THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 102

Record No.: 2014/37

Peart J.
Hogan J.
Mahon J.

IN THE MATTER OF THE

EUROPEAN ARREST WARRANT ACT 2003

BETWEEN/

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

-AND-

ANTHONY CRAIG

APPELLANT
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IN THE MATTER OF THE

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MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

-AND-

ANTHONY BALMER

APPELLANT

JUDGMENT of Mr. Justice Michael Peart delivered on the 21st day of May 2015

1. Following the making of an order for the surrender of each appellant on foot of separate European arrest warrants to the authorities in the United Kingdom by separate orders dated 18th November 2014, Edwards J. certified that the decision in each case involves a point of exceptional importance and that it is desirable in the public interest that an appeal be taken. The point of exceptional importance is the same in each case, hence these appeal have been heard together, albeit that each appellant has separate legal representation.

2. The issue so certified in each case is:

> *"Where the requested person has been sentenced in the United Kingdom to a life sentence for murder, and has served a portion of the sentence consisting of his/her individualised tariff, and which is said by the issuing state to have constituted the entirety of the punitive element of the said sentence, would the surrender of that person to serve the balance of his/her sentence constitute a contravention of any provision of the Constitution of Ireland, and in particular of Article 40.4 thereof, such that the contemplated surrender would be prohibited by Section 37 (1) (b) of the European Arrest Warrant Act, 2003?"*

Some background facts:
3. Mr Craig was convicted of an offence of murder at Preston Crown Court on the 12th February 1974 and received a mandatory sentence of life imprisonment. Under the rules then prevailing the Home Secretary directed that he serve a minimum term of 15 years (the tariff). According to information contained in the European arrest warrant in respect of Mr Craig this tariff reflects the punitive element of the sentence, and once the punitive element has expired the offender enters upon the risk element of the sentence, and may only be detained if he continues to present a risk to the public. It further states that once the tariff has been served, the independent Parole Board chaired by a judge conducts a review in order to determine if the offender's detention should be continued beyond the tariff, and that the basis of that decision is whether a continuation of detention is necessary for the protection of the public. If it is not, the offender is released on licence. If the decision is that the offender should not be released, then a further review must take place within two years and at regular intervals thereafter.

4. It appears that Mr Craig served his tariff but his detention was continued thereafter so that by the time he escaped in July 2002 from an open prison to which he had been transferred he had served some 28 years imprisonment. According to his affidavit sworn on the 31st July 2013, he came to Ireland in 2005, where he has settled and married.

5. The fact that he escaped from the open prison to which he had been transferred has resulted in the authorities in the United Kingdom seeking his surrender not only so that he can be returned to prison to serve out his life sentence, but also so that he can be prosecuted for the offence of escape contrary to common law which itself carries a discretionary maximum penalty of life imprisonment. In passing, the Court notes that Edwards J. has concluded that the offence of escape contrary to common law in the United Kingdom corresponds to the same offence in this State, and has ordered his surrender so that Mr Craig can be prosecuted there for that offence. In other words, even if the result of the present appeal is favourable to Mr Craig in respect of the sentence for murder, he will in any event be surrendered in respect of the alleged offence of escape contrary to common law. That of course does not affect the Court's decision on the issue certified for an appeal by the trial judge.

6. Mr Balmer was convicted of an offence of murder at Exeter Crown Court on the 26th March 1984, and received a mandatory life sentence with a tariff of 12 years. It appears that this tariff was later increased to 15 years. Having served the tariff representing the punitive element of the life sentence, his detention was continued by the Parole Board on the basis that this was necessary for the protection of the public.

7. However, on the 2nd March 2011 he was released on licence by the Home Secretary, having by that time spent some 27 years in prison. He was released on licence subject to a number of conditions which are set forth on the licence document given to him. These include that he report to, and place himself under the supervision of, a supervising officer, that he reside at a particular hostel and not leave to reside elsewhere without his supervisor's prior approval, and further that he not travel outside the United Kingdom without his supervisor's prior permission. That licence document also informed Mr Balmer that the licence could be revoked by the Secretary of State at any time.

8. According to Mr Balmer's affidavit he came to Ireland shortly after his release – presumably without having obtained prior permission to so do as required though he does not state that.

9. On the 19th March 2012 the Secretary of State signed a Revocation of Licence recalling Mr Balmer to prison. The reasons for that recall are indicated by the ticking of two boxes on the revocation notice, namely "allegedly committed a further offence" and "poor behaviour". Other boxes which could have been ticked but were not are: Failed to attend appointments with your supervising officer; Failed to attend pre-arranged home visits; Failed to reside as approved; or Other.

10. No further detail is contained in the revocation notice as to what offence he is alleged to have committed, or in what respect his behaviour was poor. However, the notice went on to state that upon his return to prison the Public Protection Casework Section will send him information confirming the reasons why he has been recalled to prison, how he can make representations to the Parole Board against the decision to recall him, and the information on which the decision to recall him ahs been made.

11. In due course in each case a European arrest warrant was transmitted to this jurisdiction by the relevant issuing judicial authority in the United Kingdom. Upon receipt, each was duly endorsed for execution by the High Court, and Mr Craig and Mr Balmer were arrested and brought before the High Court as required, and were thereafter remanded from time to time while the applications for their surrender were ready for hearing.

12. During that process of preparation further information was sought by the Minister in relation to the life sentence regime in the United Kingdom in order to better understand the concept of the tariff, which has been described in an affidavit of Amelia Nice, barrister-at-law provided by the UK authorities as part of the supporting material in Mr Balmer's case, as *"satisfying the requirements of retribution and deterrence",* and the nature of the balance of the life sentence, namely the preventative or risk element which she describes as *"a preventative period during which release and liberty on licence was dependent on an assessment of risk".* She goes on to state that *"the licence remains in force for the rest of the individual's life and may be revoked and the licensee returned to prison at any time if he/she no longer represents a safe enough risk to remain in the community"*. The entire of her affidavit is conveniently set forth in the judgment of Edwards J. delivered on 10th September 2014 in Mr Balmer's case at paragraph 14 thereof.

13. Similar information has been provided to the Minister in Mr Craig's case by letter from the Crown Prosecution Service on behalf of the issuing judicial authority. That letter states, as relevant:

> *"The terms "tariff" and "punitive element of the sentence" are used in section (h) of the European Arrest Warrant to explain the process for the review of a life sentence. They are not statutory terms but describe what is referred to in Section 28 of the Crime (Sentences) Act 1997 and Schedule 21 to the Criminal Justice Act 2003 as the "minimum term" and is the period of imprisonment which the offender has to serve before he can be considered for early release by the Parole Board.*
>
> *Mr Craig was convicted and sentenced on 12 February 1974 and, when he escaped in July 2002, would have already served his minimum term of 15 years imprisonment. Sentence will now be managed in accordance with Section 28 of the Crime (Sentences) Act 1997.*
>
> > *Section 28 provides that as soon as*
> >
> > *(a) a life prisoner has served the minimum term of imprisonment; and*
> >
> > *(b) the Parole Board has directed release,*
> >
> > *it shall be the duty of the Secretary of State to release him on licence.*
>
> *Section 28 (6) provides that the Parole Board shall not give a direction for release on licence of life prisoner unless*
>
> > *(a) the Secretary Of State has referred the prisoner's case to the Board; and*
> >
> > *(b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.*
>
> *Under Section 28 (7) a life prisoner may require the Secretary of State to refer his case to the Parole Board at any time*

after he has served the minimum term. Where there has been a previous reference to the Parole Board, the prisoner may require a further reference at the end of the period of two years from the disposal of that reference."

14. Each appellant has clearly served the tariff or punitive element of his sentence. The information which has been provided by the issuing judicial authority makes that abundantly clear. It has also been made clear by the information provided that any further detention which would be served by each appellant following surrender on foot of the European arrest warrant seeking his return for the purpose of returning him to prison to continue to serve the life sentence imposed, would be detention whose purpose is to protect the public from a perceived risk, and this has been explained by the issuing judicial authority as being a period of preventative detention.

15. The issue which arose for consideration in the High Court in each case, and is at the heart of the issue certified for this appeal, is whether surrendering each appellant to the United Kingdom so that they can be placed in detention for preventative purposes *until "the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined"* (the tariff having been long since served) would constitute a breach of their constitutional rights under Article 40 of the Constitution, given the constitutional imperative that no person may be deprived of his or her liberty on the grounds that there is a risk that he or she may commit a crime at some future date (an exception being by means of section 2 of the Bail Act).

16. As provided by section 16 of the European Arrest Warrant Act, 2003 as amended ("the Act") the High Court may make an order for surrender only where a number of matters are satisfied as set forth in the section, one being that the surrender is not prohibited by any provision of Part 3 of the Act. One of the sections within Part 3 of the Act is section 37(1) which, as relevant to the present appeal, provides:

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

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

(ii) the Protocols to the Convention,

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

(c) .....[emphasis added]

17. It is important to note that under this provision it is the act of surrender itself that must result in a breach of constitutional rights before surrender is prohibited, and not simply the prospect that after surrender has occurred the person might have to endure a situation that here would be constitutionally impermissible – for example where a person's surrender is sought for the purpose of prosecuting him for an offence that is an indictable offence here, and where his trial in the requesting state on that offence would not be before a jury. That would be some future event not immediately and causally connected to the act of surrender itself. The Court will come in due course to the Minister's argument that it is Article 38 of the Constitution that is engaged in this case in relation to preventative detention and its implications for the presumption of innocence, rather than Article 40.4, and to the submission that in such circumstances section 37 of the Act presents no bar to surrender since there is no causal connection or direct proximity between the act of surrender and any dilution of the presumption of innocence in the future.

18. But on the present appeals, that situation is distinguished by the appellants, who submit that their surrender itself would inevitably result in their immediate and indefinite detention which is known to be for preventative purposes only – a situation which, it is submitted, is constitutionally impermissible in this State, and therefore it is the act of surrender itself which would constitute the breach of their constitutional rights under Article 40.4 of the Constitution. They submit that in these circumstances their surrender is prohibited under Part 3 of the Act, and that the trial judge erred in making an order for their surrender under section 16 of the Act.

19. In each case under consideration Edwards J. delivered a lengthy and detailed judgment having considered many authorities to which he had been referred by Counsel for all parties. Ultimately his conclusion that surrender was not prohibited under Part 3 of the Act relied upon the judgment of the majority in the Supreme Court in *Caffrey v. Governor of Portlaoise Prison* [2012] 1 I.R. 637, in which the Supreme Court considered whether the mandatory life sentence regime in the United Kingdom whereby a minimum period to be served is specified by the trial judge (the tariff) and which represents the punitive element of the sentence, is any different from the mandatory life sentence imposed for murder in this State. The majority (Denham C.J., with whom Hardiman and Macken JJ agreed) concluded that the legal nature of the mandatory life sentence in each jurisdiction is the same.

20. *Caffrey* was not a European arrest warrant case. The matter arose by way of an application for release under Article 40.4.2 of the Constitution. The applicant had been convicted of murder in the United Kingdom and sentenced to mandatory life imprisonment with a minimum tariff of 12 years to be served there, and later made an application under the Transfer of Sentenced Persons Acts 1995 and 1997 so that he could serve his sentence in this State. That application was granted and the necessary arrangements for his transfer were put in place. Having completed serving the tariff period of his life sentence here, the applicant sought his release under Article 40.4 of the Constitution on the basis that any further detention on foot of the life sentence imposed upon him in the United Kingdom was now preventative detention only, and therefore not in accordance with law. At first instance, Charleton J. refused the application for release being satisfied that the setting of a particular tariff by the sentencing judge did not alter the legal nature of the life sentence, and concluded that he was in lawful custody in this State. The Supreme Court dismissed his appeal, and, as recorded by Edwards J in his judgments in both Mr Craig's and Mr Balmer's cases, Denham CJ, giving the majority decision stated as follows:

"29. The appellant was sentenced to life imprisonment in England. This was a mandatory sentence. There was no discretion exercised by the sentencing judge. The nature of the sentence is one of life imprisonment.

In fact this mandatory sentence is similar to the sentence a person convicted for murder would receive in the State, imprisonment for life. It is a mandatory sentence in Ireland also. There is no incompatibility between the sentence received in England and the penalty prescribed by the law of the State for a similar offence.

30 Section 7(10) clarifies that the reference to the legal nature of a sentence does not include a reference to the duration of such a sentence. This emphasises that it is necessary to look at the nature of a sentence and not merely to its duration. The nature of the sentence in issue is that of imprisonment for life. It is a life sentence. Even when a person is released from prison the sentence continues to exist. The sentence is not at an end. The

life sentence does not cease during the lifetime of the sentenced person, even when they are released on licence. The sentence in issue is imprisonment for life – it is not a twelve year sentence. The fact that there was a twelve year tariff in England does not change the nature of the sentence.

31 Once the appellant was transferred to this jurisdiction, the management of the sentence was the responsibility of the Prison Service and the related services, such as the Parole Board.

32 The appellant is serving a valid sentence of imprisonment for life, in Ireland. The management of that sentence is now governed by Irish law. The management scheme adopted in England is no longer relevant. Irish authorities could not apply the English law. It is inappropriate for the Irish State to make reference to any minimum period in the United Kingdom within which the appellant would be denied parole review. In this case, no issue of inappropriate considerations on the part of the State that detrimentally affect the appellant arise because the appellant was considered twice by the Parole Board before the twelfth year of his sentence, i.e. the Parole Board did not manage the sentence according to English practice, but managed his sentence in accordance with Irish law. I am satisfied that this is the correct approach in law to the management of the appellant's life sentence. Consequently, I would affirm the judgment and order of the High Court and dismiss the appeal of the appellant."

21. During the course of his judgments, Edwards J. addressed his own judgment in *Minister for Justice and Equality v. Nolan* [2012] IEHC 249 (upheld on appeal to the Supreme Court on a ground not germane to the present appeals), in which he had concluded that the type of sentence for which surrender was sought in Nolan (who was a "young offender" at the time of his offending and sentence), namely an indeterminate sentence of imprisonment for public protection (I.P.P.) with a specified minimum tariff, and where once the tariff period representing the punitive element of the sentence expires the prisoner enters the risk element of the sentence and can be detained further only if he continues, in the view of the Parole Board, to present a risk to the public, was in the words of the test stated by O'Donnell J. in *Nottinghamshire County Council v. B* [2011] IESC 48 (albeit a case in the context of the return of a child under Article 20 of the Hague Convention) *"is something which departs so markedly from the essential scheme and order envisaged by the Constitution and is such a direct consequence of the Court's order that return is not permitted by the Constitution".* In those circumstances, Edwards J was satisfied that surrender was prohibited under section 37 of the Act.

22. In his judgment in Craig, Edwards J. was of the clear view, as expressed in paragraph 25 thereof, that *"the life sentence imposed upon the respondent in this case is a fundamentally different form of sentence to the I.P.P. sentence that the Court had occasion to consider in the Nolan case, and the circumstances of the present case are clearly distinguishable from those in Nolan"*. He explained his conclusion in this regard at paragraph 40 as follows:

"40. The concerns that led to this Court's decision in Minister for Justice and Equality v. Nolan [2012] IEHC 249 (unreported, High Court, Edwards J., 24th May, 2012 have no corresponding application in the present case. What this Court found so objectionable about I.P.P. sentences were that they were created and judicially imposed with the express objective of "incapacitation", such that courts in the United Kingdom had the power to order the detention of individuals deemed to pose an immediate threat to the public indefinitely, and over and above any appropriate sentence for the crime committed (judicially specified in each case), with provision for their release only when the executive was satisfied (on the recommendation of the Parole Board) that they no longer represented a threat to the public. As appears from additional information quoted by this Court at paragraph 12 of its judgment in Nolan, I.P.P. sentences were expressly differentiated from life sentences by the issuing state. It was clear to this Court beyond any shadow of a doubt that their objective was not just to punish and deter, but also, and indeed predominantly, to "incapacitate". Therefore, in this Court's view, the nature of an I.P.P. sentence was such that it unquestionably involved preventative detention. That I.P.P. sentences were in practice administered and managed in the issuing state in much the same way as life sentences were administered and managed in that state could not alter the fact that such sentences of their legal nature involved preventative detention. In contrast, the objective of a mandatory life sentence is not incapacitation, and it does not of its legal nature involve preventative detention. As the Supreme Court has said, such a sentence is 'of a wholly punitive nature and does not incorporate any element of preventative detention'."

23. Having made that clear distinction between an I.P.P. sentence and a mandatory life sentence for murder, Edwards J. went on to reach his conclusions in the Craig case on the constitutional question as follows:

"41. The respondent [Craig] has never been afforded temporary release. It seems reasonable to infer that he had been stepped down to an open prison in preparation for possible release on licence. However, he absconded before that possibility could be realised. It bears commenting that even if the respondent in this case is surrendered to resume serving his mandatory life sentence, he might still be afforded clemency at some point in the future providing that his release on licence represents an acceptable level of risk in terms of his dangerousness or risk of re-offending. However, as to whether that could ever occur would be a matter solely for the UK authorities in managing and administering is resumed life sentence in accordance with their domestic law.

42. As to that, in this Court's view the issuing state is perfectly entitled to have regard to issues such as the dangerousness (if any) of the respondent, the extent to which he poses a risk to the public, and the need to protect the public, in managing and administering his mandatory life sentence and in determining whether to exercise clemency in the circumstances of this case and release from imprisonment on licence.

43. Both in this country and in the UK an administrative framework has been put in place to manage the temporary release of prisoners, including those serving life sentences. In Ireland, the executive enjoys a wide measure of discretion in the matter of release, which is seen as a privilege that is extended to prisoners rather than write the granting of temporary release as a matter of discretion is provided for in the statute (i.e. in s. 2 of the Criminal Justice Act 1960 as substituted by the Criminal Justice (Temporary Release of Prisoners) Act 2003) and is loosely regulated, or guided, by the Prisoners (Temporary Release) Rules 2004 (S.I. No. 680 of 2004). There is a non-statutory Parole Board that advises the Minister in such matters but he or she is not bound by that advice. The Prisoners (Temporary Release) Rules 2004 specify that amongst the factors that the Minister is entitled to have regard to in the exercise of his discretion is ' the potential threat to the safety and security of the public (including the victim) should the person be released' and 'the risk that the prisoner will commit further offensive released'. To deny a prisoner temporary release while his or her sentence is still extant where legitimate concerns exist about dangerousness or the risk of further offences is not to hold the said prisoner in preventative detention. A prisoner in Ireland has no right to clemency; temporary release is a privilege. Moreover, as Murray C.J. (as he then was) has stated in Dowling v. Minister for Justice, Equality and Law Reform [2003] 2 I.R 535, at p. 538 'the liberty which a prisoner enjoys while on temporary release, being a privilege, is clearly not part with the right to liberty enjoyed by an ordinary citizen'.

44. In the United Kingdom, the discretion enjoyed by the executive in the matter of clemency and release of prisoners sentenced to life imprisonment on licence is more heavily regulated than it is here and there are express statutory fetters on the Home Secretary's discretion. It appears to be the case that in practical terms the Home Secretary is obliged to release such a prisoner upon licence if his or her release is recommended by the statutory Parole Board, and that the statutory Parole Board is internal obliged to review a prisoner's case it regularly once a certain point has been reached (i.e. once the tariffs period has been served), and to recommend release unless the prisoner presents a risk to the public in terms of dangerousness or risk of re-offending. Be that as it may, these differences compared to the manner in which mandatory life sentences are managed and administered in Ireland do not change the fundamental legal nature of such sentences.

45. It is clear to this Court that in the circumstances the proposed surrender measure would not result in the respondent being subjected to 'preventative detention' and accordingly it would not on that account contravene any provision of the Constitution. The respondent's surrender is not therefore prohibited under s. 37 (1) (b) of the Act of 2003."

24. In the case of Mr Balmer, Edwards J. reached precisely the same conclusion, despite slight factual difference between in that he had been released from prison on a licence which had subsequently been revoked, whereas Mr Craig had never been released on licence and had escaped from prison.

25. The appellants seek to argue on this appeal that in so far as the trial judge distinguished the I.P.P. sentence at issue in Nolan from the mandatory life sentence at issue herein, he was incorrect. They refer to the fact that while the Supreme Court determined the appeal in Nolan on a different point, the ratio at first instance in Nolan remains intact, and is good authority for the proposition that to return a person to the United Kingdom to face an indeterminate period of detention which is stated to be purely preventative detention, the tariff/punitive element having expired, constitutes a breach of the constitutionally protected right to liberty under the Constitution.

26. The appellants submit that the Nolan principles ought to be applied mutatis mutandis to a mandatory life sentence such as those imposed on these appellants, and seek to draw support for this submission from the judgment of Murray C.J. (as he then was) in *Whelan & Lynch v. Minister for Justice, Equality and Law Reform & ors* [2012] 2 IR 1. Part of the argument in that case was that the statutory imposition of a mandatory life sentence for murder as provided by section 2 of the Criminal Justice Act, 1990 offended against the constitutional principle of proportionality because the trial judge was left with no discretion to impose a sentence that was proportionate to the gravity of the offence having regard to all the relevant circumstances. This claim was rejected the High Court (Irvine J.) and in the Supreme Court. However the appellants herein refer to certain comments of Murray C.J. in relation to the nature of a mandatory life sentence in this jurisdiction compared to such a sentence in the United Kingdom. Also in that respect, the appellants herein refer to paragraph 39 of the said judgement where the then Chief Justice notes in argument made on behalf of the State following terms:

"[39] Since a punitive sentence of life is a whole life sentence without any element of preventative detention, it cannot be compared to the sentence regime which exists the United Kingdom and which was scrutinised case law of the European Court of Human Rights as relied upon by the plaintiffs….".

27. Having referred to that submission, the appellants herein refer also to the then Chief Justice's conclusion at paragraphs [57] and [58] as follows:

"[57] …… First of all a life sentence imposed by a court [in this jurisdiction] is exclusively punitive. As Walsh J. pointed out in The People (Attorney General) v. O'Callaghan [1966] I.R.501 at p. 516, preventative justice 'has no place in our legal system'.

[58] In People (Director of Public Prosecutions) v. Jackson (unreported, Court of Criminal Appeal, 26th April 1993) Hederman J. said at p. 2: –

'It is submitted on behalf of the applicant that what in fact the Central Criminal Court did in this instance was that it imposed a preventative sentence on the accused, a sentence of life in order, as the trial judge said, to protect women from the applicant. The Court is satisfied that preventative detention is not known to our judicial system and that there is no form of imprisonment for preventative detention.'

The fact that the Constitution has been amended with regard to the grounds for refusing bail for a person awaiting trial does not affect the principle that a convicted person may not be sentenced by a court or detained by an executive order for a preventative or non-punitive purpose".

28. This conclusion was reiterated by the then Chief Justice at paragraph [63] when he stated *"in the court's view a life sentence imposed pursuant to s. 2 of the Act of 1990 is a sentence of a wholly punitive nature and does not incorporate any element of preventative detention".*

29. It is unsurprising that the appellants would seek to rely on such strong statements as to the "wholly punitive nature" of a life sentence imposed for the offence of murder in this jurisdiction, in order to distinguish it from the life sentence for murder imposed on the appellants in the United Kingdom where, though still a life sentence, it is clearly stated by the issuing judicial authority to be only partly punitive, namely for the tariff period, and that thereafter it is for preventative purposes only. Nevertheless, there remains from the appellants' perspective the need to overcome the apparent obstacle of the majority judgment in the Supreme Court in *Caffrey*, already referred to.

30. In pursuit of that objective, they first of all note the different context in which *Caffrey* was decided, namely an application by Mr Caffrey to be transferred back to this State in order to serve the mandatory life sentence imposed in the United Kingdom. They submit that *Caffrey* holds that once a transfer to this State takes place the sentenced person is effectively no longer serving an English life sentence, but is serving an Irish life sentence which is entirely punitive in nature. They submit that this was a necessary conclusion for the majority to reach if it was to avoid having to conclude that since the punitive element of the U.K. life sentence had already been served, there was no constitutional basis upon which his detention for preventative purposes could continue here.

31. It is submitted that while the judgment refers to the character of the sentence in each jurisdiction being the same (i.e. a sentence of imprisonment for life), and that it is *"the management of that sentence [which] is now governed by Irish law"* and therefore becomes an entirely punitive sentence under Irish law once transfer takes place, it does not follow that in the very different

and reverse context of a forced surrender in the opposite direction under a European arrest warrant to a country where a life sentence is not entirely punitive in nature, and is of such a nature that if it existed here would be unconstitutional, the Courts here, when considering whether an order for surrender is prohibited under section 37 of the Act because surrender will bring about a breach of a constitutional rights, can ignore the preventative purpose of the balance of the sentence to be served upon surrender on the basis that it is simply the way life sentences are managed under the laws of the United Kingdom,

32. The Minister submits that the trial judge was correct to conclude that the life sentence imposed upon Mr Craig and Mr Balmer was indistinguishable from that which was imposed in *Caffrey* – in other words they were mandatory life sentences with a minimum tariff provided (albeit of different lengths).

33. In relation to the trial judge's conclusion based on the *Whelan & Lynch* judgments [supra] that notwithstanding the specification of a minimum tariff, the life sentences imposed on the appellants were in their legal nature wholly punitive in nature and which did not incorporate any element of preventative detention, the Minister submits that the judge's reliance upon the judgment of Murray CJ in *Whelan & Lynch* is no more than an application of the principle of *stare decisis*.

34. In relation to the appellants' submission that the trial judge ought to have followed his own decision in *Nolan*, where the sentence under consideration was what was referred to as an I.P.P. (a type of sentence not known in this jurisdiction at all), the Minister submits that it is clear that the nature of the I.P.P. as it existed is not to be equated to a life sentence in any way, and that even though in Nolan surrender was refused because his detention for purely preventative purposes on foot of the I.P.P. would inevitably follow upon an order for surrender, the case is distinguishable because in the present cases the life sentence imposed in the United Kingdom is, as stated by Denham C.J. in *Caffrey*, of the same nature as a life sentence here, even if its management following imposition differs in certain respects.

35. The Minister has also submitted that the foundation for the constitutional prohibition of preventative detention is the presumption of innocence existing within Article 38.1 of the Constitution. Authority for that submission can be found in the judgment of O'Dálaigh C.J. in *People (AG) v. O'Callaghan* [1966] I.R. 501 at p. 508 where he states:

> *"… I understood [Counsel] to submit that the applicant should be held as a preventive measure. This I take to mean that he should be detained in custody because, if granted bail, it is feared he may commit other offences. The reasoning underlying this submission is, in my opinion, a denial of the whole basis of our system of law. It transcends respect for the requirement that a man shall be presumed innocent until he is found guilty and seeks to punish him in respect of offences no attempted. I say 'punish', for deprivation of liberty must be considered a punishment unless it can be required to ensure that an accused person will stand his trial called upon."*

36. In that regard Counsel has also referred to the judgment of Costello J. (upheld in the Supreme Court on appeal) in *O'Leary v. Attorney General* [1993] 1 I.R. 102 where at p. 107 he stated:

> *"… … … The presumption of innocence has long been an integral part of the common law tradition which constituted an important part of the legal order which this State then adopted (as pointed out by McCarthy J. in Ryan v. the Director of Public Prosecutions [1989] I.R. 399). The Constitution of course contains no express reference to the presumption but it does provide in Article 38 that 'no person shall be tried on any criminal charge save in due course of law'. It seems to me that it has been for so long a fundamental postulate of every criminal trial in this country that the accused was presumed to be innocent of the offence with which he was charged that any criminal trial held otherwise than in accordance with this presumption would, prima facie, be one which was not held in due course of law. "*

37. It is submitted that there can be no doubt that the presumption of innocence is at the heart of the prohibition against detention for purely preventative purposes, and that it is Article 38 rather than Article 40 of the Constitution that is engaged when discussing whether an order for surrender would result in a breach of a constitutional right. The submission in relation to Article 38 then continues on the basis that if that be so, then it is clear that the presumption relates to getting a trial 'in due course of law' in respect of some future offence not yet committed, and that due process rights here are not intended to operate outside the State. In that way, it is submitted that in so far as the surrender of the appellants back to the United Kingdom to serve the preventative element of their life sentence is perceived as interfering with their due process rights, via the presumption of innocence, then that is not something which this Court can protect against by refusing to make the order for surrender, because it would be to protect against something which may occur at some later stage outside this jurisdiction, and that a person's due process rights "do not travel".

38. In support of that submission, the Minister has referred to the judgment of O'Donnell J. in *Nottinghamshire County Council v. B* [2011] I.E.S.C 48 where, albeit in the context of an application for the return of two children to the United Kingdom under Article 20 of the Hague Convention, the issue raised by the parents, in opposing an application for their childrens' return, was that the return would breach their family rights under Article 41 and 42 of the Constitution since the law of the United Kingdom permitted the adoption of the children of married couples in circumstances which would not be permitted in this jurisdiction by virtue of the constitutional rights afforded to families under the Constitution. Counsel for the Minister refers to passage within paragraph 66 of the judgement as follows:

> *"…… It is fundamental to the structure of the Irish Constitution that its principal focus of application is to persons within its jurisdiction. It follows from the approach of Article 29 that the Constitution expects and recognises the same essential structure in other states. Therefore, the application, for example, of French law to French citizens, or to those who by residence in France have obtained the protection of the French state, is to be expected, and it is only in rare cases that the Constitution would require a court to seek to inhibit the application of such law."*

39. Similar reliance is placed upon the judgment of Edwards J. in *Minister for Justice and Equality v. Shannon* [2012] IEHC 91 where he also rejected the idea that Article 38 was intended to apply extra-territorially, and that it was clear from its terms that this could not be so.

40. It has been noted also by Counsel for the Minister that certain regimes in other countries for some form of preventative detention have been upheld as Convention-compliant by the ECtHR, most notably in *Grosskopf v. Germany,* Case 24478/03 [2011] 53 EHRR 7. It appears that under certain provisions of the German Criminal Code preventative detention may in some circumstances be imposed in addition to a period of punitive detention, if the offender has been shown to be dangerous to the public. According to the judgment of the court, the following is the regime under German law that was found not to breach Article 5 of the Convention:

> *"… The sentencing court order a preventive detention in addition to the penalty if someone is sentenced for an*

intentional offence to at least two years' imprisonment, and if the following further conditions are satisfied. Firstly, the perpetrator must have been sentenced twice already, to at least one year's imprisonment in each case, for intentional offences committed prior to the new offence. Secondly, the perpetrator must previously have served a prison sentence or must have been detained pursuant to a measure of correction and prevention for at least two years. Thirdly, a comprehensive assessment of the perpetrator and his acts must reveal that, owing to his propensity to commit serious offences, notably those which seriously harm their victims physically or mentally or which cause serious economic damage, the perpetrator presents a danger to the general public". [emphasis added]

41. This is but one example where the law of another state which permits preventative detention in certain circumstances has been found not to breach Article 5 of the Convention, and it is submitted that it must not be assumed that the life sentence regime in the United Kingdom, though admitting of a period of preventive sentence as part of an overall life sentence, it is necessarily doing something that offends against the principle sought to be upheld in this jurisdiction by the constitutional imperative that a person may not be detained for the purpose of preventing him from committing an offence.

42. Counsel has referred to the same Court's judgment in *Stafford v. United Kingdom*, Case 46295/00, Grand Chamber, 28th May 2002 where, *inter alia,* it was concluded in the context of the life sentence regime in the United Kingdom that an assessment of post-release risk and dangerousness were lawful considerations in determining whether the further detention of a prisoner for preventative purposes was permissible under the Convention. In that regard the Court stated at paragraph 80 of its judgment:

"80. … Once the punishment element of the sentence (as reflected in the tariff) has been satisfied, the continued detention, as in discretionary life and juvenile murder cases, must be considerations of risk and dangerousness…. As Simon Brown LJ forcefully commented in the case of Anderson and Taylor (para. 46) it is not apparent how public confidence in the system of criminal justice could legitimately require the continued incarceration of a prisoner who had served the term required for punishment for the offence and was no longer a risk to the public. It may also be noted that recent reforms in Scotland and Northern Ireland equate the position of mandatory life prisoners in those jurisdictions to that of discretionary life prisoners in England and Wales in respect of whom continued detention after expiry of tariff is solely based on assessment of risk of harm to the public from future violent or sexual offending."

43. Counsel for the Minister has also referred to the judgment of Denham C.J. in *Minister for Justice, Equality and Law Reform v. Murphy* [2010] 3 I.R. 77 where the respondent's surrender was sought on foot of a European arrest warrant so that he could be surrendered to the United Kingdom to resume detention under what was described as a Hospital Order. It was a detention order made in the context of the Mental Health Act, 1983 which contained both punitive and preventative elements. Nevertheless surrender was ordered following a conclusion that such an order was a detention order for the purposes of section 10 of the Act since it had been made as part of the criminal process following a conviction for rape and assault causing grievous bodily harm. The hospital order had not been made during the course of civil proceedings under the Mental Health Act, 1983.

44. However, part of the information gleaned from the European arrest warrant in *Murphy* was the following:

"Section 41 of the Mental Health Act 1983 provides that where a hospital order is made in respect of an offender by the Crown Court and it appears to the court having regard to the nature of the offences, that the antecedents of the offender and the risk of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm so to do, the court may further order that the offender shall be subject to the special restrictions set out in this section either without limit of time or during such period as may be specified in the order. An order under this section is known as "a restriction order". Under the section the patient shall continue to be detained by virtue of the relevant hospital order until he is duly discharged. The power to order the discharge of the patient can only be exercised with the consent of the Secretary of State. While a person is subject of a restriction order, medical examinations must take place at least annually and a report submitted to the Secretary of State."

45. The judgment of Denham J. (as she then was) in Murphy makes clear the effect of a restriction order, following upon a hospital order, by reference to how it is explained by Mustill L.J. in **R v. Birch** [1989] 90 Cr. App. R. 78 at p. 85 as follows:

"No longer is the offender regarded simply as a patient whose interests are paramount … Instead the interests of public safety are regarded by transferring the responsibility for discharge from the responsible medical officer and the hospital … To the Secretary of State and the Mental Health Review Tribunal. A patient who has been subject to a restriction order is likely to be detained for much longer in hospital than one who is not, and will have fewer opportunities for leave of absence."

46. It must be noted of course that the issue in *Murphy* was not whether an order of surrender would be prohibited under section 37 of the Act, but rather whether a hospital order, with a restriction order attached, and which was for an indefinite duration with powers of review as described in the warrant, was an order for detention for the purposes of section 10 of the Act. Nevertheless the nature of the detention order was of some relevance to the Court's decision, and in that regard, Denham J. stated at p.90 of her judgment:

"47. A detention order arising outside the criminal process or not relating to extraditable offences, could not be the subject of a detention order enforceable under the Act of 2003. I would affirm the statement of the High Court Judge that a person who has been made the subject of a detention order solely in a mental health context, and who escapes from that detention, could not be sought to be surrendered by means of a European arrest warrant.

48. Similarly, I would distinguish the situation addressed in The People (Attorney General) v. O'Callaghan [1966] I.R. 501. That case arose on bail motion where a prisoner had been returned for trial. The issue was whether the applicant could be held in preventative detention prior to his trial; it was submitted that if he were released on bail he might commit further offences. Walsh J. held that such detention would be a form of preventative justice which has no place in our legal system and is alien to the purposes of bail. The facts and issues of that case are entirely different to the situation addressed in this warrant where there have been convictions for serious offences and for which the respondent has been ordered to be detained.

49. Sentencing is a complex matter. All the facts and circumstances of the case require to be considered by a court, and then the court applies the law as appropriate. This may involve aspects of retribution, deterrence, protection, reparation and/or rehabilitation. The sentencing court considers the offence, the offender, the victim, all the circumstances of the case, and makes a decision according to the law. The law relating to sentencing is not identical in all member states. In this case the law of the United Kingdom enables a sentence to be one of detention by way of a

hospital order. Such a detention order apparently involves elements of protection for society."

47. Even though the issue in *Murphy* was whether the detention order came within section 10 of the Act and not whether the regime that Mr Murphy would return to if surrendered was one which would breach his rights under the Constitution by reason of the nature of the hospital order, Counsel for the Minister nevertheless submits that clearly this was not seen as a difficulty under section 37 of the Act, and he submits that the same can be said of the regime of preventative detention which is part and parcel of a life sentence as it is applied under the laws of the United Kingdom. It is urged that consistent with the idea that the penal systems of member states will inevitably be different, it is part of the arrangements foreseen and agreed to under the Framework Decision that member states of the European Union will respect and recognise the penal systems of each other, and return persons whose surrender is sought even if to do so would be to expose the surrendered person to a penal process which is not identical to that in the requested state.

48. In that regard, the Minister has referred to the judgment of Peart J. in *Minister for Justice, Equality and Law Reform v. Wharrie* [2009] IEHC 630 where on very similar facts, and against the background of the same life sentence regime in the United Kingdom, the Court concluded that even though the punitive element of the life sentence had been served, and that the respondent would be surrendered for the purposes of serving the preventative element of the life sentence, his surrender was not prohibited under section 37 of the Act. This Court has of course been invited by the appellants not to follow that decision, and it has been remarked that it was decided prior to the *Nolan, Whelan & Lynch*, and *Caffrey* cases, and that it ought not to be presumed that if *Wharrie* was to be decided now in the light of those more recent considerations of this difficult issue, the result would be the same. The Minister on the other hand seeks support from the judgment, and sees no reason why upon any reconsideration of it in the light of those more recent decisions the correctness of the decision would be doubted.

Conclusions:

49. A consideration of the majority judgment in *Caffrey* must be central to the proper determination of the issues arising in these appeals, since on the one hand the trial judge based his decision largely upon it, and the appellants herein seek to distinguish it, and submit that its conclusions cannot be simply applied to the reverse situation of a surrender out of this State.

50. It must be recognised of course that the context of *Caffrey* is different. Nevertheless, the clear statement of the majority that the nature of the sentence for murder in each jurisdiction is the same, namely a mandatory life sentence of imprisonment, even though its management may different in each, is important. The Supreme Court found it helpful to view the UK life sentence imposed on Mr Caffrey as effectively becoming an Irish life sentence upon his return here under the Transfer of Sentenced Prisoners arrangements. In other words, once the prisoner transferred here it was no longer a life sentence within which there was a tariff period followed by a period within which the prisoner must be released provided that certain conditions were fulfilled including that the Parole Board was satisfied that *"it is no longer necessary for the protection of the public that the prisoner should be confined",* but became a punitive sentence only under Irish law, and the issue of when he ought to be released back into the community on licence was a matter to be considered not by reference to English law, but under Irish law. Such a conclusion is entirely consistent with the arrangements specified in the Convention on the Transfer of Sentenced Persons the Transfer of Sentenced Persons Acts 1995 and 1997 seeks to implement, and as explained by the Council of Europe in its Explanatory Report on that Convention, particularly as regards Articles 10 and 11 thereof. In that regard it *states "… the administering state may adapt the sanction to the nearest equivalent available under its own law, provided that this does not result in more severe punishment or longer detention … the administering state thus continues to enforce the sentence imposed in the sentencing state, but it does so in accordance with the requirements of its own penal system"*.

51. In passing it can be noted also that in the same Report by the Council of Europe it helpfully clarifies what is meant in the Convention and the Act by the "nature of the sentence" as opposed to its "duration". This phraseology appears in the judgment of Charleton J. and that of Denham J. in *Caffrey*. It may be considered by some to be confusing to refer to the nature of the penalty for murder as being a mandatory sentence of imprisonment for life, when "duration" is treated separately from "nature" in the Convention. Paragraph 49 of the Council of Europe Report states in relation to Article 10 of the Convention:

> *"Where the administering State opts for the "continued enforcement" procedure, it is bound by the legal nature as well as the duration of the sentence as determined by the sentencing state (paragraph 1): the first condition ("legal nature") refers to the kind of penalty imposed where the law of the sentencing State provides for a diversity of penalties involving deprivation of liberty, such as penal servitude, imprisonment or detention. The second condition ("duration") means that the sentence to be served in the administering State, subject to any later decision of that State on, for example, conditional release or remission, corresponds to the amount of the original sentence, taking into account the time served and any remission earned in the sentencing State up to the date of transfer".*

52. In *Caffrey*, it is clear therefore that the nature of the sentence at issue was one of imprisonment (as opposed to e.g. penal servitude, detention), and its duration was for life. The same can be said of the life sentences imposed on the appellants herein. The way the authorities in either jurisdiction manages those sentences, either under statute or by some less structured mechanism, alters neither the nature of the sentence nor its length.

53. The fact that *Caffrey* determined that a life sentence in this jurisdiction was entirely punitive in nature, whereas the same sentence in the UK was not, and that Mr Caffrey ceased to have an entitlement to have his sentence managed here by reference to the UK's arrangements of management of life sentence prisoners following his transfer here, does not of itself translate into a conclusion that to surrender a person back to the UK on foot of a European arrest warrant for the purpose of him being returned to prison on foot of a recall notice does not breach his Irish constitutional rights because the UK authorities are entitled to manage him any way they like under their own arrangements. In order to determine whether for the purposes of section 37 of the Act surrender would breach a constitutional right, it is necessary to see what is the management regime to which he would return, rather than to simply look at the label attached to the balance of the sentence still remaining i.e. "preventative detention". That phrase can mean different things in different contexts. For example, as noted by Denham C.J. in Caffrey itself, the pre-trial context in *People (AG) v. O'Callaghan* is very different to the context in the present case or any other case where it is being referred to in relation to a person who has been convicted of an offence and sentenced to a term of imprisonment.

54. It can be noted in passing that the description "preventative detention" or similar are not used in section 28 of the Criminal Justice Act 1993 in the United Kingdom, which is the statutory basis for continued detention of the life prisoner after the tariff has expired. But it is the phrase used by the issuing judicial authority in the warrant, and it is the way it is described by Ms. Nice in her affidavit as already referred to. As stated, it is the substance and content of the regime of sentence management and not the label which some attach to it that must be looked at in order to determine whether or not, in the words of O'Donnell J. it *"is something which departs so markedly from the essential scheme and order envisaged by the Constitution and is such a direct consequence of the Court's order that return is not permitted by the Constitution*".

55. Philosophical concepts of utilitarianism and reductivism are called in aid by those in society who favour locking up recidivists and others who are considered to have a propensity to commit crime, and throwing away the key. The justification for the incarceration of such persons so that they are incapable of committing offences that they are thought likely to commit if left at large is the greater good of the greatest number in society, at the expense of the rights of the putative offender.

56. This mechanism of preventative detention by which society is thought to be rendered more safe is sometimes referred to as 'incapacitation'. In its purest form incapacitation was achieved by the passing of a death sentence, long since removed from the statute books both here and the neighbouring jurisdiction. Dismemberment was another form of penalty meted out with a view to disabling the commission of certain crimes, and again has long since disappeared from civilised society. Our own history and that of the neighbouring jurisdiction remind us that deportation to such far-flung places as Van Diemen's Land in the 19th century was considered an effective way of ridding society of persons thought to put society at risk. More recently, and not far away at all, preventative detention in the form of internment without trial was considered justified in order to keep a an ethnic and religious majority safe from the perceived violent attentions of a an ethnic and religious minority. In other countries regimes of racial segregation sought the same result.

57. Those who advocate and practise 'incapacitation' in less extreme forms nowadays favour the imposition of harsher penalties for recidivist offending, usually by lengthy sentences of imprisonment, which are disproportionate to the offences being punished, firstly so that those offenders are taken off the streets and 'incapacitated', and secondly as a deterrent to those who might otherwise want to break the law. Either way, it is a form of preventative detention.

58. These forms of preventative detention and incapacitation are what the Constitution finds no place for, and against which our Courts have for so long set their face. Although the case law under the Constitution has developed from far less extreme cases of threatened incapacitation than those mentioned, the mischief sought to be averted is the same – the ability to lock a person away in order to prevent him or her from committing crime, either without trial, or by the imposition of a longer period of detention than the offence warrants.

59. In *O'Callaghan*, the refusal of bail because the applicant was considered to be somebody who would continue to commit offences if given bail was considered to be a form of preventative detention which challenged the presumption of innocence, and found no place in our legal order. In *The People (DPP) v. Bambrick* [1996] 1 I.R. 265 Carney J. was quite satisfied that even though he would have wished to be able to keep the convicted man in prison for preventative purposes given the appalling nature of the crimes with which he had been charged with murder but to which he had pleaded guilty to manslaughter (a plea accepted by the DPP) he was precluded from doing so given the state of the law here regarding preventative detention.

60. Those constitutionally unacceptable forms of preventative detention are a far cry from a detention which is part of a life sentence lawfully passed upon a person who has been convicted of the offence of murder, and whose risk to the public becomes a factor for consideration when his release under licence falls to be considered by a Parole Board. It is unfortunate perhaps that it has attracted in the issuing state the label 'preventative detention' where it is clear from the information provided that in reality in the UK it is a period of detention, which is part of a life sentence, and which follows the expiry of a specified mandatory period of incarceration, after which the prisoner may be considered to pose such a low risk to society that *"it is no longer necessary for the protection of the public that the prisoner should be confined"*. The UK statute does not describe this period as being one of 'preventative detention'. It is a misnomer to so describe it since it misleads, and tempts an interpretation of the regime as being one that our Constitution has set its face against. It is nothing of the sort when one considers the substance rather than the label. In fact, the regime by which life prisoners are considered for release on parole in this State is very similar indeed, where the risk that the prisoner poses to society is one of the factors which will be taken into account in any decision to release on licence. One may ask rhetorically why it should be considered that to surrender a person back to a regime of sentence management which may even be more benign than that which exists in this State and which passes constitutional muster should be considered to constitute such a breach of fundamental rights that his surrender should be considered to be prohibited.

61. The I.P.P. sentence in *Nolan* referred to earlier was a different situation altogether. That was a sentence of indefinite length. It was not even a life sentence. It was purely preventative in a sense which reflects just what is constitutionally impermissible here as was found by Edwards J. in Nolan. Interestingly, the I.P.P. was soon abolished after it was found to be in violation of the European Convention on Human Rights.

62. Similarly, what is said by Murray C.J. in *Whelan & Lynch*, as referred to earlier and relied upon by the appellants herein, must be read as referring not to the means by which a person prior to his release is considered for release by a Parole Board by reference to considerations such as risk and dangerousness, as it is sometimes referred to, but rather to measures whereby persons are taken out of society or kept out of society, not for the purposes of punishment but only so that they will be unable to commit offences – i.e. incapacitated. That is what our Constitution prohibits.

63. This Court finds there to be no error on the part of the trial judge in the reasoning and conclusion which he reached in paragraphs 41-45 of his judgment in Mr Craig's case, and that despite the small factual difference in Mr Balmer's case, the same conclusion is justified in his case also.

64. For all these reasons, the issue certified by the trial judge for the consideration of this Court on this appeal is to be answered by stating that to surrender the appellants to serve the balance of their life sentence does not constitute a contravention of any provision of the Constitution of Ireland, and in particular of Article 40.4 thereof, such that the contemplated surrender would be prohibited by Section 37 (1) (b) of the European Arrest Warrant Act, 2003.