Neutral Citation: [2014] IEHC 459

THE HIGH COURT

[2012 No. 321 EXT.]

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003, AS AMENDED

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

MICHAEL ANTHONY BALMER

RESPONDENT

JUDGMENT of Mr Justice Edwards delivered on the 10th of September, 2014.

Introduction

1. The respondent is the subject of a European arrest warrant issued by the United Kingdom of Great Britain and Northern Ireland (hereinafter "the U.K.") on the 31st of October, 2012. The warrant was subsequently received in this jurisdiction and was duly placed before the High Court which endorsed it. The respondent was arrested on the 11th of June, 2013, and on the following day he was brought before the High Court in accordance with s. 13 of the European Arrest Warrant Act 2003, as amended (hereinafter "the Act of 2003") when a date was fixed for the purposes of s. 16 of the Act of 2003. Thereafter the matter was adjourned from time to time, until it came on for hearing before this Court on the 4th of March, 2014. Following the s. 16 hearing commenced on that date, and further hearings on the 10th of March, 2014, and the 19th of March, 2014, the Court reserved its judgment, which it now delivers.

2. This Court is asked by the applicant to make an Order pursuant to s. 16 of the Act of 2003 directing that the respondent be surrendered to such person as is duly authorised by the issuing State to receive him. The respondent does not consent to his surrender to the U.K. and this Court's jurisdiction to make an order directing that the respondent be surrendered is dependant upon a judicial finding that the requirements of s. 16 of the Act of 2003 have been satisfied. Accordingly, the Court has been put on inquiry as to whether the requirements of s. 16 of the Act of 2003, both controversial and uncontroversial, have been satisfied. In so far as specific points of objection are concerned, the Court has had to consider a number of specific objections to the respondent's surrender and it is proposed later in this judgment to consider the specific objections pleaded.

Uncontroversial Matters

3. The Court has before it an affidavit of arrest sworn by Garda Finbar O'Regan on the 18th of June, 2013. No issue has been raised as to identity. There is an acceptance by the respondent that he is the person to whom the European arrest warrant relates.

4. The Court has received and scrutinised a true copy of the European arrest warrant in this case, and further has taken the opportunity to inspect and compare the original European arrest warrant which is on the Court's file and which bears this Court's endorsement. The Court is satisfied following its consideration of this evidence and documentation that:

> (a) the European arrest warrant in this case has been endorsed for execution in accordance with s. 13 of the 2003 Act;
>
> (b) the European arrest warrant in this case was duly executed and the person who was arrested and who was brought before the Court is the person in respect of whom the European arrest warrant was issued;
>
> (c) the European arrest warrant in this case is manifestly in the correct form;
>
> (d) although the European arrest warrant in this case is a conviction type warrant there is no suggestion that the respondent was tried *in absentia*;
>
> (e) the Court is not required, under ss. 21A, 22, 23, or 24 of the Act of 2003 (as inserted by ss. 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005), to refuse to surrender the respondent.

5. In addition the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) Order 2004 (S.I. No. 4 of 2004) (hereinafter "the 2004 Designation Order"), and duly notes that by a combination of s. 3(1) of the Act of 2003, and Article 2 of, and the Schedule to, the 2004 Designation Order, the "United Kingdom of Great Britain & Northern Ireland" is designated for the purposes of the Act of 2003 as being a State that has under its national law given effect to the Framework Decision.

6. The European arrest warrant in this case relates to a single offence, i.e. murder, contrary to common law. The respondent was convicted at a trial before Exeter Crown Court and was sentenced to life imprisonment on the 26th of March, 1984.

Sentencing of the Respondent

7. According to Part (c) of the warrant the murder charge carried a maximum sentence of up to life imprisonment, and as stated in the last paragraph a sentence of life imprisonment was actually imposed. Part (c) also contains the following further information with respect to the remaining sentence to be served:

> "[T]he requested person has been recalled following a breach of licence conditions. Upon his return to prison his detention will be reviewed by the Parole Board. It is not possible to state how long he will remain in prison as it is a matter for the Parole Board as to whether he will be re-released on licence in the future."

8. Part (f) of the standard form of the European arrest warrant mandated by Council Framework Decision of 13th June, 2002, on the

European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA) ("the Framework Decision") makes provision for the furnishing, at the option of the issuing judicial authority, of other information that may potentially be relevant or of assistance. The following appears in Part (f) of the warrant under present consideration:

> "The requested person was sentenced to life imprisonment on the 26/3/1984. He was released on licence on the 2/3/2011. A copy of the licence is attached dated 18/2/2011 (enclosure 1). The conditions of the licence are set out in that document. On the 19/3/2012 he was recalled to prison by the Secretary of State under section 32(1) of the Crime (Sentences) Act 1997 having breached the conditions of his licence, a copy of the recall notice is attached (enclosure 2). His return is requested for him to be recalled to serve his sentence."

9. The Court has considered the copy licence attached to the warrant as enclosure 1, and also the revocation of licence and recall notice attached to the warrant as enclosure 2. It is not necessary for the purposes of this judgment to recite the exact terms of the licence or the revocation of licence documents. However, the recall notice that informed the respondent of the fact that his licence had been revoked indicated that he was being recalled to custody because he had "allegedly committed a further offence" and because of "poor behaviour".

The notice went on to state:

> "You will receive more detailed reasons once you have been returned to custody.
>
> The police will return you to the nearest prison. When you reach the prison, you must show this letter to the reception officer, and tell the officer your prison number. ***It is in your own interests that the prison is made aware that you are a recalled prisoner as quickly as possible***.
>
> You should also ask an officer on the wing/cell block, to make sure that prison staff have contacted the Public Protection Casework Section in the Home Office, to let them know you are back in custody.
>
> The Public Protection Casework Section will send you the following information:
>
> - Confirmation of the reasons why you have been recalled to prison;
> - How you can make representations (appeal) to the Parole Board against the decision to recall you;
> - The information on which the decision to recall you was taken.
>
> If you have not received the above information within 5 days of being back in prison, you must ask prison staff to contact the Public Protection Casework Section to check that it has been sent."

(emphasis as in original)

10. Part (h) of the standard form of the European arrest warrant mandated by the Framework Decision is designed to provide the executing judicial authority with information concerning whether under the legal system of the issuing State it is possible to seek a review of the penalty imposed, or clemency, in the case of custodial life sentences or lifetime detention orders. In the present case the issuing judicial authority has provided the following information in Part (h):

> "Murder
>
> - the legal system of the issuing Member State allows for a review of the penalty or measure imposed - on request or at least after 20 years - aiming at a non-execution of such penalty or measure,
>
> and
>
> - the legal system of the issuing Member State allows for the application of measures of clemency to which the person is entitled under the law or practice of the issuing Member State, aiming at non-execution of such penalty or measure.
>
> The offender has to serve an appropriate minimum period (the tariff) 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. All lifers 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.
>
> An independent Parole Board 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 Board 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 Board 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 two years to review the prisoner's detention, and at regular intervals thereafter."

Correspondence and Minimum Gravity

11. The issuing judicial authority has sought to invoke paragraph 2 of Article 2 of the Framework Decision by ticking the box relating to "Murder, grievous bodily injury" in Part (e) of the warrant. No issue was raised in regard to this, and it is clear from the description of circumstances in Part (e) that the appropriate box has been ticked and there can be no suggestion of gross and manifest error. Providing that the threshold with respect to minimum gravity specified in s. 38(1)(b) of the Act of 2003 is met, this Court need not concern itself with correspondence in relation to this offence. S. 38(1)(b) of the Act of 2003 requires that under the law of the issuing State the offence is punishable by imprisonment for a maximum period of not less than three years. Part (c)1 of the European

arrest warrant specifies that the offence of murder contrary to common law attracts a penalty of up to life imprisonment. Accordingly the requirements of s. 38(1)(b) with respect to minimum gravity are met.

Specific Objections
12. The substance of the respondent's objections to his surrender was pleaded in the following terms:

> 1. The proposed surrender of the Respondent is contrary to Article 5 of the European Convention on Human Rights in that it cannot be regarded for the purposes of detention, justified as punishment for the original murder. Section F of the European Arrest Warrant herein, states that the Respondent must serve the punitive element of the life sentence and that *"once this punitive term of imprisonment has expired, the offender enters into the risk element of the sentence. He may only he detained if he continues to present a risk to the public'*. By virtue of having been released on licence, it is self-evident that the punitive term of imprisonment has been served. The Respondent has already served just under 27 years' imprisonment, [from the 26th March. 1984 to the 2nd March. 2011] that being the punitive element of the sentence, and is now sought to be returned to prison on grounds of public protection.
>
> 2. The proposed surrender of the Respondent in respect of the said offences to the United Kingdom is prohibited by section 37 of the Act of 2003 because it constitutes *inter alia*:
>
> (a) The respondent repeats the ground at 1 above *mutatis mutandis*.
>
> (b) A breach of his right to trial in due course of law as guaranteed by Article 38.1 of the Constitution in that, *inter alia*, the stated reasons for the revocation of the licence of the Applicant are so vague as to amount to attempting to deprive the Applicant of his liberty otherwise than in due course of law
>
> (c) A breach of his right not to suffer preventive detention, as guaranteed by Article 40.1 of the Constitution"

Evidence Adduced on behalf of the Respondent
13. The respondent relies first upon his own affidavit sworn on the 21st October, 2013. As the affidavit is short it is appropriate to reproduce the substantive contents of it in full:

> "3. At the outset, I say that I have a terrible difficulty in being accurate about dates; even remembering significant dates like the date of my release from prison is difficult for me.
>
> 4. I was released by licence dated the 18 February, 2011 (my actual release, as appears from the notes on the licence, appears to have been shortly afterwards, around the 2nd March, 2011, but I don't have a good memory of the date).
>
> 5. I am informed and believe that the Secretary of State for Justice in the United Kingdom revoked the said licence, by notice dated the 19th March, 2012 (over a year later) recalling me to prison. The reasons given were *pro-forma* reasons of "Allegedly committed a further offence" and "poor behavior" (2 out of 6 boxes were ticked beside 6 corresponding *pro-forma* reasons on the revocation of licence). I beg to refer to a copy of the licence and recall notice which I believe were sent by pdf file from the issuing state to the Central Authority by email dated the 20lh November, 2012, when produced. A copy of the said document is appended hereto.
>
> 6. It is not offered as a reason for revoking the licence that this deponent has been charged or committed a new criminal offence.
>
> 7. I say that, according to the best of my recollection, I was first to be considered for parole, after serving 12 years of my sentence, (around the year 1996) but that Michael Howard, the then Secretary of State, increased the "tariff" to 15 years (which meant that I would not be considered for parole until the year 1999, approximately).
>
> 8. I say that the release process became a very long drawn-out process and that on one occasion, having been moved to an open prison, I was returned to the regular or closed prison without being released. This return had the effect, I believe, of effectively sending me to the bottom of the parole waiting list, and meant that on that occasion, 1 had to effectively reapply for parole, which seriously delayed my parole application as a whole. In any event, the first time I was released was in the year 2011.
>
> 9. I then came to Ireland, after release and settled here- I found casual employment to help support myself
>
> 10. I was arrested on or about the 12th June, 2013 in Ireland, (I don't remember this date, but it appears so from the records) and remanded in custody, where I have been ever since. If returned to the United Kingdom, I would expect an indefinite period of preventative detention; with a very optimistic minimum of four years
>
> 11. I believe that I have served the punitive portion of my sentence. I am advised and believe that the current surrender request is not so that I can be further punished for the offence of murder. I am advised and believe that the current surrender request is solely for the purposes of detaining me so as to assess whether I am a continuing risk to the public, namely public protection grounds.
>
> 12. I therefore pray this Honourable Court for an order refusing the order of surrender sought as to surrender me would violate my rights under, *inter alia* Article 5 of the European Convention on Human Rights and Article 40.1 of the Constitution."

14. The respondent also relies upon an affidavit of laws of a Ms Amelia Nice, a Barrister at Law practising at the Bar of England and Wales, sworn in these proceedings on the 27th of February, 2014. Ms Nice has deposed to the following matters:

> "2. I have reviewed the extradition request relating to MICHAEL ANTHONY BALMER ['BALMER'] dated 28 September 2012. I have also read the request for further information about the sentence imposed, the minimum tariff and statutory provisions relating to release and recall on licence. That request is dated 10 February 2014.
>
> 3. The relevant background facts are that on 26 March 1984, BALMER was sentenced to life imprisonment for the offence of murder. The murder was committed on 26 July 1983. On 18 February 2011, the Secretary of State authorised the

release of BALMER. His actual release date was 2 March 2011. On 19 March 2011, the Secretary of State for Justice revoked the licence.

Sentencing

4. Section 1(2) of the *Murder (Abolition of Death Penalty)* Act 1965, provides:

> '(1) No person shall suffer for death for murder, and a person convicted of murder shall […] be sentenced to imprisonment for life'.

Tariffs

5. Section 1(2) of the 1965 Act provided:

> 'On sentencing any person convicted of murder to imprisonment for life the Court may at the same time declare the period which it recommends to the Secretary of State as the minimum period which in its view should elapse before the Secretary of State orders the release of that person on licence under section 27 of the Prison Act 1952.'

6. No appeal lay against any such recommendation.

7. The terms "tariffs" 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.

8. The formal setting of 'punitive' periods for those sentenced to life imprisonment, was introduced in 1983 by policies brought in by the then Home Secretary. Under those arrangements, Home Office Ministers set a minimum period imprisonment – known colloquially as the "tariff" – to satisfy the requirements of retribution and deterrence and specified that period which had to be served in full before a offender's release could be considered by the Parole Board.

9. The tariff period ran from the date of first remand in custody and included all periods spent in custody on remand. The tariff period thus represented the full 'punitive' period to be served.

10. However, this period did not provide an automatic release date, as the offenders could be detained beyond the tariff expiry date on grounds of risk for as long as necessary.

11. Thus, life sentences were often referred to as encompassing a 'punitive' period, represented by the tariff length and a 'preventative' period during which release and liberty on licence was dependent on the assessment of risk.

12. In November 2002, the House of Lords decided in the case of *R. (on the application of Anderson) v.Secretary of State for the Home Department* [2002] UKHL 46, that tariff-setting was a sentencing exercise that should be performed by a judge. Tariffs set by ministers were found to be incompatible with the European Convention on Human Rights (ECHR), but not illegal. This distinction was important because it meant that tariffs which had already been set were still enforceable.

13. After *R (Anderson),* ministers stopped setting new tariffs. The judgment was given effect by the Criminal Justice Act 2003 (CJA 2003), which came into force on 18 December 2003. Since that date, all newly convicted offenders have had minimum terms set in open court by the trial judge. The CJA 2003 allows existing prisoners with an unexpired ministerial set tariff to apply to the High Court to have a new minimum term set. If they do not apply, then the original tariff will remain the effective punitive period for that offender.

Licence

14. Those sentenced to life are released by way of a life licence issued under section 28(5) of the *Crime (Sentences) Act 1997* ['C(S)A 1997'].

15. 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.

16. Those were the provisions applicable to BALMER and applicable to date.

17. According to the provisions of the C(S)A 1997, a licence can be revoked at any time and the licensee recalled to prison to continue to serve his or her life sentence. Under section 32(1) of the C(S)A 1997, the Secretary of State can revoke a licence at any time on the recommendation of the Parole Board.

18. Any recall case must be referred to the Parole Board; S32(4) C(S)A 1997.

19. Once the licence has been revoked, the offender is unlawfully at large until returned to custody; s32(6) C(S)A 1997. It must be shown that there is a risk of danger to the public before recall is likely to be agreed.

20. Once recalled, an offender will be in prison until released by the Parole Board; s32(5) C(S)A 1997.

21. The test for release is the same as for initial release. The Parole Board will consider whether the circumstances leading to recall show that the prisoner poses an unacceptable risk of committing further offences of serious harm. The Board is not solely bound to consider the validity of the reasons given by the Secretary of State for recall but could, for example, uphold a recall decision because of other behaviour that comes to light before the hearing.

22. The relevant sections of the *C(S)A 1997* are below:

Section 28 Duty to release certain life prisoners

(1A) In this Chapter –

(a) references to a life prisoner to whom this section applies are references to a life prisoner in respect of whom an order has been made under subsection (2) of section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 or a direction under subsection (5) of that section has been given or will be required to be given at the appropriate stage;

and

(b) references to the relevant part of his sentence are references to the part of his sentence specified in the order or direction or, in the case of a life prisoner in respect of whom a direction under subsection (5) of that section has not been given but will be required to be given at the appropriate stage, the whole of his sentence, and in this section "appropriate stage", in relation to such a direction, has the same meaning as in subsection (6) of that section.

(1B) But if a life prisoner is serving two or more life sentences –

(a) he is not to be treated for the purposes of this Chapter as a life prisoner to whom this section applies unless such an order or direction has been made or given in respect of each of those sentences or such a direction will be required to be given at the appropriate stage;

and

(b) the provisions of subsections (5) to (8) below do not apply in relation to him until he has served the relevant part of each of them.

(5) As soon as –

(a) a life prisoner to whom this section applies has served the relevant part of his sentence; and

(b) the Parole Board has directed his release under this section, it shall be the duty of the Secretary of State to release him on licence.

(6) The Parole Board shall not give a direction under subsection (5) above with respect to a life prisoner to whom this section applies 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.

(7) A life prisoner to whom this section applies may require the Secretary of State to refer his case to the Parole Board at any time –

(a) after he has served the relevant part of his sentence; and

(b) where there has been a previous reference of his case to the Board, after the end of the period of two years beginning with the disposal of that reference; and

(c) where he is also serving a sentence of imprisonment or detention for a term, after he has served one-half of that sentence;

and in this subsection "previous reference" means a reference under subsection (6) above or section 32(4) below.

(8) In determining for the purpose of subsection (5) or (7) above whether a life prisoner to whom this section applies has served the relevant part of his sentence, no account shall be taken of any time during which he was unlawfully at large within the meaning of section 49 of the Prison Act 1952.

Section 31 Duration and conditions of licences

(1) Where a life prisoner is released on licence, the licence shall, unless previously revoked under section 32(1) or (2) below, remain in force until his death.

(2) A life prisoner subject to a licence shall comply with such conditions as may for the time being be specified in the licence; and the Secretary of State may make rules for regulating the supervision of any description of such persons.

(2A) The conditions so specified shall include on the prisoner's release conditions as to his supervision by –

(a) an officer of a local probation board appointed for or assigned to the petty sessions area within which the prisoner resides for the time being;

(b) where the prisoner is under the age of 22, a social worker of the social services department of the local authority within whose area the prisoner resides for the time being; or

(c) where the prisoner is under the age of 18, a member of a youth offending team established by that local authority under section 39 of the Crime and Disorder Act 1998.

(3) The Secretary of State shall not include on release, or subsequently insert, a condition in the licence of a life prisoner, or vary or cancel any such condition, except -

(a) in the case of the inclusion of a condition in the licence of a life prisoner to whom section 28 above applies, in accordance with recommendations of the Parole Board; and

(b) in any other case, after consultation with the Board.

(4) For the purposes of subsection (3) above, the Secretary of State shall be treated as having consulted the Parole Board about a proposal to include, insert, vary or cancel a condition in any case if he has consulted the Board about the implementation of proposals of that description generally or in that class of case.

(5) The power to make rules under this section shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(6) In relation to a life prisoner who is liable to removal from the United Kingdom (within the meaning given by section 46(3) of the 1991 Act, subsection (2) above shall have effect as if subsection (2A) above were omitted.

Section 32 Recall of life prisoners while on licence

(1) If recommended to do so by the Parole Board in the case of a life prisoner who has been released on licence under this Chapter, the Secretary of State may revoke his licence and recall him to prison.

(2) The Secretary of State may revoke the licence of any life prisoner and recall him to prison without a recommendation by the Parole Board, where it appears to him that it is expedient in the public interest to recall that person before such a recommendation is practicable.

(3) A life prisoner recalled to prison under subsection (1) or (2) above -

(a) may make representations in writing with respect to his recall; and

(b) on his return to prison, shall be informed of the reasons for his recall and of his right to make representations.

(4) The Secretary of State shall refer to the Parole Board –
(a) the case of a life prisoner recalled under subsection (1) above who makes representations under subsection (3) above; and

(b) the case of a life prisoner recalled under subsection (2) above.

(5) Where on a reference under subsection (4) above the Parole Board –
(a) directs in the case of a life prisoner to whom section 28 above applies; or

(b) recommends in the case of any other life prisoner, his immediate release on licence under this section, the Secretary of State shall give effect to the direction or recommendation.

(6) On the revocation of the licence of any life prisoner under this section, he shall be liable to be detained in pursuance of his sentence and, if at large, shall be deemed to be unlawfully at large."

Case Law, Commentary and Arguments.
15. The Court has received extensive written and oral submissions from both sides which were of considerable assistance. It was also referred to an extensive body of domestic and foreign jurisprudence, and will refer to this to the extent considered necessary.

16. The jurisprudence to which the Court was referred included:

1. *Minister for Justice and Equality v. Nolan* [2012] IEHC 249 (unreported, High Court, Edwards J., 24th May, 2012);

2. *Minister for Justice, Equality and Law Reform v. Wharrie* [2009] IEHC 630 (unreported, High Court, Peart J., 22nd January, 2009);

3. *Minister for Justice, Equality and Law Reform v. Murphy* [2010] 3 I.R. 77;

4. *R. (on the application of Anderson) v. Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 A.C. 837;

5. *Minister of Justice and Equality v. Kelly (aka Nolan)* [2013] IESC 54 (unreported, Supreme Court, 10th December, 2013);

6. *O'Leary v. Attorney General* [1993] 1 I.R. 102

7. *O'Leary v. Attorney General* [1995] 1 I.R. 254

8. *The People (Director of Public Prosecutions) v. D.O'T.* [2003] 4 I.R. 286

9. *The State (Cannon) v. Kavanagh* [1937] 1 I.R. 428

10. *The State (Aherne) v. Cotter* [1982] I.R. 188

11. *The State (Healy) v. O'Donoghue* [1976] I.R. 325

12. *Nottinghamshire County Council v. B* [2011] IESC 48 (unreported, Supreme Court, 15th December, 2011)

13. *Minister for Justice and Equality v. Shannon* [2012] IEHC 91 (unreported, High Court, Edwards J., 15th February, 2012)

14. *Minister for Justice, Equality and Law Reform v. Brennan* [2007] 3 I.R. 732

15. *Minister for Justice, Equality and Law Reform v. Stapleton* [2008] 1 I.R. 669

16. *Clarke v. McMahon* [1990] 1 I.R. 228

17. *The People (Director of Public Prosecutions) v. Campbell* (1983) 2 Frewen 131

18. *Pilecki v. Circuit Court of Legnica* [2008] 1 WLR 325

19. *Grosskopf v. Germany* [2011] 53 EHRR 7

20. *Stafford v. United Kingdom* [2002] 35 EHRR 32

21. *Wynne v. United Kingdom* [1995] 19 EHRR 333

22. *Kafkaris v. Cyprus* [2009] 49 EHRR 35

23. *James, Wells and Lee v. United Kingdom* [2013] 56 EHRR 12

24. *R (Wellington) v. Secretary of State for the Home Department* [2009] 1 AC 335

25. *R v. Bieber* [2009] 1 WLR 223

26. *Harkins v. United Kingdom* [2012] 55 EHRR 19

27 *Ahmad v. United Kingdom* [2013] 56 EHRR 1

28. *R v. Oakes and others* [2013] 3 WLR 137

29. *Vinter v.United Kingdom* [2012] 55 EHRR 34

30. *People (AG) v. O'Callaghan* [1966] I.R. 501

31. *People (DPP) v. Jackson* [2003] WJSC-CCA 3741 26/04/1993 (unreported, Court of Criminal Appeal, Hederman J., 26th April,1993)

32. *People (DPP) v. Bambrick* [1996] 1 I.R. 265

33. *Lynch & Whelan v. Minister for Justice, Equality and Law Reform and Ors* [2012] 1 I.R. 1

34. *Lynch & Whelan v. Minister for Justice, Equality and Law Reform and Ors* [2008] 2 I.R. 142

35. *Caffrey v. Governor of Portlaoise Prison* [2012] 1 I.R. 637

36. *Cox v. Ireland* [1992] 2 I.R. 503

37. *The People (DPP) v. Anthony McMahon* [2011] IECCA 94

38. *Whelan v. Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* [2007] IEHC 374

39. *Kinahan v. The Minister for Justice* [2001] 4 I.R. 454

The Court has read, considered and taken due account of all of this jurisprudence. In addition, it has considered the further case of *Dowling v. Minister for Justice, Equality and Law Reform* [2003] 2 I.R. 535.

17. The Court has also had regard to *Sentencing Law and Practice, 2nd Ed*, by Thomas O'Malley (Thompson Round Hall, 2006) :- see chapter 2 generally, and paragraphs 2-21 to 2-24 in particular; and also chapter 21 generally, and paragraphs 21-32 and 21-33 in particular. Furthermore, in conducting its own legal research the Court has read two published articles, namely *Life Sentences in Ireland and the European Convention on Human Rights*, by Prof J. Paul McCutcheon and Dr Gerard Coffey, both of the School of Law at the University of Limerick, (I.Y.I.L., 2006, p 101 - 119) and *The Life Sentence and Parole*, by Mr Diarmuid Griffin of the School of Law at NUIG and Prof Ian O'Donnell of the Centre for Crime and Justice Studies at UCD (B.J. Criminol (2012) 52(3) : 611-629), and has found these to be of some assistance. The Court has also given due consideration to the import and effect of the sixteenth amendment to the Constitution.

18. In its judgment in *Minister for Justice and Equality v. Nolan* [2012] IEHC 249 (unreported, High Court, Edwards J., 24th May, 2012) this Court refused to surrender a respondent to the United Kingdom to serve a form of sentence known as an Indeterminate Sentence for Public Protection (I.P.P. sentence), in circumstances where he had served the punishment component of that sentence and would be held thereafter solely for the protection of the public, i.e. in preventative detention. The Court considered that to surrender the respondent in that case so that he might be detained on that basis would breach his constitutional rights, and specifically his right not to be deprived of liberty save in due course of law guaranteed in Article 40.4.1° of the Constitution. In the Court's view the proposed measure, i.e. the detention of the respondent indefinitely for purely preventative and public protection purposes, was something which would so markedly depart from the essential scheme and order envisaged by our Constitution, and would be so proximately connected with any order for surrender that the Court might make, as to justify non-surrender under s. 37(1)(b) of the Act of 2003, and the Court so ordered.

19. In the present case this Court is required to consider *Nolan* type arguments relied upon by a respondent who is wanted to resume serving a life sentence for murder in the issuing state, in circumstances where, having served well in excess of the "tariff" period fixed in his case (initially 12 years but later increased to 15 years), and having been released upon licence on the 2nd of March, 2011, the issuing state, just over a year later, on the 19th of March, 2012, saw fit to revoke his licence for alleged breaches of the conditions attaching to it, and now seeks to have him returned to prison. While he was at liberty on foot of the licence that had been granted to him the respondent left the issuing state and came to Ireland. He had been living openly here until he was arrested on the 11th of June, 2013, on foot of the European arrest warrant with which we are presently concerned.

25. The issues in this case are in many respects similar to, though not identical, to issues raised in a case of *Minister for Justice and Equality v. Craig* (unreported, Edwards J., 31st of July, 2014) and in respect of which the Court has given judgment after the hearing in the present case had been concluded and judgment reserved. The following remarks made by the Court in its judgment in the Craig case also apply and are relevant in the circumstances of the present case.

> "25. It requires to be stated 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*. In the circumstances the principle of *stare decisis* is not engaged and the *Nolan* case does not represent a binding precedent that this Court must follow.
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> 26. However, counsel for the respondent has contended that even if the Court is not obliged to follow its earlier decision in *Nolan*, it nevertheless ought to do so because, in the present case, a similar issue arises for determination in respect of tariff-expired life sentences to that which the Court was required to consider in respect of I.P.P. sentences in the *Nolan* case. Counsel for the respondent contends that if his client is returned to prison it will be for purely preventative and public protection purposes, and that this is something which is fundamentally objectionable under Irish constitutional law. His case is that any such contemplated preventative detention would so markedly depart from the essential scheme and order envisaged by our Constitution, and would be so proximately connected with any order for surrender that the Court might make, as to justify non-surrender under s. 37(1)(b) of the Act of 2003.
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> 27. Counsel for the applicant has argued in response that the Nolan case is clearly distinguishable from the circumstances of the present case, and that having regard to the previous decision of the High Court in *Minister for Justice Equality and Law Reform v.Wharrie* [2009] IEHC 249 (unreported, High Court, Peart J., 22nd January, 2009), and the decisions of the Supreme Court in *Lynch and Whelan v.Minister for Justice, Equality and Law Reform* [2012] 1 I.R. 1, and in *Caffrey v.Governor of Portlaoise Prison* [2012] 1 I.R. 637, the Court ought not to approach both cases in the same way. Specifically, counsel for the applicant urges upon the Court that the legal nature of respondent's life sentence is the same as a mandatory life sentence imposed by the courts in this jurisdiction, and that it contains no element of preventative detention. Counsel for the applicant has argued further, and in the alternative, that if there is any element of preventative detention in how the respondent's continuing sentence is expected to be administered, such preventative detention would be permissible in its context. The case is made that under the Irish Constitution preventative detention is not prohibited in all circumstances. Where, in the case of a prisoner who has been sentenced to imprisonment for life, clemency is being considered by the executive, or its agent the Parole Board, it is lawful and permissible to retain the prisoner in preventative detention pending an assessment of on-going risk to the public, or for the protection of the public where on-going risk has been assessed as existing. Counsel for the applicant maintains that, contrary to the respondent's contention, such detention would not so markedly depart from the essential scheme and order envisaged by our Constitution, or be so proximately connected with any order for surrender that the Court might make, as to justify non-surrender under s. 37(1)(b) of the Act of 2003.
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> **The Court's Decision**
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> **The "preventative detention" issue**
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> 28. In this jurisdiction a person convicted of murder faces a mandatory sentence of imprisonment for life under s. 2 of the Criminal Justice Act 1990 (hereinafter the Act of 1990). Moreover, s. 2 of the Criminal Justice Act 1960 (hereinafter the Act of 1960), as amended by the Criminal Justice (Temporary Release of Prisoners) Act 2003, confers on the Minister (for Justice and Equality) the discretionary power to grant such a person temporary release.
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> 29. The nature of the mandatory life sentence for murder in this jurisdiction was considered by Irvine J. in the High Court, and on appeal by a five judge bench of the Supreme Court, in the conjoined cases of *Lynch & Whelan v. Minister for Justice, Equality and Law Reform and Ors* [2008] 2 I.R. 142 (H.Ct); [2012] 1 I.R. 1 (S.Ct). The plaintiffs, who had each received mandatory life sentences for murder, brought proceedings challenging the constitutionality of s. 2 of the Act of 1990. They complained that the imposition of the mandatory life sentence provided for by s. 2 of the Act of 1990 offended against the constitutional doctrine or principle of proportionality because the trial judge had no discretion to impose a sentence that was proportionate to the gravity of the offence having regard to all relevant circumstances. The plaintiffs also complained that, in exercising a power of release, the Minister was carrying out a judicial function offending the doctrine of separation of powers enshrined in the Constitution. The plaintiffs further complained that s. 2 of the Act of 1990 was incompatible with article 5 of the European Convention on Human Rights in that the length of time actually served in prison was left to be determined by the executive. The High Court dismissed the plaintiffs' claims and refused all relief. The plaintiffs then appealed unsuccessfully to the Supreme Court.
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> 30. In dismissing the appeals in the cases of *Lynch and Whelan*, the Supreme Court held, *inter alia*, that the life sentence imposed pursuant to s. 2 of the Act of 1990 was a sentence of a wholly punitive nature and did not incorporate any element of preventative detention. The Supreme Court, following its consideration of *Deaton v. The Attorney General and The Revenue Commissioners* [1963] I.R. 170 ; *The People (Director of Public Prosecutions) v. Jackson* (unreported, Court of Criminal Appeal, 26th April, 1993) ; *The People (Director of Public Prosecutions) v. Bambrick* [1996] 1 I.R. 265 and *The People (Attorney General) v. O'Callaghan* [1966] I.R. 501, stated (per Murray C.J. at para. 63 *et seq*.):
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> > "[63] 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.
> >
> > [64] It is a sentence which subsists for the entire life of the person convicted of murder. That person may, by virtue of a discretionary power vested in the executive, be temporarily released under the provisions of the relevant legislation on humanitarian or other grounds but he or she always remains liable to imprisonment on foot of the life sentence should the period of temporary release be terminated for good and sufficient reason.
> >
> > [65] It may be appropriate at this point to note that in the event of a prisoner's privilege of temporary release being withdrawn by virtue of a breach of the conditions of that release the Minister, or any person acting on his behalf, is bound to observe fair procedures before withdrawing the privilege of temporary release as was held by this court in *The State (Murphy) v. Kielt* [1984] I.R. 458 and *Dowling v. Minister for Justice* [2003] 2 I.R. 535. Should the Minister fail to observe such procedures or otherwise act in an unlawful, arbitrary or capricious manner in terminating the release for a breach of his conditions or otherwise, the prisoner may seek to have that decision set

aside by way of judicial review before the courts.

[66] In all these circumstances the court does not consider that there is anything in the system of temporary release which affects the punitive nature or character of a life sentence imposed pursuant to s. 2. In particular a decision to grant discretionary temporary release does not constitute a termination let alone a determination of the sentence judicially imposed. Any release of a prisoner pursuant to the temporary release rules is, both in substance and form, the grant of a privilege in the exercise of an autonomous discretionary power vested in the executive exclusively in accordance with the constitutional doctrine of the separation of powers (*per* Finlay C.J. in *Murray & Murray v. Ireland* [1991] I.L.R.M. 465).

[67] Finally, on this aspect of the matter the plaintiffs have attached significance to the fact that in exercising his power to grant temporary release under s. 2 of the Act of 1960 the Minister must, *inter alia*, have regard to the gravity of the offence and the potential threat which the person's release might pose to the safety of members of the public (including the victim of the offence for which he was imprisoned). That does not mean that the Minister is exercising a judicial function when making such a decision and in particular it does not mean that a decision not to release because of a risk of safety to the public converts the punitive sentence for murder into a preventative one. The Act specifies a range of grounds upon which a Minister may consider granting temporary release. They include preparing him for release upon the expiration of his sentence, the re-integration of a rehabilitated prisoner in society, release on grounds of health or other humanitarian grounds. It is a necessary incident to the exercise of a purely executive discretion that the decision-maker would be bound to have, before directing a person's release on any of the possible grounds, regard to a whole range of matters of which some 12 are specified in s. 2(2) of the Act of 1960. Inevitably two of those considerations which ought to be taken into account in the making of any such decision are the gravity of the offence and the risk which the temporary release would pose to the public. A decision to grant temporary release even for a short period such as to permit a prisoner to attend a family funeral would necessarily involve a consideration of any potential risk that that would have for the safety of members of the public. Such a consideration is incidental to the discretionary power and its purpose. It is not a decision on the sentence to be served. Refusing temporary release is a decision not to grant a privilege to which a prisoner has no right. Any such decision or policy on which it is based must serve the purpose or objects of the provision of the Act of 1960 only. It cannot be seen in any sense as converting a subsisting punitive sentence into some form of preventative detention."

31. In *Caffrey v. Governor of Portlaoise Prison* [2012] 1 I.R. 637 the Supreme Court considered whether the legal nature of a mandatory life sentence for murder imposed by a court in the United Kingdom, accompanied by a recommendation by the trial judge that the convicted person should serve a minimum tariff period before being considered for release, was any different from that of a mandatory life sentence in this jurisdiction. A five member bench of the Supreme Court concluded, by a three : two majority, that the legal nature of both sentences was the same, although the manner in which the executive in the United Kingdom was required by UK statute law to manage service of such a sentence is different to how the executive in this jurisdiction is required to do so under Irish statute law.

32. Procedurally, the *Caffrey* case involved an inquiry under Article 40.4.20 of the Constitution. The applicant was convicted of murder in the United Kingdom and on the 15th of December, 1999, he was sentenced to life imprisonment. The trial judge recommended to the British Home Secretary that the applicant serve a minimum tariff period of twelve years imprisonment for the murder. This was to meet the requirements of retribution and general deterrence. The applicant sought a transfer to Ireland for the purposes of serving his sentence as provided for under the Transfer of Sentenced Persons Acts 1995 and 1997. The applicant was informed by the Irish Prison Service that following his transfer he should expect to serve, at a minimum, the tariff that had been imposed in the United Kingdom, excluding the time already served. The applicant then signed a letter indicating his consent to the transfer. The High Court issued a warrant authorising the transfer. No application was made to adapt the nature of the applicant's sentence. The minimum term of the applicant's sentence as indicated by the trial judge expired in 2010. The applicant sought his immediate release in the High Court on the basis that the sentence he was serving, having passed the tariff period of twelve years for punishment and general deterrence, was now entirely preventative, which was incompatible with Irish law. The High Court (Charleton J.) refused to release the applicant and upheld the lawfulness of his detention, holding that the motivation of the trial judge in setting a particular tariff did not change the legal nature of the sentence, which was a life sentence, and that the applicant was thus in lawful custody. The applicant then appealed unsuccessfully to the Supreme Court against the order of the High Court refusing to release him.

33. The judgment of the majority in the Supreme Court was delivered by Denham C.J. with whom Hardiman and Macken JJ. agreed. The Chief Justice stated (at paras. 29 to 32:

"[29] The applicant was sentenced to life imprisonment in England. This was a mandatory sentence. There was no discretion exercised by the sentencing judges. 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) [of the Transfer of Sentenced Persons Act 1995, as amended by section 1 of the Transfer of Sentenced Persons (Amendment) Act 1997] 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 life time 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 applicant 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 applicant 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 applicant would be denied parole review. In this case, no issue of inappropriate considerations on the part of the State that detrimentally affect the applicant arise because the applicant 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 applicant's life sentence. Consequently, I would affirm the judgment and order of the High Court and dismiss the appeal of the applicant."

34. The finding in *Caffrey* that a mandatory life sentence imposed in the United Kingdom, accompanied by a tariff period set by the sentencing judge to meet the requirements of retribution and general deterrence, is of the same legal nature as a mandatory life sentence imposed by an Irish Court, must be viewed in its context, namely that it was a finding in connection with the continued enforcement in this state of a sentence imposed by a court in another state in accordance with the Transfer of Sentenced Persons Acts 1995 and 1997 (construed in the light of the Convention on the Transfer of Sentenced Persons signed in Strasbourg on the 21st of March, 1983). That legislation, and in particular s. 7(10) of the Transfer of Sentenced Persons Act 1995, as amended by section 1 of the Transfer of Sentenced Persons (Amendment) Act 1997, makes it clear that, within that particular context, a reference to the legal nature of a sentence does not include a reference to the duration of a sentence.

35. In practical terms the duration of a life sentence in any particular case will depend on how the sentence is managed or administered by the executive in the enforcing state, particularly in terms of the granting of early release from prison as an exercise in clemency. While theoretically a person sentenced to imprisonment for life may be held in prison for the whole of his or her remaining life, in the overwhelming majority of cases such a person is, at some point during their remaining life, released on licence by the executive in the exercise of clemency. In Ireland the executive in managing a life sentence enjoys a much wider discretion in terms of both when, and if so in what circumstances, it may release a person on licence, than does the executive in England.

36. The crux of the matter in terms of what divided the majority and the dissenting members of the Supreme Court in the *Caffrey* case was whether or not the fixing of a tariff by a sentencing judge, as is required under United Kingdom law, involves more than the mere fettering of the discretion of the executive in terms of when a person sentenced to life imprisonment is entitled to be considered for possible release on licence, such that it goes to the very nature of the sentence, rather than simply to its management or administration (albeit that the manner in which the sentence is managed or administered may have consequential implications for the duration of such a person's imprisonment). The members of the Supreme Court who were in the majority in the *Caffrey* case considered that the tariff system did not alter the nature of the sentence and that account should not be taken of it. In their view how the sentence was intended to be managed under the United Kingdom's legislation was "irrelevant" to their consideration of the legal nature of the sentence for the purposes of its continued enforcement in Ireland, and indeed that it was "inappropriate for the Irish State to make reference to any minimum period in the United Kingdom within which the applicant would be denied parole review." Conversely, members of the Supreme Court who were in the minority in the *Caffrey* case considered that the structured division of a sentence, as is the case in the United Kingdom, into a minimum tariff period to be served in prison, justified only by punitive considerations, followed by the balance of the sentence during which the person will have his liberty restrained on an ongoing basis, but will not necessarily continue to be imprisoned, such imprisonment being justifiable only on public protection grounds, represented "the essence of the sentence". In their view a mandatory life sentence formally structured in that way was of a different legal nature to the unstructured mandatory life sentence in this jurisdiction.

37. The dissenting view in *Caffey* is succinctly stated in paragraphs 68 to 70 of the judgment of Fennelly J. (Murray J. concurring):

"[68] The expression *legal nature* is one of the broad import. It is clear and is common case that it is distinct from the duration of the sentence. The fact that it is a life sentence relates to its duration, not to its nature. It seems clear, beyond any doubt or argument, that the sentence of life imprisonment which was imposed on the applicant is comprised of two distinct elements well established and recognised in English law. There is a first period, 12 years in this case, called the tariff, which was imposed by way of retribution and general deterrence. That is the punitive element of the sentence. Following the expiry of the tariff period, a prisoner such as the applicant is, when detained in England, serving a part of the sentence which is justified exclusively on grounds of public protection, i.e. to prevent him from committing further crimes during the period of the detention.

[69] That, it seems to me, relates to the "legal nature" of the sentence. With great respect to the trial judge, who was working without the benefit of the detailed account of English law provided by Mr. David Perry Q.C., this is not a mere matter of the motivation of the sentencing judge. Any judge, including a judge in this jurisdiction, will take into account a range of considerations when imposing a sentence. A lengthy sentence may be imposed partly as punishment, partly as deterrent and may also take into account the continued danger the perpetrator presents to the public. It does not lead to a structured division of the sentence as is the case in English law. Where a sentencing judge specifies what is described as a minimum tariff, justified only by punitive considerations, the person sentenced will be considered as having fully served that aspect of his sentence and be eligible for parole, unless his further detention is justified for the protection of the public. That is, in my view, of the essence of the sentence.

[70] There then remains the question whether such a sentence is compatible with Irish law. It is clear from a consistent line of authority that a sentence imposed for purely preventative reasons is never permissible. …"

38. It is clear on the evidence before me that the type of sentence considered by the Supreme Court in the Caffrey case was indistinguishable from the sentence imposed upon the respondent in the present case. It seems to me that in the *Caffrey* case the Supreme Court has determined, at least for the moment, the issue as to whether a mandatory life sentence such as that which was imposed upon the respondent in this case by Preston Crown Court is of the same legal nature as a mandatory life sentence imposed here. The Supreme Court has said that it is, and this Court is bound by their determination of that issue.

39. In circumstances where the Supreme Court has also held in the conjoined cases of *Lynch and Whelan* (previously cited) that the mandatory life sentence as we know it is a sentence of a wholly punitive nature and does not incorporate any element of preventative detention, this Court must inevitably conclude that, notwithstanding the tariff period that was fixed by the trial judge in the respondent's case, the life sentence imposed upon the respondent by Preston Crown Court was also, in its legal nature, a sentence of a wholly punitive nature that does not incorporate any element of preventative detention.

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.

41. The respondent in the present case 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 his 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 his case and release him 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 a right. The granting of temporary release as a matter of discretion is provided for in 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 a further offence if 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, "[t]he liberty which a prisoner enjoys while on temporary release, being a privilege, is clearly not on a par 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 in turn obliged to review a prisoner's case regularly once a certain point has been reached (i.e. once the tariff 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"

41. In terms of the s. 37(1)(b) objection based upon Article 40.4 of the Constitution, it seems to this Court that the only material difference between the circumstances of the present case and those of the *Craig* case are that in the present case the respondent was released from prison on licence, which licence has since been revoked, whereas in Mr Craig's case he had never been released on licence. He was being prepared for the possibility of being released on licence and had been stepped down to an open prison in the course of that preparation, from which he escaped. However, in so far as the legal issues raised in relation to possible preventative detention are concerned, they are in this Court's mind identical. The decision in this case must therefore be the same as that in the *Craig* case.

42. The Court notes that in the present case the respondent has also raised a s. 37(1)(a) issue based upon article 5 of the ECHR and that no such objection was argued before the Court in the Craig case. The Court has considered the article 5 based point. The respondent's case is that the detention, upon which the proposed surrender is based, is arbitrary, as there has been a failure to demonstrate that it is sufficiently causally connected to the original conviction for murder, and that surrender would therefore be incompatible with the State's obligations under the European Convention on Human Rights. In support of these contentions he relies upon, and has referred the Court to *Minister for Justice and Equality v. Kelly (aka Nolan)* [2013] IESC 54 (unreported, Supreme Court,

10th December, 2013); *James, Wells and Lee v. United Kingdom* [2013] 56 EHRR 12; *Stafford v. United Kingdom* [2002] 35 EHRR 32 and *Grosskopf v. Germany* [2011] 53 EHRR 7.

43. Referring to the Supreme Court's decision in *Kelly* (aka Nolan) counsel for the respondent had noted, in supplemental written submissions to this Court dated the 10th of March, 2014, that the Supreme Court had acknowledged the jurisprudence of the E.Ct.H.R in regard to arbitrary detention, and that it had cited *James, Wells and Lee v. United Kingdom* as an example of the type of arbitrary detention that was prohibited by article 5.

44. Very particular reliance was placed by the respondent on paragraph 189 of the decision of the Strasbourg Court in *James, Wells and Lee v. United Kingdom*. The Court acknowledges this passage. However to properly contextualize it I think it is necessary to quote more extensively from that portion of the judgment which appears under the heading "General Principles". The Strasbourg Court stated:

> "189. For the purposes of Article 5 § 1 (a), the word "conviction" has to be understood as signifying both a finding of guilt after it has been established in accordance with the law that there has been an offence and the imposition of a penalty or other measure involving deprivation of liberty (see *M. v. Germany*, cited above, § 87; and *Grosskopf v. Germany*, no. 24478/03, § 43, 21 October, 2010). The Court has also made it clear that the word "after" in sub-paragraph (a) does not simply mean that the detention must follow the conviction in point of time: in addition, the detention must result from, follow and depend upon or occur by virtue of the conviction (see *Van Droogenbroeck v. Belgium*, 24 June, 1982, § 35, Series A no. 50; and *Grosskopf*, cited above, § 44). In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue (see *Weeks v. the United Kingdom*, 2 March, 1987, § 42, Series A no. 114; *Stafford v. the United Kingdom* [GC], no.46295/99, § 64, ECHR 2002-IV; *Kafkaris v. Cyprus* [GC], no. 21906/04, § 117, 12 February, 2008; and *M. v. Germany*, cited above, § 88). In this connection the Court observes that, with the passage of time, the link between the initial conviction and a later deprivation of liberty gradually becomes less strong. Indeed, as the Court has previously indicated, the causal link required by sub-paragraph (a) might eventually be broken if a position were reached in which a decision not to release or to re-detain was based on grounds that were inconsistent with the objectives of the initial decision by the sentencing court or on an assessment that was unreasonable in terms of those objectives (see *Weeks*, cited above, § 49; and *Grosskopf*, cited above, § 44).
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> 190. Where the "lawfulness" of detention is in issue, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law (see *Saadi*, cited above, § 67).
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> 191. However, having regard to the object and purpose of Article 5 § 1 (see paragraph 187 above), it is clear that compliance with national law is not sufficient in order for a deprivation of liberty to be considered "lawful". Article 5 § 1 also requires that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see *Bouamar v. Belgium*, 29 February 1988, § 47, Series A no. 129; *Chahal v. the United Kingdom*, 15 November 1996, § 118, Reports1996 V; *Stafford*, cited above, § 63; *Saadi*, cited above, § 67; *Kafkaris*, cited above; 116; *A. and Others*, cited above, § 164; and *Medvedyev and Others v. France* [GC], no. 3394/03, § 79, 29 March 2010). The Court has not previously set out an exhaustive list of what types of conduct on the part of the authorities might constitute arbitrariness for the purposes of Article 5 § 1 but some key principles can be extracted from the Court's case-law in this area to date (see *Saadi*, cited above, § 68). These principles should be applied in a flexible manner having regard to the degree of overlap among them and given that the notion of arbitrariness varies to a certain extent depending on the type of detention involved (see *Saadi*, cited above, § 68).
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> 192. First, detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities (see *Saadi*, cited above, § 69). Thus, by way of example, the Court has found violations of Article 5 § 1 in cases where the authorities resorted to dishonesty or subterfuge in bringing an applicant into custody to effect his subsequent extradition or deportation (see *Bozano v. France*, 18 December 1986, §§ 59-60; and Series A no. 111; *Èonka v. Belgium*, no. 51564/99, § 40-42, ECHR 2002 I).
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> 193. Second, the condition that there be no arbitrariness demands that both the order to detain and the execution of the detention genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1 (see *Saadi*, cited above, § 69). Where, for example, detention is sought to be justified by reference to Article 5 § 1 (c) in order to bring a person before the competent legal authority on reasonable suspicion of having committed an offence, the Court has insisted upon the need for the authorities to furnish some facts or information which would satisfy an objective observer that the person concerned may have committed the offence in question (see *O'Hara v. the United Kingdom*, no. 37555/97, §§ 34-35, ECHR 2001 X). In the context of Article 5 § 1 (d), which permits the detention of a minor for the purpose of educational supervision, the Court found that a period of detention in a remand prison which did not in itself provide for the person's educational supervision would be compatible with that Article only if the imprisonment was speedily followed by actual application of such an educational regime in a setting designed and with sufficient resources for that purpose (see *Bouamar*, cited above, §§ 50 and 52). Likewise, in the case of the detention of a person of unsound mind pursuant to Article 5 § 1 (e), the Court has held that there must be medical evidence establishing that his mental state is such as to justify his compulsory hospitalisation (see *Winterwerp*, cited above, § 39).
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> 194. Third, for a deprivation of liberty not to be arbitrary there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention (see *Saadi*, cited above, § 69). Thus, as noted above, detention for educational supervision pursuant to Article 5 § 1 (d) must take place in a setting and with the resources to meet the necessary educational objectives (see *Bouamar*, cited above, § 50). Where Article 5 § 1 (e) applies, the detention of a person for reasons relating to his mental health should be effected in a hospital, clinic or other appropriate institution (see *Aerts v. Belgium*, 30 July 1998, § 46, Reports 1998 V; and *Brand v. the Netherlands*, no. 49902/99, § 62, 11 May 2004). In the context of Article 5 § 1 (a), a concern may arise in the case of persons who, having served the punishment element of their sentences, are in detention solely because of the risk they pose to the public if there are no special measures, instruments or institutions in place, other than those available to ordinary long-term prisoners, aimed at reducing the danger they present and at limiting the duration of their detention to what is strictly necessary in order to prevent them from committing further offences (see *M. v. Germany*, cited above, § 128; and *Grosskopf*, cited above, § 51). However, in assessing whether the place and conditions of detention are appropriate, it would be unrealistic, and too rigid an approach, to expect the authorities to ensure that relevant treatment or facilities be available immediately: for reasons linked to the efficient management of public funds, a certain friction between available and required treatment and facilities is inevitable and must be regarded as acceptable (see *Brand*, cited above, § 64). Accordingly, a reasonable balance must be struck between the competing interests involved. In striking this balance, particular weight should be given to the applicant's right to liberty, bearing in mind that a significant delay in

access to treatment is likely to result in a prolongation of the detention (see *Brand*, cited above, § 65). In the *Brand* case itself, the Court found that even a delay of six months in the admission of the applicant to a custodial clinic could not be regarded as acceptable in the absence of evidence of an exceptional and unforeseen situation on the part of the authorities (see § 66 of the Court's judgment).

195. Fourth, the requirement that detention not be arbitrary implies the need for a relationship of proportionality between the ground of detention relied upon and the detention in question. However, the scope of the proportionality test to be applied in a given case varies depending on the type of detention involved. For example, in the context of detention pursuant to Article 5 § 1 (a), the Court has generally been satisfied that the decision to impose a sentence of detention and the length of that sentence are matters for the national authorities rather than for this Court (see *T. v. the United Kingdom* [GC], no. 24724/94, § 103, ECHR 2000-I; and *Saadi*, cited above, § 71). However, as noted above, it has indicated that in circumstances where a decision not to release or to re-detain a prisoner was based on grounds that were inconsistent with the objectives of the initial decision by the sentencing court, or on an assessment that was unreasonable in terms of those objectives, a detention that was lawful at the outset could be transformed into a deprivation of liberty that was arbitrary (see *Grosskopf*, cited above, §§ 44 and 48; *Weeks*, cited above, § 49; and *M. v. Germany*, cited above, § 88). Where detention of an alcoholic pursuant to Article 5 § 1 (e) is in issue, the Court has indicated that a deprivation of liberty is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained (see *Witold Litwa v. Poland*, no. 26629/95, § 78, ECHR 2000 III; and *Hilda Hafsteinsdóttir v. Iceland*, no. 40905/98, § 51, 8 June 2004). An individual cannot be deprived of his liberty as being of "unsound mind" unless the mental disorder is of a kind or degree warranting compulsory confinement, and the validity of continued confinement depends upon the persistence of such a disorder (see *Winterwerp*, cited above, § 39; *Johnson*, cited above, § 60; and *Varbanov v. Bulgaria*, no. 31365/96, § 45, ECHR 2000 X). In the case of the detention of a person "for the prevention of the spreading of infectious diseases", it must be established that the spreading of the infectious disease is dangerous to public health or safety, and that the detention of the person infected is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest (see *Enhorn v. Sweden*, no. 56529/00, § 44, ECHR 2005 I). In the context of detention under Article 5 § 1 (f), the Court has indicated that as long as a person is being detained with a view to deportation or for the purpose of preventing an unauthorised entry, there is no requirement that the detention be reasonably considered necessary. However, the length of the detention should not exceed that reasonably required for the purpose pursued (see *Chahal*, cited above, §§ 112-113; and *Saadi*, cited above, §§ 72-74)."

45. The Court further takes specific note of the case of *Stafford v. United Kingdom*, referred to in the passage just cited, and upon which significant reliance is placed. In *Stafford* the Strasbourg Court found that the revocation of the licence of a prisoner who had received a mandatory life sentence for murder in 1967, and had been released on licence in 1991, on the grounds that in 1994 he had been convicted of forgery of travellers cheques and passports, was contrary to article 5, as there was insufficient causal connection between the reasons for revocation and the original murder conviction. The Court held that as his detention was justified not on the basis that there was a risk that he would commit further violent offences but rather on the basis that there was a risk that he might commit further non-violent imprisonable offences, his detention was arbitrary. It is also of some significance that the Court found a violation of article 5(4) on the basis that he could not have the lawfulness of his continued detention decided by a Court.

46. The facts in *Stafford* may be contrasted with those in *Grosskopf v. Germany* where post-sentence detention on public protection grounds was held to be justified as it was clearly linked to the objectives of the sentence. Grosskopf was a burglar who had committed high-value burglary. He had shown no insight into his crimes; he had repeatedly declared that his burglaries were not immoral. A psychiatric report found that he was likely to re-offend in a similar way. He had always made his living from crime when at liberty and had hardly worked in prison. When his sentence came to an end these considerations remained valid. The Strasbourg Court rejected the claim of breach of article 5.

47. The respondent contends that no causal link is manifest between the briefly stated grounds offered as justification for revocation of his licence, and that to surrender him in the circumstances would have the effect of returning him to arbitary detention.

48. The Court is not impressed with this argument. The starting point is that it is to be presumed that the issuing state will respect the respondent's rights and that they do not intend to place him in arbitrary detention. That presumption may, of course, be rebutted but the respondent bears an evidential burden of adducing cogent evidence to suggest that that which is presumed is not the case. The sole evidence relied upon is the fact that the reasons for the revocation are stated in short form in the notice that was sent to the respondent, and the matters referred to in the respondent's own affidavit. As to the latter, it bears remarking that these do not engage in any way with the stated reasons other than to assert that "*[i]t is not offered as a reason for revoking the licence that this deponent has been charged or committed a new criminal offence*". Even that is incorrect because one of the short form reasons provided is that he "*allegedly committed a further offence*".

49. However, reasons for the revocation of the licence are stated, albeit in short form. What is of considerable significance is that the respondent was informed in the recall notice that he would be provided with more detailed reasons once he had returned to custody, including the information on which the decision to recall him was based. Moreover, he was given an indicative timeframe in which that would occur, i.e. within 5 days of his return to prison, failing which, he was told, he should ask the prison staff to chase it up with the Public Protection Casework Section in the Home Office. Most crucially, he was informed about a process of review by an independent body, i.e. the Parole Board, of which he could avail for the purpose of appealing against the decision to recall him. There is no reason to believe that any such review would be conducted other than in accordance with fair procedures.

50. In circumstances where the respondent has adduced no cogent evidence to rebut the presumption that his rights will be respected; where he has already received short form reasons for his recall; where he has received an assurance that he will receive more detailed reasons in a short timeframe following his return to custody, including the information on which the decision to recall him was based, and where he has the possibility of having the decision to recall him independently reviewed, the Court is satisfied that an order for his surrender would not be contrary to this State's obligations under the European Convention on Human Rights

51. If upon his return to custody in the issuing state, and having received the further details to which he is entitled, he continues to maintain that his detention is arbitrary, he will have an immediate remedy of which he can avail, namely the said review procedure.

52. While this Court acknowledges the jurisprudence of the E.Ct.H.R. that has been opened to it, it is not prepared to express any view as to whether the continued detention of the respondent would or would not in fact be article 5 compliant. That is a matter to be determined before the Parole Board and/or the courts in the issuing state. It is not reasonable for the respondent to expect that this Court, as the executing judicial authority, should embark on some form of judicial review of the decision to revoke his licence to

determine whether or not there was sufficient causal connection between the reasons for revocation of his licence and his original murder conviction. This Court is singularly ill-equipped to do so. None of the records are in this jurisdiction. None of the relevant police, prison, probation or Home Office personnel are in this jurisdiction. In addition, this Court has but limited knowledge of the detail of U.K. sentencing law and procedures, the U.K. Probation System, the U.K. Prison System and U.K. Home Office policy and procedures. The Parole Board and/or the courts in the issuing state are far better equipped to make the necessary judgment, and there is no reason to believe that the respondent could not seek an effective remedy there should it be necessary for him to do so. However, the one thing that can be said with certainty is that this Court is not satisfied, on present information, that the presumption that the issuing state will respect the respondent's rights has been displaced. It has not, and the Court is bound to proceed on the basis of that which is presumed. I therefore reject the objection under s. 37(1)(a)(i) based upon article 5 ECHR as not having been made out.

Conclusion

53. It is appropriate to surrender the respondent in respect of both offences to which the European arrest warrant relates.