THE HIGH COURT

[2021] IEHC 162

[Record No. 2020/3367 P]

BETWEEN

LIAM CAMPBELL

PLAINTIFF

AND

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Paul Coffey delivered on the 22nd day of February 2021

1. The plaintiff seeks a declaration that the defendants ("the State") have failed to transpose into national law the obligations imposed upon Ireland under Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] O.J. L327/27 ("the Framework Decision"). It is common case that the State was obliged by article 29(1) of the Framework Decision to transpose its provisions into national law by 5 December 2011 and that it has wrongfully failed to do so. It is further agreed that because the relevant instrument is a framework decision, it cannot have direct effect and does not therefore confer rights or impose obligations that are part of domestic law. It is further not in dispute that the obligation imposed on the State by article 29(1) can only be enforced by the Commission which has in fact commenced infringement proceedings against the State before the Court of Justice of the European Union under Article 258 of the Lisbon Treaty. At issue therefore is whether the State's admitted breach of its obligation under article 29(1) of the Framework Decision to implement its provisions by 5 December 2011 is in the circumstances of this particular case justiciable at the suit of the plaintiff as a private individual before the national courts of this State.

Background

2. By plenary summons dated 11 May 2020, the plaintiff sought the following declaratory reliefs: -

   (1) a declaration that the State has failed to transpose into national law the obligations imposed upon them under the Framework Decision;

   (2) a declaration that the State has failed to transpose into national law the obligations imposed upon them under Council Framework Decision 2008/829/JHA; and

   (3) a declaration that the failure of the State to transpose the Framework Decisions amounts to an infringement of the plaintiff's rights under Article 6 and 7 of the Charter of Fundamental Rights of the European Union.

3. At the hearing of this action, senior counsel for the plaintiff indicated that the latter two reliefs were no longer being pursued for the following reasons: -

(1) it was accepted that Council Framework Decision 2008/829/JHA has been given legal effect by the Criminal Justice (Mutual Recognition of Decisions on Supervision Measures) Act 2020 which was enacted on 26 November 2020; and

(2) it was further accepted that the plaintiff has not as yet suffered any breach of any right, his complaint being that he anticipates a possible breach of rights that he does not currently have but which may accrue to him in the future.

4. The Framework Decision is a measure that was adopted by the Council of the European Union on 27 November 2008 pursuant to Article 34(2)(b) of the Amsterdam Treaty to approximate the laws and regulations of Member States in the area of Justice and Home Affairs and specifically to apply the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of enforcement in the European Union.

5. The Framework Decision replaces the provisions of previous conventions on the transfer of sentenced persons (which are referred to in article 26(1)) with provisions that allow a Member State to enforce a prison sentence imposed by another Member State against a person who resides in its territory. It further sets up a system for the transfer of convicted prisoners back to the Member State of which they are nationals or where they normally live or to another Member State with which they have close ties in order to serve their prison sentence there.

6. The plaintiff is an Irish national and the subject of a European Arrest Warrant which seeks his surrender to the Republic of Lithuania for the purposes of prosecuting him for three offences. On 15 July 2020 the High Court (Donnelly J) made an order for his surrender which the plaintiff has appealed to the Court of Appeal who heard the matter on 19 January 2021 following which it reserved its judgment.

7. The plaintiff's case is that if he is surrendered, prosecuted, tried and convicted, he is likely by reason of the gravity of the relevant offences to serve a lengthy sentence of imprisonment in Lithuania which he could at least apply to serve in Ireland if the declaration sought is granted by this Court and the State acts upon it to give legal effect to the Framework Decision prior to the execution of such sentence as may be imposed on him in the future.

8. No evidence was advanced at the hearing of this action on behalf of the plaintiff who instead has adopted the findings of fact which were made by the High Court that resulted in the making of the order for his surrender on 15 July 2020 insofar as they are relevant to this case.

9. Those findings disclose that the plaintiff is sought by the Republic of Lithuania on foot of a European Arrest Warrant of 26 August 2013 for the purpose of prosecuting him for three offences: -

(1) Preparation for a crime under article 21(1) and article 199(2) of the Criminal Code of Lithuania which has a maximum sentence of a term of imprisonment of ten years;

(2) Terrorism under article 250(6) of the Lithuanian Criminal Code which has a maximum sentence of a term of imprisonment of twenty years; and

(3) Illegal Possession of Firearms under article 253(2) of the Lithuanian Criminal Code which has a maximum sentence of a term of imprisonment of eight years.

10. In her judgment delivered on 26 June 2020 Donnelly J summarised the details of the alleged offences that were given by the issuing Judicial Authority as follows: -

> "(The plaintiff) is alleged to have made arrangements, while acting in an organised terrorist group, the Real Irish Republican Army ("RIRA") to acquire a substantial number of firearms and explosives from Lithuania and smuggle them into Ireland. The EAW states that during the period from the end of 2006 to 2007, the respondent made arrangements with Seamus McGreevy, Michael Campbell (his brother), Brendan McGuigan and other unidentified persons ("named persons") to travel to Lithuania for the purposes of acquiring firearms and explosives, including, automatic rifles, snipper guns, projectors, detonators, timers, trotyl, and to return them to Ireland, without specific permission from the Lithuanian Authorities and without declaring them to the Irish customs. In the middle of 2007, (the plaintiff) organised conspiracy meetings concerning the logistics of how to acquire the firearms and explosives and provided money for the purpose of the weapons to the named persons and introduced them to go to Lithuania to test the weapons, purchase them, arrange training of how to use the weapons with the weapons dealer, and return them to Ireland without the detection of customs. In this way, the EAW states that (the plaintiff) together with the named persons provided support to the terrorist group."

11. It is common case that the relevant alleged offences so described are very serious in nature such that if the plaintiff is in fact surrendered and thereafter prosecuted, tried and convicted in Lithuania, it is highly likely that he will be sentenced to a lengthy term of imprisonment. It is not in dispute that if transposed into national law, the Framework Decision would be of potential benefit to the plaintiff but only in the event that he is ultimately convicted and sentenced to a term of imprisonment in Lithuania insofar as it would give him an entitlement to at least apply to be transferred back to the Member State of which he is a national, namely Ireland, so that he could serve his prison sentence in this State.

12. Senior counsel for the State opposes the granting of any relief to the plaintiff on the following grounds: -

(1) that the obligation imposed by article 29(1) of the Framework Decision to transpose the measure into national law is enforceable only by the European Commission

(which has referred Ireland to the Court of Justice in early December 2020) and is not justiciable at the suit of a private individual before the national courts of this State by reason of the fact that the Framework Decision is a legal instrument that is not capable of direct effect and therefore a measure that does not impose obligations or confer rights that are part of national law;

(2) that the proceedings are premature by reason of the fact that the plaintiff has as yet to be surrendered, prosecuted, tried, convicted and sentenced in respect of all or any of the three offences for which his surrender is sought; and

(3) that the proceedings are pointless because the Government is currently preparing legislation to give legal effect to the Framework Decision which it expects to be enacted by the end of this year.

13. Senior counsel for the plaintiff accepts that there is no authority to be found in any decided case, text book or academic article which supports his entitlement under national or European law to *quia timet* relief arising from a wrongful failure to implement a framework decision. Instead he contends that the plaintiff's entitlement to relief flows from the high-level principles of primacy and the effective enjoyment of rights which were applied by the Court of Justice in the seminal case of *Francovich v. Italy* (Joined Cases C-6/90 and C-9/90) [1991] E.C.R. I-5357.

Council Framework Decision 2008/909/JHA

14. The key provisions of the Framework Decision that are relevant to this case are as follows: -

(1) article 3(1) declares that the purpose of the Framework Decision is

"to establish the rules under which a Member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognise a judgment and enforce the sentence";

(2) by virtue of article 1(c) and (d), the "issuing State" is the Member State in which a judgment is delivered whilst the 'executing State' is the Member State to which the judgment and a required accompanying 'certificate' in a prescribed form is forwarded for the purpose of its recognition and enforcement;

(3) by virtue of article 1(b), a "sentence" means any custodial sentence or any measure involving deprivation of liberty imposed for a limited or unlimited period of time on account of the criminal offence on the basis of criminal proceedings;

(4) article 4(1) sets out the criteria applicable to the forwarding of a judgment and a certificate to another Member State and provides, *inter alia*, that the issuing State may with the consent of the sentenced person where so required, forward the relevant documents to, among others, the Member State of the nationality of the sentenced person. The forwarding of the judgment and certificate may only take place where the competent authority of the issuing State, where appropriate after

consultations between the competent authorities of the issuing and executing States, is satisfied that the enforcement of the sentence by the executing State would serve the purpose of facilitating the social rehabilitation of the sentenced person. During such consultation, the competent authority of the executing State may present the competent authority of the issuing State with a reasoned opinion, that enforcement of a sentence in the executing State would not serve the purpose of facilitating the social rehabilitation and successful reintegration of the sentenced person into society;

(4) article 4(5) (which is specifically relied upon by the plaintiff) provides, *inter alia*, that the sentenced person may request the competent authorities of the issuing State or the executing State "to initiate a procedure for forwarding the judgment and certificate under the Framework Decision". Article 4(5) expressly provides, however, that a request made pursuant to its provisions "shall not create an obligation of [sic] the issuing State to forward the judgment together with the certificate";

(5) article 8(1) provides that the competent authority of the executing State "shall" recognise a judgment that has been forwarded to it in the prescribed manner and that it "shall forthwith" in such circumstances enforce the sentence unless it decides to invoke one of the grounds for non-recognition and non-enforcement provided for in Article 9 which sets out twelve such grounds;

(6) article 12(2) requires the competent authority in the executing State to make a final decision on the recognition of the judgment and the enforcement of the sentence within a period of 90 days of receipt of the judgment and the certificate unless a ground for postponement arises under article 11 or article 23(3);

(7) article 13 provides that as long as the enforcement of the sentence in the executing State has not begun, the issuing State may withdraw the certificate from that State provided it gives reasons for doing so whereupon the executing State "shall" no longer enforce the sentence.

15. Senior counsel for the plaintiff contends that the result to be achieved by article 4(5) is in effect the conferring on a sentenced person the right to apply to the issuing State to serve his or her sentence in, among others, the Member State of his or her nationality. Whilst article 4(5) seeks to give to a sentenced person the entitlement "to initiate a procedure for forwarding the judgment and certificate under the Framework Decision", the issuing State is not obliged to comply with such a request and is not expressly obliged to give reasons for not so doing. Moreover, even where an issuing State has complied with such a request and forwarded the judgment and certificate to the executing State, it retains an entitlement to withdraw the certificate provided it gives reasons for so doing and enforcement in the executing State has not begun.

16. It follows from this that whilst the Framework Decision seeks to confer on the sentenced person what is in effect a right to apply to the issuing State to initiate a procedure that

may result in the execution of the judgment in the Member State of the nationality of that person, there is no right to repatriation per se and the issuing State is not under any obligation to forward the judgment and certificate, not even where such would be in the interests of the sentenced person.

The nature and legal effect of a Council Framework Decision

17. As the plaintiff's case primarily concerns the legal consequences that follow from the failure of a Member State to implement a framework decision by its prescribed specified date, it is important to consider the nature and legal effect of such a legal instrument in its proper historical context.

18. The Maastricht Treaty of 1992 established the European Union and its "three pillars", the pillars being the European Communities, a Common Foreign and Security Policy and Cooperation in Justice and Home Affairs.

19. Within each "pillar", a different balance was struck between the use of supranational legislation and intergovernmental cooperation. Thus, prior to the Lisbon Treaty of 2009, the EU could not enact ordinary legislation by way of regulations or directives in the area of Justice and Home Affairs but instead could only proceed by way of intergovernmental cooperation, initially by way of "joint action" under the Maastricht Treaty of 1992 and thereafter by way of "Council Framework Decision" under the Amsterdam Treaty of 1997.

20. The Council Framework Decision is therefore a legal instrument of intergovernmental cooperation under the "Third Pillar" and derives its legal effect from Article 34 of the Amsterdam Treaty whereunder such a decision is binding upon a Member States only "as to the result to be achieved" but does "not entail direct effect". Insofar as the making of such a decision left to the national authorities "the choice of form and methods" to achieve the result, framework decisions are at first blush similar to directives but unlike directives, framework decisions are not capable of direct effect and were prior to the Lisbon Treaty unenforceable by the Commission against any Member State before the Court of Justice and were subject only to a limited and conditional jurisdiction of that Court.

21. The Lisbon Treaty entered into force on 1 December 2009 and replaced the old three pillars of Maastricht with a new European Union. For the first time the EU's supranational competence (albeit on a shared competence basis) was extended into the area of "freedom, security and justice" (Part Three, Title V TFEU) and, in particular, to "judicial cooperation in criminal matters" (Part Three, Title V, Chapter 4 TFEU) by extending the "ordinary legislative procedure" to the "mutual recognition of judgments and judicial decisions". Article 288 of the TFEU provides that "the Union's competences" are exercisable by "regulations, directives, decisions, recommendations and opinions" but does not include within this exhaustive list "framework decisions" which were clearly thereby abolished *sub silentio*, no doubt because they were seen by the drafters of the Treaty to be an outmoded tool of intergovernmental cooperation that was no longer suitable to a new era of supranational competence in the area of what had previously been referred to as "Justice and Home Affairs".

22. The legal status and effect of the framework decisions that were still in force at the time of the entry into force of the Lisbon Treaty on 1 December 2009 were provided for in Protocol (No. 36) of the TFEU. By virtue of Article 9 of the Protocol, framework decisions that had not been subject to repeal, annulment or amendment continued to have the legal effect attributed to them under Article 34(2)(b) of the Amsterdam Treaty. Since the expiry of a five year transitional period on 1 December 2014, however, such framework decisions can now by virtue of Article 10 of the Protocol be enforced by the Commission against Member States before the Court of Justice under the infringement procedure for non and incorrect implementation and are also now fully subject to the jurisdiction of the Court.

The remedy given in *Francovich v. Italy*

23. Whilst conceding that this case concerns not a directive but a framework decision and not an accrued right that has been breached but rather the anticipated breach of a right that may or may not accrue to the plaintiff at an unknown time in the future, senior counsel for the plaintiff nonetheless contends that the principles which underlay the finding of state liability in *Francovich v. Italy* apply *mutatis mutandis* to this case.

24. The significance of *Francovich* is that it was the first case in which the European Court of Justice created a remedy under community law (now EU law) that is directly enforceable by individuals in the national courts of Member States to protect Community law rights (now EU law rights) other than those which are directly effective.

25. In that case, the applicants were the employees of a company that had become insolvent as a result of which they were owed significant sums by way of unpaid income which would have been guaranteed and paid had Italy implemented by its prescribed specified date Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the member states relating to the protection of employees in the event of the insolvency of their employer [1980] O.J. L283/23 ("Directive 80/987/EEC") whereunder it had an obligation to organise and finance a guarantee system save that the payment obligation would lie not with the State but with a guarantee institution. The Court of Justice found that whilst the obligation to organise and finance the guarantee system was unconditional, the provisions in Directive 80/987/EEC did not identify the relevant institution that was liable to discharge the payment obligation and therefore lacked the precision necessary to be enforceable against the Member State before its national courts. Having found that the wording of Directive 80/987/EEC was insufficiently precise to allow for direct effect, the Court went on to hold that the Italian State was nonetheless liable in damages to the applicants on the principle of community law that Member States are obliged to make good loss and damage caused to individuals by breaches of community law for which they could be held responsible.

26. The Court of Justice gave the following reasons for its finding that state liability existed "as a matter of principle": -

> "31. It should be borne in mind at the outset that the EEC Treaty has created its own legal system, which is integrated into the legal systems of the Member States and

which their courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions (see the judgments in Case 26/62 *Van Gend en Loos* [1963] ECR 1 and Case 6/64 *Costa v. ENEL* [1964] ECR 685).

32. Furthermore, it has been consistently held that the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see in particular the judgments in Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmentha*l [1978] ECR 629, paragraph 16, and Case C-213/89 *Factortame* [1990] ECR 1-2433, paragraph 19.)

33. The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals are unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.

34. The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the state and where consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.

35. It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.

36. A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 of the Treaty, under which Member States are required to take all appropriate measures, whether general or particular to ensure fulfilment of their obligations under Community law. Among these is the obligation to nullify the unlawful consequences of a breach of Community law (see, in relation to the analogous provision of Article 86 of the ECSC Treaty, the judgment in Case 6/60 *Humblet v. Belgium* [1960] ECR 559)."

27. Having found that it was a principle of community law that the Member States are obliged to "make good" loss and damage caused to individuals by breaches of community law for which they may be held responsible, the Court of Justice went on to state the conditions under which such liability gave rise to "a right to reparation" where, as in that case, the breach of community law arose from the failure of a Member State to fulfil its obligation to implement a directive. The Court stated that in such a case, the Member State's

liability to give a right of reparation did not arise unless the following three conditions were met: -

(1) the result prescribed by the directive should entail the grant of rights to individuals;

(2) it should be possible to identify the contents of those rights on the basis of the provisions of the directive; and

(3) a causal link should exist between the breach of the State's obligation and the loss and damage suffered by the injured parties.

28. Having modified the second condition to require that the rule of law breached must be serious, the Court of Justice has since accepted that failure to take any measure to transpose a directive in order to achieve the results it prescribes within the period laid down for that purpose constitutes per se a serious breach of Community law.

29. Prior to *Francovich* Community law required the national courts of Member States to ensure the effective enjoyment of Community law rights by applying Community law and giving it primacy where it was directly effective against Member States and, where not, by adopting a communautaire interpretation of national laws so that national courts were required to construe national law conformably with Community law. The significance of *Francovich* is that it was the first case in which the Court of Justice applied the principles of primacy and effective enjoyment of rights to afford individuals the possibility of obtaining redress in a national court against a Member State where their rights have been infringed by a breach of Community law(now EU law) attributable to that Member State.

30. The remedy given by *Francovich* is limited in two important respects that are relevant to this case. First, it is a remedy that was characterised by the Court of Justice as a "right of reparation" and applies therefore only where the breach of EU law complained of has caused loss and damage. Secondly, where the breach complained of is the wrongful failure of a Member State to implement a directive by a prescribed specified date, the injured party cannot recover compensation unless he or she can demonstrate compliance with all three of the limiting criteria (as modified) that were set out by the Court. Critical to the availability of the remedy in such a case therefore is proof that the wrongful failure by the Member State to implement a directive has resulted in the impairment of the effective enjoyment of a right that ought otherwise to have accrued to the injured party had the directive been properly implemented. Accordingly, the remedy is not available to protect a right entailed by a directive that has not accrued or which may never accrue to a claimant in the future. It follows from this that even if it were to be accepted that the remedy given by *Francovich* is not confined to the non or incomplete or incorrect transposition of secondary EU legislation like directives, the three conditions specified by the Court of Justice would nonetheless continue to apply whatever legal instrument of EU law is being relied upon.

Irish authorities relied on by the plaintiff

31. Senior counsel for the plaintiff conceded in argument that *Francovich* does not speak to *quia timet* cases where the impairment of the effective enjoyment of a right entailed by a directive has not yet occurred but is merely anticipated. Instead he opened and relied on two judgments which, he suggested, afforded examples of the High Court granting declaratory relief in circumstances similar to this case where the effect of the relief was "purely prospective".

32. The first of these cases, *Tate v. Minister for Social Welfare* [1995] 1 I.R. 418 concerned claims arising from Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1978] O.J. L6/24 ("Council Directive 79/7/EEC") where the reliefs sought and granted (including two awards of damages) arose primarily from a holding of the Court of Justice in an Article 177 reference in a previous case, *Cotter and McDermott v. Minister for Social Welfare* (Case 286/85) [1987] E.C.R. 1453. In that case, the Court of Justice held that article 4(1) of Council Directive 79/7/EEC was a measure that had direct effect from 23 December 1984 (being the date by which it was due to be implemented) so that in the absence of measures implementing it from that date, women were entitled to have the same rules applied to them as were applied to married men. Carroll J. expressly held that the rights of the plaintiffs in that case came from Council Directive 79/7/EEC which had "direct effect" from the date on which the State failed in its obligation to implement Council Directive 79/7/EEC. She went on to state that once the directive under scrutiny took on "the mantle of direct effect" every type of action which would be available in the national domestic law is available "to ensure observance of the Directive". As can be readily seen *Tate* concerned the vindication of rights under a directive that had already acquired direct effect, and which had thereby vested rights in the plaintiffs, eleven years before the case came before the High Court for hearing. The decision does not, therefore, support the proposition that a national court can grant declaratory relief *quia timet* to ensure the effective enjoyment of a right entailed by a directive that has not yet accrued and which may or may not accrue to a plaintiff at some unknown time in the future.

33. Senior counsel for the plaintiff further relied on the case of *P. v. The Chief Superintendent of the Garda National Immigration Bureau and Ors* [2015] IEHC 222 where the applicant who had been charged with misuse of drugs offences sought declaratory and other relief on the basis that the first named respondent had wrongfully failed to identify her as a victim of human trafficking in breach of her rights under Parliament and Council Directive 2011/36/EU of 5 April 2011 on preventing and combatting trafficking in human beings and protecting its victims [2011] O.J. L101/1 ("Parliament and Council Directive 2011/36/EU") and further on the basis that the said directive had not been properly transposed into Irish law. O'Malley J. found that there had been inadequate transposition of Parliament and Council Directive 2011/36/EU but further held that:

> "This therefore being a directive intended to confer rights on individuals, it may be relied upon directly".

34. In her subsequent ruling as to the appropriate reliefs to be ordered by the Court she noted that it had already been agreed between the parties that the applicant was entitled on foot of her judgment to declaratory relief and to damages. On foot of that agreement she made a declaration that the State had failed to adequately transpose the Directive insofar as it failed to adopt an appropriate mechanism for the early identification of and provision of assistance to victims of human trafficking who are suspected of involvement in criminal offences and made a further declaration that the applicant's application to be considered as a victim of human trafficking was not assessed in a manner which was compliant with the Directive. She further awarded the Plaintiff general damages in the sum of €30,000 for breach of her rights.

35. *P* is a case in which damages and declaratory relief were granted because the Court found that there had been a breach of rights entailed by a directive that could be relied upon directly by the applicant. It is not, therefore, an example of the High Court granting "purely prospective" declaratory relief in respect of an anticipated breach of rights entailed by a directive that had not at the time of the hearing of the case accrued to the plaintiff. No less significantly, it is not a case in which there appears to have been any consideration given by counsel or the Court to the issue of principle that arises in this case.

Conclusions

36. Since *Francovich* was decided in 1991, there has been no decided case which has either extended the application of the remedy of state liability to framework decisions or which has dispensed with the three limiting criteria (as modified) which apply to all cases involving the wrongful failure by a Member State to implement a directive by its prescribed specified date. Accordingly, the principle of state liability remains a remedy that is enforceable by private individuals in national courts against Member States but is applicable only to directives and is, in a case arising from the wrongful failure to implement a directive, subject to the three limiting conditions (as modified) that were set out by the Court of Justice in *Francovich*. Although the remedy given by Francovich is "a right of reparation" there is no reason in principle why a national court cannot, where necessary or appropriate, also grant adjunctive declaratory relief particularly where the wrongful impairment of the full effectiveness of a right entailed by a directive is continuing.

37. This Court cannot in the absence of authority or reason extend the protection of rights that is given by Francovich to rights entailed by framework decisions. Framework decisions have a history and legal character that is distinct and wholly different to that of directives to which they have similarities but not equivalence. It is not axiomatic that the results to be achieved under a framework decision are amenable to the same protection and redress in a national court of a Member State as is applied to the wrongful impairment of the effective enjoyment of rights entailed by a directive. National courts are required to take account of all the essential characteristics of EU law including the fact that only some of the provisions of that law have direct effect. Framework decisions do not have direct effect because they were adopted on the basis of the former third pillar of

the European Union and derive their effect solely under Article 34(2)(b) of the Amsterdam Treaty. Whilst they cannot have direct effect, national courts and authorities nonetheless have an obligation to interpret national law in conformity with EU law (subject to certain limits) including framework decisions from the date prescribed for their implementation. Framework decisions are thus sui generis and relics of a bygone era when Justice and Home Affairs were not the subject of the supranational competence of the EU but were rather the subject of enhanced intergovernmental cooperation and action. Unlike a directive, a framework decision is not a supranational legislative act but rather an ad hoc legal instrument of intergovernmental action that was designed to be unenforceable by the Commission against Member States before the Court of Justice for the entirety of the period that such decisions were made. It would be highly anomalous indeed if the drafters of the Amsterdam Treaty, who must be taken to have been cognisant of the principle of State liability, intended framework decisions to be designedly unenforceable by the Commission against Member States before the Court of Justice but to be nonetheless enforceable by private individuals in the national courts of Member States. Although by virtue of Protocol (No. 36), framework decisions can now be enforced by the Commission against Member States before the Court of Justice, their legal character has not changed insofar as such measures continue to derive the entirety of their legal character from the Amsterdam Treaty. At all events, senior counsel for the plaintiff does not rely on Protocol (No. 36) to the Lisbon Treaty to advance his case.

38. Even assuming without deciding that the principle of state liability can be extended to the wrongful failure by a Member State to implement a framework decision, the three conditions attaching to liability would continue to apply. Accordingly, as the remedy identified in *Francovich* applies only where there is a causal link between the non-implementation of the relevant legal instrument and loss and damage that has been suffered by the individual seeking relief, there is an insuperable difficulty for the plaintiff in that the remedy is not available *quia timet* to redress loss and damage that is anticipated at some unknown time in the future but which has not yet occurred and which may never occur whether because, as in this case, the plaintiff may never become a "sentenced person" or because the State will have implemented the Framework Decision by the time that he has.

39. It may well be that in a future case it will be decided that national courts have a *quia timet* jurisdiction to intervene and grant declaratory relief where the person seeking redress is in imminent peril of an inevitable impairment of the effective enjoyment of a right entailed by a directive or even a framework directive, but this is not such a case. The plaintiff has not, for example, placed evidence before the court to suggest that he has consented to his surrender or that he intends to plead guilty to the charges that are the subject of the European Arrest Warrant. On the contrary, and as is his absolute entitlement, he has contested his surrender both at first instance and on appeal and has not indicated his attitude to the relevant charges or given even an estimation as to when the relevant trial is likely to conclude or disclosed as to whether he intends to appeal against conviction if he is not acquitted.

40. I am in any event satisfied that the granting of a declaration in this case would be utterly pointless and would serve no useful purpose in circumstances in which even senior counsel for the plaintiff readily acknowledged that the declaration that he is seeking on behalf of his client does not of itself require the State to take any action but is instead merely an "intensely modest" and "gentile and polite relief" that will in effect do no more than encourage the State to continue to do what it is already doing, namely, preparing legislation to give legal effect to the Framework Decision within the current year.

41. For the reasons stated above, I am satisfied that the obligation imposed on the State by article 29(1) of the Framework Decision is not justiciable at the suit of the plaintiff before this Court in the circumstances of this case for which reason I will dismiss the plaintiff's claim and refuse the relief sought.