 Act contains but rather in respect of what it *does not contain*. The finding of unconstitutionality in respect of both Article 40.1 relates to a *legislative failure* to provide for a statutory scheme of legal aid having so provided in the case of other comparably situated persons. This is the substance of the plaintiff’s constitutional challenge.  68. In these circumstances, given that the identified unconstitutionality relates to a legislative lacuna, an order declaring the 2003 Act to be unconstitutional would be inappropriate. Just as I observed in the High Court in *BG v. Ireland (No.2)* [[2011] IEHC 445](http://www.bailii.org/ie/cases/IEHC/2011/H445.html), [[2011] 3 I.R. 748](http://www.bailii.org/ie/cases/IEHC/2011/H445.html),767 (where a similar unconstitutional lacuna had come to light), a finding of unconstitutionality would serve no real purpose in the present case “other than a Samson-like collapsing of the legislative pillars which gave rise to the unconstitutionality in the first instance.” At the same time, this Court must fashion an effective remedy to address the legislative lacuna if it is to be faithful to the constitutional command contained in Article 40.3.1 to "defend and vindicate the personal rights of the citizen", so far as it is practicable to do so. It is in these particular circumstances that the court "will feel obliged to fashion its own remedy": see *McDonnell v. Ireland* [1998] 1 I.R. 134, 148, *per* Barrington J.  69. Similar views were expressed by Murray C.J. in *Carmody v. Minister for Justice* [[2009] IESC 71](http://www.bailii.org/ie/cases/IESC/2009/S71.html), [[2010] 1 I.R. 635](http://www.bailii.org/ie/cases/IESC/2009/S71.html), 668 - where an unconstitutional legislative lacuna of this kind has been identified- to the effect that in this type of case the court enjoys a constitutional jurisdiction "to grant such remedy as it considers necessary to vindicate the right concerned." In that case the applicant contended that the fact that he had no right to apply for criminal legal aid in a District Court trial which would provide him with representation by counsel as well as a solicitor and therefore no right to be granted such legal aid where the essential interests of justice so require. The Supreme Court held while that the Criminal Justice (Legal Aid) Act 1962 was not unconstitutional, the failure to make provision in suitable cases for the present of counsel at a criminal trial was, objectively, a breach of the accused's entitlement under Article 38.1 to trial in due course of law. Viewed thus, *Carmody* is really a classic example of an unconstitutional lacuna where the invalidation of the underlying legislation is neither an appropriate or a necessary remedy.  70. What, then, should the remedy in the present case actually be? I confess that I have not found it easy to arrive at an entirely satisfactory solution. In *Carmody* Murray C.J. stated that ([[2010] 1 I.R. 635](http://www.bailii.org/ie/cases/IESC/2009/S71.html), 669):  “…. it would be unjust and contrary to the appellant’s right to a trial “in due course of law” as required by Article 38.1 of the Constitution if the prosecution of the charges brought against him were allowed to proceed while he is denied the right to apply for legal aid to include solicitor and counsel and have that application determined on its merits. To allow a trial to proceed without any possibility of determining whether it was essential to a fair hearing that the defendant be represented by solicitor and counsel would be, in the words of O’Higgins C.J., in the *Healy* case, ‘to tolerate injustice’”.  71. It seems to me, however, that the potential injustice disclosed in *Carmody* was more acute, real and immediate than in the present case. While it is clear from *Carmody* that the remedy must be appropriate and effective to address the unconstitutional lacuna, the parallel remedy suggested in this case - restraining the surrender of the accused pending the enactment by the Oireachtas of the appropriate legislation - would have a disproportionate effect on the smooth operation of the European Arrest Warrant system which could scarcely be warranted having regard to the facts of this case. As I have already pointed out, while the effect of the unconstitutional discrimination is real, the practical disadvantages of this lacuna so far as this plaintiff are probably relatively modest.  72. In these circumstances, I consider that it suffices, for present purposes, simply to grant a declaration that the failure on the part of the Oireachtas to ensure that persons facing surrender requests under the 2003 Act have the same rights by law to legal aid as they would if facing trial on indictment in this State for corresponding offences amounts to a breach of Article 40.1. It is not necessary at this stage to go any further and, specifically, any remedy which involved at this point granting an order restraining the surrender of the plaintiff on foot of the EAW request would represent a disproportionate interference with the operation of the 2003 Act and would tend to undermine the mutual trust and goodwill which are inherent in the European Arrest Warrant procedure.  **Conclusions** 73. In summary, therefore, I would hold as follows:  74. This Court is bound by the decision of the Supreme Court in *Olsson* to hold that the right to legal assistance provided for in Article 11(2) of the Framework Decision refers only to the right to legal representation and not to legal aid as such.  75. So far as the plenary proceedings are concerned, I am of the view that the failure to provide persons facing surrender under the 2003 Act with the same legal entitlements to legal aid as would obtain if they were facing trial on indictment in this State or facing surrender to the International Criminal Court under the 2006 Act amounts to a clear breach of the guarantee of equality before the law in Article 40.1.  76. In the light of the Supreme Court’s decision in *Carmody* it is clear that it falls to this Court to fashion the most appropriate remedy to address this unconstitutional lacuna. In the present case an order restraining the surrender of the accused pending the enactment by the Oireachtas of the appropriate legislation - would have a disproportionate effect on the smooth operation of the European Arrest Warrant system which could scarcely be warranted having regard to the facts of this case. While the effect of the unconstitutional discrimination is a potentially real one so far as this plaintiff is concerned, the practical disadvantages of this lacuna are nonetheless probably relatively modest. It is, accordingly, simply sufficient to grant a declaration that the failure on the part of the Oireachtas to ensure that persons facing surrender requests under the 2003 Act have the same rights by law to legal aid as they would if facing trial on indictment in this State for corresponding offences amounts to a breach of Article 40.1.  **JUDGMENT of Ms. Justice Irvine delivered on the 23rd day of October, 2015**  1. I have read and considered the judgments of the President and Hogan J. on this appeal. Having done so, I gratefully adopt the summary of the factual background to these proceedings set out by Hogan J. at paras. 1 to 11 of his judgment. Likewise I fully agree with the President’s summary of the backdrop to the European Arrest Warrant Act 2003 (“the 2003 Act”) and in particular his explanation of the Council Framework Decision of 13th June, 2002 (“the Framework Decision”).  2. Like my colleagues, I too am satisfied that the first issue posed for the Court’s consideration, namely whether Article 11.2 of the Framework Decision imposes an obligation on the requested State to provide legal aid to a person whose surrender is sought under an European Arrest Warrant (“EAW”), was earlier decided by an unanimous Supreme Court in *Minister for Justice v. Olsson* [[2011] 1 I.R. 384](http://www.bailii.org/ie/cases/IESC/2011/S1.html" \o "Link to BAILII version).  3. In *Olsson*, O’Donnell J. considered the proper interpretation of Article 11.2. He did so having specifically identified the issue to be decided on the appeal which he expressed in the following manner at para. 8 of his judgment:-  “Accordingly, the point argued on this appeal is limited to the contention that the provision of legal assistance under the terms of the Scheme falls short of what is required by law for a person whose return is requested pursuant to a European Arrest Warrant”.  4. He then proceeded to answer that question in light of the submissions of the parties commencing at para. 11 of his judgment. It is unnecessary for the purposes of this judgment to set out the text of that part of his judgment here. Suffice to state that having considered the same I reject as unsustainable the submission made on the appellant’s behalf that this Court could conclude that O’Donnell J.’s analysis of the obligations imposed by the relevant Article might be considered *obiter* to his decision.  5. I also join with my colleagues in their judgment that it would be inappropriate and indeed improper for this Court to seek to overturn or side-step the decision in *Olsson*, which is of course binding on this Court, by making a reference to the Court of Justice of the European Union under Article 267 TFEU. To do so would be inconsistent with the hierarchical structure of our legal system and would also undermine the concept of legal precedent which is of such importance in the context of providing certainty and consistency in the judicial process.  **The Plenary Proceedings.**  6. Having regard to what is stated by Hogan J. at paras. 37 to 47 of his judgment, I am also satisfied that that the constitutional argument based upon Mr O’Connor’s claim that the 2003 Act fails to vindicate his equality rights as guaranteed by Article 40.1 is properly before this Court on appeal. The issue was fully canvassed in the pleadings before the High Court, the defendants engaged with the issue in para. 12 of their defence and the argument rejected by Mr. Justice Edwards, at pps. 54 to 57 inclusive of his judgement.  7. It is the relief which Mr. O’Connor seeks, should the Court rule in his favour, that causes me difficulty. Having claimed a breach of his Article 40.1 rights he claims that “the 2003 Act is unconstitutional to that extent contravening *inter alia* the guarantee in Article 40.1 of equality before the law. As a consequence, his surrender under the EAW is not permitted.” He then claims the following relief:-  “AND THE PLAINTIFF CLAIMS:  1. A declaration accordingly  2. Further and other relief  3. Costs”  8. In other words, Mr. O’Connor seeks to have the Court declare unconstitutional all of the provisions in the 2003 Act as relate to the surrender of persons against whom an EAW has been issued regardless of the fact that, as is referred to by the President in his judgment, he takes no issue with any particular provision of the Act itself in terms of its constitutionality. His real complaint is about a *lacuna* in the legislation in that it does not provide him with a statutory regime for legal aid in the context of his EAW proceedings. While there might in exceptional circumstances be grounds for striking down an Act of the Oireachtas by reason of the absence therefrom of some particularly vital provision, this is, on the facts, certainly not such a case.  9. Notwithstanding the fact that the remedy sought by Mr. O’Connor is one which I would have to refuse even if satisfied as to the correctness of his equality argument, I agree with Hogan J. that it would be wrong to refuse to consider granting Mr. O’Connor the alternative relief of a declaration to the effect that the 2003 Act failed to vindicate his Article 40.1 rights, if satisfied as to the validity of that claim. I do not reach that conclusion lightly in circumstances where it appears that the parties in the High Court did not debate the form of relief that might be available to Mr. O’Connor if he was to only succeed in relation to the constitutional aspect of his claim. However, I am satisfied that such relief could be afforded to Mr. O’Connor without visiting any injustice upon the defendant.  **Constitutional Argument.** 10. Simply put, the claim Mr. O’Connor makes in his pleadings is that statutory legal aid regimes such as those provided for in the Criminal Justice (Legal Aid) Act 1962 (“the 1962 Act”) and the Civil Legal Aid Act 1995 have been made available to individuals who are in a comparable or less serious position to those the subject matter of EAW proceedings, in terms of what is at stake. He contrasts his position to the individual whose surrender is sought to the International Criminal Court under the International Criminal Court Act 2006 and a person facing relatively modest criminal proceedings in this jurisdiction. Both have an entitlement to a statutory scheme of legal aid whereas none such is available to him although facing a request for his surrender under the 2003 Act. Thus, insofar as their entitlement to be legally aided is concerned, persons whose surrender is requested under the 2003 Act are not treated equally before the law in the manner required by Article 40.1. Their entitlement to legal aid rests upon the operation of what was at the relevant time known as the Attorney General’s Scheme (“the Scheme”), renamed the Legal Aid (Custody Issues) Scheme as of 1st January 2013, which is non-statutory in nature.  11. In the course of legal submission, significant emphasis was placed upon the provisions of s. 23(6) of the International Criminal Court Act 2006 which entitles an individual whose surrender is sought to the International Criminal Court to statutory legal aid under the 1962 Act. In terms of equivalence the position of such an individual could not be distinguished from his own when facing potential surrender under the 2003 Act. The Court was urged to consider the disparity in the type of legal aid available to Mr. O’Connor under the 2003 Act and to conclude that the same could not be justified. Accordingly, the guarantee afforded him by Article 40.1 required that he be afforded a scheme of legal aid that is governed and regulated by statute.  12. In the course of the High Court proceedings Mr. Patrick Gilheaney, who was responsible for the administration of the Scheme, gave evidence that the Scheme was of an *ad hoc* nature and applied to all persons arrested under the 2003 Act. He stated that payment under the Scheme was not regarded as discretionary and that once the judge dealing with the matter made a recommendation that payment would be made. As to eligibility thresholds, he advised that there were none such and that it was left to the presiding judge to make an assessment as to whether the individual concerned had sufficient financial means to retain legal counsel. The thrust of his evidence was that all recommendations for legal aid made in EAW cases are automatically honoured. As a matter of practice, when EAW proceedings are first before the court, the lawyer who has accepted instructions indicates to the court that they will be applying for the Scheme at the conclusion of the proceedings and at that point in time the judge invariably makes a recommendation for payment. That being so it must be accepted that it is only at the end of the process that there is absolute certainty as to whether or not those instructed will be paid for the services which they have provided. However, even if perchance the presiding judge were to refuse the necessary recommendation, the individual whose surrender had been sought would have had the benefit of full legal representation and advice from the start to the very end of the legal process. It would be the legal team that would be at a loss.  **Discussion.** 13. The first matter to observe is that an individual’s right to legal aid, whilst provided for in the Criminal Justice (Legal Aid) Act 1962 does not stem from statute as was advised by Murray C.J. in *Carmody v. The Minister for Justice* [[2009] IESC 71](http://www.bailii.org/ie/cases/IESC/2009/S71.html). At p. 653 he stated the following concerning that right:-  “[63] One of the first matters which the Court made quite clear is that the right to legal aid does not stem from a statute. It is a constitutional right. The Act of 1962, to the extent that it does make provision for legal aid, is merely a means of vindicating that right.”  14. Concerning the right to legal aid, O’Donnell J. in *Olsson* noted:-  “The right to be represented, and if unable to pay for representation to have such representation provided is really an aspect of the right to a trial in due course of law guaranteed by Article 38.1 and the administration of justice required under Article 34.1 of the Constitution. A trial on a serious charge without such legal assistance would fall short of those constitutional standards (see *The State (Healy) v. Donoghue* [1976] I.R. 325). The Constitution focuses on the fairness of the trial, not on the precise manner in which any representation is made available.”  15. Henchy J. at p. 353 of that judgment described the constitutional obligation to provide free legal advice and representation in criminal cases in the following manner:-  “When the Constitution states that “no person shall be tried on any criminal charge save in due course of law” (Article 38 S1), that (the State guarantees in its laws to respect, and, as far as practicable, by its laws to defendant vindicate the personal rights of the citizen” (Article 40.3.1), that “the state shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property right of every citizen” (Article 40.3.2), and that “no citizen shall be deprived of his personal liberty save in accordance with law” (Article 40.4.1), it necessarily implies, at the very least, a guarantee that the citizen shall not be deprived of his liberty as a result of a criminal trial conducted in a manner, or in circumstances, calculated to shut him out from a reasonable opportunity of establishing as innocence; or, where guilt has been established or admitted, of receiving a sentence appropriate to his degree of guilt and his irrelevant personal circumstances.”  16. Looking first at the issue of equivalence in the context of an individual’s constitutional right to legal aid, in my view an individual served with an EAW is not engaged in a process which by any stretch of the imagination could be considered equivalent to that which happens in the course of a criminal trial. The individual whose surrender is sought is either due to stand trial at some future date in a member state where their liberty will be at stake or will already have been convicted and lost their liberty by reason of a trial conducted in another member state. His liberty is not at stake in the manner in which it is at stake in the course of a criminal trial.  17. In these proceedings Mr. O’Connor faces a request for his surrender to the English authorities to serve a prison sentence imposed upon him there following his conviction on two charges of revenue fraud and also to face one charge of unlawful bail jumping. It is also important to emphasise that his return is sought to another member state in the context of the legislation introduced as a result the Framework Decision intended to streamline extradition among member states and in the context of a renewed trust and confidence in the courts of the member states. It is convenient for me to borrow the following text from the introductory section of the judgment of the President.  “The European arrest warrant is a function of an EU Framework Decision that was intended to streamline extradition among member states by replacing inter-State requests with enforcement of court orders from one country to another. The scheme is founded on trust in the systems of justice in the participating states. Cumbersome rules of procedure were replaced by a standard unified process that applied across the European Union. Strict time limits were laid down so that the process of transmitting a wanted person from where he was arrested to the requesting State court would operate smoothly and efficiently. Some of the old rules were dispensed with because they were thought to be unnecessary in the new community of trust in common precepts of substantive and procedural justice.”  18. It is true to say that the EAW proceedings potentially have serious consequences for Mr. O’Connor in that if he is returned to England he will likely serve the prison sentence already mentioned. However, the proceedings before this Court do no more than seek his transfer to the jurisdiction of another member state where he was found guilty of those charges thus depriving him of his right to liberty. Following the approach taken by Murray C.J., when describing the extradition process in *Attorney General v. Parke* (unreported, Supreme Court, 6th December, 2004) it may fairly be said that the proceedings under the 2003 Act should be considered to be more in the nature of a sui generis inquiry. At p. 11 of his judgment he stated:  “I should first of all state the obvious, namely, that although extradition may entail serious consequences for a person subjected to it, such as the loss of liberty, extradition proceedings are not a criminal process and are not in the nature of a criminal trial. The burden of proof of facts which may rest on the applicant in these proceedings is not that of a criminal trial. I hasten to add that the learned High Court judge did not approach this matter on such a basis and it is just that I consider it appropriate at this point to distinguish between extradition proceedings and other forms of proceedings, criminal and criminal and civil. An extradition proceeding, pursuant to the relevant Acts, has its own special features which in a certain sense makes it sui generis.”  19. Accordingly, insofar as Mr. O’Connor seeks to equate his position in these EAW proceedings to the position of an individual facing criminal charges in this jurisdiction and whose liberty is at stake, I am not satisfied his equivalence claim is well founded.  20. Even if Mr. O’Connor had not been convicted in England and his surrender was sought for the purposes of securing his return to stand trial on charges of tax fraud, in my view he could not successfully argue that he was in an equivalent position to a member of the public in this jurisdiction facing trial for some other criminal offence. It is only subsequent to his surrender that he will find himself in an equivalent position to his Irish counterpart in this jurisdiction. As was stated by the Chief Justice *in The State (O) v. Daly* [1977] 1 I.R. 312, at 315:-  “There is a danger that the decision in *Healy’s* case may be misunderstood in the sense that it may be regarded as plight applying to situations in circumstances which were not contemplated. It is worth recalling, therefore, that the decision in that case applies only to the trial of persons charged with criminal offences and not to the earlier or ancillary stages of criminal proceedings. It has to do with the circumstances in which the interests of justice and the requirements of a fair trial necessitate that the person charged be provided with legal assistance if he cannot provide such for himself.”  21. That brings me conveniently to the Mr. O’Connor’s submission that the constitutional requirement that he be treated equally before the law as per Article 40.1 mandates that he should be provided with legal aid under a statutory scheme equivalent to that which would be enjoyed by an individual facing extradition under the International Criminal Court Act 2006.  22. On the facts it is very difficult to distinguish between the position of an individual arrested under the 2003 Act and one whose surrender is sought under the International Criminal Court Act 2006. Each are sought to be surrendered to different authorities but for the same purpose; either to serve a sentence already imposed or to meet charges that have been proffered. Both provide for the surrender of fugitives from justice and the procedure set out for seeking and effecting surrender are almost identical. While it is of course true to say that the 2006 Act deals with offences which are perhaps the most grave in the context of society as a whole such as genocide, war crimes and crimes against humanity, it is possible that a person against whom an EAW has issued could equally be facing or have been convicted of venous crimes which would carry equivalent penalties to those that might be imposed by the International Criminal Court under the 2006 Act.  23. It must be accepted that the 2006 Act is different from the 2003 Act insofar as it provides as follows: -  “S23(5) The Court shall order that legal aid be provided for the arrested person if it appears to it that the person’s means are insufficient to enable him or her to obtain such aid.  (6) On the making of such an order the arrested person shall be entitled to free legal aid in the proceedings and for that purpose section 3 of the Criminal Justice (Legal Aid) Act 1962 shall apply, with the necessary modifications, in relation to the person as if he or she had been granted a legal aid (trial on indictment) certificate under that section.”  24. It is accordingly clear that individuals facing surrender under these two separate Acts of the Oireachtas have legal representation provided to them albeit that that such representation is delivered in a different manner. The individual facing surrender under the 2006 Act receives legal aid from the outset which is provided through the mechanism of the 1962 Act while his counterpart whose surrender is sought under the 2003 Act will also have legal representation from the outset under the scheme but where it cannot guaranteed with absolute certainty that the lawyers will be paid until the end of the process when the judge will decide whether or not to make the necessary recommendation.  **Conclusion.**  25. I regret to say that while I am in agreement with Mr Justice Hogan that individuals facing a request for their surrender under the Acts of 2003 and 2006 should be considered to be in an equivalent class for the purposes of the constitutional argument, I cannot agree with him that Mr. O’Connor’s Article 40.1 rights have been breached by reason of the absence of a right to the benefit of a statutory legal aid scheme under the 2003 Act.  26. It is important not to lose sight of precisely what right Mr. O’Connor maintains he is entitled to. He has a constitutional right to have competent legal representation provided by the state if he is unable to pay for it himself. He does not have a right to have that representation provided via any particular scheme, statutory or otherwise. The 1962 Act, to the extent that it makes provision for legal aid, is merely a means whereby the constitutional right to legal representation may be vindicated, as was held by Murray CJ in *Carmody.*  27. The mechanism by which such a right is vindicated is not itself relevant unless there is in substance a diminution in the effectiveness of its delivery by virtue of some element pertaining to the method of its delivery. The fact that the Scheme is not on a statutory footing or that it has features which are different from those of the statutory scheme cannot provide Mr. O’Connor with a legitimate basis for complaint. Uniformity in the method of the delivery of legal representation is not what is required. The State has a discretion as to how it will meet its constitutional obligations to provide legal representation for those entitled to it.  28. In order for Mr. O’Connor to succeed in his claim, which is one based upon an alleged invidious discrimination, he would have to be in a position to establish by evidence that the Scheme provides a less effective method of vindicating his right to legal representation when compared to that which would be provided to him under the 1962 Act.  29. There was no evidence led in the High Court to establish that the Scheme, as a matter of substance, is any less effective in vindicating the rights of an individual served with an EAW than is the statutory legal aid scheme provided under the 1962 Act. There was no evidence to suggest that persons in Mr. O’Connor’s position ever had difficulty obtaining legal representation from either solicitors or barristers. Indeed, he did not seek to avail of the Scheme himself. Neither was there any evidence, for example, to demonstrate that the quality of the lawyers willing to accept instructions under the Scheme, on the basis that they would only have recourse to the Scheme for the purposes of their fees, were any less capable than those available to provide legal representation under the statutory legal aid scheme. Neither, was any evidence lead to prove that any lawyer had ever refused to accept instructions for a person against whom a EWA had issued on the basis that they had concerns that they might not be paid at the end of the process because it would be left to the judge’s discretion as to whether or not to make the recommendation required to support the payment of their fees.  30. Accordingly, even accepting Hogan J.’s analysis of the differences between the Scheme and the statutory legal aid scheme provided for under the 1962 Act, I am not satisfied that Mr. O’Connor has demonstrated that the 2003 Act, because it does not provide him with a statutory scheme of legal fails to vindicate his equality rights under Article 40.1. That this is so is principally because he has failed to establish that a person facing surrender under the 2003 Act is provided with a materially less advantageous system of legal representation because it is provided under the Scheme rather than under the statutory scheme available to individuals such as those whose surrender is sought under the 2006 Act.  31. Finally, it is probably apposite to take judicial notice of the fact that the Attorney General’s Scheme is the method whereby the constitutional right to legal representation is provided for many classes of litigants. For example, legal representation for many custody related judicial reviews, which are of enormous import to those whose interests are at stake, is provided through the scheme. The statutory scheme is not available to those wishing to pursue claims of this type. Nonetheless, such proceedings are regularly pursued with the benefit of expert legal assistance provided through the Scheme.  32. Accordingly, I am satisfied that once effective legal assistance is available, be that by way of a statutory scheme or a non statutory scheme such as the Attorney General’s Scheme, the precise method whereby that assistance is delivered is immaterial.  33. Legal assistance of such nature was available to Mr O’Connor from the outset of these EAW proceedings had he chosen to avail of it. Accordingly, I am not satisfied that he has made out any claim that the defendants have failed to vindicate his equality rights guaranteed by Article 40.1 of the Constitution.  34. For all of these reasons I would decline the declaratory relief sought and would dismiss the appeal. | | |

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