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Judgment

Title: Minister for Justice and Equality -v- O'Connor

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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](#)

Status: Approved

Result: Dismiss

Judgment by: Hogan J. [Link to judgment](#)

Status: Approved

Result: Dismiss

Judgment by: Irvine J. [Link to judgment](#)

Status: Approved

THE COURT OF APPEAL

**Ryan P.
Irvine J.
Hogan J.
Between/**

MINISTER FOR JUSTICE AND EQUALITY

AND

THOMAS O'CONNOR

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 replacing inter-State requests with enforcement of court orders from one country to another. The scheme is justice in the participating States. Cumbersome rules of procedure were replaced by a standard unified procedure in the Union. Strict time limits were laid down so that the process of transmitting a wanted person from where he court would operate smoothly and efficiently. Some of the old rules were dispensed with because they were new community of trust in common precepts of substantive and procedural justice. The system was implemented 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 for surrender to serve sentences for tax fraud that were imposed in 2007, and to face the charge of absconding. 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 before the Court in two proceedings and two appeals, but essentially, the same issue arises in them. One appeal is the extradition proceedings 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 Attorney General's Scheme - now called the Legal Aid (Custody Issues) Scheme - which is available to provide legal representation in EAW cases, is not compliant with the Framework Decision underpinning the European Arrest Warrant. At the relevant time, s. 10 of the European Arrest Warrant Act 2003 provided that the wanted person should, in accordance with the provisions of the Act and the Framework Decision, be arrested and surrendered to the issuing State. The scheme is in reference to the Framework Decision but as it applied at the time, the section had the reference to the Decision. It is in this case that the payment scheme provided for legal assistance under the Custody Issues Scheme is in question because it is provided on an administrative and discretionary basis and not by way of a formal binding and enforceable 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 on the same factual circumstance. He claimed that the absence of a statutory scheme of legal aid, by contrast with the scheme in criminal cases and for civil legal aid, constituted a breach of his constitutional rights, specifically, equality of citizens.

6. The High Court rejected Mr. O'Connor's challenge to the European Arrest Warrant proceedings and dismissed his appeal. The Court held that it should therefore proceed to make an order for the surrender of Mr. O'Connor. The Court sought a reference to the Court of Justice of the European Union under Article 267 TFEU because it held that such a reference was necessary when the Court had already made its decision in a case, even if it had not actually delivered its judgment in that situation in this case. The Court did, however, certify a point of law of exceptional public importance which was 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 the Charter and the general principles of EU law imposes no obligation to provide legal aid, whether or not 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 provided in the Warrant Act 2003 and Council Framework Decision 2002/584/J.H.A.A. of 13th June 2002 on the European Arrest Warrant and procedures between Member States: O.J. L.190/1 18.7.2002. The relevant provision is in Article 11 which provides:

"1. When a requested person is arrested, the executing competent judicial authority shall, in accordance with that person of the European Arrest Warrant and of its contents, and also of the possibility of the person's situation in judicial authority.

2. A requested person who was arrested for the purpose of execution of a European Arrest Warrant, assisted by a legal Counsel and by an interpreter in accordance with the national law of the Member State.

8. In his judgment in the High Court, Edwards J. cited the case *Minister for Justice, Equality and Law Reform v. O'Connor* in which the Supreme Court analysed the meaning and effect of Article 11.2 of the Framework Decision. The Supreme Court authority was not binding, in that the interpretation of Article 11.2 was not part of the ratio decidendi, but rather, obiter dictum which was a contention advanced by Counsel for Mr. O'Connor in the High Court and which Edwards J. considered that such debate was arid because even if he was to consider the case not to be binding, his 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* but his reasoning is not binding on this Court because it was *obiter* and we are free to decide not to follow that precedent, Counsel candidly acknowledges that that is the end of Mr. O'Connor's appeal in this Court. In the 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 refer the question to Luxembourg. A party in the final national Court is entitled to have a matter of Union law referred to the Court of Justice.

10. On one view this Court could confine its consideration of the appeal to the question of the precedential value of the Supreme Court judgment in *Olsson's* case. However, having regard to the submissions filed by both sides to the appeal, the Court does of course know the arguments because we have the judgment of the High Court in which all the issues were argued.

11. We are therefore concerned first with the issue of compliance with the Framework Decision and, secondly, with 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 representation and then only in accordance with the national law of the executing Member State 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 but provided to a requested person as to the nature and extent of his right to legal assistance and that legal assistance to be provided to him. The Act was complied with once the respondent was informed that 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 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 cases were decided in the requested person's favour (under the terms of the Scheme itself and on foot of the respondent's affidavit), the Attorney General had no residual discretion in such cases and where legal assistance was provided as of right.

5. That despite having been represented throughout the proceedings, the respondent still had no right to legal assistance had not been provided to him as of right as required by the Act of 2003. Further, the respondent sought declaratory relief but was instead arguing that non-compliance with the Act prevented the Court from granting him such relief. It cannot 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, and the Court limited its scope. A trial on a serious charge without such legal assistance would fall short of the requirements of the Act.

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 whether the provision of legal assistance under the terms of the Scheme falls short of what is required by law for a person whose arrest is authorised by a European Arrest Warrant”. He went on to say in the next paragraph that “The respondent’s case in this appeal is that the Framework Decision and Act of 2003, as amended”. Interpreting Article 11.2, the judgment proceeds as follows:

“The Framework Decision therefore imposes no obligation on the requested State to provide legal assistance otherwise. It merely provides for a right of representation, and then only in accordance with the law of the 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 the purpose of the Arrest Warrant, “effective access to justice is in fact afforded by the guarantees provided in s. 13(4) of the Legal Aid Act 1995, which provides for the possibility, which exists for persons unable to fund legal representation from within their own resources, of applying to the Attorney General’s Scheme/The Legal Aid (Custody Issues) Scheme that such representation should be paid for. In this Court by Mr. Gilheaney, which mirrors that given to the Supreme Court by Mr. Jevon Alcock in the *Olsson* case, the recommendation is granted the Legal Aid Board invariably follows that recommendation. In reality, the discretion is 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. It rejected the argument that the phrase “in accordance with national law” had to be given the narrow construction that it was given in *Brigades Union* [1995] 2 A.C. 513. The facts of the case were wholly different and inapplicable to the present case.

16. Edwards J. also rejected the other arguments put forward on Mr. O'Connor's behalf. In particular, he held that the provision of legal aid in certain cases which is contained in Article 47 para. 3 of the Charter of Fundamental Rights, even in the present case, was based on the need to ensure effective access to justice. That did not specify the form of legal aid and the essential requirement was for effective access to justice. That was available in the present case under the Scheme. That approach was also the basis for the High Court's rejection of the argument grounding Mr. O'Connor's judgment. It holds as follows:

“The Act of 2003 enjoys the presumption of constitutionality, and the respondent/plaintiff bears the burden of proving that it is unconstitutional. In this Court's view, there is simply no evidence before it that the Act of 2003 is unconstitutional in respect, or that it permits of any unconstitutional discrimination; or for that matter that the Act of 2003 is unconstitutional in and in particular the principle of equivalence. Accordingly, the presumption of constitutionality applies to the Act of 2003, and the Court has no reason to believe that the Act of 2003 is unconstitutional. It does not breach the principle of equality before law as guaranteed in Article 40.1 of the Constitution. It does not breach the principle of equality before law as guaranteed in Article 40.1 of the Constitution if 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 between the two cases. a. *Olssen* was, he said, invited to apply for the scheme and was told that the recommendation would be made on the basis of an affidavit from a Civil Servant saying that the recommendation will be honoured if made. That did not happen in the O'Connor case.

b. Mr. Olssen was represented at all stages by solicitor and Counsel.

c. Counsel says that if it was intended to be binding, O'Donnell J. would have conducted a value for money exercise by examining the French version of the Framework Decision and the preparatory materials, but he did not. 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 to be a right to legal assistance when a requested person could not afford to pay for it himself. He cited the European Convention on Human Rights 6(1)(c) in support. It could not have been intended that the requested person would be deprived of legal assistance in cases of 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 issue of legal aid was central to the decision in the *Olsson* case. The High Court considered questionable the suggestion that the Charter of Fundamental Rights actually applied to European arrest warrant cases. Even if it did, the Court was satisfied that the service provided to the person involved and not the mode of provision thereof. The judge rejected the submission that “in accordance with national law” demanded provision by legislation and that some other method such as the

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 do not actually distinguish the cases. Indeed, the evidence as to the operation of the existing scheme was to the contrary. It affects the principle that is clearly and unequivocally stated by the Supreme Court. The Supreme Court addressed the question here. The judgment given by O'Donnell J. represented the unanimous view of the members of the Court on this specific question and deals with it in the clearest of terms. In the circumstances, it is unavoidable that the Court is bound by the Court.

21. Incidental confirmation of the conclusions of the Supreme Court and Edwards J. is to be found in recent developments in the Union, although it appears that they will not apply in Ireland or the United Kingdom. The EU has been endeavouring to provide for free legal aid in cases of EAW, as well as in criminal proceedings generally. There are wide variations in the practice of providing legal aid. Some progress has been made since 2009 towards harmonising procedural safeguards. The Framework Decision on translation of proceedings, on provision of information and on the right to legal representation was adopted in late 2009 and is under discussion with the Parliament which would require provision of legal aid for persons in EAW Warrant proceedings: Council Document 6603/15. Such Community legislation would not be necessary if the requirement for free legal aid to be available for wanted persons. It also follows that there is at present no Community law 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 manner in which that has not been harmonised to date. The right to representation is reflected in the Framework Decision on the right 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 State is not to provide a right to have assistance at the State's expense. Of course, the particular State may provide legal aid. It is to be a legal or Constitutional right under national law. *Olsson* does not deny such entitlement; it rejects the claim 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 rely on EU law 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. Developments in the Community legislative process provide incidental confirmation of the Supreme Court's 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 not the law of the Court of Justice of the European Union under Article 267 TFEU. That possibility exists now because the time for appeal was not permitted has now expired. That would not, however, be an appropriate course to adopt even if the Court took a different view of the issue than that of the Supreme Court. While it is always prudent in these matters to ensure that the 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, it is not the hope of securing a different result. That would be inconsistent with the Constitutional structural relationship between the Court and the Supreme Court. It is not something that this Court would be prepared to consider otherwise than in wholly exceptional circumstances.

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 a right to challenge in this case. There is a cross-appeal against that ruling. In my judgment, the claim in this action is not a claim for legal aid which make it unnecessary to embark on this question. The point will be clearer when I have discussed this question.

28. The claim in Mr. O'Connor's statement of claim is that he would be eligible because of his limited means to access the statutory criminal provision or the civil scheme. That is his right. Article 11(2) of the Framework Decision requires the provision of legal aid for subjects of EAW applications. The 2003 Act does not provide for legal aid and is therefore invalid under the Constitution. That is for two reasons as claimed: first, because it is in conflict with the State's obligation under the Framework Decision discussed above. Secondly, it contravenes the guarantee of equality in Article 40.1 of the Constitution. Since the State provides a basis for persons encountering legal process in comparable circumstances or in matters of lesser consequence, the failure to provide a similar facility in statutory form in extradition represents an unlawful distinction that is contrary to the right to equality. It is instances by comparison and contrast a minor criminal offence and a matter coming under the International Convention on the Protection of the Rights of All Persons Subjected to Arbitrary Detention.

demonstrate affairs at different ends of the spectrum which carry with them statutory legal aid entitlement. 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. The Act does not inhibit access to legal assistance. It does not provide that an individual is limited to access to legal assistance. Mr. O'Connor's Counsel seeks the invalidation of the Act because of what it does not contain. Despite declaring that the Act is, in the specified circumstances of alleged discrimination, "unconstitutional", the Act does not provide that at least that all of the provisions relating to rendition of the subject of the warrant are to be condemned as unconstitutional in this area. If the legislation is infirm because of non-compliance with the Constitution, then it must be declared unconstitutional.

30. Under s. 13 (4) of the Act, "A person arrested under a European arrest warrant shall, upon his arrest, 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 European Convention on Human Rights and Fundamental Freedoms done at Rome on the 4th day of November 1950 and the European Convention for the Protection of Human Rights and Fundamental Freedoms 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 that the offence specified in the European arrest warrant is an offence to which section 13(4) of the Act applies.

31. The Act itself protects a person who is the subject of a warrant from being surrendered if their human rights are violated. It also provides that a person could not be extradited on foot of a European arrest warrant because the legal aid 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 claiming a right to legal aid for him and persons in his situation to be available as of right on a statutory basis. The Act is the vehicle by which the EAW decision was implemented in the State. There is nothing in its provisions which would render the Act unconstitutional. He is claiming a right that is separate and distinct from the provisions of the Act. The Act has nothing to do with the claim.

33. In my judgment, this claim cannot succeed as an independent case seeking to invalidate the Act for which it is necessary to know how much of the Act would be condemned or whether the entire legislation would fall, assuming that the claim is successful.

34. The claim here may be contrasted with the issue that arose concerning s. 2 of the Criminal Justice (Legal Aid) Act 1997. In *Minister for Justice [2010] 1 ILRM 157*, the section empowered the District Court to certify for representation for indigent persons charged with offences when justice so required. It permitted provision for Counsel only in certain cases, excluded any right to Counsel in other cases. The Supreme Court held that the absence of a right to Counsel in appropriate cases, represented a failure by the State, but the limited provision in s. 2(1) did not render the Act unconstitutional. In the circumstances of the failure by the State as found, the Court granted a declaration that the State was to provide 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 can establish a right to legal aid. Neither is there any question as to the quality of the representation that is available to a requested person.

36. It seems to me that even if this Court took the view that there was some substance in the issue raised, it would not be appropriate or procedurally legitimate. In my view, there is no basis on which to consider making a Carmody-type declaration of claim or in the submissions, and neither is it discussed in the judgment of the High Court, nor in the appeal.

37. Could Mr. O'Connor have sued the State, claiming the right to a statutory scheme, but without seeking to invalidate the 2003 Act? The Court does not have to express a view on this because it was not claimed or argued. The claim is a defence that the State was satisfied to provide for appropriate legal aid as certified or recommended by a legal aid officer. A claim of standing would more directly and immediately and relevantly arise in that context. The present litigation is about the enforcement of the warrant in addition to Mr. O'Connor's own claim. Whatever the merits of the case, it is not a claim for a statutory scheme.

standing to contest the compliance of the Irish arrangements with the Framework Decision. In my view, his challenge, which is misconceived for the reasons I have explained, is inextricably entwined with his resistance to the enforcement of the Framework Decision. I decline to rule on the question of standing as a separate issue in the appeal and to leave the question to another day.

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 proving that it is unconstitutional. In this Court’s view, there is simply no evidence before it that the Act of 2003 is unconstitutional; or that it permits of any unconstitutional discrimination; or for that matter that the Act breaches the principle of equality before the law, and in particular the principle of equivalence. Accordingly, the presumption of constitutionality applies to the Act of 2003, and the Court has no reason to believe that the Act of 2003 is unconstitutional. It does not breach the principle of equality before the 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 proceedings in accordance with the national law of the executing Member State”, does this mean that the person sought by the Member State is thereby sought is entitled to be provided where necessary with such legal assistance? Or whether such an obligation is discharged by means of the provision of such assistance through the operation of an administrative scheme? Independently of this, does the failure to place this scheme on a statutory basis breach the equality provisions of Article 40.1 of the Constitution in circumstances where other accused persons are entitled to such entitlement? These essentially are the issues which this Court is required to consider in the appeal. (Edwards J.) delivered on 4th December 2014: see *Minister for Justice and Equality v. O’Connor* (No. 1).

2. As it happens, the result in the case was announced on 2nd December 2014 and the judgment was delivered to the parties on 4th December 2014 (albeit in draft form). In the interval between the 2nd December 2014 and the 4th December 2014 the Court was asked to make a reference pursuant to Article 267 TFEU to the Court of Justice concerning the constitutionality of the Framework Decision. Prior to 1st December 2014 no Irish court had jurisdiction to make such a reference. Article No. 36 to the Treaty of Lisbon provided for such a jurisdiction after a five year transitional period. The transitional period came into force on 1st December 2009 and the transitional period expired on 1st December 2014. In a judgment delivered in January 2015 Edwards J. declined to make such a reference on the ground that he was now not a court of law with jurisdiction to make such a reference: see *Minister for Justice and Equality v. O’Connor* (No. 1).

3. Returning now to the main judgment, Edwards J. heard two separate sets of proceedings in which he delivered judgment on the principal issues raised. The first set of proceedings arises out of the European Arrest Warrant issued by Great Britain and Northern Ireland on the 13th June, 2011. That warrant seeks the surrender of the respondent to face trial on the charge that he failed to hold honour his bail in the interval between the two concurrent sentences of four years and six months respectively for tax fraud which he was sentenced to in the Crown Court on 29th January 2007 following his conviction on 26th October 2006. The warrant was issued in breach of 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 provision of a statutory based system of legal aid for requested persons under the 2003 Act, and the Act of 2003, Article 40.1 of the Constitution. The Minister, Ireland and the Attorney General were all named as respondents in the proceedings (“the plenary proceedings”).

5. The UK warrant was endorsed by the High Court for execution in this jurisdiction on the 27th March, 2012. The respondent was brought before the High Court (Sheep J.) on the 27th March, 2012 following his arrest. The respondent was advised of his rights in the course of the s.13 hearing. He was provided with professional legal advice and representation, and a notional date (the 16th March, 2012) for the purposes of s. 16 of the Act of 2003. The respondent was remanded on bail to the date fixed for his trial. He was represented at the s. 13 hearing. No indication was given of an intention on the part of the respondent to challenge the validity of the warrant.

recommendation under the Attorney General's Scheme.

6. Those proceeds were adjourned from time to time to enable points of objection to be filed. In the end, only one objection was ultimately proceeded with, namely that pleaded in the following

"The grounds of objection to the application for Mr. O'Connor's surrender to the United Kingdom are:

1. Mr. O'Connor would qualify for statutory legal aid. But there is no statutory scheme of legal aid required by Art. 11(2) of the Framework Decision ('in accordance with the law or practice') as made part of national law by s.10 of the 2003 Act (the Framework Decision'). On account of the nature of this objection, it is to be considered before any other objection is considered. Further, because the 2003 Act provides for legal aid, it is to that extent repugnant to the Constitution and, in principle, to E.U. law."

7. As the respondent did not consent to his surrender to the United Kingdom, it fell to the High Court to determine whether the requirements of s.16 of the 2003 Act have been satisfied. Edwards J. observed that the Court's decision directing that the respondent be surrendered was dependant upon a judicial finding that the requirements had been satisfied. However, that all the relevant statutory prerequisites (such as, for example, the identity of the offence, the gravity threshold and the correspondence of the offence with an offence under Irish law) had been satisfied. The question of whether this State had complied with the requirements of the Framework Decision as 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 by Edwards J. - that the State has, in fact, established a system of legal aid for requested persons. This system was established on an administrative rather than a statutory basis. That scheme was previously known as the Legal Aid (Custody Issues) Scheme, but in 2012 it was re-named the Legal Aid (Custody Issues) Scheme ("the Scheme") on 1st January 2013.

9. While it is accepted that the scheme is generally an ex gratia one in that the Attorney General is not bound to make every recommendation made thereunder, the evidence which was given in the High Court in *Justice, Equality and Law Reform v. Olsson* [2011] IESC 1, [2011] 1 I.R. 384 applies in the case of recommendations made by the court in cases arising under the 2003 Act. The 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. The evidence which had been given in *Olsson* by a Mr. Jevon Alcock, then a solicitor in the Crown Prosecution Service, to the effect that all recommendations for legal aid made in EAW cases arising under the Scheme are binding.

11. Similar evidence was given in the present case by Mr. Patrick Gilheaney, an assistant director of the Department of Justice. His principal task was to administer the Scheme. He confirmed that despite the re-naming of the Scheme the Scheme remained the same. He confirmed that the Scheme applied to all persons arrested in Ireland. The question of whether the Scheme should in fact apply in any given case was dependent on an assessment of the facts and the making of a judicial recommendation.

12. Mr. Gilheaney agreed that the Scheme was an *ad hoc* administrative scheme which had no statutory basis. He confirmed the evidence which had been given in *Olsson* to the effect that payment thereunder was discretionary in cases of recommendations made in respect of 2003 Act cases. He said that payments of up to €10,000 per annum were processed regularly under the Scheme following a judicial recommendation. Mr. Gilheaney responded to a question posed by Edwards J. that the Scheme contained no formal financial cap. He said that a decision was made that it would rest with the Court in its wisdom to decide upon a person's financial means. Mr. Gilheaney agreed that in practice this amounted to an assessment by the Court as to whether the 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 Scheme.

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 proceeded the decision of the Supreme Court in *Olsson* regarding the interpretation of Article 11(2) of the Charter of Fundamental Rights of the EU of whether of the comments of O'Donnell J. in that case should strictly be regarded as part of the nature of *obiter dicta*.

15. So far as the discrimination argument based on Article 40.1 in the plenary proceedings was concerned, the court said:

"That approach provides the answer to the respondent / plaintiff's suggestion that the Scheme was unconstitutional, alternatively illegal, discrimination and disparity in terms of treatment of a person in the respondent's position compared with that provided to certain persons in other contexts. It was contended that because there is statutory legal aid in domestic civil cases, and for cases based on a warrant from the International Criminal Court in extradition matters, and for persons who might be made the subject of an [anti-social behaviour] order, how persons in the same or similar class are treated, and that this constitutes discrimination and disparity in terms of the mechanism employed to legally assist persons in the same position as the mechanism employed to legally assist persons who are wanted on foot of a warrant. There is equivalence with respect to the fundamental principle that requires to be realised that persons who 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 the 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:

"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 the consequences of non-compliance with 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 law of the executing Member State."

18. As has already been indicated, two issues now fall immediately for consideration in respect of the Scheme: First, does Article 11(2) confer a right to legal aid in cases involving requested persons? Second, if so, is it 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 Member State?"

19. It is clear from the language of Article 11(2) the right to legal assistance must be in accordance with the law of the executing Member State." This pre-supposes that the rights and entitlement of the requested person must be determined in a manner which is legally binding and contains clear rules, but the entitlement must be determined as the present appeal is concerned, the only right (or, more accurately, claimed right) which is claimed to be a 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 national law. With the exception of a common law right (which does not arise in the present case), a right to legal assistance 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, however, that given on behalf of the Minister under the Scheme that every judicial recommendation for assistance will be faithfully honoured without qualification could, in principle, be enforced by virtue of the Scheme.

22. This still does not mean, however, that the Scheme was being provided in accordance with the law of the Member State.

still by "its nature" be changed "at the whim of the authorities": see Case 145/82 *Italian Republic* [1983] E.C.R. 711, para. 10. It is for this reason that the Court of Justice has held that administrative practices of this kind were insufficient to give legal effect to a Directive and to satisfy the requirements of Article 11(2) of the Framework Decision. Costello J. remarked in the (admittedly different) context of administrative circulars regulating the implementation of the Framework Decision in *Meath Vocational Education Committee*, High Court, November 20, 1990:

"These [administrative] measures are not, of course, illegal. But they have no legal effect. The measure which ensures compliance with them is not a legal one but the undeclared understanding that the State 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 clear that the Framework Decision does refer to "law or practice of the issuing Member State." While I fully accept that the context of this reference is entirely different from that of Article 11(2) - since it refers to the law or practice of the issuing Member State may require of an issuing Member State in cases where the surrendered person is sentenced to a life sentence - what is significant is that the Union legislator has used the term "law or practice" elsewhere in the Framework Decision. In other words, if the rights guaranteed by Article 11(2) are to be vouchsafed by national *practice* - as distinct from national law - the Framework Decision could not be relied upon to require a Member State to provide legal aid.

24. Judged from the perspective of national constitutional law, it is all too plain that the only way in which legal aid can be established in accordance with law in this State is where the Oireachtas enacted legislation to that effect. Article 15.2.1 and Article 20 of the Constitution. It is true that Dáil Éireann has voted supply for the State and this appropriation doubtless appears as a line item in the annual Appropriation Acts. But the quality of publicly accessible and generally applicable legal principles, standards and rules which are established by a 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 amended - is not something which can be blithely ignored. The deliberative process involved in the enactment of legislation was plainly regarded by the drafters of the Constitution as an essential pre-requisite in a democratic system of government.

26. The extra-statutory nature of the Scheme is not, of course, illegal and nor does it render the Scheme incompatible with domestic constitutional law. It is nonetheless not one provided "in accordance with national law" as required by Article 11(2) of the Framework Decision.

Does Article 11(2) of the Framework Decision confer a right to publicly funded legal aid?

27. We may now turn to the first question: does Article 11(2) of the Framework Decision confer a right to publicly funded legal aid? This is a matter which was at heart of the Supreme Court's decision in *Meath Vocational Education Committee*. It has not been legally represented at all stages of the European Arrest Warrant procedure, but neither has it been recommended under the Attorney General's Scheme. It was contended instead that the Scheme was not in accordance with the requirements of the Framework Decision. As O'Donnell J. put it ([\[2011\] 1 I.R. 384](#)):

"Accordingly the point argued in this appeal is limited to the contention that the Scheme, as it stands, in the terms of the Scheme falls short of what is required by law for a person who is arrested under a European arrest warrant.

The respondent's case in this appeal depends on an interpretation of the Framework Decision as amended. Article 11(2) of the Framework Decision provides that a requested person has the right to be assisted by legal counsel ... in accordance with the national law of the executing Member State. The Scheme, therefore imposes no obligation on the requested state to provide legal aid, which is merely provided for a right of representation; and then only in accordance with the national law of the issuing Member State."

28. At the hearing of the appeal in the present case, counsel for the appellant, Dr. Forde S.C.J. stated that the observation from the judgment was merely *obiter* and that this Court were not bound by these observations. If, notwithstanding the constraints of precedent, we should look afresh again at the interpretation of Article 11(2) of the Framework Decision, argued, would the Union legislator express the right in these terms if it was not intended to be applied in a large number of those cases - quite possibly a majority of cases - where the requested person could not or

29. Given that all the Member States themselves adhered to the European Convention of Human Rights (including the obligation to provide legal aid contained in Article 6(1)(c) of the Convention), it might seem that the Framework Decision would simply effectively state the obvious, namely, that the requested person had the right to legal aid. The Framework Decision 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 civil and criminal law of different Member States - which can so often arise in proceedings under the Framework Decision. It has been intended that the Union legislator would have been prepared to deny legal aid to persons who surrender on very serious charges to distant parts of the European Union where the individual is unfamiliar with the language or the nature of the legal system or had no family ties with the country. It is not clear that such a person would have had the right to legal aid had he or she been facing more or less the same charges in his or her legal system?

31. This is a potentially attractive argument to which, had the matter been *res integra*, this Court would have given close consideration. Indeed, in other circumstances, it might well have been appropriate to refer the question to the Article 267 reference to the Court of Justice of the European Union on this very question of the 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 Court has been asked to consider by the legislators is that Article 11(2) does not confer such a right itself must be regarded as strong evidence that Article 11(2) does not bear the interpretation for which the plaintiff contends. This is unlikely to be changed by changes at EU level to which Ryan P. has referred in his judgment. If there was already a presumption of legal aid conferred by the EAW Framework Decision, then legislative proposals to vest accused with a right to legal aid would be superfluous and unnecessary.

33. For my part, however, I do not think that the issue is, in fact, *res integra*. The question of the interpretation of Article 11(2) of the Framework Decision was squarely before the Supreme Court in the case of *Olsson* in 2011. The issue was legal representation and not with legal aid. I consider that this Court is bound by the decision in *Olsson* on the appellant's claim. I accept, of course, that the Supreme Court did not then - although it would have been able to - make an Article 267 reference at the time it decided *Olsson* in January 2011, but this in itself cannot be taken as a basis for 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 a reference, irrespective of any views which the Supreme Court may have expressed on the point. However, it is not having regard to the hierarchical system of our legal system and the importance of precedent that it is inappropriate for this Court to take a step which might be thought indirectly to impeach the decision in *Olsson*. 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. This was that that was not an issue which previously arose in *Olsson*. That case is, accordingly, not an authority on the point is concerned. The Supreme Court has expressly confirmed that just because the validity of a statute is in question by reference to one ground, there is no bar to a subsequent challenge to that statute on another ground. See *Quinn v. Ryan* [1965] I.R. 70, 120, *per* Ó Dálaigh C.J. and *Laurentiu v. Minister for Justice* [2011] I.R. 112. 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 Supreme Court to make a statutory footing amount to a violation of Article 40.1 of the Constitution in that he is placed in a position different from similarly situated persons whose entitlement to legal aid is governed and regulated by statute. The appellant contends that persons facing criminal trials for precisely the same offences (or corresponding offences) under the Criminal Justice (Legal Aid) Act 1962 ("the 1962 Act") or who are facing proceedings in the 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 the failure to make a statutory footing, the appellant is placed in a position different from similarly situated persons whose entitlement to legal aid is governed and regulated by statute.

failure to put the legal aid scheme for persons facing surrender under the 2003 Act on a statutory basis in breach of Article 40.1 of the Constitution. As this is a matter on which the Court is unfortunately divided, the question of whether the constitutional issue is properly before the Court.

38. The plenary proceedings (2012, 11958P) were commenced in November 2012. Paragraphs 12 and 13 of the State's statement of claim are in the following terms:

"9.....because one or other of the said Legal Aid schemes have been made applicable to proceedings which are comparable to or where what is at stake for the affected individual is in no way less serious than [the European Arrest Warrant] proceedings. The EAW Act is unconstitutional to that extent, in particular in Article 40 s.1 of equality before the law: for instance, s. 23(5) and s. 23(6) of the Legal Aid Act 2006 and s. 118 of the Criminal Justice Act 2006 ("civil" anti-social behaviour proceedings) and a range of other civil proceedings.

10. Accordingly, since the plaintiff would at the time be eligible for legal aid under the EAW Act or other legislation or statutory instrument applies one or other of the said schemes to proceedings, the EAW Act is unconstitutional and contravenes E.U. law to that extent that 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 paragraphs of the statement of claim delivered on 23rd November 2012. Paragraphs 12 and 13 of the State's statement of claim are in the following terms:

"11. It is denied that the European Arrest Warrant Act 2003 as amended is unconstitutional to the extent that it denies legal aid in respect of other proceedings which are comparable or less serious than those covered by the Act under the European Arrest Warrant Act 2003 as amended.

12. It is denied that the European Arrest Warrant Act 2003 as amended contravenes 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. In order to reproduce these submissions in this judgment, it is perhaps sufficient to state that these submissions were found to be unconstitutional to the extent that it failed to provide legal aid when such a right was available. The plaintiff further contended that legislation could be unconstitutional "to the extent that it denies legal aid in respect of other proceedings which are comparable or less serious than those covered by the Act under the European Arrest Warrant Act 2003 as amended." The plaintiff then referred to other cases dealing with the application of Article 40.1 of the Constitution to accused persons such as *McMahon v. Leahy* [1984] I.R. 525 and *O'Sullivan v. Irish Prison Service*.

41. The written submissions of the State dealing with the constitutional issue focussed first on the plaintiff's lack of locus standi [1980] I.R. 269 and the plaintiff's alleged lack of locus standi to challenge the absence of a statutory basis. It should be said that this particular objection was rejected by Edwards J. as he found that the plaintiff was "unhappy" and that he would "most likely qualify for legal aid under the Criminal Justice Act 2006." The State has not sought in this appeal to disturb that finding.

42. The balance of the State's arguments on the constitutional issue were directed - in admission of the substance of the Article 40.1 claim. Relying on the dicta in cases such as *Minister for Justice v. Sliczynski* [2008] IESC 32 which stressed that proceedings under the EAW procedure were serious measures such as the 2006 Act dealing with the International Criminal Court were according to the purpose of this purpose.

43. The constitutional issue was fully addressed in the main judgment of Edwards J. at paragraphs 12 and 13 of the Article 40.1 arguments for reasons I will separately and presently consider. It is true that the declaration is not addressed in the judgment of Edwards J., but since, of course, he rejected the claim, 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 to challenge the finding of "incompatibility with EU law" insofar as "the European Arrest Warrant Act 2003, as amended."

of legal aid being contended for." The plaintiff's written submissions of 31st March 2015 address the issue under the headings of equivalence/equality with sub-headings dealing with appropriate distinctions were justifiable. The written submissions of the State dated 13th April 2015 also state (at para. 58) that there is no basis "in European Law or in the Constitution requiring legal representation in differing situations."

45. These submissions were repeated by counsel on both sides in the course of the hearing. In this Court makes it clear that counsel for the plaintiff was relying on the equality argument in the case of *Olsson*. Counsel for the State also addressed the Court on the equality issue, stressing that there is no "discrimination" and that the plaintiff had not "identified how he has been treated differently from 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 side made submissions on the precise form of remedy in the event that a breach of Article 40.1 was disclosed. It is also true that neither side realistically contend that they did not have fair notice that this issue might arise were the Court to find that Article 40.1 had been infringed. The State defendants plainly faced the possibility that the 2003 Act might be unconstitutional and they were on full notice of this. The grant of a declaration identifying a legislative lacuna while at the same time refusing to declare the 2003 Act unconstitutional is a course of action the State is concerned as compared with a more broad ranging declaration of constitutional invalidity which has 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 legal aid in the case of persons facing surrender under the 2003 Act amounts to an unconstitutional discrimination.

49. One of the immediate comparators relied on for this purpose is that of persons facing surrender under the 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 the person's financial 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 for the purpose of that purpose s. 3 of the Criminal Justice (Legal Aid) Act 1962 shall apply, with any necessary modifications in relation to the person as if he or she had been granted a legal aid (trial on indictment) under that section."

50. In the High Court Edwards J. rejected the argument that the 2006 Act provided an appropriate comparator. The requirement to provide legal aid is created by Article 55 and Article 67 of 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 trial. The International Criminal Court itself. While Part IX of the Rome Statute deals with the surrender of a person to the requested state, contrary to what Edwards J. appears to have suggested, there appears to be no requirement to provide legal aid *respect of the actual surrender process itself before the national authorities*. 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 persons facing criminal trial in this State. Likewise, the circumstances in which the request for legal aid is invoked would, in practice, be confined to quite exceptional cases. Whereas surrender requests are made, 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 Scheme and a statutory entitlement under, e.g., the 1962 Act or the 2006 Act. It is a matter of invariable practice and not simply as a question of gratuitous benevolence. There is a clear distinction between the Scheme and a statutory entitlement under, e.g., the 1962 Act or the 2006 Act.

thus by Edwards J.:

- “• Application to avail of the scheme has to be made at the very outset, often have no inkling of how difficult or protracted the case may be or the person's position.”
- Although an application is made at the outset, it is only when the case concludes that a recommendation is made. At the conclusion, a recommendation may be refused by the court, but it is left to the court's discretion how this discretion is to be exercised; different judges may have radically different views on how this discretion is to be exercised. The Court is invited to contrast the position under the two existing statutory legal aid schemes, 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 which will disqualify a person from benefiting under the scheme. A court is left to its discretion and 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 this is done in the context of a judicial recommendation, is against the separation of powers, since this is an entirely administrative function which should be left to 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 ‘discrimination’ in the context of European arrest warrant cases.”

53. The Scheme thus lacks the detailed, legal criteria of a kind to be expected in a statutory scheme dealing with financial eligibility.

54. In this respect, it is impossible to avoid the conclusion that persons whose surrender is required by a European arrest warrant are in this respect treated equally before the law in the manner required by Article 40.1 so far as the right to legal aid is concerned. In the case of persons whose surrender is sought under the 2003 Act, their entitlement to legal aid is governed by the operation of an extra-statutory scheme as leavened by judicial practice and commitments given by the Government. In other essentially similar cases the entitlement is governed and regulated by law, i.e., legislation. This is the case under the Oireachtas.

55. It is also undeniable that both the extra-statutory nature of the Scheme and the fact that a person must wait until the conclusion of the hearing for a judicial determination - which itself is not based on a judicial recommendation - and the making of a recommendation dilute the position of the client. In contrast to the position under the 2003 Act, the requested person is thus placed at a greater disadvantage in securing appropriate legal services. This in turn subtly weakens his or her right to object or complain if dissatisfied with the level of legal services received.

56. It must equally be concluded that, so far as this issue is concerned, there are no real differences between the cases of persons facing trial in a domestic court or facing surrender under the 2006 Act on the one hand and surrender under the 2003 Act on the other. It could hardly be correct that, for example, the person facing surrender to London on fraud charges should rest on the terms of a purely administrative scheme with attendant uncertainties (even if - as must be accepted - that scheme is invariably applied in practice) without a judicial recommendation to this effect) whereas such a person facing trial in Dublin on exacting 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 required by a European arrest warrant and those made under the 2006 Act. Indeed, it may be noted that this is tacitly acknowledged by the Government in its Decision when, dealing with multiple requests for surrender, it provides that:

“This Article shall be without prejudice to the Member States’ obligations under the Convention relating to the Criminal Court.”

58. In this respect, it must be recalled that the Supreme Court has confirmed that the principle of equality before the law is a fundamental principle of the Constitution.

necessary at this stage to go any further and, specifically, any remedy which involved at this stage the surrender of the plaintiff on foot of the EAW request would represent a disproportionate burden on the State under the 2003 Act and would tend to undermine the mutual trust and goodwill which are inherent in the 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 aid under Article 11(2) of the Framework Decision refers only to the right to legal representation and not to the right to legal aid.

75. So far as the plenary proceedings are concerned, I am of the view that the failure to provide legal aid 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 for corresponding offences amounts to a clear breach of 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 provide a remedy to address this unconstitutional lacuna. In the present case an order restraining the enactment by the Oireachtas of the appropriate legislation - would have a disproportionate effect on the European Arrest Warrant system which could scarcely be warranted having regard to the fact that the unconstitutional discrimination is a potentially real one so far as this plaintiff is concerned, though the lacuna are nonetheless probably relatively modest. It is, accordingly, simply sufficient to grant an order to the Oireachtas to ensure that persons facing surrender requests under the 2003 Act have legal aid as they would if facing trial on indictment in this State for corresponding offences amounting to a clear breach of the law in 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. I have also read the summary of the factual background to these proceedings set out by Hogan J. at paras. 1 to 10. I agree with the President's summary of the backdrop to the European Arrest Warrant Act 2003 and 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 - whether the Framework Decision imposes an obligation on the requested State to provide legal aid to a person facing surrender under an European Arrest Warrant ("EAW"), was earlier decided by an unanimous Supreme Court in *Olsson* [2011] 1 I.R. 384.

3. In *Olsson*, O'Donnell J. considered the proper interpretation of Article 11.2. He did so having regard to the fact that it had been 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 Scheme, as it stands, in the terms of the Scheme falls short of what is required by law for a person who is facing surrender under a European Arrest Warrant".

4. He then proceeded to answer that question in light of the submissions of the parties concerning the proper interpretation of Article 11.2. It is unnecessary for the purposes of this judgment to set out the text of that part of his judgment. Having considered the same I reject as unsustainable the submission made on the appellant's behalf that O'Donnell J.'s analysis of the obligations imposed by the relevant Article might be taken to have been decided in favour of the appellant.

5. I also join with my colleagues in their judgment that it would be inappropriate and indeed unlawful for this Court to overturn or side-step the decision in *Olsson*, which is of course binding on this Court, by making a declaration of illegality of the European Arrest Warrant system under Article 267 TFEU. To do so would be inconsistent with the principle of mutual trust which underpins the system and would also undermine the concept of legal precedent which is of such importance in the common law system.

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 persuaded by the argument based upon Mr O'Connor's claim that the 2003 Act fails to vindicate his equality rights properly before this Court on appeal. The issue was fully canvassed in the pleadings before the Court and was engaged with the issue in para. 12 of their defence and the argument rejected by Mr. Justice J. of his judgement.

7. It is the relief which Mr. O'Connor seeks, should the Court rule in his favour, that causes concern. Of his Article 40.1 rights he claims that "the 2003 Act is unconstitutional to that extent contrary to Article 40.1 of equality before the law. As a consequence, his surrender under the EAW is not 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 of the Act which require the surrender of persons against whom an EAW has been issued regardless of the fact that, in his judgment, he takes no issue with any particular provision of the Act itself in terms of its constitutionality. There is about a *lacuna* in the legislation in that it does not provide him with a statutory regime for legal aid in criminal proceedings. While there might in exceptional circumstances be grounds for striking down an Act on the basis of the absence therefrom of some particularly vital provision, this is, on the facts, certainly not the case here.

9. Notwithstanding the fact that the remedy sought by Mr. O'Connor is one which I would have no doubt as to the correctness of his equality argument, I agree with Hogan J. that it would be wrong to refuse him the alternative relief of a declaration to the effect that the 2003 Act failed to vindicate his Article 40.1 rights. The validity of that claim. I do not reach that conclusion lightly in circumstances where it appears that the Court should not debate the form of relief that might be available to Mr. O'Connor if he was to only succeed in one aspect of his claim. However, I am satisfied that such relief could be afforded to Mr. O'Connor and to the defendant.

Constitutional Argument.

10. Simply put, the claim Mr. O'Connor makes in his pleadings is that statutory legal aid regimes under the Criminal Justice (Legal Aid) Act 1962 ("the 1962 Act") and the Civil Legal Aid Act 1995 have been applied to persons who are in a comparable or less serious position to those the subject matter of EAW proceedings. He contrasts his position to the individual whose surrender is sought to the International Criminal Court Act 2006 and a person facing relatively modest criminal proceedings in this jurisdiction who is entitled to a statutory scheme of legal aid whereas none such is available to him although facing a relatively serious charge under the 2003 Act. Thus, insofar as their entitlement to be legally aided is concerned, persons whose surrender is sought under the 2003 Act are not treated equally before the law in the manner required by Article 40.1. Their position is different from the operation of what was at the relevant time known as the Attorney General's Scheme ("the AG's Scheme") (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 the Criminal Court Act 2006 which entitles an individual whose surrender is sought to the International Criminal Court under the 1962 Act. In terms of equivalence the position of such an individual could not be compared to a person facing potential surrender under the 2003 Act. The Court was urged to consider the disparity between the position of Mr. O'Connor under the 2003 Act and to conclude that the same could not be justified. According to the Court, the same could not be justified. According to the Court, the same could not be justified.

Article 40.1 required that he be afforded a scheme of legal aid that is governed and regulated by law.

12. In the course of the High Court proceedings Mr. Patrick Gilheaney, who was responsible for the Scheme, gave evidence that the Scheme was of an *ad hoc* nature and applied to all persons arrested and charged. Payment under the Scheme was not regarded as discretionary and that once the judge dealt with the recommendation that payment would be made. As to eligibility thresholds, he advised that they were left to the presiding judge to make an assessment as to whether the individual concerned had sufficient means to obtain legal counsel. The thrust of his evidence was that all recommendations for legal aid made in accordance with the Scheme were honoured. As a matter of practice, when EAW proceedings are first before the court, the law indicates to the court that they will be applying for the Scheme at the conclusion of the proceedings. The presiding judge invariably makes a recommendation for payment. That being so it must be accepted that there is absolute certainty as to whether or not those instructed will be paid for the services. However, even if perchance the presiding judge were to refuse the necessary recommendation, the individual who had been sought would have had the benefit of full legal representation and advice from the outset of the 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 Constitution of 1962 does not stem from statute as was advised by Murray C.J. in *Carmody v. The Minister for Justice*. 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 is not a statutory right. It is a constitutional right. The Act of 1962, to the extent that it does provide for legal aid, is 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 state-funded representation, is an aspect of the right to a trial in due course of law guaranteed by Article 38.1 of the Constitution. It is required under Article 34.1 of the Constitution. A trial on a serious charge with the minimum standards short of those constitutional standards (see *The State (Healy) v. Donoghue*) focuses on the fairness of the trial, not on the precise manner in which any representation is provided."

15. Henchy J. at p. 353 of that judgment described the constitutional obligation to provide for legal aid in criminal cases in the following manner:-

"When the Constitution states that 'no person shall be tried on any criminal charge' (Article 38 S1), that (the State guarantees in its laws to respect, and, as far as possible, to vindicate the personal rights of the citizen' (Article 40.3.1), that 'the state shall protect the best it may from unjust attack and, in the case of injustice done, vindicate the property right of every citizen' (Article 40.3.2), and that 'no citizen shall be deprived of his liberty except in accordance with law' (Article 40.4.1), it necessarily implies, at the very least, that no citizen shall be deprived of his liberty as a result of a criminal trial conducted in a manner which does not afford him a reasonable opportunity of establishing his innocence; or, if he is found guilty, of receiving a sentence appropriate to his degree of guilt and his individual circumstances."

16. Looking first at the issue of equivalence in the context of an individual's constitutional right to a fair trial, an individual served with an EAW is not engaged in a process which by any stretch of the imagination is equivalent to that which happens in the course of a criminal trial. The individual whose surrender is sought is not being tried on any charge on some future date in a member state where their liberty will be at stake or will already have been at stake as a result of a trial conducted in another member state. His liberty is not at stake in the manner of a criminal trial.

17. In these proceedings Mr. O'Connor faces a request for his surrender to the English authorities following his conviction on two charges of revenue fraud and also of tax evasion. It is also important to emphasise that his return is sought to another member state in order to ensure that the Framework Decision intended to streamline extradition among member states is given renewed trust and confidence in the courts of the member states. It is convenient for me to refer to the introductory section of the judgment of the President.

"The European arrest warrant is a function of an EU Framework Decision that

among member states by replacing inter-State requests with enforcement of one against another. The scheme is founded on trust in the systems of justice in the particular member states. The old rules of procedure were replaced by a standard unified process that applied across the member states. The rules were laid down so that the process of transmitting a wanted person from where he was arrested to the State court would operate smoothly and efficiently. Some of the old rules were thought to be unnecessary in the new community of trust in common precepts of justice."

18. It is true to say that the EAW proceedings potentially have serious consequences for Mr. O'Connor. In England he will likely serve the prison sentence already mentioned. However, the proceedings do not seek his transfer to the jurisdiction of another member state where he was found guilty of the offence. He has a right to liberty. Following the approach taken by Murray C.J., when describing the extradition proceedings (unreported, Supreme Court, 6th December, 2004) it may fairly be said that the proceedings are 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 be a serious matter for a person subjected to it, such as the loss of liberty, extradition proceedings are not in the nature of a criminal trial. The burden of proof of facts which may rest on the person is not that of a criminal trial. I hasten to add that the learned High Court judge was correct on this basis and it is just that I consider it appropriate at this point to distinguish between extradition and other forms of proceedings, criminal and criminal and civil. An extradition proceeding 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 with that of a person facing criminal charges in this jurisdiction and whose liberty is at stake, I am not satisfied that he can do so.

20. Even if Mr. O'Connor had not been convicted in England and his surrender was sought for him to stand trial on charges of tax fraud, in my view he could not successfully argue that he was in a position as a member of the public in this jurisdiction facing trial for some other criminal offence. It is only in the case of a person who will find himself in an equivalent position to his Irish counterpart in this jurisdiction. As was said in *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 of being applied in a plight applying to situations in circumstances which were not contemplated. It is clear that the decision in that case applies only to the trial of persons charged with criminal offences and the ancillary stages of criminal proceedings. It has to do with the circumstances in which the requirements of a fair trial necessitate that the person charged be provided with legal aid. It does not provide such for himself."

21. That brings me conveniently to the Mr. O'Connor's submission that the constitutional requirement before the law as per Article 40.1 mandates that he should be provided with legal aid under the 2006 Act 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 in Ireland whose surrender is sought under the International Criminal Court Act 2006. Each are sought to be surrendered for the same purpose; either to serve a sentence already imposed or to meet charges that are brought against them for the surrender of fugitives from justice and the procedure set out for seeking and effecting their surrender. It is of course true to say that the 2006 Act deals with offences which are perhaps the most serious of the whole such as genocide, war crimes and crimes against humanity, it is possible that a person could equally be facing or have been convicted of venous crimes which would carry equivalent sentences to those 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 for legal aid.

"S23(5) The Court shall order that legal aid be provided for the arrested person if the means available to him or her 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 for the purpose that purpose section 3 of the Criminal Justice (Legal Aid) Act 1962 shall apply, subject to the provisions of that Act in relation to the person as if he or she had been granted a legal aid (trial on indictment).

section.”

24. It is accordingly clear that individuals facing surrender under these two separate Acts of representation provided to them albeit that that such representation is delivered in a different manner. A person facing surrender under the 2006 Act receives legal aid from the outset which is provided through the State. His counterpart whose surrender is sought under the 2003 Act will also have legal representation provided under the Scheme but where it cannot be guaranteed with absolute certainty that the lawyers will be paid. 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 surrender under the Acts of 2003 and 2006 should be considered to be in an equivalent class for the purpose of the constitutional right to legal representation, I cannot agree with him that Mr. O'Connor's Article 40.1 rights have been breached by reason of 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 is entitled to have competent legal representation provided by the state if he is unable to pay for it himself. He is not entitled to that representation provided via any particular scheme, statutory or otherwise. The 1962 Act provides for legal aid, is merely a means whereby the constitutional right to legal representation is given effect. As stated by Murray CJ in *Carmody*.

27. The mechanism by which such a right is vindicated is not itself relevant unless there is some question as to the effectiveness of its delivery by virtue of some element pertaining to the method of its delivery. It is not sufficient that a statutory footing or that it has features which are different from those of the statutory scheme. There must be a legitimate basis for complaint. Uniformity in the method of the delivery of legal representation is not required. It has a discretion as to how it will meet its constitutional obligations to provide legal representation.

28. In order for Mr. O'Connor to succeed in his claim, which is one based upon an alleged inequality of treatment, he has to be in a position to establish by evidence that the Scheme provides a less effective method of 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 fact, is less effective in vindicating the rights of an individual served with an EAW than is the statutory legal aid scheme. There was no evidence to suggest that persons in Mr. O'Connor's position ever had difficulty in 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 was inferior to that which would only have recourse to the Scheme for the purposes of their fees, were any less capable of providing legal representation under the statutory legal aid scheme. Neither, was any evidence led to prove that a person would not accept instructions for a person against whom a EWA had issued on the basis that they had no means to pay for legal representation at the end of the process because it would be left to the judge's discretion as to whether or not legal aid was required to support the payment of their fees.

30. Accordingly, even accepting Hogan J.'s analysis of the differences between the Scheme and the 1962 Act, I am not satisfied that Mr. O'Connor has demonstrated that the Scheme fails to provide him with a statutory scheme of legal aid which fails to vindicate his equality rights under Article 40.1 because he has failed to establish that a person facing surrender under the 2003 Act is provided with a less advantageous system of legal representation because it is provided under the Scheme rather than the 1962 Act which is 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 for the provision of legal representation is provided for many classes of litigants. For example, in relation to custody related judicial reviews, which are of enormous import to those whose interests are at stake. The statutory scheme is not available to those wishing to pursue claims of this type which 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 the Scheme or the 1962 Act, the constitutional right to legal representation is satisfied.

statutory scheme such as the Attorney General's Scheme, the precise method whereby that

33. Legal assistance of such nature was available to Mr O'Connor from the outset of these Examinations. He was made aware of the availability of such assistance from the outset and was in full avail of it. Accordingly, I am not satisfied that he has made out any claim that the defendant has breached his 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

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