THE SUPREME COURT

Supreme Court Record No: S:AP:IE:2022:000129

High Court Record No. 2021 330 EXT

[2024] IESC 9

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

AND IN THE MATTER OF MA

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

BETWEEN

THE MINISTER FOR JUSTICE & EQUALITY

Appellant

And

MA

Respondent

JUDGMENT of Ms. Justice Baker delivered on the 7th of March 2024.

1. This is the appeal of MA ("the appellant") from the order of Biggs J. made on 24 October 2022 ([2022] IEHC 633) by which she acceded to the request for his surrender to the United Kingdom pursuant to a warrant issued under the Trade and Cooperation Agreement 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").

2. 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. The retrospective application of those legislative changes was found by the Northern Ireland Court of Appeal in *R v. Morgan* [2021] NICA 67 to be incompatible with Article 7 of the European Convention of Human Rights ("the Convention"), but that decision was reversed on appeal to the Supreme Court of the United Kingdom (*Morgan and ors. v. Ministry of Justice (Northern Ireland)* [2023] UKSC 14; [2024] A.C. 130). The decisions in the *Morgan* cases concerned the application of the new provisions for early release in respect of persons who had been convicted and sentenced before the commencement of the 2021 legislation.

3. In the High Court, the appellant objected to surrender on two grounds. First, that he faced a real risk of subjection to covert surveillance of his legal consultations and phone calls were he to be detained in prison in Northern Ireland, in breach of Article 38.1 and 40.3.1° of the Constitution, Articles 6 and 8 of the Convention, and Article 49 of the Charter of Fundamental Rights of the European Union ("the Charter"). Leave to appeal was not granted in respect of this ground.

4. Leave to appeal was granted on 26 January 2023 ([2023] IESCDET 3) on the second ground of objection to surrender, that concerning Article 38.1 of the Constitution, Article 7 of the Convention, and Article 49 of the Charter.

5. In its Determination, the Court characterised the issue as:

> "Whether it would be a breach of Article 38 of the Constitution for MA to be returned to Northern Ireland to face charges arising from events in 2021 where the law governing the remission of his sentence has changed in a manner which was potentially averse to his interests." (para. 12)

6. This Court further observed the potentially close connection between the constitutional question and that arising under Article 7 of the Convention and, while noting the normal rule that any issue concerning the Convention should be addressed in the courts of the requesting State, gave leave to argue the question in relation to the Convention.

7. The core question in the appeal is if surrender of the appellant is permitted having regard to arguments raised concerning the compatibility of the retrospective application of the amended sentencing regime with Article 7 of the Convention and Article 49 of the Charter.

Background

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. In *R v. Morgan & Ors.* a challenge to the legislation 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.

11. 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. 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.

12. Following the decision of the Court of Appeal, one of the four applicants, [...] , brought a further application for leave to apply for judicial review and interim relief seeking relief which would give rise to his release from prison. This culminated in the decision of Scoffield J. in *Re* [...] [2022] NIQB 8, refusing relief.

13. 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.

14. 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)

The High Court Judgment

15. The UK Supreme Court had not delivered its judgment on the appeal in *Morgan* at the time the trial judge, Biggs J., delivered her judgment in the High Court.

16. Biggs J. rejected the argument that surrender could risk a breach of MA's rights under Article 7 of the Convention, and she distinguished the judgment of the Court of Appeal of Northern Ireland in *Morgan*, on the basis that it was relevant and probably determinative, that, unlike the appellants in *Morgan*, MA had not yet been convicted or sentenced.

17. She reached that conclusion in the light of s. 37(1)(a) of the European Arrest Warrant Act 2003 ("the Act of 2003") which obliges the requested state to assess whether the requesting state is likely to comply with its own obligations under the Convention. She relied on the judgment of this Court in *Minister for Justice v. Balmer* [2016] IESC 25 [2017] 3 I.R. 562. ("*Balmer*") and found that there was no real risk and "no concrete evidence" that the United Kingdom of Great Britain and Northern Ireland would not comply with its obligations under the Convention.

18. She distinguished the High Court decision in *Minister for Justice and Equality v. Nolan* [2012] IEHC 249 (upheld on appeal [2013] IESC 54), where surrender had been refused on the basis that it was the "particular and unusual circumstances of that case" which prohibited surrender as a consequence of a breach of s. 37(1)(a) of the Act of 2003 (para. 63(h)).

19. Biggs J. characterised the constitutional test as whether a direct consequence of surrender, had it occurred in Ireland, would be so egregious as to amount to a breach of Irish constitutional guarantees (para. 63(m)). She found that there was no "fundamental defect in the system of justice in the UK and Northern Ireland" to justify refusal of surrender (para. 63(n)).

20. The issues in this appeal principally concern Article 7 of the Convention, and the corresponding Article 49 of the Charter. In oral argument, the appellant conceded that no argument arose under the Constitution, in the light of the consistent application of the statement in *Minister for Justice and Equality v. Ivo Smits* [2021] IESC 27 that:

"[I]t is clear that the fact that the individual concerned may be subjected to a process that would not be permitted under the terms of the Constitution will not, in itself, be a ground for refusal of surrender. That much is established by *Minister for Justice v. Brennan* [2007] 3 I.R. 732 ('Brennan') and the judgments following it." (para. 42)

21. In the course of further oral argument, a question arose as to whether the surrender of the appellant under the warrant involved the application of EU law and might raise an issue of interpretation of the Charter.

Jurisdiction

22. It is useful to first explain the source of jurisdiction to order surrender in the light of the withdrawal of the United Kingdom from the EU. The EAW regime provided for by Council Framework Decision of 13 June 2002, was transposed into Irish law by the European Arrest Warrant Act 2003.

23. The TCA of 30 December 2020 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.

24. 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.

25. Part VII of Part 3 of the TCA was implemented in domestic law 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.

26. As a result of a reference under Article 267 TFEU made by this Court, and the subsequent decision of the Court of Justice, it is clear that the United Kingdom was lawfully designated as a third country for the purposes of the operation of the EAW regime, and that accordingly the request to extradite MA must be treated in accordance with the provisions of the Act of 2003: See *Saqlain v. Governor of Cloverhill* and *Shahzad v. Governor of Mountjoy Prison* ([2021] IESC 45, Case C-479/21 PPU). The decision of the CJEU was that Article 217 of the TEFU is a sufficient legal basis for the conclusion that Article 62.1(b) of the Withdrawal Agreement read in conjunction with Article 185 thereof and Article 632 of the Trade and Cooperation Agreement are binding on Ireland.

27. 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.

28. Accordingly for the purposes of the Act 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.

The Legislation: The European Arrest Warrant Act 2003 (as amended)

29. Certain statutory provisions now fall to be considered. The statutory obligation in s. 10 of the Act mandates that, when a relevant arrest warrant is issued in respect of a person, that person shall be surrendered to the issuing state. That mandatory provision must be seen as central to the scheme of the legislation, the purpose of which was to give effect to the Framework Decision which provided for warrant and surrender procedures between Member States. The principles of mutual trust and recognition of the legal systems of the contracting states, and judicial cooperation are central to that purpose. Recital 10 of the Framework Decision provides as follows:

> "The mechanism of the European Arrest Warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union …."

30. Section 10 of the 2003 Act (as amended) provides the obligation on the requested state to surrender when the statutory conditions are met:

> "10.—Where a judicial authority in an issuing state issues a relevant arrest warrant in respect of a person—
>
> (a) against whom that state intends to bring proceedings for an offence to which the relevant arrest warrant relates,
>
> (b) who is the subject of proceedings in that state for an offence in that state to which the relevant arrest warrant relates,

(c) who has been convicted of, but not yet sentenced in respect of, an offence in that state to which the relevant arrest warrant relates, or

(d) on whom a sentence of imprisonment or detention has been imposed in that state in respect of an offence to which the relevant arrest warrant relates, that person shall, subject to and in accordance with the provisions of this Act, be arrested and surrendered to the issuing state"

31. Section 37 provides a broad defence to surrender, and in its material parts provide as follows:

"37(1) A person shall not be surrendered under this Act if—

(a) his or her surrender would be incompatible with the State's obligations under—

(i) the Convention, or

(ii) the Protocols to the Convention,

(b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38 (1)(b) applies)."

Article 7 of the Convention: Arguments and Caselaw

32. 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.

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."

33. It is accepted that Article 7 embodies the principle of legality (*nullum crimen, nulla poena sine lege*) and is recognised as a central component of the rule of law referenced in the Preamble of the Convention. Article 7 expressly prohibits not only the retrospective creation of substantive criminal offences, but the retrospective imposition of higher penalties than those available at the time the offence was committed.

34. The appellant argues that retrospective application of the new legislative regime governing release on licence would breach his rights under Article 7 were he to be convicted and sentenced following surrender. The appellant argues that is apparent now, following the decision of the UK Supreme Court in *Morgan*, that the new regime limiting his entitlement to seek release on licence will apply to him should he be convicted and given a custodial sentence. He argues that the decision of the UK Supreme Court is an incorrect interpretation of the meaning and effect of Article 7, and of the jurisprudence of the ECtHR. The appellant does not suggest that every retrospective adverse change to the manner of execution of a sentence necessarily breaches the principle of legality, and the severity of the impugned measure is an important consideration found in the authorities. The appellant argues that the change in parole effected by the new rules is severe, was not foreseeable, and breaches his legitimate expectation.

35. The respondent argues that surrender will be refused only when it would lead to an egregious denial of fundamental human rights, and where it can be clearly demonstrated that the system of justice of the requesting state would undermine the rule of law and would expose an individual to a real risk to a denial of fundamental rights.

36. In that regard, the respondent further argues that the threshold is high, as is apparent *inter alia* from *AG v. Marques* [2016] IECA 374 where the Court of Appeal noted that the threshold was that there be a substantial or real risk of unfairness. That test will be met only in the most exceptional and rare circumstances.

37. Additionally, the respondent submits that the substantive content of fundamental rights is broadly similar in the United Kingdom and Northern Ireland because of the legal systems operating in those jurisdictions and their continued participation in the Convention and other international instruments: see case C-327/18 PPU – *RO*.

The Interpretation of Article 7 of the Convention

38. The question of whether a retrospective change in the law or in the administrative measures concerning the execution or implementation of a sentence could amount to a breach of Article 7 has been the subject of several decisions of the Court in Strasbourg. The ECtHR has developed a distinction between the imposition of a penalty or sentence and the measures implementing such a penalty or sentence.

39. In *Welch v. United Kingdom* (App. No. 17440/90), (1995) 20 E.H.R.R. 247, the ECtHR set out the criteria for determining whether a measure constituted a penalty at para. 28:

> "[T]he starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a 'criminal offence', [o]ther factors that may be taken into account as relevant in this connection are the nature and

purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity".

40. The 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.

41. In *Kafkaris v. Cyprus* (App. No. 21906/04), [2009] 49 E.H.R.R. 35, the Cypriot Penal Code provided that premeditated murder, of which the applicant had been convicted, carried a sentence of life imprisonment, interpreted as the remainder of the individual's life. However, the Prison Regulations stipulated that life prisoners were eligible for remission of up to a quarter of their sentence. The executive and administrative authorities operated in reliance on the Regulations that the penalty was in practice to be treated as 20 years' imprisonment, with all prisoners being eligible for remission of sentence for good behaviour. The Regulations were deemed unconstitutional, which deprived the applicant of the possibility of remission and his 20-year sentence became one of indeterminate length.

42. The ECtHR found a violation of Article 7, as Cypriot law, taken as a whole, was not formulated with sufficient precision to enable the applicant to reasonably discern (even with appropriate advice) the scope of the penalty of life imprisonment and the manner of its

execution, thus giving rise to an issue as to the "quality of law". But the ECtHR repeated its earlier formulation that the Regulations concerned the execution of the penalty, which was outside the scope of Article 7, and rejected the argument that a heavier penalty had been retroactively imposed on him. I will return to *Kafkaris* later in this judgment.

43. 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 that:

> '[T]he Court does not rule out the possibility that measures taken by the legislature, the administrative authorities or the courts after the final sentence has been imposed or while the sentence is being served may result in the redefinition or modification of the scope of the "penalty" imposed by the trial court. When that happens, the Court considers that the measures concerned should fall within the scope of the prohibition of the retroactive application of penalties enshrined in Article 7 § 1 *in fine* of the Convention. Otherwise, States would be free – by amending the law or reinterpreting the established regulations, for example – to adopt measures which retroactively redefined the scope of the penalty imposed, to the convicted person's detriment, when the latter could not have imagined such a development at the time when the offence was committed, or the sentence was imposed. In such conditions Article 7 § 1 would be deprived of any useful effect for convicted persons, the scope of whose sentences was changed *ex post facto* to their disadvantage. The Court points out that such changes must be distinguished from changes made to the manner of execution of the sentence, which do not fall within the scope of Article 7 § 1 *in fine*' (para. 89)

44. *Del Río Prada* involved sentences for a combined term of over 3000 years for terrorism-related offences. Subsequently, by legislation enacted in 2000, the sentences were combined to

a maximum 30-year term, and under the new law, that sentence was to be treated as one from which remission could be deducted. Some 6 years after the new law was introduced, the Spanish Supreme Court held that the newly imposed term which flowed from the legislative change was not a new sentence but rather a statement of the maximum time a prisoner would have to serve. That Court therefore held that remission fell to be deducted successively from each of the sentences which together added to 3000 years, not from the newly formulated 30-year term, which the Spanish Supreme Court did not regard as a "sentence". The practical effect from the point of view of the appellant was that she would have had 9 years remission from a 30-year term but no remission if the 30-year term were to be treated as time to be actually to be served, rather than in a true sense a "sentence".

45. The ECtHR found that the imposition of the new sentencing regime amounted to a breach of Article 7, as there had been a change in the substance or "scope" of the penalty, and not merely a change in an administrative regime for early release. That new approach to remission was regarded as being more than a measure relating to the execution of the penalty. Rather, it comprised a "redefinition" of the scope of the penalty because the maximum term of 30 years "ceased to be an independent sentence" to which remission applied and became one to which remission was not applicable. It also considered that while she was serving her sentence "the appellant had every reason to believe that the penalty imposed was the 30-year maximum term from which any remissions of sentence for work done in detention would be deducted."

46. The appellant argues that the Grand Chamber acknowledged in *Del Río Prada* that 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. He argues that the judgment of the UK Supreme Court in *Morgan* failed to have regard to what he asserts is the significant development of the Article 7 jurisprudence by the Grand Chamber in *Del Río Prada*. 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.

47. The respondent argues that it is of importance that the appellant has not yet been sentenced, unlike the litigants in the *Morgan* case. Any judge sentencing MA following conviction will be aware of the new remission regime. A decision made at sentencing stage would therefore be made in the context of the existing change. The ECtHR in *Del Río Prada* was dealing with measures imposed after a final sentence had been imposed and while the sentence is being served: see *Del Río Prada* at para. 89.

48. 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. There the applicant had been sentenced to 20 years imprisonment and, while released on licence, was recalled to prison on the basis that he had violated the terms of his licence. Legislation was introduced which altered his entitlement to an automatic and unconditional release after being recalled to prison at the three-quarter stage

of his sentence. Unless released earlier by the Parole Board, the applicant would be required to spend the entirety of his 20 year sentence in custody. The application was unanimously declared inadmissible, the Court noting (at para. 32) that characterising *Del Rio Prada* as amounting to a decision that early release provisions could lead to the modification of the scope of the sentence "oversimplifies the Court's analysis in that case." The Court observed at para. 36 that the judgment in *Del Rio Prada* did not depart from the proposition in *Uttley* that "where the nature and purpose of a measure relate exclusively to a change in the regime for early release, this does not form part of the 'penalty' within the meaning of Article 7". On this basis, the legislative changes to the system of early release were categorised as the manner of the execution of his sentence and consequently no issue arose under Article 7.

49. The judgment of the Court of Appeal of Northern Ireland and of the UK Supreme Court in *Morgan* illustrate the complexity of the arguments and form the basis of the challenge in the present appeal, and I will for that reason examine them in some detail.

The Judgments in *Morgan*

50. In *R v. Morgan,* the Court of Appeal in Northern Ireland was hearing appeals against sentences on the part of four convicted person who were initially sentenced by the trial judge in November 2020. The offenders were tried together and charged with a variety of terrorist offences, and after the trials had commenced each pleaded guilty. The precipitating factor in the appeal was the passage in 2021 of the Counter Terrorism and Sentencing Act and the introduction into the Criminal Justice (Northern Ireland) Order 2008 of the new arrangements for release on licence which came into effect in Northern Ireland on 30 April 2021.

51. The appellants argued that the application of the new licence regime amounted to a retrospective legislative increase in their custodial term, that the legal landscape had been decisively changed, and that they were now exposed to a new penalty replacing what had been

the sentencing decision of the trial judge. They argued that the imposition of this new statutory regime for release on licence breached their rights under Article 7. The substance of the sentence was said to have been altered, and the application of the new legislation could not be viewed as an administrative exercise, or the execution of a penalty previously imposed by the trial judge, but was rather a modification or redefinition of that penalty amounting to a retrospective application of penalties.

52. The Ministry of Justice of England and Wales argued in opposition that the sentence had not changed, nor had the term of the custodial sentence been increased, but rather what had changed was the release provisions which are part of the administration of the sentence. Each appellant remained subject to a custodial sentence of the full term imposed by the trial judge, and release, remission and licence are not relevant considerations in sentencing. It was argued therefore that the sentence remained unchanged, notwithstanding that the legislation had altered the condition relating to release on licence.

53. The Court of Appeal in Northern Ireland regarded the determination of the custodial period of a determinate fixed sentence by the trial judge to be an essential element in the sentencing process such that it is at this stage that the "penalty" for the purposes of Article 7 is imposed (para 94). The effects brought about by the introduction of the salient aspects of the 2021 Act were described as "considerable" in view of a number of factors: The offender loses his statutory entitlement to release on licence at the time set by the judge. Under the statutory scheme prior to 2021 the sentencing judge must ensure release at the halfway point in the sentence, and the offender is bound to suffer an irrecoverable loss of at least 16%, contrary to the stipulations of the judge as laid down at the date of sentencing. Having to obtain the approval of the parole authorities to be released on licence was a new hurdle, which an offender

could fail to pass, and amounted to a new sanction, replacing the prior automatic entitlement to release (para. 91).

54. It concluded:

> "It appears to the court that when it stands back and considers the effect of the changes brought about by the 2021 Act, it is evident that there has, as a result, been a serious erosion of the role and function of the trial judge… Moreover, in significant ways the terms of the 2008 Order in respect of the penalty imposed on the DCS prisoner have been changed. While self-evidently this has occurred in relation to the length of the period in custody before release on licence, it also arises by virtue of the fact that a parole commissioner has now a crucial role to play in determining whether actual release on licence can take place." (at para. 92)

55. The conclusion of the Court was that while the "span" of the overall sentence survives, "it does so at the cost of expunging key elements within the sentencing process which hitherto had been applied to these offenders." This had the effect that the sentencing arrangements had been "subverted", and in the language of *Del Rio Prada* had been redefined or modified in its scope.

56. It held that the imposition of the new legislative provisions on the four appellants would breach Article 7. The fact that there was judicial involvement in the determination of the period to be spent in custody, and that this was fixed at the date of sentencing by the trial judge was central to its reasoning and to the characterisation of the scope or nature of the penalty as understood in the jurisprudence of the ECtHR.

57. The UK Supreme Court disagreed. It regarded the task of fixing the time at which the convicted person was to be released on licence as related to the manner of execution. It was

accepted that in Northern Ireland there is judicial involvement in determining the date when prisoners are to be released on licence, an involvement not found in the law of England and Wales. That fact was not sufficient to change the activity to one in which a penalty is fixed and "focus should remain on the activity rather than on the identity of the actor." In the words of Lord Stephens:

> "The autonomous concept of a penalty does not change simply because there is judicial involvement under article 8 of the 2008 Order in determining the manner of execution or enforcement of a penalty." (para 109)

58. The Court of Appeal of Northern Ireland was considered to have fallen into error in placing reliance on the fact that there was judicial involvement in determining the custodial period, and the fact of judicial involvement itself is not sufficient to change the measure to one by which a penalty is fixed by domestic law or within the autonomous concept of a penalty in the Convention.

59. 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."

60. 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.

The Approach to a Request for Surrender under EAW

61. The operation of the system for surrender under the Act of 2003 has been the subject of a number of judgments of the Superior Courts and from these it is possible to discern the first principles.

62. The correct approach of the requested court to an argument regarding the correctness of the decision of the UK Supreme Court in *Morgan* is clear from the scheme of the Framework Decision, domestic legislation and the Convention itself. If a Convention remedy is available to the appellant in the requesting state, the correct forum for arguing any question concerning any apprehension of a breach of the Convention is in the requesting state. What requires to be established to resist surrender is whether the appellant's rights under the Convention will be respected were he to be surrendered.

63. This approach was the subject of discussion in two of the early cases of this Court, both delivered in 2007: *Minister for Justice, Equality and Law Reform v. Brennan* [2007] IESC 21, [2007] 3 I.R. 732 ("*Brennan*"), and *Minister for Justice, Equality and Law Reform v. Stapleton* [2007] IESC 30, [2008] 1 I.R. 669 ("*Stapleton*").

64. In *Brennan,* it was held that the surrender of a person to a foreign country is not precluded merely because the legal system of the requesting state affords a different system of criminal justice. There the respondent had absconded from the United Kingdom while he was serving a number of sentences, and the EAW sought his return to serve the balance of the sentences, but also to prosecute him for the offence of escaping from lawful custody, the latter

offence carrying a mandatory sentence which, it was argued, was capable of resulting in a sentence which was not proportionate in his individual circumstances.

65. Murray C.J. delivering the judgment, with which the other members of this Court agreed, noted, the "manner, procedure and mechanism" by which fundamental rights are protected in different countries will vary according to national laws and tradition, and that there had to be "egregious circumstances" if a refusal of an application for surrender is necessary to protect the individual personal rights of the requested person.

66. That theme was continued in *Stapleton* which considered the impact of a lapse of time on fair trial rights in the requesting state, also the United Kingdom. Surrender there was sought for the purpose of prosecuting fraud offences alleged to have occurred some 30 years previously, and the argument was that much of the evidence upon which the requested person might have relied in his defence was no longer available. The High Court declined to order surrender ([2006] IEHC 43, [2006] 3 I.R. 26) and Peart J. did so on the basis that the High Court was "in just as good a position to be satisfied as to whether the respondent would receive a trial on these offences within a reasonable time as a Court in the requesting State". His view essentially was that the ability to invoke Convention rights should not be postponed to the requesting state, and that a conclusion could be drawn from the evidence before the requested state. Peart J. observed that he did not believe "that it would be appropriate to expose him to the hazard that his rights might not be vindicated there [in England]" in the same manner in which they would in this jurisdiction. That decision was reversed on appeal, on the ground that the High Court had been mistaken to make an assessment in Ireland as to whether the prosecution should proceed in England on account of delay.

67. *Stapleton* establishes that an Irish court to which a request for surrender is made is obliged to interpret the objections to surrender for which provisions is made in s. 37 "so far as

possible, in the light of and so as not to be in conflict with provisions of the Framework Decision". Critically, Fennelly J. noted:

> "The corner stone of the entire system is, of course, the principle of mutual recognition of the judicial decisions and mutual trust of the legal systems of the other Member States." (p. 684)

68. That *dictum* reflects Recital 6 of the Framework Decision which characterises "the principle of mutual recognition" as "the cornerstone of judicial cooperation". See further the case of *Criminal proceedings against Pupino* (Case C-105/03) [2006] Q.B. 83; [2005] E.C.R. I-5285.

69. Fennelly J. noted that the principle of mutual confidence found in Recital 10 is broader than the principle of mutual recognition. Member States must "proceed on the assumption that the Courts of the issuing Member State, as is required by Article 6.1 of the Treaty on European Union, 'respect human rights and fundamental freedoms'". This is consistent with the obligation under Article 6.2 of the TEU, referenced in Article 1.3 of the Framework Decision, that each state should respect fundamental rights as guaranteed by the Convention "and as they result from the constitutional traditions common to the Member States as general principles of Community law".

70. *Stapleton* is of particular importance in the present case because there this Court concluded that the respondent would, following surrender to the UK, have available to him a procedure to seek the remedy of prohibition, and to argue that the delay was such as to make it unfair to require him to stand trial.

71. From these two judgments it is clear that, in order to refuse surrender on the grounds of an apprehended denial of fundamental human rights, a person must show that there are

"egregious circumstances such as a clearly established and fundamental defect in the system of justice of a requesting State where a refusal of an application for surrender may be necessary to protect such rights" *per* Murray C.J. in *Brennan* at p. 744, cited by Fennelly J. at p. 691 of *Stapleton*.

72. This is supported by legislation. Section 4A of the Act of 2003 creates a presumption that the issuing state will comply with the Framework Decision, and *ipso facto* with the Convention:

> "4A. It shall be presumed that an issuing state will comply with the requirements of the relevant agreement, unless the contrary is shown."

73. This evidential presumption noted by this Court, *per* MacMenamin J. in *Minister for Justice and Equality v. Vestartas* [2020] IESC 12 ("*Vastartas*") "speaks specifically to the task facing" the court of the requested state.

74. Accordingly, an argument by an individual that his or her rights might be infringed by surrender because of the approach to the adjudication of rights is never sufficient, unless it can be shown that the system of justice in the requesting state is such that that person has no procedural means of arguing for a defence of those fundamental rights, or that the substantive laws of the requesting state do not recognise, enforce or uphold those rights.

75. This has led to the general statement of principle in the authorities, most recently in the judgment of this Court in *Minister for Justice v. Campbell* [2022] IESC 21, [2022] I.L.R.M. 28, that to refuse surrender on foot of a valid EAW must be seen as wholly exceptional.

76. Surrender was refused in *Minister for Justice and Equality v. J.A.T. (No. 2)* [2016] IESC 17, also involving a request from the United Kingdom, where this Court concluded by a

majority that there did exist an evidential basis for the finding of a potential abuse of process, where what was proposed was the prosecution of the requested person for financial crimes allegedly committed in that jurisdiction. The factors regarded as central in that case were the unexplained lapse of time and the personal vulnerabilities and family circumstances of the requested person. O'Donnell J. (as he was then) who gave the lead judgment regarded the circumstances on a cumulative basis as "rare, and indeed exceptional" noting that the case concerned a repeat application for surrender following a considerable lapse of time and avoidable delay by the authorities in both jurisdictions, that there was a potentially significant impact on the son of the requested person, and the knowledge on the part of the requesting and executing state of these factors. Together, these were sufficient to justify a refusal.

77. The high bar of exceptionality is apparent from *Vestartas,* where the requested person had committed a large number of offences in Lithuania when he was aged between 14 and 15 years old. He had served part of his custodial sentence and was released on parole but his released was revoked two years later, around the time when he came to Ireland. The EAW was not issued for another seven years, although the evidence was that the Lithuanian authorities became aware of his whereabouts five years before the EAW was transmitted to this jurisdiction. The requested person had by then long achieved his majority and was part of a family unit in Ireland with two young daughters both of whom had been born in Ireland. This Court allowed the appeal of the Minister from the decision of the High Court, and ordered surrender of the requested person to Lithuania.

78. In *Balmer,* the issue raised by the respondent was *inter alia* that his return would contravene, and be incompatible with, the State's obligation under the Convention as the procedures operating in the United Kingdom did not provide for any hearing before a licence was revoked and a person recalled to custody. This Court distinguished its decision in *Minister*

for Justice v. Nolan aka Kelly [2013] IESC 54 because there the concession had been made by the requesting State, the United Kingdom, that the operation of a system for indeterminate detention for the protection of the public was incompatible with the Convention, as had been held by the European Court of Human Rights in *James, Wells and Lee v. United Kingdom* (App. nos. 25119/09, 5715/09 and 57877/09), [2013] 56 E.H.R.R. 12. It goes without saying that such a concession was not made in the present case.

79. Allied to this is the public interest inherent in the Framework Decision that contracting states be at liberty to, and facilitated in, the prosecution of crimes and punishment of convicted persons, a point made by MacMenamin J. at para. 96 of his judgment in *Vastartas*:

> "Were it to be the situation that, on surrender, the respondent would be entirely shut out from raising [his Convention rights and potential breach thereof] this might be a different case. Arguably such a preclusion would be a denial of fundamental rights."

80. In *Smits,* O'Malley J. noted that one of the underlying principles of the Framework Decision was to "ensure the free circulation of court decisions in criminal matters" and observed that the courts of this State are to act on a presumption that the judicial process in the United Kingdom will be "attended by the necessary guarantees of fundamental rights and legal principle" (para. 64).

Application to the Present Appeal

81. The core question for this Court is whether the requesting state would comply with its obligations under the Convention. To an extent the question is answered by this Court's judgment in *Brennan* and the later *Balmer.* The Convention applies and is enforceable with full effect in the jurisdiction of Northern Ireland and no evidence has been adduced to suggest that the courts in that jurisdiction, or the UK Supreme Court to which an appeal lies, will fail to

respect, enforce and support the appellant's fundamental rights under the Convention. Added to that is the presumption that the national courts of the United Kingdom will apply Convention principles and permit the enforcement by MA of those rights in their courts. No general systemic failure or anticipation of such failure has been shown.

82. Provided it can be said with a degree of certainty that there exists a system compliant with Convention principles, and under which a person is entitled to assert those rights, and provided also that the requesting state is amenable to a decision of the Strasbourg Court, then as was stated by O'Donnell J. in *Balmer,* surrender pursuant to an EAW or to a requesting State which is a member of the Council of Europe may in practice pose few problems. O'Donnell J. observed that what was to be assessed was whether the system included what he called the "supranational court" which itself has power to definitively rule on the compliance of a particular system within the Convention. As he said:

> "It is rare for a national court to have to consider for the first time, and without assistance, and to pass judgment on, the compatibility with the Convention of the legal or administrative system of another contracting state. Indeed, in those rare and, perhaps, egregious cases where the issue raised could justify a refusal to surrender, the residual jurisdiction of a court to refuse to surrender a person because of an anticipated breach of rights guaranteed under the Convention may be a salutary element in the enforcement of rights which the requesting State is obliged to uphold." (p. 577)

83. As the Court noted (at pp. 590-591), the making of an extradition treaty and the implementation of a Framework Decision has to be viewed through the lens of Article 29 of the Constitution, requiring friendly cooperation, and Articles 1 and 5 which require respect for the sovereignty of other countries. Thus, the principles of friendly cooperation and mutual trust and confidence are not unique to the EAW regime, but are key attributes of sovereignty, and

can be said to arise by reason of the sovereignty of the Irish State and the constitutional requirement to respect the judicial sovereignty of other foreign friendly states.

Alleged Systemic Failure

84. However, the Appellant argues that the decision of the UK Supreme Court in *Morgan* amounts to a systemic failure or can be interpreted as evidence that courts of the United Kingdom have taken an erroneous approach to the interpretation of the Convention, and will take that approach should he be returned. The question then is whether this Court is required to, or is competent to, form its own views as to the correctness of the argument made by MA ., that the new sentencing regime operating under statute in the United Kingdom which will apply to him, should he be convicted following a surrender, is compliant with the Article 7 of the Convention as interpreted by the Court in Strasbourg.

85. The starting point under the Framework Decision is the obligation and responsibility of the requested State to surrender, subject only to the provisions of s. 37 the Act of 2003. Section 37 in effect makes Convention compliance a key factor, not how domestic law might interpret the Convention or might, by reason of its interpretation of the Convention, assess the likelihood of non-compliance. McKechnie J. in *Minister for Justice and Equality v. Ostrowski* [2013] IESC 24, [2013] 4 I.R. 206 observed that it is not possible for an Irish court in the light of the correct interpretative approach to the Framework Decision to apply a proportionality test on the merits of the application. In that regard it seems to me that the argument of the appellant in reliance on *Morgan* is misplaced. Indeed, the fact that the UK Supreme Court in *Morgan* considered the meaning and import of rights under Article 7 of the Convention shows, in circumstances so akin to the present appeal as to be compelling, that that the appellant may raise, and have determined, questions concerning Convention rights within the jurisdiction of the United Kingdom and Northern Ireland.

86. I would reject the argument of this Court should rule on the correctness of the decision of the UK Supreme Court in *Morgan*. The Court in Strasbourg is the judicial body responsible for interpreting the Convention and whether the actions of a particular Contracting State are Convention compliant. To engage now in a critique of the decision in *Morgan* is not permissible under the domestic statutory scheme, or the principles underpinning the Framework Decision, those of mutual confidence, respect and recognition, would fail to respect the essence of the sovereignty of the United Kingdom, and would usurp the jurisdiction of the Strasbourg Court. This Court is not competent for those reasons to predict how the Strasbourg Court will interpret the change in regime in Northern Ireland, or whether, if any of the *Morgan* appellants were to make application to the Strasbourg Court, the decision of the UK Supreme Court would be upheld.

87. In practical terms it would seem clear that if the appellant is to be surrendered to Northern Ireland, any argument he might seek to make in that jurisdiction regarding his Convention rights must take account of the decision of the UK Supreme Court in *Morgan* which is materially similar. Indeed, having regard to the fact that the appellant has not yet been convicted of the crime in respect of which his surrender is sought, his argument under the Convention is less weighty than that made by the *Morgan* plaintiffs in the Northern Irish case, who had already been convicted and sentenced when the legislative change was implemented, but whose argument was rejected by the UK Supreme Court.

88. 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.

89. The UK Supreme Court disagreed because it 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. There will be no retrospective interference with a judicial decision through the application of the amended early release regime applicable to him as there appeared to be in *Morgan*.

90. It is highly likely as a result that any challenge under the Convention in Northern Ireland, or on appeal to the UK Supreme Court that might be brought by the appellant after surrender, would fail. 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. It might be that the ECtHR in those circumstances would not require him to exhaust domestic remedies as the outcome of his claim in the domestic courts is reasonably certain.

Conclusion on Convention Argument

91. In the light of the imperative from the Act of 2003 and the Framework Decision as interpreted by the judgments of this Court, 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 the opposite is the case, and 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. It is not for this Court to consider whether the UK Supreme Court was correct in its decision in *Morgan*, and 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. This Court has on numerous occasions recognised the strength of the rule of law and of Convention principles in the UK Courts, and 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. Of more significance is the fact that 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. This Court would arguably itself be in breach of the Convention, and most certainly be in breach of the Framework Decision, were it to embark upon a consideration of the correctness of the judgment of the UK Supreme Court in *Morgan*, and how that judgment might impact upon any argument that might be made by MA should he be surrendered to face trial.

92. It follows therefore that I would reject the argument that surrender should be refused under s. 37 on account of a perceived breach of Convention rights and the appeal must fail on that ground.

Foreseeability

93. The second limb of the Article 7 argument advanced by the appellant concerns the foreseeability of the change effected by the new laws.

94. As noted above, the ECtHR in *Kafkaris* found a breach of Article 7 where the newly adopted law of Cyprus lacked sufficient precision to enable the applicant to discern or anticipate, even with appropriate advice, the scope of the penalty and the manner of its execution. In *Coëme and Ors. v. Belgium* (App. Nos. 32492/96, 32547/96, 32548/96, 33209/96

and 33210/96), the ECtHR held that Article 7 extended to the protection of the legitimate expectations of a person who is "detrimentally affected", in particular by the frustration of their expectations. That case involved a change to the limitation period within which an offence could be prosecuted, and the Court held that the change did not come within Article 7 as it did not amount to an alteration to the penalty imposed.

95. The UK Supreme Court in *Morgan* held that the change was foreseeable for two reasons: changes had occurred previously in other contexts; and there was a strong public policy reason for the change. The appellant argues that this is incorrect and accepts that, while with the benefit of legal advice it might be possible to discern a developing trend with regard to the judicial approach to sentencing measures, that such could not apply to changing political views which may or may not lead to a change in legislative measures.

96. The argument here advanced fails for the same reason as that regarding retrospectivity and it is not necessary to repeat it. Further no absolute right to remission exists in Irish law, and remission is granted subject to a very wide executive discretion: *O'Shea v. Minister for Justice and Equality* [2015] IEHC 636, *per* McDermott J. Release on licence is no more than a privilege, one exercisable by the executive, and is not part of the judicial function: *DPP v. Finn* [2000] IESC 75, [2001] 2 I.R. 25.

Implication of Charter Rights.

97. 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. In perhaps unduly simple terms, 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 that reasoning 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?

98. Chapter VI of the Charter concerns justice and states in general that everyone whose rights and freedoms guaranteed by the laws of the Union are violated has a right to an effective remedy and a fair trial. Article 49 incorporates the principles of legality:

> "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 law or international at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable."

99. 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. If the ECtHR were to take a contrary view and conclude that the regime was not compatible with Article 7 it is to be assumed the decision would be respected in the requesting state and the regime altered accordingly. These considerations can also lead to the conclusion that the executing state may refuse to surrender when it is asserted that the regime is incompatible with Article 49 of the Charter, albeit that the Charter will not apply to any trial and/or sentence. Alternatively, a question arises as to whether the executing court is required to make its own assessment of the issue on the basis that the Charter might be interpreted differently. Such an

approach would of necessity seem to require a reference under Article 267 in every case in which a similar argument was advanced.

100. 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.

101. The CJEU has, however, considered the implications of Article 47 and 48(2) of the Charter for the purposes of Article 4a of the Framework Decision. The distinction between the imposition of a penalty or sentence and the implementation or execution of a penalty or sentence distinction has been endorsed an important element of the CJEU's jurisprudence on Article 4a of the Framework Decision. See for example: C-571/17 PPU - *Ardic* 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 C-270/10 PPU – *Tupikas* (paras. 78 – 80), and C-271/17 – *Zdziaszek* (paras. 85, 90 and 96).

102. 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 the revocation of the suspension of a custodial sentence. There, the Court determined that whilst revocation is "likely to affect the situation of the person concerned, the fact remains that that person cannot be unaware of the consequences that may result from an infringement of the conditions to which the benefit of such a suspension is subject" (para 83).

103. To approach the question of whether a reference under Article 267 of the TFEU is necessary, one must bear in mind a number of first principles.

104. Were MA 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.

105. 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.

106. 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.

107. 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.

108. In all of these cases the Court 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.

109. 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 rather 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*.

110. In a subsequent request for a preliminary hearing under Article 267 TFEU in respect of the interplay between the EAW regime and the Charter, Case C-128/18 - *Dumitru-Tudor Dorobantu*, the Grand Chamber highlighted the demanding standard and exceptionality of this test being satisfied. After making preliminary observations regarding the set of common values on which the Union is founded, the Court turned to consider the existence of mutual trust and mutual recognition between Member States implied and justified by these common values. It continued to note its significance for the provisions of the Framework Decision, with the principle of mutual recognition as the cornerstone of judicial cooperation such that the

execution of an EAW is the norm with any exception being construed strictly. It again stressed the exceptional circumstances where mutual recognition and mutual trust may be limited, such as where the judicial authority of the executing Member State has information showing there to be a real risk of inhuman or degrading treatment in the issuing Member State, and said that the requested judicial authority must assess the existence of that risk when called upon to execute an EAW (para. 51). The test must be applied in the light of information that is "objective, reliable, specific and properly updated" and which demonstrates a systemic or generalised risk of breach of rights. Mere evidence of deficiencies is not always efficient to establish the proposition that the requested individual will be subject to inhuman or degrading treatment in the event of surrender, see *Aranyosi and Căldăraru*, Case C-404/15 and Case-659/15. It must involve a specific and precise determination by the requested Court of a substantial and real risk.

111. In order to ascertain whether it would be a breach of EU law for this Court to surrender MA, the Court would have to be satisfied that surrender would be a breach of MA's Charter rights. No Charter right of MA 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.

112. In part the answer is to be found in Articles 53 and 52.3 of the Charter.

113. Article 53 provides as follows:

> "Nothing in this Charter shall be interpreted as restricting, or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union,

the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member State's Constitution."

114. For the purposes of determining the question now at hand Article 52 identifies the scope of the rights guaranteed thereby. Article 52.3 provides for coincidence of meaning and scope of Charter and Convention Rights:

"In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

115. Accordingly, two questions arise:

1. 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?

2. 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?

116. 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, of Peers & ors, *The EU Charter of Fundamental Rights: A Commentary* (2nd ed, Hart Publishing 2021).

117. 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 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. O'Donnell J. considered that there would have to be the "clearer guidance" from the CJEU to support such an argument (at para. 70).

118. A factor from Case C-128/18 - *Dumitru-Tudor Dorobantu* that I wish to highlight is that the Court of Justice came to its conclusion in the light of the provisions of the Charter, while noting the importance of the Convention in the interpretation of Charter principles (para. 71). That leads me to the conclusion that an assessment of the meaning and effect of Charter rights, and of whether the surrender of a person could amount to a failure of compliance with Article 49.1 of the Charter is a matter that requires assessment. Whilst the executing state is

itself competent to interpret the Charter, the question arises whether in the present circumstances the interpretation and application of the Charter warrants a reference to the Court of Justice.

119. In that instance the question resolves itself to the criteria that the executing judicial authority ought to apply in assessing 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.

Questions:

120. 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 this is not simply a contentious matter for the parties which is to be raised and ruled on in an adversarial manner. Rather to make a reference is an obligation in European law which a court of final appeal should always bear in mind as its 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.

121. The questions in respect of which a reference is to be 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 harsher 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.

122. The issues 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?

123. Therefore, I propose making a reference to the Court of Justice under Article 267 of the TFEU 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?