THE HIGH COURT

[2022] IEHC 633

[2021 No. 330 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

SEÁN WALSH

RESPONDENT

JUDGMENT of Ms. Justice Caroline Biggs delivered on the 24th day of October, 2022

1. By this application, the applicant seeks an order for the surrender of the respondent to the Kingdom of Great Britain and Northern Ireland pursuant to a Trade and Cooperation Agreement warrant dated the 26th of November 2021 ("the TCA warrant"). The TCA warrant was issued by George Connor, District Judge sitting at Laganside Court, Belfast, as the issuing judicial authority.

2. The TCA warrant seeks the surrender of the respondent in order to prosecute him in respect of alleged terrorist-type offences.

3. The TCA warrant was endorsed by the High Court on the 7th of December 2021 and the respondent was arrested and brought before the High Court on the 8th of December 2021, on foot of same.

4. I am satisfied that the person before the Court, the respondent, is the person in respect of whom the EAW was issued. No issue was raised in that regard.

5. I am satisfied that none of the matters referred to in ss. 21A, s 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), arise for consideration

in this application, and surrender of the respondent is not prohibited for any of the reasons set forth in any of those sections.

6. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. Each of the offences in respect of which surrender of the respondent is sought carries a maximum penalty in excess of twelve months' imprisonment.

7. At part E., the warrant sets out the circumstances of the alleged offences and the nature and legal classification of same. The TCA warrant states:

> *"1. That [Seán Walsh], between the 18th day of July 2020 and the 21st day of July 2020, belonged to a proscribed organisation, namely the Irish Republican Army, contrary to Section 11(1) of the Terrorism Act 2000.*
>
> *2. That he, between the 18th day of July 2020 and the 21st day of July 2020, directed the activities of an organisation which was concerned in the commission of acts of terrorism, contrary to section 56(1) of the Terrorism Act 2000.*
>
> *3. That he, on the 19th day of July 2020, conspired with others to direct the activities of an organisation, namely the Irish Republican Army, which was concerned in the commission of acts of terrorism, contrary to Article 9(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and section 56(1) of the Terrorism Act 2000.*
>
> *4. That he, on the 19th day of July 2020, with the intention of committing acts of terrorism or assisting another to commit such acts, engaged in conduct in preparation for giving effect to his intention, namely attended a meeting of the Executive of the Irish Republican Army at 17 Buninver Road, Gortin, contrary to section 5(1) of the Terrorism Act 2006."*

8. I am satisfied that correspondence can be established between the offences referred to in the TCA warrant and offences under the law of this State, *viz.*:

(i) The corresponding offence for Section 11 (1) of the Terrorism Act 2000 is Section 21 of the Offences Against the State Act 1939 as amended.

(ii) The corresponding offence for Section 56 (1) of the Terrorism Act 2000 is Section 71 (a) of the Criminal Justice Act 2006

(iii) The corresponding offence for Section 9 (1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and Section 56 (1) of the Terrorism Act 2000 is Section 71 of the Criminal Justice Act 2006

(iv) The corresponding offences for Section 5 (1) of the Terrorism Act 2006 are Section 71 of the Criminal Justice Act 2006 Section 21 a of the Offences Against the State 1939 or Section 6 (1) (a) (i) of the Criminal Justice Terrorist Offences Act 2005.

9. As surrender is sought to prosecute the respondent, no issue arises under Section 45 of the Act of 2003.

10. Part H of the warrant states:

"The offence(s) on the basis of which this warrant has been issued is (are) punishable by/has(have) led to a custodial life sentence or lifetime detention order:

Offence 2. That he, between the 18th day of July 2020 and the 21st day of July 2020, directed the activities of an organisation which was concerned in the commission of acts of terrorism, contrary to section 56(1) of the Terrorism Act 2000.

Offence 3. That he, on the 19th day of July 2020, conspired with others to direct the activities of an organisation, namely the Irish Republican Army, which was concerned in the commission of acts of terrorism, contrary to Article 9(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and section 56(1) of the Terrorism Act 2000.

Offence 4. That he, on the 19th day of July 2020, with the intention of committing

acts of terrorism or assisting another to commit such acts, engaged in conduct in preparation for giving effect to his intention, namely attended a meeting of the Executive of the Irish Republican Army at 17 Buninver Road, Gortin, contrary to section 5(1) of the Terrorism Act 2006.

[T]he issuing State will upon request by the executing State give an assurance that it will:

Where a life sentence (whether mandatory or discretionary) is imposed the sentencing judge determines what part of the sentence must be served in prison before the offender may be considered for release on licence: That period is referred to as the minimum term.

Every person sentenced on indictment has the right to ask for a review of that minimum term by the Court of Appeal.

The offender has to serve the appropriate minimum term that reflects the punitive element of the sentence. Once this punitive term of imprisonment has expired the offender enters into the risk element of the sentence. He may only be detained if he continues to present a risk to the public.

An independent panel of Parole Commissioners in Northern Ireland conducts a review of the prisoner's sentence once the punitive element of the sentence has expired. A judge chairs this panel. An oral hearing can take place to determine whether the prisoner's detention should continue. The Parole Commissioners for Northern Ireland must decide whether it is necessary for the protection of the public for the prisoner's detention to continue. At this hearing the prisoner has the right to be present, to be legally represented and to call and question witnesses.

The Parole Commissioners for Northern Ireland can direct the release of the

prisoner. If it decides that the prisoner should not be released then a further hearing will take place within 2 years to review the prisoner's detention and at regular intervals thereafter.

All life sentence prisoners are released under a Licence that remains in force for the rest of their lives. The life licence can be revoked at any time if necessary on public protection grounds.

In every case, including cases where a whole life term or a minimum term exceeding twenty years has been imposed, the prisoner may apply for compassionate release under section 7 of the Life Sentences (Northern Ireland) Order 2001 and/or for release under the powers of the Royal Prerogative of Mercy:

Review the penalty or measure imposed - on request or at least after 20 years, and/or

Encourage the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing State, aiming at a non-execution of such penalty or measure."

11. The respondent objected to surrender on the following grounds:

I. The respondent faces a real risk of being subjected to covert surveillance of his legal consultations and phone calls while detained at Roe House in Maghaberry Prison, giving rise to an egregious breach of Articles 38.1 and 40.3.1 of the Constitution, Articles 6 and 8 of the European Convention of Human Rights and his corresponding rights under the EU Charter of Fundamental Rights.

II. Under legislation now in force in the requesting state, persons convicted of terrorism offences are not permitted release under licence at the half-way point of their sentence, as is the case with all other offenders. This law applies

retrospectively, so that the respondent now faces a longer term of imprisonment than he was liable to serve at the time of his alleged offences. This legislation has been found by the Northern Ireland Court of Appeal to be incompatible with Article 7 ECHR, but it nevertheless remains in force. In the circumstances, the surrender of the respondent would give rise to egregious breaches of his rights under Article 38.1 of the Constitution, under Articles 7 ECHR and under Article 49 of the EU Charter.

Ground I

Affidavit of Sean Devine

12. The submissions relating to this ground were by and large based on the Affidavit of a Mr. Sean Devine Barrister who was asked by the solicitors for the respondent to comment on the surveillance of professional consultations, namely, Solicitor-Barrister consultations in Maghaberry Prison being subject to covert surveillance by the Prison Service, the PSNI and/or the British Security Services. For the purposes of setting out the respondent's case, this Court will set out the relevant extracts from this Affidavit.

13. Mr. Devine swore an affidavit dated 1st March 2022 wherein he averred to the following:

- He states that this issue is of particular resonance at the present time, flowing from two cases in which he has personal involvement.
- He states that the prison authorities have been providing information about legal consultations to the PSNI. This came to light in the course of an ongoing criminal case and an ongoing extradition case whereby:
  (i) [T]he prosecution sought to rely upon details about the defendant's confidential legal consultations in order to deny him bail (HMP Maghaberry); and

(ii) [T]hose representing the requesting state, again in the context of bail, were able to rely upon information provided by the prison authorities (Hydebank YOC), to successfully resist a bail application.

- He states that the prison authorities in the criminal case referred the above provided details to the PSNI in relation to when, with whom, and for what duration the legal consultations took place. The Public Prosecution Service ("PPS") have since indicated publicly during other legal proceedings that this practice has ceased, albeit that public confidence in the sanctity of such consultations was undermined. In the extradition case, details of private consultations with a family member were provided.
- He also states that it has come to light in recent times that the prison authorities were allowing the monitoring of legal consultations in the context of serious case. This issue was well publicised in the case of *R. v. Holland and Teer* 174 E.R. 313.
- Rather than reciting the issue at length herein, he attached the letter sent on behalf of one of the accused, Mr. Holland, to the PPS by his solicitors, Madden and Finucane Solicitors. The author of the letter, Mr. Shiels confirmed his consent to the letter being exhibited in this Affidavit. This letter confirmed that after his first complaint seemed to have been obstructed by the prison service, when he resubmitted his complaint, he received the following:

"Our client received an apology on 31st January 2022 from Governor Allison Walsh in this regard concerning the monitoring and listening to his Zoom visit on 12th January 2022:

a. *"As per your initial complaint, I can confirm that whilst staff have authority to supervise all visits virtually, they do not have permission to listen to conversations taking place. I have addressed this issue with staff and I am satisfied that this was a misunderstanding on the day in question, staff have been*

made aware of the correct process and I do not envisage any further issues of this kind. 31/01/22."

(Complaint number MY00296/22 refers.)"

- Covert monitoring of legal consultations is obviously of vert significant and fundamental concern and he referred to a number of cases in that regard.
- He continues by stating that the situation has been further compounded by the fact that since these events have unfolded, Mr. Teer has instructed that he has been intimidated by prison officials. There was considerable press attention about this issue which was front page on both Irish News and Belfast Telegraph, which led to Mr. Teer being pressurised within the prison in the following manner:

  On Friday, 11th February 2022 in the afternoon, Mr. Teer was at his cell when he received a red Valentines card from his wife. The envelope came already opened as if by a blade. Inside the envelope there was no card but there was a small brown envelope which was addressed to a Senior Officer in Harrowgate Army Barracks. When Mr. Teer raised this issue with the female officer who was delivering the mail, she told him:

  "The envelope is not for you."
- On Saturday 12th February 2022, a prison officer named Jake said to another prisoner in the security department within the jail:

  "I hear you were caught on listening to phone calls"

  To which the Security PO replied:

  "*Sure what's wrong with that? All the calls are listened to. What happens if your solicitor is telling you something illegal? There are a couple of guys in security who would do that there. Governor will not get caught out. He always covers himself."*

- Again, on Saturday 12th February 2022, when Mr. Teer was being moved from E3 to E2, the PO working on E2 said to Mr. Teer:

  "Paddy, I like you but just a bit of advice. Just pick your battles, that's all I'm saying"

  Mr. Teer replied:

  "Sure it's illegal what they are doing"

  The Prison Officer responded:

  "All I'm saying is pick your battles."

- Mr. Teer's impression was that the officer was acting out of genuine concern rather than trying to intimidate him.
- These issues are ongoing and it is submitted that this Court may consider that they are of some concern and infringe upon the accused's fundamental right to confidential legal consultations.
- The concerns in terms of the ability to consult confidentially with those held in custody, bearing in mind that many of Mr. Walsh's co-accused are in custody, is also of ongoing concern. This issue has only recently been unearthed, and may require a challenge by way of judicial review to obtain the necessary remedies and assurances that accused persons and their legal representatives can be confident that privileged consultations are not being surveilled.

Affidavit of the Respondent's Solicitor

14. The respondent's solicitor swore an affidavit dated 5th May 2022, wherein he averred to the following:

- In light of the revelations contained in the affidavit of Mr. Devine and the nature of the relevant prosecution in the North, and the issues arising therefrom, he says that the respondent has felt unable to meaningfully engage with his legal advisors whilst

remanded at Portlaoise Prison. Given the concerns expressed by the respondent and the events at Maghaberry Prison, the respondent's solicitor made representations to the Governor at Portlaoise Prison on the 12th of April 2022 seeking assurances that all privileged consultations were free from any form of surveillance. He initially received no reply.

- He says that on the 26th of April 2022, he received a telephone call from Mr. Cianin Shiels, Solicitor with Madden and Finucane in Derry City who act for Mr. Joseph Barr, the co-accused of the respondent, and who is presently before the Courts in the North and remanded in custody at Maghaberry Prison. He states that Mr. Shields' Solicitor confirmed that he had grave concerns with the integrity of his consultations with Mr. Barr and firmly believed that they were subject to surveillance. Mr. Shiels' Solicitor also shared correspondence with him that he had sent to the Public Prosecution Service in Belfast and stressed that this was not an isolated incident. He refers to the correspondence dated the 26th of April 2022 from Madden and Finucane Solicitors to the Public Prosecution Service which has been exhibited.
- Having received no response from the Governor of Portlaoise Prison, further correspondence was sent on 3rd May 2022, whereby a response was received on the same date merely referring us to Rule 38 of the Prison Rules and not addressing the substantive concerns raised therein. As a result of this, further correspondence was sent to the Governor of Portlaoise Prison dated 4th May 2022 seeking an undertaking that all of the respondent's consultations with his legal advisors would be free from any form of intrusive surveillance by the authorities in this state or any other entity.

- A response was received to the letter sent on 4th May 2022 on behalf of the Governor of Portlaoise Prison, by email as follows:

  "Good afternoon Ciara,

  In relation to the correspondence received below I am instructed to inform you on behalf of the governors that in line with all persons entering prisons there is no surveillance of any visitors or professional persons

  I hope this clarifies the matter for you"

- He states that this response does not address the concerns raised in any meaningful way and, its meaning is in any event, difficult to discern.
- He states that having practiced previously in Northern Ireland, he has some insight into the issues in Maghaberry Prison, particularly between prison staff and republican prisoners after the August 2010 agreement had been reached and mediated by the Irish Trade Union Movement. He says that he is aware of prisoner ombudsman reports that were critical of the prison regime at Maghaberry Prison, in particular, following a complaint by a prisoner serving a sentence at the Republican Roe House landing whereby he alleged that prison staff planted the Governor's personal details in their cell. He understands that this complaint was upheld and both a disciplinary and a PSNI investigation followed. He has sought further clarification about this matter and have made representations to the Northern Ireland Department of Justice and the Prisoner Ombudsman in Belfast by way of correspondence dated 4 May which is exhibited.

15. Respondent's Supplemental Submissions

The respondent filed supplemental submissions on the 20th June 2022. Therein he submitted:

- The applicant, in her submissions, points to a legal presumption that the rights of the respondent will be respected, and any rulings from the European Court of Human Rights (hereafter "ECtHR") will be respected.
- However, recent events in the United Kingdom give rise to the concern (notwithstanding its ostensible commitment to the European Convention on Human Rights) that there is a real risk that these EU legal commitments will *not* be respected.
- On the 15th June, the European Commission announced that it has brought infringement proceedings against the government of the United Kingdom in respect of disregard for sections of the Northern Ireland protocol to the TCA, which relate to economic matters.
- The web content of the European Commission which announced the infringement proceedings also quoted the Vice-President of the Commission as follows:
  "European Commission Vice-President, Maroš Šefčovič, said: 'Trust is built by adhering to international obligations. Acting unilaterally is not constructive. Violating international agreements is not acceptable. The UK is not respecting the Protocol. That is why we are launching these infringement proceedings today. The EU and the UK must work together to address the practical problems that the Protocol creates in Northern Ireland due to Brexit.'"
- It is submitted that the infringement proceedings are the latest development in a climate of hostility to EU oversight created by the Executive in the executing state. The Law Society in England has previously condemned the plans to erode the Human Rights protections in the United Kingdom. The president of the Law Society in England has said:
  "*With the Bill of Rights, the UK could begin to slide below the standards we agreed to in the European Convention on Human Rights, to which the UK still belongs. This*

would not only bring into question Britain's honour and trustworthiness as an international partner, it would also diminish people's ability to enforce their rights and remove UK courts' ability to keep pace with international standards".

- Information in the public domain establishes that the current UK government has indicated that it will attempt to restrict the effect of interim measures from the ECtHR in the future, as a response to recent Rule 39 rulings (i.e. a direction to implement interim measures) from the ECtHR.
- It is therefore submitted that, *inter alia,* the recent developments, as set out above, increase the need to seek appropriate assurances from the executing state in relation to respect for fundamental rights. Such assurances must then be weighed accordingly.

16. The respondent submits that given the sensitivity of this matter, and the alleged use of covert surveillance of the respondent by the issuing state, the respondent has sought assurances from the Governor of Portlaoise Prison, where he is detained, as to the integrity of his consultations with legal advisors there. He has yet to receive any or any satisfactory assurances.

17. In light of the contents of Mr. Devine's Affidavit, the respondent acknowledged and submitted that the proper course of action for the Court to take in the first instance, by analogy with the approach adopted in *L.M.* (Case C-216/18 PPU) and in *Aranyosi and Căldararu* (Cases C-404/15 and C-659/15 PPU) is to seek clarification from the authorities in the requesting state as to whether the confidentiality of client-attorney consultations is being respected and will be respected at Maghaberry Prison.

18. It is submitted by the respondent that there is, by reason of the foregoing, a real risk to the protection of the fundamental rights of the requested person such that assurances or guarantees ought to be sought.

19. In this regard, the respondent submits that it is of particular concern that the breach of

lawyer-client confidentiality and consequent interference with fair trial rights, has not resulted in disciplinary proceedings. In *Finucane v. McMahon*, the Supreme Court took into account the lack of disciplinary proceedings in respect of behaviour which had violated fundamental rights in the past, in assessing future risk. Finlay C.J. stated as follows; -

> *"It was submitted by the respondents that the very fact that so many of the prisoners have now successfully brought their claims before the courts in Northern Ireland indicated that there was no ground for the applicant's fear of invasion ofhis constitutional rights. I have no difficulty in accepting that if ill-treatment of any of the prisoners in the Maze Prison is brought to the notice of the courts in Northern Ireland it will be condemned and remedied. The very forthright and unequivocal language of the judgment of Hutton J. in the judgment which was before this Court in Pettigrew's case amply supports such a belief. This Court has, however, as its primary obligation, the duty to prevent such invasions of the applicant's rights and it is not a sufficient discharge of that duty for it to rely upon the vindication of those rights by compensation after they have been invaded.*
>
> *Having carefully considered the findings of fact made by the High Court and the uncontested evidence before it, I have come to the conclusion that there is a probable risk, if the applicant were returned to the Maze Prison in Northern Ireland, that he would be assaulted or injured by the illegal actions of the prison staff. In reaching this conclusion I have been particularly influenced by the fact that he has been, rightly or wrongly, identified as being involved in the attack on prison officer Ferris, which, it is reasonable to assume, members of the prison staff may well still associate with his death, notwithstanding the ruling in the criminal case.*
>
> *If they do, the total absence of any repercussions on the staff as a result of the ill-treatment of prisoners in the aftermath of the escape, and from that point of view the*

success of their conspiracy to cover up their conduct would appear to make the applicant, in my view, a probable target for ill-treatment".

20. It is submitted that the absence of any meaningful action on foot of the admitted breach of the fundamental rights, set out above, points towards the need, to seek relevant assurances and in default of satisfactory assurances, to refuse surrender on this ground alone.

21. The respondent submits that on the current evidence, his surrender, without adequate assurances, would be in breach of his fair trial rights pursuant to Article 6 of the ECHR.

The Applicant's submissions

22. The applicant does not dispute that such surveillance would not be proper and would constitute a breach of rights. However, she submits that the assertions of the respondent in relation to perceived surveillance fall far short of the type of cogent evidence that would be required before the Court would be required to engage in the first step of the two-step test set out by the CJEU in *LM v Minister for Justice* and in *Aranyosi and Căldăraru.*

Relevant Caselaw

23. The relevant principles applicable to the Court's consideration of the issue of prison conditions are well established and set out in *ML v. Generalstaatsanwaltschaft Bremen* (C-220/18) wherein the Court stated at para. 62; -

[62] Thus, in order to ensure observance of Article 4 of the Charter in the particular circumstances of a person who is the subject of a European arrest warrant, the executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated, is then bound to determine, specifically and precisely, whether, in the particular circumstances of the case, there are substantial grounds for believing that, following the surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment,

within the meaning of Article 4, because of the conditions for his detention envisaged in the issuing Member State (judgment of 5 April 2016, Aranyosi and Căldăraru, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 92 and 94).

[63] To that end, that authority must, pursuant to Article 15(2) of the Framework Decision, request of the judicial authority of the issuing Member State that there be provided as a matter of urgency all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State. That request may also relate to the existence, in the issuing Member State, of any national or international procedures and mechanisms for monitoring detention conditions, linked, for example, to visits to prisons, which make it possible to assess the current state of detention conditions in those prisons (judgment of 5 April 2016, Aranyosi and Căldăraru, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 95 and 96).

[64] The issuing judicial authority is obliged to provide that information to the executing judicial authority (judgment of 5 April 2016, Aranyosi and Căldăraru, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 97).''

Decision

24. Having reviewed the information in this case, this Court finds:

(i) It seems that there are two instances of surveillance referred to by Mr. Devine. He also submits that the Public Prosecution Service has publicly stated that such practices have ceased.

(ii) He refers to a case involving a Mr. Holland. Yet again, this accused was advised personally that the practice of recording consultations on the day in question, has ceased.

(iii) He refers to alleged incident of monitoring and intimidation of a co -accused,

namely, Mr. Teer.

(iv) There is also a reference to a Mr. Barr having a video call with a solicitor involving another Zoom link from Mageberry prison.

(v) The respondent referred to the report from the Ombudsman, but he did not open or provide the Court with a copy of same. In any case, it seems to be a report of some antiquity, going back to 2011.

(vi) The correspondence with the Midlands Prison has no relevance to this case as there is no evidence presented to this that would even suggest, much less confirm, that the respondent's phone calls or consultations with his legal team are subject to surveillance.

(vii) This Court does not accept that recent events in the United Kingdom give rise to a concern that there is a real risk that that EU legal commitments will *not* be respected, as they relate to this respondent. The *dicta* referred to below in *RO* (Case C-327/18 PPU) is of equal relevance to this issue.

25. I am not satisfied that the respondent has produced to this Court, information that is objective, reliable, specific or properly updated

26. I am not satisfied that the respondent has produced to this Court information that Shows systematic or generalized deficiencies in the prison system of the issuing state.

27. While this Court is entitled to consider information from all manner of sources, it must be noted that the respondent has not relied upon judgments from the ECHR, or other courts, or reports from bodies acting under the aegis of the Council of Europe or the United Nations on this issue.

28. This Court has considered the case of *Finucane v. Mahon* [1989] WJSC-HC 1493 whilst it acknowledges the principles as set by the respondent, it has to be said that the facts are a far cry from the facts in this case. The applicant in Finucane was convicted in Belfast

Crown Court of terrorist offences in 1981. In 1983, he escaped from the Maze Prison and his delivery was sought in relation to a number of offences alleged to have been committed during the course of that escape and to serve the remainder of the sentence previously imposed. The applicant objected to his surrender on the basis that he would be subject to inhuman and degrading treatment, and assaults, should he be surrendered. The Court agreed, but on the basis of the following facts:

> *"(1) The Applicant had on the 14th day of June 1982 been sentenced to 18 years imprisonment and on the 25th day of September 1983 was a convicted prisoner serving that sentence in H-Block 7 of the Maze Prison which Block contained over 120 republican prisoners.*
>
> *(2) On that date 38 prisoners escaped from H-Block 7 into the prison grounds after having held up and bound the prison officers in that block and a substantial number of these prisoners, including the Applicant, escaped from the prison itself.*
>
> *(3) The report of an inquiry by H.M. Chief Inspector of Prisons into the security arrangements at H.M. Prison, Maze, relevant to this escape (the Hennessy Report) referred to in the Applicant's affidavit described this escape as "the most serious escape in the recent history of the United Kingdom Prison Service" and noted that during the escape one prison officer died (the direct cause subsequently having been found by the Lord Chief Justice to have been heart failure), four other prison officers were stabbed, two were shot, thirteen were kicked about and beaten and forty-two were subsequently off work with nervous disorders.*
>
> *(4) After the Prison Authorities had resumed control of H-Block 7 the remaining prisoners were locked in their cells.*
>
> *(5) Guns had been used in the escape from H-Block 7 and the prison officer in that block had been seriously wounded in the head by a gunshot in the escape.*

(6) Prison Officers therefore decided to transfer all the remaining prisoners in H-Block 7, a total of 88, to H-Block 8, which was nearby and was unoccupied, in order to ensure that those prisoners were housed in a block where there was no risk that other weapons were hidden to enable a thorough search to be made of H-Block 7 for hidden weapons, and also to enable the police scene of crime officers to carry out a thorough investigation in that block. It was alleged that the said prisoners while being transferred from H-Block 7 to H-Block 8, were subjected to assaults by prison officers and that some were bitten by dogs under the control of their handlers, being prison officers.

(7) On Monday, the 26th day of September 1983 the Governor of the Maze had a meeting with representatives of the Prison Officers Association (H.M. Prison Maze Cellular) and was informed by them that as a mark of respect to Officer Ferris certain services were being withdrawn by them until after the funeral of Prison Officer Ferris.

(8) On the following morning at a meeting with Senior Staff, the Governor learned that the Prison Officers were not allowing prisoners requests to visit the Medical Officer.

(9) He then met members of the Prison Officers Association, expressed his concern at their action in refusing prisoners request for medical treatment and requested them to review their decision in this regard, but they refused.

(10) The Governor then informed Miss Simmons of the Northern Ireland Office and it appears from the evidence of Mr. Jackson that it was decided that the best way of dealing with the problem was to attempt to have normal working conditions in the prison restored.

(11) These conditions were restored on the day after Prison Officer Ferris" funeral

viz. on Friday, the 30th day of September 1983.

(12) Thereafter requests for medical treatment and legal advice were dealt with, though there was some delay.

(13) Soon after the escape, Mr. Jackson of the Northern Ireland Office became aware of allegations made by and on behalf of prisoners about alleged mistreatment in the course of the transfers to H-Block 8 of prisoners who had remained behind in H-Block 7 and also in respect of the treatment of prisoners who had escaped and were re-captured."

29. The facts of the Holland case are simply not comparable to this case.

30. This ground of objection is, therefore, dismissed.

Ground II

31. The respondent submits that under legislation in force in the requesting state, the respondent would face a longer term of imprisonment than he would have been liable to serve at the time of his alleged offences. The legislation in question has been declared by the Northern Ireland Court of Appeal to be incompatible with Article 7 ECHR, but it nevertheless remains in force. In the circumstances, it is submitted that the surrender of the respondent would give rise to an egregious breach of his rights under Articles 38.1 and 15.5.1 of the Constitution, under Article 7 ECHR and under Articles 47 and 49 of the EU Charter of Fundamental Rights.

The relevant Northern Ireland legislation is as follows:

(i) The legislation in force at the time of the alleged commission of the offences was Section 8 of the Criminal Justice Northern Ireland Order 2008 which stated:

"[8] (1) This Article applies where a court passes – A sentence of imprisonment for a determinate term, other than an extended custodial sentence, or

(a) A sentence of detention in a young offenders centre in respect of an offence

committed after the commencement of this Article.

(2) The court shall specify a period (in this Article referred to as "the custodial period") at the end of which the offender is to be released on licence under Article 17.

(3) The custodial period shall not exceed one half of the term of the sentence."

(ii) The legislation now governing any potential sentence that the respondent may receive is Article 20 A (3) of the Counter-Terrorism and Sentencing Act 2021 which states:

"(3) The Department of Justice shall release the terrorist prisoner on licence under this Article as soon as—

(a) the prisoner has served the relevant part of the sentence; and

(b) the Parole Commissioners have directed the release of the prisoner under this Article."

Article 20 A (9) states; -

"For the purposes of this Article –

"appropriate custodial term", in relation to a serious terrorism sentence, an extended custodial sentence or an Article 15A terrorism sentence, means the term determined as such by the court under Article 13A, 14 or 15A; "commencement date" means the date on which section 30 of the Counter-Terrorism and Sentencing Act 2021 comes into force; "relevant part of the sentence" means—

(a) in relation to an extended custodial sentence or an Article 15A terrorism sentence, two-thirds of the appropriate custodial term;

(b) in relation to any other sentence, two-thirds of the term of the sentence."

The Affidavit of Sean Devine

32. The substance of the respondent's objection on this ground is set out in an Affidavit

of Mr. Sean Devine, Barrister at the Bar of Northern Ireland, who swore an affidavit dated 1st March 2022. This Court finds the optimal method of establishing the respondent's case, is to set out the relevant averments in said Affidavit.

33. Mr. Devine refers to the judgement of the Northern Ireland Court of Appeal delivered on 22nd December 2021 in *R v. Morgan, Marks, Lynch and Heaney* [2021] NICA 67. In Morgan, the Northern Ireland Court of Criminal Appeal heard appeals against sentence on the part of four defendants initially sentenced at a hearing before the trial judge, Colton J., on 13th November 2020. The Court of Appeal delivered judgment on 22nd December 2021. Maguire L.J. identified the issue at play in the appeal at para. 6; -

> *"The precipitating factor in relation to the appeals which have now come forward has been the passage through Parliament in 2021 of the Counter Terrorism and Sentencing Act. This received Royal Assent on 29 April 2021. By virtue of section 50, section 30 entered into force the day after the Act was passed. Section 30 introduced Article 20A into the Criminal Justice (Northern Ireland) Order 2008 from 30 April 2021. It is this step which is at the core of events and will be discussed later on in this judgment."*

It is noteworthy that the appellant's sentence was imposed on 13th November 2020. The upshot of this change, is that the defendants, rather than being released at the "halfway" mark of their sentence; -

(i) will only be eligible for release at the two thirds point of their sentence; and

(ii) that release must be approved by the Parole Commissioners.

34. It is submitted that this Court may wish to consider the legislative background set out at paras. 13-27 by Maguire L.J. At paragraph 30, the learned Judge correctly identifies; -

> *"…the central issue before the court in these proceedings is that of the alleged repugnancy of the new regime with Article 7 of the ECHR."*

Article 7 provides; -

> *"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."* [Court's emphasis]

The Court then sets out the arguments of the various parties before considering the arguments around Articles 7, 6 and 5 ECHR respectively. In short compass, the Court goes on to find that there has been a breach of article 7 ECHR; -

> *"[94] In these circumstances, the court is driven to the conclusion that the sentencing arrangements which have governed the sentencing process in respect of these men has been subverted. In the court's opinion, in the above referred respects, and acknowledging that the law in Northern Ireland is not the same as that applying in England, these cases engage Article 7 and breach it as being contrary to the principle of non-retrospective application of a "penalty." To use the language of Del Rio Prada – see paragraph [89] – the penalty imposed by the trial judge has been the subject of redefinition or modification of its scope as imposed originally by the trial court.*

However, the Court considers the scope for a "remedy" at para. 118 *et seq*. The Court found that it is required to interpret legislation so as to uphold Convention rights, unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so. The Court stated at para. 124; -

> *"[124] In the present case, it seems to us that there is little or no room for the court, by means of interpretation to read the 2021 Act in the way the applicants' would wish. The reality, rather, is that the offending provisions cannot be read in a manner*

opposite to the direction which the whole of the legislation was intended to go. We reject the proposition advanced on behalf of the applicants that "the court can do whatever is necessary by way of remedy." This fails to take into account the need to respect the relevant boundary lines. The present situation, rather, points to the need for the court to look, in the context of remedy, to section 4 of the Human Rights Act."

35. A declaration of incompatibility does not affect the validity, continued operation or enforcement of the provision in respect of which it is made. It follows that the relevant legislative provision will continue to have force and effect, notwithstanding its incompatibility with Convention rights, until such time as it may be amended. A well-known dictum recognising this comes from Lord Hutton in the case of *R (Anderson) v. Secretary of State for the Home Department* [2003] AC 837 at paragraph 63. Lord Hutton further stated at para. 128; -

"[I]t remains supreme and that if a statute cannot be read so as to be compatible with the Convention, a court has no power to override or set aside the statute. All that a court may do, pursuant to section 4 of the 1998 Act, is to declare that the statute is incompatible with the Convention. Therefore, if a court declares that an Act is incompatible with the Convention, there is no question of the court being in conflict with Parliament or of seeking or purporting to override the will of Parliament. The court is doing what Parliament has instructed it to do in s4 of the 1998 Act."

In respect of the 'remedy overall' the Court found at para. 131; -

"(i) The offending provision in this case cannot be read in a manner which obviates its inconsistency with the Convention and nor can it be given an interpretation which avoids it.

(ii) This is a case where the object, purpose and meaning of the statute points in a clear direction which, in fact, is a direction directly opposite to the direction in which the applicants' wish to go.

(iii) In these circumstances the court must decide whether this is a case for a declaration of incompatibility, which requires the exercise of discretion by the court.

(iv) The court sees no reason to refuse such a declaration and will make one in this case.

(v) This will, however, not affect the validity, continued operation or enforcement of the law. In other words, the offending statute is not overridden or set aside and remains operative.

(vi) Whether or not these circumstances lead to the amendment of the law is not a matter for this court but it is for others to decide."

36. The Court ultimately made the following orders at para. 147; -

"The court will make the following orders:

1. Grant an extension of time in each of the four cases;

2. Grant a declaration of incompatibility to the effect that the 2021 Act is in breach of Article 7 of the ECHR, in the ways described in the text of the judgment; and

3. Dismiss the proceedings before the court."

In conclusion then, the defendants were not successful in effecting any real change to what the present Court may consider was an unlawful state of affairs which, in a very arbitrary way, impacted upon the appellant's liberty.

37. The Court accepted at para. 144; -

"While we consider that the most obvious option would have been to mount a judicial review, we accept that the option chosen – of seeking to proceed to this court – was a step which was open to the applicants, though the option was not without difficulty,

principally related to the issue of obtaining a remedy, even if the appeal was otherwise successful."

38. Mr. Walsh's alleged behaviour would seem to pre-date the introduction of these retrospective measures but, if convicted, they would be applicable to any sentence imposed upon him.

39. The Court may also consider that the UK legislature has, by the introduction of these measures, demonstrated a willingness (according to the Court of Criminal Appeal of Northern Ireland) to take steps which contravene the human rights of those in Mr. Walsh's position. This issue will be the subject of consideration of the UK Supreme Court and, potentially, the European Court of Human Rights in due course.

40. One of the appellants, Mr. Kevin Heaney, had already brought judicial review proceedings by the time of the Court of Appeal proceedings, which had been stayed pending the Court of Appeal outcome. They returned to the judicial review proceedings, no doubt prompted by the Court of Appeal's indication/comments. This culminated in the decision Mr. Justice Scoffield on 7 February 2022: Re: Heaney [2022] NIQB 8.

41. Mr. Justice Scoffield's "introduction" to the case is helpful in summarising the aim of the proceedings:

"The applicant now seeks to breathe fresh life into the judicial review proceedings and, through them, to secure further relief by forcing one of a number of public authorities to take some step or action in order to ameliorate his position. His Order 53 statement has been amended to claim relief, and name new respondents, which were not encompassed within the original claim."

42. The operative aspect of Mr. Justice Scoffield's judgment on this issue is perhaps to be found at para. 19; -

"[19] It is disappointing, to say the least, that the case which is now mounted on behalf of the applicant was not fully and fairly put before the Court of Appeal when it was considering the issue of remedy in the applicant's partially successful appeal against sentence. It is clear that the Court of Appeal proceeded on the basis that the proper 'target' of the appellants' Convention challenge was the 2021 Act and that this was not focused on the provisions of the 2008 Order as being those which had legal effect in this jurisdiction and which were the operative provisions governing the appellant's sentence. If the argument was to be advanced that Aarticle 20A of the 2008 Order is subordinate legislation and that the Court of Appeal could and should have gone further in terms of the relief it would grant, having heard full argument on the Article 7 grounds, that should have been raised in the course of the appeal.

[20] I consider it to be arguable that, if the focus had been on the 2008 Order, the Court of Appeal may have been (as this court would be) empowered to grant more intrusive relief than a declaration of incompatibility under section 4 of the HRA. The Court of Appeal's powers under the Criminal Appeal (Northern Ireland) Act 1980 are limited to an extent; but that Act contains provisions - such as sections 43(1) and 26(2) - designed to ensure that the court can do justice in the case before it.

[…]

[26] I would ordinarily, therefore, have granted leave on the merits in relation to a challenge to the legislation. However, I cannot ignore the fact that the Court of Appeal has recently - in proceedings which are still ongoing to the extent that the MoJ is seeking leave to appeal to the Supreme Court - clearly determined that a declaration of incompatibility under section 4 of the HRA in respect of the 2021 Act was the (only) appropriate remedy to grant in relation to the legislation in this applicant's case and that, as a result, the legislation would continue to have effect. In

light of that, I consider that the appropriate course is to refuse leave to apply for judicial review."

The Respondent's Submissions

43. In essence, the respondent submits that under legislation now in force in the requesting State, persons convicted of terrorism offences are not permitted release under licence at the "half-way" point of their sentence, as is the case with all other offenders. This law applies retrospectively, so that the respondent now faces a longer term of imprisonment than he was liable to serve at the time of his alleged offences. The respondent refers to, and relies upon, the concept of *Nulla poene sine lege* in Irish and EU Law. As noted, this legislation has been found by the Northern Ireland Court of Appeal to be incompatible with Article 7 ECHR, but it nevertheless remains in force. As the respondent submits surrender of the respondent would give rise to egregious breaches of his rights under Article 38.1 of the Constitution, under Articles 7 ECHR and under Article 49 of the EU Charter, this Court has determined to review the relevant caselaw and legislation in relation to both a Section 37 (1) (a) and 37 (1) (b) challenge.

44. Section 37 (1) (b) of the Act of 2003 states; -

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

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 relevant arrest warrant is an offence to which section 38 (1) (b) applies)."

Caselaw relevant to Section 37 (1) (b) of the Act of 2003

45. In considering whether surrender is prohibited on the basis that same would be in breach of any provision of the constitution, it would seem appropriate to start off with the leading case of *Minister for Justice v. Brennan* [2007] IESC 21 wherein Murray C.J. concluded; -

"There is no doubt that the operation of the process for surrender as envisaged by the Act of 2003, as amended, is subject to scrutiny as to whether in any particular case it conforms with constitutional norms and in particular due process so that, for example, the respondent in such an application has an opportunity to be duly heard in the proceedings.

However, the argument of the appellant goes much further. He has contended that the sentencing provisions of the issuing State, in this case the United Kingdom, did not conform to the principles of Irish law, as constitutionally guaranteed, governing the sentencing of persons to imprisonment on conviction before our Courts for a criminal offence.

The effect of such an argument is that an order for surrender under the Act of 2003, and indeed any order for extradition, ought to be refused if the manner in which a trial in the requesting State including the manner in which a penal sanction is imposed, does not conform to the exigencies of our Constitution as if such a trial or sentence were to take place in this country. That can hardly have been the intention of the Oireachtas when it adopted s. 37(1) of the Act of 1973 since it would inevitably have the effect of ensuring that most requests for surrender or extradition would have to be refused. And indeed if that were the intent of the Framework Decision, which the Act of 1973 implements, and other countries applied such a test from their own perspective, few, if any, would extradite to this country.

Indeed, it may be said that generally extradition has always been subject to a proviso that an order for extradition, as with any order, should not be made if it would constitute a contravention of a provision of the Constitution. I am not aware of any authority for the principle that the extradition or surrender of a person to a foreign

country would contravene the Constitution simply because their legal system and system of trial differed from ours as envisaged by the Constitution.

The manner, procedure and mechanisms according to which fundamental rights are protected in different countries will vary according to national laws and constitutional traditions. The checks and balances in national systems may vary even though they may have the same objective such as ensuring a fair trial. There may be few, if any, legal systems which wholly comply with the precise exigencies of our Constitution with regard to these matters. Not all for example will provide a right to trial by jury in exactly the same circumstances as our Constitution does in respect of a trial for a non-minor offence. Rules of evidence may differ. The fact that a person would be tried before a judge and jury in this country for a particular offence could not in my view, be a basis for refusing to make an order for surrender solely on the grounds that in the requesting State he or she would not be tried before a jury. The exceptions which we have to the jury requirement, as in trials before the Special Criminal Court, acknowledges that a fair trial can take place without a jury even though it is constitutionally guaranteed for most trials in this country.

That is not by any means to say that a Court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may well be 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 . It would not be appropriate in this case to examine further possible or hypothetical situations where this might arise. The sole matter which I wish to make clear here is that the mere fact that a trial or sentence may take place in a requesting State according to procedures or principles

which differ from those which apply, even if constitutionally guaranteed, in relation to a criminal trial in this country does not of itself mean that an application for surrender should be refused pursuant to s. 37(2) of the Act.

I would dismiss the appeal."

The above principles are repeated and reiterated in *Minister for Justice and Equality v. Hall* [2009] IESC 40, in *Minister for Justice and Equality v. Purse* [2020] IEHC 515, in *AG v. Marques* [2016] IECA 374, and in *Minister for Justice and Equality v. Balmer* [2016] IESC 25.

46. Section 37 (1) a of the Act of 2003 states; -

"(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."

47. The respondent submits that his Article 7 rights will be breached in the event that he is surrendered. Article 7 of the European Convention on Human Rights states:

"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."

Principles relevant to Section 37 (1) (a)

When considering a potential breach of the ECHR the following is helpful guidance for this Court. In *Minister for Justice and Equality v. Balmer* [2016] IESC 25 O'Donnell J. stated at para. 23; -

> *"[23] Ireland is by no means the only country which has grappled with this issue. In principle, a similar type of problem may arise if it is alleged that surrender would result in treatment or procedures that would constitute a breach of the ECHR. However, surrender, at least within the EU pursuant to an EAW, or indeed to countries which are Member States of the Council of Europe, may pose fewer problems for courts in practice. The rights guaranteed by the Convention apply in the requesting state. Those states are obliged to enforce the rights under the ECHR, and prima facie are best placed to do so - see Minister for Justice, Equality and Law Reform v. Stapleton [2008] (2) 1 I.R. 669. Furthermore, there is a system of scrutiny, review and reporting on the protection of rights under the Convention, and ultimately a supranational court which can definitively rule on the compliance of a particular system with the Convention. (3)Moreover, since the Convention applies in many different legal systems, its guarantees are expressed at a level of generality, and a margin of appreciation applies which allows for differences between contracting states. It is rare for a national court to have to consider for the first time, and without assistance, and to pass judgment upon 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."*

O'Donnell J. continued at para. 66; -

"[66] ... When an issue under s.37(1)(a) arises in respect of surrender to another contracting state, there is no question of Article 29 requiring a degree of tolerance, or some relative test as approved by this Court in Brennan and Buckley. Unlike the Irish Constitution, the ECHR applies with full force in the requesting state. The only question, therefore, for the requested court, is whether the requesting state will comply with its own obligations under the Convention. The potential for international friction is further reduced by the existence of institutions which are entitled to report, and in the case of European Court of Human Rights, to determine, whether or not a regime is compatible with the dictates of the Convention. Furthermore, the Irish court is entitled to apply a presumption that the national court of the requesting state is best placed to make a determination as to compatibility, at least in the first place. Such a state has, after all, the obligation of conducting the trial and administering the sentence. It may be rare, therefore, for a national court to have to address the question equivalent to a determination under s.37(1)(a) of the EAW Act without the benefit of reports and decisions from the institutions of the Council of Europe or in circumstances where it is not entitled to rely, at least in the first place, on the existence of national courts bound to uphold the provisions of the Convention. However, where such an issue does arise, the question for the national court would be whether the particular provision in issue is a breach of rights guaranteed in the Convention. That is an entirely distinct test from the test posed under s.37(1)(b) of the EAW Act, which is whether what is proposed is both such a direct consequence of surrender, and would, if it occurred in Ireland, be so egregious in breaching the guarantees of the Irish Constitution that the Court cannot, consistently with its constitutional obligations, order surrender. This test was not applied by Hogan J. Instead, the false analogy with s.37(1)(a) of the EAW Act led the learned judge to

simply address the question of whether the regime for life sentences in the UK would, if enacted in Ireland, be contrary to the Irish Constitution." [Emphasis added].

It may be that the respondent's supplemental submissions have relevance to this ground of objection.

48. In this regard, this Court is mindful of the judgment of the CJEU in *RO* (Case C-327/18 PPU) wherein the Court examined a reference from the Irish High Court regarding the effect on surrender, if any, of the UK's notification under Article 50 TEU of its intention to withdraw from the Union. The CJEU ultimately found that the giving of the notification did not justify the refusal or postponement of the execution of a European Arrest Warrant issued by the UK authorities. Although matters have moved on since this judgment was given on 19th September 2018 in that the UK has now withdrawn from the European Union, what has not changed is the UK's participation in the ECHR. Accordingly, the following guidance of the CJEU in *RO* continues to apply; -

"[52] In that regard, it must be observed that, in this case, the issuing Member State, namely the United Kingdom, is party to the ECHR and, as stated by that Member State at the hearing before the Court, it has incorporated the provisions of Article 3 of the ECHR into its national law. Since its continuing participation in that convention is in no way linked to its being a member of the European Union, the decision of that Member State to withdraw from the Union has no effect on its obligation to have due regard to Article 3 of the ECHR, to which Article 4 of the Charter corresponds, and, consequently, cannot justify the refusal to execute a European arrest warrant on the ground that the person surrendered would run the risk of suffering inhuman or degrading treatment within the meaning of those provisions.

[…]

[57] In addition, it must be emphasised that Articles 27 and 28 of the Framework Decision respectively reflect Articles 14 and 15 of the European Convention on Extradition of 13 December 1957. As was stated at the hearing before the Court, the United Kingdom has ratified that convention and has transposed the latter articles into its national law. It follows that the rights relied on by RO in those areas are, in essence, covered by the national legislation of the issuing Member State, irrespective of the withdrawal of that Member State from the European Union.

[…]

[61] Consequently, as the Advocate General stated in point 70 of his Opinion, in a case such as that in the main proceedings, in order to decide whether a European arrest warrant should be executed, it is essential that, when that decision is to be taken, the executing judicial authority is able to presume that, with respect to the person who is to be surrendered, the issuing Member State will apply the substantive content of the rights derived from the Framework Decision that are applicable in the period subsequent to the surrender, after the withdrawal of that Member State from the European Union. Such a presumption can be made if the national law of the issuing Member State incorporates the substantive content of those rights, particularly because of the continuing participation of that Member State in international conventions, such as the European Convention on Extradition of 13 December 1957 and the ECHR, even after the withdrawal of that Member State from the European Union. Only if there is concrete evidence to the contrary can the judicial authorities of a Member State refuse to execute the European arrest warrant. (Emphasis added)"

49. Following the UK serving notice of its intention to leave the EU, an agreement was

entered known as the EU - UK Withdrawal Agreement 2019, agreed on 17th October, 2019 ("the Withdrawal Agreement"). A statutory instrument was signed which is designed to give domestic effect to such agreement, *viz*. SI 719/2020 European Arrest Warrant Act 2003 (Designated Member states) (Amendment) Order, 2020 (S.I. No. 719 of 2020).

50. As the UK has been designated as a Member State for the purposes of the Act of 2003 and this application thereunder, the presumption in Section 4A of the Act of 2003 applies to the UK as a Member State**.** Section 4A of the Act of 2003 provides; -

> *"It shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown."*

Is Article 7 Engaged?

51. The applicant submits that there is no need for the Court to engage in any detailed examination of the legislation in question, given that a process is in place in the UK whereby its compatibility with the ECHR will be determined and the appropriate action taken. Without prejudice to this, the applicant submits that, even if the legislation ultimately remained in place, it is not apparent that there would in fact be a breach of Article 7 ECHR.

52. In this regard, an obvious distinguishing factor from the Morgan case referred to by Mr. Devine in his Affidavit, is that the applicants in that case had been sentenced prior to the introduction of the impugned legislation. Accordingly, it appears that the sentencing judge, when calculating the appropriate term of imprisonment to impose, would have presumed that the convicted persons would have a right to be released on licence when they had served 50% of their sentence. The sentence imposed, accordingly, would not have reflected the amending legislation.

53. In Morgan, Maguire L.J. stated at para. 93; -

> *"[93] Independently of one another, each of the new measures have the effect of dismantling aspects of the law governing the sentence of the offenders as it was at the*

date when it was handed down. 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.

[94] In these circumstances, the court is driven to the conclusion that the sentencing arrangements which have governed the sentencing process in respect of these men has been subverted. In the court's opinion, in the above referred respects, and acknowledging that the law in Northern Ireland is not the same as that applying in England, these cases engage Article 7 and breach it as being contrary to the principle of non-retrospective application of a "penalty." To use the language of Del Rio Prada – see paragraph [89] – the penalty imposed by the trial judge has been the subject of redefinition or modification of its scope as imposed originally by the trial court."

54. In contrast, were the respondent in the present case to be surrendered and convicted, any judge sentencing him would be aware that he would have to serve two thirds of his sentence before being eligible to be released on parole.

55. The respondent referred to an extract from the third edition of O'Malley's *Sentencing Law and Practice*. However, the applicant submits that this extract does not appear to support the respondent's argument. The applicant submits, and this Court agrees, that where O'Malley notes a possible breach of Article 7 ECHR, this is in the context of legislative amendments made *after* sentencing (in contrast to the situation in the present case). He states at para. 3.08;

-

"[3.08] Changes in sentencing practice, revisions of formal sentencing guidelines or changes in parole arrangements may result in offenders receiving or serving longer prison sentences (or paying heavier fines) than would have applied if they had been sentenced when they committed their offences. Does this mean that they are being

subjected to a heavier penalty than was "applicable" at the time of the offence? There is at least one clear statement by the European Court of Human Rights and a decision of the House of Lords to the effect that art.7(1) is not violated in these circumstances. What matters is that a person should not receive a penalty heavier than the maximum that applied when the offence was committed."

56. Further at Para. 89 of the European Court of Human Rights judgment in *Del Rio Prado***,** as quoted by the respondent also supports this distinction; -

"[89] In the light of the foregoing, the 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." [Emphasis added]

57. The respondent in the present case has not been sentenced. It cannot be the case that the impugned legislation in Northern Ireland will redefine or modify the penalty imposed by the trial court, as that penalty has not been imposed yet. Accordingly, the applicant submits and this Court agrees, that unlike the applicants in the Morgan case, the respondent cannot bring himself within the category of cases referred to by O'Malley and the European Court of Human Rights, in the extracts quoted above.

Consideration of *Del Río Prada*

58. Though it is not strictly necessary to determine this issue, it does seem that there is at the very least, an arguable point, as to whether the Court in Morgan was correct in holding that Article 7 was engaged. In Morgan, the judgement of *Del Río Prada* (Application no. 42750/09) was relied upon as part of the Court's decision.

59. In Del Río Prada, the Court found a violation of Article 7 to have occurred. This was in circumstances where the relevant change in the law was by way of a judicial re-interpretation of what the sentence imposed, in fact, was. In order to understand this case, and the Court's rationale, it is necessary to understand the chronology of events:

(i) The applicant in that case had been previously sentenced by the *Audiencia Nacional* to over 3,000 years imprisonment over the course of eight separate sets of criminal proceedings between 1988 and May 2000, for terrorism-related offences committed between 1982 and 1987.

(ii) In November 2000, the *Audiencia Nacional* grouped these sentences together into one sentence of 30 years imprisonment. This was explained by the ECtHR at paragraph 14 of its judgment; -

> *"[14] By a decision of 30 November 2000, the Audiencia Nacional notified the applicant that the legal and chronological links between the offences of which she had been convicted made it possible to group them together (acumulación de penas) as provided for in section 988 of the Criminal Procedure Act (Ley de Enjuiciamiento Criminal) in conjunction with Article 70.2 of the 1973 Criminal Code, in force when the offences were committed. The Audiencia Nacional fixed the maximum term to be served by the applicant in respect of all her prison sentences combined at thirty years."* [Emphasis added].

(iii) As noted by the Grand Chamber at paragraphs 37 and 38 of its judgment, at the time that this 30-year maximum period was imposed, the judicial understanding was:

> *"[T]hat this limit amounts to a new sentence – resulting from but independent of the others – to which the sentence adjustments (beneficios) provided for by*

law, such as release on licence, day-release permits and prerelease classification apply".

(iv) The applicant had earned 9 years' remission by working while in prison, and in April 2008 the prison authorities applied to the *Audiencia Nactional* to approve her release in July 2008, on the basis that the 9 years' remission should be deducted from the 30-year maximum period, as had been the interpretation of the law when the 30-year maximum period had been fixed in 2000.

(v) However, this proposal that she released in July 2008 was rejected on the basis that, on the 28th February 2006, the Spanish Supreme Court in case 197/2006 set a precedent known as the "parot doctrine" and had:

> "*[R]uled that the remissions of sentence granted to prisoners were henceforth to be applied to each of the sentences imposed and not to the maximum term of thirty years provided for in Article 70.2 of the Criminal Code of 1973. The court's ruling was based in particular on a literal interpretation of Articles 70.2 and 100 of the Criminal Code of 1973 <u>according to which that maximum term of imprisonment was not to be treated as a new sentence distinct from those imposed, or a distinct sentence resulting from those imposed, but rather as the maximum term a convicted person should spend in prison.</u>"*
>
> *Thus, the court stated: "The Supreme Court confirmed the "Parot doctrine" in subsequent judgments (see, for example, judgment no. 898/2008 of 11 December 2008). In its judgment no. 343/2011 of 3 May 2011 it referred to the departure from previous case-law in judgment no. 197/2006 in the following terms:*
>
> *"In the present case it was initially considered that the appellant would have finished serving the ljjegal maximum term of imprisonment on 17 November*

2023, and that situation has not changed. It is the way sentence adjustments [beneficios penitenciarios] are applied that has changed. Until judgment no. 197/2006 (cited above) they were applied to the maximum term a prisoner could serve. This judgment and others that followed deemed that to be an error, and considered that the adjustment should be applied to the sentences actually imposed, which were to be served in succession, one after the other, until the limit provided for by law had been reached."

This had the effect that the remission earned was now to be deducted from each of the individual consecutive sentences making up the total of more than 3,000 years, effectively giving no benefit to the applicant. The Court held:

"[83] Both the European Commission of Human Rights and the Court in their case-law have drawn a distinction between a measure that constitutes in substance a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty". In consequence, where the nature and purpose of a measure relate to the remission of a sentence or a change in a regime for early release, this does not form part of the "penalty" within the meaning of Article 7 (see, among other authorities, Hogben, cited above; Hosein, cited above; L.-G.R. v. Sweden, no. 27032/95, Commission decision of 15 January 1997; Grava, cited above, § 51; Uttley, cited above; Kafkaris, cited above, § 142; Monne v. France (dec.), no. 39420/06, 1 April 2008; M. v. Germany, cited above, § 121; and Giza v. Poland (dec.), no. 1997/11, § 31, 23 October 2012). In Uttley, for example, the Court found that the changes made to the rules on early release after the applicant's conviction had not been "imposed" on him but were part of the general regime applicable to prisoners and, far from being punitive, the nature and purpose of the "measure" were to permit early release, so they could not be regarded as inherently "severe". The Court accordingly found

that the application to the applicant of the new regime for early release was not part of the "penalty" imposed on him.

[...]

[88] The Court would emphasise that the term "imposed", used in the second sentence of Article 7 § 1, cannot be interpreted as excluding from the scope of that provision all measures introduced after the pronouncement of the sentence. It reiterates in this connection that it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory (see Hirsi Jamaa and Others v. Italy [GC], no. 27765/09, § 175, ECHR 2012, and Scoppola (no. 2), cited above, § 104).

[89] In the light of the foregoing, the 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.

[90] In order to determine whether a measure taken during the execution of a sentence concerns only the manner of execution of the sentence or, on the contrary, affects its scope, the Court must examine in each case what the "penalty" imposed actually entailed under the domestic law in force at the material time or, in other words, what its intrinsic nature was. In doing so it must have regard to the domestic law as a whole and the way it was applied at the material time (see Kafkaris, cited above, § 145).

[91] (c) Foreseeability of criminal law

When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability (see Kokkinakis, cited above, §§ 40-41; Cantoni, cited above, § 29; Coëme and Others, cited above, § 145; and E.K. v. Turkey, no. 28496/95, § 51, 7 February 2002). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries.

The Court continued at para. 99; -

"[99] Like the Chamber, the Grand Chamber considers that in spite of the ambiguity of the relevant provisions of the Criminal Code of 1973 and the fact that the Supreme Court did not set about clarifying them until 1994, it was clearly the practice of the Spanish prison and judicial authorities to treat the term of imprisonment to be served (condena), that is to say the thirty-year maximum term of imprisonment provided for in Article 70.2 of the Criminal Code of 1973, as a new, independent sentence to which

certain adjustments, such as remissions of sentence for work done in detention, should be applied."

Accordingly, in that case, it was not the case that the amount of remission had changed to the detriment of the prisoner. Rather, the actual penalty imposed had changed. This is evident from the following comments of the Grand Chamber; -

"[100] That being so, while she was serving her prison sentence and in particular after the Audiencia Nacional decided on 30 November 2000 to combine her sentences and fix a maximum term of imprisonment – the applicant had every reason to believe that the penalty imposed was the thirty-year maximum term, from which any remissions of sentence for work done in detention would be deducted."

60. Such a view would be in keeping with other international authorities. In *Coëme and Others v. Belgium (*Applications nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96), the ECHR indicated at para. 142; -

"[142] Mr Coëme and Mr Hermanus submitted that application of the new law on limitation of prosecution had breached Article 7 of the Convention, which 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."

[143] The applicants asserted that the principle of the immediate application of the new law on limitation of prosecution and Parliament's express intention required the Court of Cassation to find that the proceedings against them had become time-barred

on 22 February 1996, that is five years after the event which had caused time to begin to run again on 22 February 1991. But in its judgment of 5 April 1996 the Court of Cassation had ruled that time had begun to run again and extended a limitation period which had already lapsed, this being illegal given that an initial five-year period had begun to run on 30 November 1989 in Mr Coëme's case and on 29 February 1988 in Mr Hermanus's case. In addition, it had restarted the limitation period a second time, although this was not permissible under Article 22 of the Code of Criminal Investigation, taking into consideration the date of 10 June 1992. The applicants argued on that basis that the Court of Cassation had effectively applied Article 25 of the Law of 24 December 1993 retrospectively. That had breached Article 7 of the Convention, in that determination of the period during which an offence could be punished was certainly as much a part of the concept of "penalty" as the measure imposed pursuant to the law as a punishment. Article 7, they argued, enshrined the principle of the foreseeability of the elements of an offence and the relevant penalty, which included the foreseeability of prosecution.

[...]

[145] The Court reiterates that, according to its case-law, Article 7 embodies, inter alia, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with

the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.

When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statute law as well as case-law and implies qualitative requirements, including those of accessibility and foreseeability (see the Cantoni v. France judgment of 15 November 1996, Reports 1996-V, p. 1627, § 29; and the S.W. and C.R. v. the United Kingdom judgments of 22 November 1995, Series A nos. 335-B and 335-C, pp. 41-42, § 35, and pp. 68-69, § 33, respectively). The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision (see Murphy v. the United Kingdom, application no. 4681/70, Commission decision of 3 and 4 October 1972, Collection 43, p. 1). Since the term "penalty" is autonomous in scope, to render the protection afforded by Article 7 effective the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision (see the Welch v. the United Kingdom judgment of 9 February 1995, Series A no. 307-A, p. 13, § 27). While the text of the Convention is the starting-point for such an assessment, the Court may have cause to base its findings on other sources, such as the travaux préparatoires. Having regard to the aim of the Convention, which is to protect rights that are practical and effective, it may also take into consideration the need to preserve a balance between the general interest and the fundamental rights of individuals and the notions currently prevailing in democratic States (see, among other authorities, the Airey v. Ireland judgment of 9 October 1979, Series A no. 32,

pp. 14-15, § 26, and the Guzzardi v. Italy judgment of 6 November 1980, Series A no. 39, pp. 34-35, § 95).”

The Court continued at para. 149; -

“[149] The extension of the limitation period brought about by the Law of 24 December 1993 and the immediate application of that statute by the Court of Cassation did, admittedly, prolong the period of time during which prosecutions could be brought in respect of the offences concerned, and they therefore detrimentally affected the applicants' situation, in particular by frustrating their expectations. However, this does not entail an infringement of the rights guaranteed by Article 7, since that provision cannot be interpreted as prohibiting an extension of limitation periods through the immediate application of a procedural law where the relevant offences have never become subject to limitation.

The question whether Article 7 would be breached if a legal provision were to restore the possibility of punishing offenders for acts which were no longer punishable because they had already become subject to limitation is not pertinent to the present case and the Court is accordingly not required to examine it, even though, as Mr Hermanus maintained, the Court of Cassation, in the proceedings against him, held that time had been caused to run again by a measure which did not have that effect on the date when it was taken.

[150] The Court notes that the applicants, who could not have been unaware that the conduct they were accused of might make them liable to prosecution, were convicted of offences in respect of which prosecution never became subject to limitation. The acts concerned constituted criminal offences at the time when they were committed and the penalties imposed were not heavier than those applicable at the material time. Nor did the applicants suffer, on account of the Law of 24 December 1993,

greater detriment than they would have faced at the time when the offences were committed (see, mutatis mutandis, the Welch judgment cited above, p. 14, § 34)."

61. In *Kafkaris v. Cyprus* (Application no. 21906/04), the ECHR stated at para. 126; -

"[126] The applicant submitted that when he had been sentenced to mandatory life imprisonment on 10 March 1989 by the Limassol Assize Court, under the Prison Regulations applicable at the time, "life imprisonment" had been tantamount to imprisonment for a period of twenty years. As a result of the repeal of the Regulations, the amendment of the relevant legislative provisions and the retroactive application of the provisions thus amended, he had been subjected to an unforeseeable prolongation of his term of imprisonment from a definite twenty-year sentence to an indeterminate term for the remainder of his life, with no prospect of remission, and to a change in the conditions of his detention. Thus, a heavier penalty had been imposed than that applicable at the time he had committed the offence of which he had been convicted, in breach of Article 7 of the Convention.

[127] In the applicant's view, the Government should be estopped from denying that his sentence had been more than twenty years and that by applying the Regulations he would have served his sentence by 2002. It was clear from the facts that the applicant believed that his sentence expired in 2002. He had not appealed against his sentence, relying on the notice and release date given by the prison authorities. In fact, both the prison authorities and the Office of the Attorney-General had been aware of this. The prolongation of his sentence following the repeal of the Regulations could not have been foreseen either at the time of committing the offence or at the time of his sentencing. His sentence had been retroactively increased from a definite twenty-year term to an indefinite term without the prospect of remission."

The Court continued at para. 137; -

"[137] The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see S.W. v. the United Kingdom, and C.R. v. the United Kingdom, 22 November 1995, §§ 35 and 33 respectively, Series A no. 335-B and C).

[...]

[142] The concept of "penalty" in Article 7 is, like the notions of "civil right and obligations" and "criminal charge" in Article 6 § 1 of the Convention, autonomous in scope. To render the protection afforded by Article 7 effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision (see Welch v. the United Kingdom, 9 February 1995, § 27, Series A no. 307-A, and Jamil v. France, 8 June 1995, § 30, Series A no. 317-B). The wording of Article 7 § 1, second sentence, indicates that the 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". Other 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 (see Welch, cited above, § 28, and Jamil, cited above, § 31). To this end, both the Commission and the Court in their case-law have drawn a distinction between a measure that constitutes in substance a "penalty" and a measure that concerns the "execution" or "enforcement" of the

"penalty". In consequence, where the nature and purpose of a measure relates to the remission of a sentence or a change in a regime for early release, this does not form part of the "penalty" within the meaning of Article 7 (see, inter alia, Hogben, cited above; Hosein v. the United Kingdom, no. 26293/95, Commission decision of 28 February 1996, unreported; Grava, cited above, § 51; and Uttley, cited above). However, in practice, the distinction between the two may not always be clear cut."

The Court concluded at para. 150; -

"[150] The Court considers, therefore, that there is no element of retrospective imposition of a heavier penalty involved in the present case but rather a question of "quality of law". In particular, the Court finds that at the time the applicant committed the offence, the relevant Cypriot law taken as a whole was not formulated with sufficient precision as to enable the applicant to discern, even with appropriate advice, to a degree that was reasonable in the circumstances, the scope of the penalty of life imprisonment and the manner of its execution. Accordingly, there has been a violation of Article 7 of the Convention in this respect.

[151] However, as regards the fact that as a consequence of the change in the prison law (see paragraph 58 above), the applicant, as a life prisoner, no longer has a right to have his sentence remitted, the Court notes that this matter relates to the execution of the sentence as opposed to the "penalty" imposed on him, which remains that of life imprisonment. Although the changes in the prison legislation and in the conditions of release may have rendered the applicant's imprisonment effectively harsher, these changes cannot be construed as imposing a heavier "penalty" than that imposed by the trial court (see Hogben and Hosein, both cited above). In this connection, the Court would reiterate that issues relating to release policies, the manner of their implementation and the reasoning behind them fall within the power

of the member States in determining their own criminal policy (see Achour, cited above, § 44). Accordingly, there has not been a violation of Article 7 of the Convention in this regard.

[152] In conclusion, the Court finds that there has been a violation of Article 7 of the Convention with regard to the quality of the law applicable at the material time. It further finds that there has been no violation of this provision in so far as the applicant complains about the retrospective imposition of a heavier penalty with regard to his sentence and the changes in the prison law exempting life prisoners from the possibility of remission of their sentence."

In *M v. Germany* (Application no. 19359/04), the Court outlined at para. 106; -

"[106] The applicant further complained that the retrospective extension of his preventive detention from a maximum period of ten years to an unlimited period of time violated his right not to have a heavier penalty imposed on him than the one applicable at the time of his offence. He relied on Article 7 § 1 of the Convention, which reads:

"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."

The Court further stated at para. 133; -

"[133] In view of the foregoing the Court, looking behind appearances and making its own assessment, concludes that preventive detention under the German Criminal Code is to be qualified as a "penalty" for the purposes of Article 7 § 1 of the Convention.

[134] The Court further reiterates that it has drawn a distinction in its case-law between a measure that constitutes in substance a "penalty" – and to which the absolute ban on retrospective criminal laws applies – and a measure that concerns the "execution" or "enforcement" of the "penalty" (see paragraph 121 above). It therefore has to determine whether a measure which turned a detention of limited duration into a detention of unlimited duration constituted in substance an additional penalty, or merely concerned the execution or enforcement of the penalty applicable at the time of the offence of which the applicant was convicted.

[...]

[136] In this respect the present case must again be distinguished from that of Kafkaris (cited above). Mr Kafkaris was sentenced to life imprisonment in accordance with the criminal law applicable at the time of his offence. It could not be said that at the material time, a life sentence could clearly be taken to amount to twenty years' imprisonment (ibid., §§ 143 et seq.). By contrast, in the present case, the applicable provisions of criminal law at the time the applicant committed his offences clearly and unambiguously fixed the duration of a first period of preventive detention at a maximum of ten years.

[137] In view of the foregoing, the Court concludes that there has been a violation of Article 7 § 1 of the Convention."

62. The contrast between the Del Río Prada and the present case is obvious. Here, the penalties of 10 years' imprisonment in respect of Offence 1 and life imprisonment in respect of Offences 2, 3 and 4, have remained unchanged. Remission will be deducted from the same penalties. The level of remission has changed, yes, as has the parole process, but as discussed above, the authorities show that these factors do not engage Article 7 ECHR.

Decision

63. In summary, and in applying all of the above, this Court finds:

(a) The respondent relies upon the judgment in Morgan in support of his assertion that there will be a breach of the respondent's Article 7 rights upon surrender and that surrender should be refused. For reasons as set out above, this Court does not agree. Crucially, unlike the applicants in Morgan, the respondent in this case has not been sentenced.

(b) In the event that this Court is wrong in so finding and that the respondent is, in fact, on a par with the applicants in Morgan, the first question that must be addressed is whether surrender should be prohibited under Section 37 1 (a) of the Act of 2003. The second question that arises is whether surrender should be prohibited under section 37 (1) (b) of the Act of 2003.

(c) In response to both questions, the applicant submits, and this Court agrees, that there is a fundamental weakness in the respondent's argument in the present case. The respondent presumes that the two possible outcomes of the Morgan appeal in the UK are as follows:

(i) The UK Supreme Court upholds the declaration of incompatibility, but the UK Parliament ignores this, and leaves the offending legislation in place; or

(ii) The UK Supreme Court finds the legislation to be compatible with the ECHR. The applicants take their case to the European Court of Human Rights, which finds a violation of Article 7 ECHR, but the UK Parliament ignores this and leaves the offending legislation in place. It should, perhaps, be noted and only by way of comment at this juncture as discussed herein, that there is at least an arguable case that the legislation is compatible with the ECHR.

(d) Mr. Justice O'Donnell stated in Balmer that the essential question for this Court in relation to a challenge under Section 37 (1) A is; -

"[W]hether the requesting state will comply with its own obligations under the Convention."

(e) The approach of the respondent in this regard, is at odds with the dicta of Mr. Justice O'Donnell in Balmer wherein he states that the rights guaranteed by the Convention apply in the requesting state. Those states are obliged to enforce the rights under the ECHR, and *prima facie*, are best placed to do so. Furthermore, he states that there is a system of scrutiny, review and reporting on the protection of rights under the Convention, and ultimately a supranational court which can definitively rule on the compliance of a particular system with the Convention.

(f) In this regard, the United Kingdom remains party to the ECHR and, as is evident from the Affidavit of Mr. Devine BL herein, has a system of checks and balance in place which allow rights under the ECHR to be asserted in the courts, and for the courts to vindicate such rights through, for example, the granting of a declaration of incompatibility with the ECHR in respect of impugned legislative provisions. It appears from the Affidavit of Mr. Devine that the UK Supreme Court is due to decide the issue as regards whether the impugned legislative provisions are contrary to Article 7 ECHR. The UK Courts are actively engaged in a process which appears to be very similar to our own, in which the question of incompatibility with the ECHR will be determined.

(g) This Court must presume that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown.

(h) It is notable that in Balmer, Mr. Justice O'Donnell indicated that in cases where surrender is prohibited as a consequence of a breach of Section 37 1 (a) of the Act of 2003, *that these cases are rare and, perhaps, egregious.* This Court also notes the case opened by the respondent of *Minister for Justice and Equality v. Nolan*

[2012] IEHC 249, wherein the Court indicated in the particular and unusual circumstances of that case, that surrender was prohibited in light of the systemic and fundamental breach of rights in that case.

(i) Mr. Justice O'Donnell further stated in Balmer; -

"[T]he potential for international friction is further reduced by the existence of institutions which are entitled to report, and in the case of European Court of Human Rights, to determine, whether or not a regime is compatible with the dictates of the Convention."

(j) In light of the processes in being, no concrete evidence has been put before this Court to suggest, much less show, a real risk that the Kingdom of Great Britain and Northern Ireland will not comply with its obligations under the convention. Thus, the respondent's objection under Section 31 (1) A of the Act of 2003 fails.

(k) The respondent notes that a declaration of incompatibility has been made by the Northern Irish Court of Appeal in relation to the legislation at issue in the present case, and points to the fact that this declaration did not have the effect of invalidating the legislation. As it happens, however, the effect of the declaration in the UK appears to be precisely the same as the equivalent declaration in this jurisdiction, where Section 5 (2) (a) of the European Convention on Human Rights Act 2003 provides as follows:

> *"(2) A declaration of incompatibility—*
>
> *(a) shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made..."*

(l) The respondent points to the fact that the UK authorities have lodged an appeal against the Northern Irish Court's declaration of incompatibility, and have not revoked the impugned legislative provisions pending that appeal. Again, however,

a similar situation can arise in this jurisdiction. For example, in *A v. Minister for Justice & S v. Minister for Justice* [2019] IEHC 547, Barrett J. declared s. 56 (9) (a) of the International Protection Act 2015 to be unconstitutional. The Minister appealed this, with s. 56 (9) (a) remaining fully in force pending the appeal. The Supreme Court in *A v. Minister for Justice & Equality & Ors., S v. Minister for Justice & Equality & Ors., I v. Minister for Justice & Equality & Ors.* [2020] IESC 70 allowed the appeal and vacated the declaration.

(m) The test posed under Section 37 (1) (b) of the EAW Act, is whether what is proposed is a direct consequence of surrender, and would, if it occurred in Ireland, be so egregious in breaching the guarantees of the Irish Constitution, that the Court cannot, consistently with its constitutional obligations, order surrender.

(n) In light of the forgoing, I do not find that there is such a fundamental defect in the system of justice in the UK and Northern Ireland such as to refuse surrender under Section 37 (1) (b) of the Act of 2003.

64. This ground of objection is dismissed.

65. I am satisfied that surrender of the respondent is not precluded by reason of Part 3 of the Act of 2003 or another provision of that Act.

66. It, therefore, follows that this Court will make an order pursuant to Section 16 of the Act of 2003 for the surrender of the respondent to the Kingdom of Great Britain and Northern Ireland.