AN CHÚIRT UACHTARACH
THE SUPREME COURT

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High Court Record No.: 2021 No. 330 EXT

[2024] IESC 9

O'Donnell C.J.
Charleton J.
Baker J.
Woulfe J.
Hogan J.
Collins J.
Donnelly J.

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003 (AS AMENDED)

AND IN THE MATTER OF SÉAN WALSH

BETWEEN

MINISTER FOR JUSTICE

APPLICANT

AND

SÉAN WALSH

RESPONDENT

Reference

1. The Supreme Court has, by its judgment delivered on 7th March 2024, ([2024] IESC 9) decided to refer to the Court of Justice, pursuant to Article 267 of the Treaty on the Functioning of the European Union, one question arising in respect of the interpretation of the Framework Decision of 13 June 2002 on the European Arrest Warrant and Surrender Procedures between

Member States ("Framework Decision") and Article 49 of the Charter of Fundamental Rights of the European Union ("Charter").

2. The request arises in the request for surrender of Mr Walsh ("the appellant") to the United Kingdom pursuant to a warrant issued under the Trade and Cooperation Agreement of 30 December 2020, between the European Union and the European Atomic Energy Community, of one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part ("TCA").

3. The TCA governs relations between the United Kingdom and the European Community, and, in particular for the purposes of this appeal, provides for the continuation of the European Arrest Warrant system then in operation. Title VII of Part 3 of the TCA applies in respect of arrest warrants issued in accordance with s. 98 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019. Title VII provides for surrender arrangements to apply between the United Kingdom and the European Union in respect of the surrender of persons after the end of the transition period on 31 December 2020. Those provisions are identical to the extradition arrangements provided for under the Framework Decision.

4. Part VII of Part 3 of the TCA was implemented in domestic law in Ireland by S.I. 720 of 2020, the European Arrest Warrant (Application to Third Countries) (United Kingdom) Order 2020 made under s. 2(2) of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012, by which the United Kingdom of Great Britain and Northern Ireland was designated as a third country to which the Act of 2003 applies.

5. Under the provisions of the Framework Decision, the Minister for Foreign Affairs and Trade may designate a non-member State for the purposes of the operation of the European Arrest Warrant scheme to non-EU countries. Following the decision of the CJEU and by S.I.

150 of 2021, the United Kingdom of Great Britain and Northern Ireland was designated as an issuing State and a Member State for the purposes of the operation of the European Arrest Warrant regime.

6. Accordingly, for the purposes of the domestic legislation and the Framework Decision the United Kingdom is to be treated as if it were a Member State for the purposes of the operation of the EAW regime such that a request to surrender under a warrant from that jurisdiction is to be dealt with under the Act of 2003 and the Framework Decision.

7. It is proposed that the applicant be charged with terrorism offences and, should he be convicted and sentenced to a term of imprisonment, his entitlement to be released on licence will fall to be governed by UK legislation enacted in 2021, after the offences in question are alleged to have been committed.

8. Four warrants of arrest were issued by the District Judge of the Magistrates' Courts of Northern Ireland on 26 November 2021 in respect of four offences: the offence of membership of a proscribed organisation; the offence of directing the activities of an organisation concerned in the commission of acts of terrorism; the offence of conspiracy to direct the activities of an organisation concerned with the commission of acts of terrorism; and the offence of preparing to commit acts of terrorism. The UK-EU Surrender Warrant indicated the maximum length of the custodial sentence which may be imposed for the offences. In respect of the first-listed offence a term of imprisonment not exceeding 10 years can be imposed upon conviction on indictment, and for the remaining three offences, a term of imprisonment for life upon conviction on indictment. The offences are alleged to have been committed between 18 July 2020 and 20 July 2020.

9. Legislative changes to the regime permitting release on licence were made by the Terrorist Offenders (Restriction of Early Release) Act 2020 and Article 20A of the Criminal Justice (Northern Ireland) Order 2008, as inserted by s. 30 of the Counter Terrorism and

Sentencing Act 2021. These changes became operative in respect of Northern Ireland from 30 April 2021. The result of the changes was that a person convicted of certain terrorism-type offences would no longer be entitled to automatic release on licence at the halfway point in their sentence but would have to serve a minimum of two thirds before release on licence could be permitted. Further, unlike under the previous regime, the release on licence would have to be first approved by the Parole Commissioners.

10. The appellant argues that surrender is incompatible with his rights under Article 7 of the Convention. Article 7 provides:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
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> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

11. The European Court of Human Rights ("ECtHR") has rejected the proposition that retrospective changes to systems of remission or early release are a violation of Article 7, as such measures do not form part of the "penalty" for the purposes of the Article. The decisions in *Hogben v. the United Kingdom* (App. No. 11653/85) and *Uttley v. United Kingdom* (App. no. 36946/03) illustrate this approach. In both, no breach of Article 7 was found, despite the introduction of restrictions on eligibility for release on licence retrospectively extending the time the applicants would spend in custody. Rather the measures were categorised as the implementation or execution of a penalty, which could not be considered inherently severe as their nature and purpose remained the facilitation of early release. This was also the conclusion **i**n *Kafkaris v. Cyprus* (App. No. 21906/04), [2009] 49 E.H.R.R. 35.

12. The ECtHR subsequently gave a judgment which the appellant argues is illustrative of a difference in approach. In *Del Rio Prada v Spain* (Application no. 42750/09), (2014) 65 E.H.R.R 37, the ECtHR stated the distinction between a measure that constitutes a "penalty" and a measure that concerns the "execution" and "enforcement" thereof may not always be clear-cut (para. 85) and recognised that measures taken during the execution of a sentence may affect its scope (para. 90). Thus, the appellant submitted, *Del Rio Prado* evidenced a more flexible approach on the part of the ECtHR to the application of Article 7 than its previous jurisprudence. The appellant argues that the new sentencing and licence regime now operating in Northern Ireland has the practical effect of increasing the time a person spends in prison, such that as a matter of substance he is exposed to a heavier penalty than that which might have been imposed at the time of the alleged commission of the relevant offence. He further argues that the transfer of functions from the trial judge in partially determining the period for release on licence to the Parole Commissioners is a fundamental alteration in the "identity" or "scope" (the phrase used in *Del Río Prada*) of the penalty.

13. Whether and to what extent the decision in *Del Río Prada* is a modification of the previous ECtHR jurisprudence is in dispute in this appeal, and the respondent argues that there has been no change in the principles. It relies in particular on *Abedin v. UK* (Application No. 54026/16), (2021) 72 E.H.R.R. SE6.

14. In *R v. Morgan & Ors.* a challenge to the UK legislation in issue in this reference was brought by four persons, each of whom had already been sentenced when the legislative changes were made, who argued that the imposition on them of the new legislative regime means they would suffer a harsher penalty, and that they had a legitimate expectation to be treated under the regime applicable at the time of the commission of the offence or of the imposition of sentence.

15. The Court of Appeal of Northern Ireland held that, in light of the fact that the appellants had already been sentenced under the old regime when the changes were made, the application of the new law was a retrospective imposition of penalty amounting to a modification or redefinition of the penalty imposed by the trial judge, and was therefore repugnant to Article 7 of the Convention: [2021] NICA 67. The Court granted a declaration of incompatibility, but in the light of the role the Convention plays in the operation and effect of legislation in Northern Ireland, the Court refused to make any order that the amending legislation was invalid or unenforceable.

16. The Supreme Court of the United Kingdom granted leave to appeal against the judgment of the Court of Appeal of Northern Ireland, and in its judgment delivered on 19 April 2023, that Court allowed the appeal by the Minister of Justice and set aside the declaration of incompatibility. The Court found that the retrospective application of s. 30 of the Counter Terrorism and Sentencing Act 2021 is not incompatible with Article 5 and Article 7 of the Convention: (*Morgan and ors. v. Ministry of Justice (Northern Ireland)* [2023] UKSC 14; 2023 2 W.L.R. 905.

17. The UK Supreme Court (Lord Stephens of Creevyloughgare**,** with whom the other members of the Court agreed), considered that there was no retroactive increase in the penalty, and what had changed was "the way in which the lawfully prescribed determinate custodial sentences imposed on the respondents are to be executed" (para. 116). Consequently, the legislative changes were outside the concept of "law" in Article 7 (para. 117), and did not breach the requirements of Article 5, including the requirement of foreseeability (paras. 128-129)

18. In summary the UK Supreme Court said at para. 114:

> "The nature of the measures was to change the manner of execution of the determinate custodial sentences by restricting the eligibility for release on licence of terrorist

prisoners. The nature and purpose of the changes brought about by section 30 of the 2021 Act and article 20A of the 2008 Order was not to lengthen the determinate custodial sentences imposed on the respondents. The length of those sentences was not increased in any sense."

19. Lord Stephens noted that in *Del Rio Prada* the ECtHR had said that the severity of the order is not itself decisive, and, as the nature and purpose of the measure is to permit early release, it cannot be regarded as inherently severe. He further noted that a change to the execution or enforcement of the penalty did not fall under Article 7 rather contracting states are free to determine their own criminal policy in respect of such changes, and thus the appeal of the Minister was allowed.

20. It is clear that in Northern Ireland the judge is involved in setting the element of the sentence which must be served before release on licence. As a result the actual warrants in the *Morgan* cases were required to be altered by an administrative decision, and it was this element of the new process that was regarded by the Court of Appeal of Northern Ireland as amounting to a "subversion" of the sentence with a consequence that a breach of the /convention was established.

21. The UK Supreme Court said that it did not follow that the function being eroded went to the fixing of the penalty. The argument in the present appeal is weaker than that in *Morgan* because the appellant has not been convicted or sentenced, and the new parole /licence regime applicable to him will be the current regime. There will be no retrospective interference with a judicial decision.

Correct approach to a request for surrender under the Framework Decision

22. The starting point of a court considering a request for surrender under the Framework Decision is the obligation and responsibility of the requested state to surrender, subject only to

the proviso that a respondent may resist surrender on the grounds that his or her Convention rights are likely to be breached by surrender.

23. The requesting state is a contracting party to the Convention, has incorporated the Convention into its domestic law, the compatibility of the regime has been considered and upheld by the courts of that state, and there is a right of individual petition to the ECtHR. It has not been seriously doubted in the course of argument, that should the appellant be returned to Northern Ireland he does have available a remedy of making an individual application to the ECtHR regarding the proper interpretation of the Convention and whether the sentence and licence regime now operative in Northern Ireland could amount to a retrospective sentence.

24. In the light of the imperative from Irish domestic law, the European Arrest Warrant Act 2003 (as amended), and the Framework Decision, as interpreted by the judgments of this Court and by the CJEU, the appellant's argument that surrender to Northern Ireland would be in breach of his Convention rights is not supported either by the facts or arguments advanced on his behalf. Not only has no systemic flaw been identified which would suggest a likely and egregious breach of Convention rights were surrender to be ordered, but recent case law from the Courts of Northern Ireland and in the appellate jurisdiction of the UK Supreme Court presents a legal system in which the Convention is robustly and unequivocally adopted and applied. The approach this Court must take to the surrender request does not permit a refusal to return based on an analysis that the UK Supreme Court judgment in *Morgan* was wrongly decided. Nothing in the circumstances of the present case is capable of suggesting that the appellant's rights to invoke the Convention will not be fully respected and analysed. Further, the appellant has available to him the remedy of bringing an application to the Court in Strasbourg where a definitive and authoritative analysis and consideration of the legislative changes will be made.

25. This Court therefore rejected the argument that surrender should be refused under s. 37 on account of a perceived breach of Convention rights and the appeal failed on that ground.

The question concerning Charter rights.

26. However, a further complexity is apparent in the present case. In considering whether to accede to the surrender request this Court is clearly engaged in the application and of European Union law, to which the Charter applies, and which raises therefore a question of the terms of Article 49 of the Charter, which is framed in identical terms to Article 7 of the Convention. The issue is whether in circumstances where the requested court arrives at a reasoned conclusion that neither the Constitution nor the Convention requires refusal of surrender, is the reasoning that leads to that conclusion sufficient to adequately deal with an argument of compliance with the Charter? Furthermore, is it necessary that the executing state conduct an assessment of the compatibility with the Charter of the new Northern Ireland sentencing regime for terrorist offences?

27. Article 49 of the Charter corresponds to Article 7 of the Convention and Article 52.3 is therefore applicable. Accordingly, two questions arise:

(i) Has the requested person shown by evidence or established by argument that the scope of the rights which might be engaged under the Charter are different from those recognised, established and subject to the case law of the Convention?

(ii) Has the requested person established anything in European Union law that might suggest that it differs from the protection currently afforded under the jurisprudence of the ECtHR?

28. The Court of Justice has ruled that Article 49 of the Charter corresponds to or is based on Article 7 of the Convention. This is clear in C-72/15 *Rosneft* (paras. 164-165), C-42/17 *Mas and MB* (para. 54), and C-634/18 *JI* (para. 47). This much is noted at para. 52.111, and the

sources cited therein at footnote 192 of Peers & ors, *The EU Charter of Fundamental Rights: A Commentary* (2nd ed , Hart Publishing 2021).

29. The CJEU has considered the implications of Article 47 and 48(2) for the purposes of Article 4(a) of the Framework Decision and the distinction between the imposition of a penalty or sentence and the implementation or execution of a penalty or sentence distinction is one that has been endorsed in EU law and it is an important element of the CJEU's jurisprudence on Article 4a of the Framework Decision: See for example: Ardic**,**C-571/17 PPU where the CJEU held that for the purposes of Article 4a(1) of Framework Decision the concept of "decision" does not cover a decision relating to the execution or application of a custodial sentence previously imposed, except where the purpose or effect of that decision is to modify either the nature or quantum of that sentence and the authority which adopted it enjoyed some discretion in that regard. See also *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraphs 78 to 80, and *Zdziaszek*, C-271/17PPU, EU:C:2017:629, paragraphs 85, 90 and 96)

30. This was confirmed in the more recent decision of that Court in Joined Cases C-514/21 and C-515/21, *LU* & *PH* which concerned revocations of the suspension of a custodial sentence.

31. However, no judgment of the Court of Justice has considered the implication of Article 49 of the Charter on a change in the parole or licence provisions impacting upon the sentence of convicted persons, or of those charged for crimes alleged to have been committed before such change. This is not surprising as the areas in which the criminal law of member states involves the application of EU law are not, generally speaking, extensive.

32. Were Mr Walsh to be surrendered for trial to the jurisdiction of Northern Ireland no issue of EU law would be engaged in the trial process, and indeed in a criminal trial in this jurisdiction, usually no issue of EU law is engaged as a criminal trial is not usually concerned with the application or implementation of European law, although of course in specific cases

it could do so. The Charter is explicit that it does not "establish any new power or task" for the EU, in other words that it does not extend its competence to criminal matters**.** It follows therefore that the Charter, or any rights or assertion of rights under the Charter, would have no part to play in the domestic criminal process at issue in this appeal.

33. The question, rather, is if the requested state is obliged, or competent, to itself make an assessment as to whether it would be a breach of the Charter obligations of the requested state to surrender in circumstances where it is contended that the sentencing provisions which might be applied in the requesting state are incompatible with Article 49, albeit that such provisions are not themselves subject to the provisions of that Article.

34. The first principle and general rule remains that surrender of a requested person under the Framework Decision is the general rule and derives from the principles of mutual cooperation and confidence outlined above.

35. In general, the EAW regime has been interpreted consistently by the CJEU as requiring that any person resisting surrender must establish justifying and substantial grounds for believing that he or she would face a real risk of being subjected to a breach of rights. Most of the case law where the CJEU has considered Charter rights have been cases where the requested persons had argued that he or she would be subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter has been demonstrated , see for example Joined Cases C-354/20 PPU and C-412/20 PPU - *L and P*. This is because Article 19.2 of the Charter specifically applies to decisions concerning removal expulsion and extradition and precludes removal where there is a serious risk of subjection to the death penalty torture or inhuman or degrading treatment, which does not arise here.

36. In all of these cases the Courts of Justice stressed the high threshold of arguability, and that the requested person must demonstrate a real and substantial risk, more than a hypothetical risk and more than mere possibility of exposure to such breach.

37. In order to ascertain whether it would be a breach of EU law for this Court to surrender Mr Walsh, the Court would have to be satisfied that surrender would be a breach of Mr Walsh's Charter rights. No Charter right of Mr Walsh is capable of being breached in the criminal trial itself, and therefore what is in question is whether Charter rights are engaged in the surrender decision other than as provided for by Article 19 and if so, what the threshold must be for this Court to make a conclusion on the argument.

38. The Explanation relating to Article 52(3) of the Charter is clear that the "meaning and scope" of Charter rights are found in the text of the Convention but also in the case law of the ECtHR. Nonetheless EU law is autonomous, and the Court of Justice is the ultimate arbiter of the interpretation of Charter rights. This factor, at least at a theoretical level, means that the Court of Justice could come to a different view on the meaning and effect of the Charter fair trial rights, and how, and if, the new sentencing regime operating in Northern Ireland is capable of being analysed by reference to those rights for the purpose of the surrender decision. While it may be noted that there have been some suggestions in Advocate General opinions that Article 52.3 permits the CJEU to adopt a different, and arguably more demanding, interpretation of Charter provisions than the corresponding provisions of the Convention as interpreted, that approach would appear to be inconsistent with the terms and intent of Article 52.3 and has not been adopted by the CJEU itself. This Court in *Minister for Justice v. Celmer* [2019] IESC 80, [2020] 1 I.L.R.M. 121, rejected in an argument made on behalf of the respondent and IHREC that more extensive protection is provided to rights under the Charter as against an equivalent right under the Convention, and O'Donnell J. considered that there would have to be the "clearer guidance" from the CJEU to support such an argument (at para. 70).

39. The Court of Justice in a judgment given in September 2016 on a request for a preliminary ruling from the Supreme Court of Latvia, Case C-182/15 - *Petruhhin* said that

when an extradition request is being considered it is not sufficient for a Member State to simply ascertain that the requesting state is a party to the Convention and said that reference must be made to Article 4 of the Charter (para. 56) and that the requested Member State must "verify that the extradition will not prejudice the rights referred to in Article 19 of the Charter" (para. 60). *Petruhin* was affirmed by the CJEU in Case C-398/19 - *BY – Generalstaatsanwaltschaft Berlin*. What is in issue here, and in recent cases, is the question of the application of the Charter outside the circumstances contemplated in that Article.

40. In that instance therefore the question resolves itself to the criteria that the executing judicial authority ought to apply in assessing the quality of the fair trial rights, or framed differently compliance with the principle of legality in respect of criminal penalties, and whether there is a risk that those rights might be breached, in circumstances where the Court is satisfied that surrender is not precluded by either the Constitution or the Convention for reasons already addressed.

The Issue and Conclusion of this Court:

41. This Court is aware that the meaning and application of rights under the Charter are not to be interpreted as a domestic measure, but is rather to be given autonomous meaning in European law.

42. This Court is a court of last resort for the purposes of Article 267(3) TFEU. In view of the decision of the CJEU in *Consorzio Italian Management e Catania Multiservizi* (Case C-561/19, EU:C:2021:799) (at para. 51) regarding the extent of that duty, this Court could not say that the issue presented is so clear such that it could comfortably arrive at its own conclusion on that question.

43. In the light of this Court's obligation in the case where a matter is not *acte clair,* and because this Court is the final court in which European law is interpreted domestically, I have come to the conclusion that a reference under Article 267 of the TFEU is accordingly necessary.

In Case C-561/19 *Consorzio Italian Management, Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA*, the CJEU emphasised that a reference is not simply a matter of contention, being raised and ruled on in an adversarial context. Rather to make a reference is an obligation in European law which a court of final appeal should always bear in mind as its sole responsibility. As noted by Charleton J. in *Merck Sharpe & Dohme v. Clonmel Healthcare* [2022] IESC 11 this obligation presents irrespective of whether the making of a reference is contended for, mentioned, or opposed by the parties before that court in any relevant controversy.

44. The question in respect of which a reference is made concern the impact of the Charter. The appellant, if he is returned to Northern Ireland, and convicted, is as a matter of high probability likely to be sentenced in circumstances where the law relating to imprisonment and release from prison offers him, at least in a subjective sense, a more harsh regime than that prevailing at the time of the alleged commission of the offence. The new regime makes two changes. It increases the length of time that a sentenced person must remain incarcerated before he or she can apply for early release, and it imposes an additional administrative or discretionary element in the grant of a licence to be released which now must be approved by the Parole Commission, a separate condition which did not exist heretofore.

45. The issue for determination concern whether, where an argument is raised that an executing state is precluded by virtue of Article 49 of the Charter and Article 7 of the Convention, and, where applicable, the provisions of its own national Constitution, from surrendering an individual to a requesting state itself a contracting party to the Convention, on the grounds that a legislative change, adopted after he is alleged to have committed an offence, is said to impose a heavier penalty contrary to Article 49 of the Charter and Article 7 of the Convention, and a Court has concluded that surrender is not otherwise a breach of the Convention rights of the individual, it is nevertheless obliged to make its own separate

assessment (of necessity involving a reference to the CJEU under Article 267 of the TFEU) of whether surrender is precluded by Article 49?

46. The Court of Justice has never determined the correct approach to the issues and the jurisprudence of the Court in Strasburg does not afford a clear answer.

47. It is therefore proposed that the question to be asked under Article 267 of the TFEU is as follows:

> *Where, pursuant to the Trade and Cooperation agreement of 30.12.2020 (incorporating the provisions of the Framework Decision of 13 June 2002 in respect of the surrender of persons pursuant to European arrest warrants) surrender is sought for the purposes of prosecution on terrorist offences and the individual seeks to resist such surrender on the basis that he contends that it would be a breach of Art. 7 of the ECHR and Art. 49(2) of the Charter of Fundamental Rights of the European Union on the basis that a legislative measure was introduced altering the portion of a sentence which would be required to be served in custody and the arrangements for release on parole and was adopted after the date of the alleged offence in respect of which his surrender is sought and, where the following considerations apply:*
>
> *(i) The requesting state (in this case the UK) is a party to the ECHR and gives effect to the Convention in its domestic law pursuant the Human Rights Act, 1998;*
>
> *(ii) The application of the measures in question to prisoners already serving a sentence imposed by a court, has been held by the courts of the United Kingdom (including the Supreme Court of the United Kingdom) to be compatible with the Convention;*

(iii) *It remains open to any person including the individual if surrendered, to make a complaint to the European Court of Human Rights;*

(iv) *There is no basis for considering that any decision of the European Court of Human Rights would not be implemented by the requesting state;*

(v) *Accordingly, the Court is satisfied that it has not been established that surrender involves a real risk of a violation of Art. 7 of the Convention or the Constitution ;*

(vi) *It is not suggested that surrender is precluded by Art. 19 of the Charter;*

(vii) *Article 49 of the Charter does not apply to the trial or sentencing process;*

(viii) *It has not been submitted that there is any reason to believe there is any appreciable difference in the application of Art. 7 of the Convention and Art. 49 of the Charter;*

Is a court against whose decision there is no right of appeal for the purposes of Article 267(3) TFEU, and having regard to Art. 52(3) of the Charter and the obligation of trust and confidence between member states and those obliged to operate surrender to the EAW provisions pursuant to the Trade and Cooperation Agreement, entitled to conclude that the requested person has failed to establish any real risk that his surrender would be a breach of Art. 49(2) of the Charter or is such a court obliged to conduct some further inquiry, and if so, what is the nature and scope of that inquiry?