THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 89

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

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 21st of May 2015

1. In this appeal this Court is required to consider and determine the following question as certified by the High Court (Edwards J.), namely:

> "whether the requested person has been sentenced in the United Kingdom to a life sentence for murder, and has served the portion of the sentence consisting the entirety of the punitive element of the said sentence, would the surrender of that person to serve the balance of his or her sentence constitute a contravention of any provision of the Constitution of Ireland and, in particular, Article 40.4 thereof, except where the contemplated surrender would be prohibited by s. 37(1)(b) of the European Arrest Warrant Act 2003?"

2. The relevant facts and law have been set out in the judgment of Peart J. which has just been delivered. I gratefully adopt his summary of those facts and the applicable legal principles. Where, however, I respectfully part company with the reasoning of the majority of the Court is in the conclusions which are contained in that judgment.

3. In the present case, it is common case that the respondent, Mr. Craig, was convicted of murder in 1974. His life sentence contained an order that he serve a minimum term of 15 years imprisonment. This minimum period is known as "the tariff." In the present case, the warrant emanating from the UK authorities helpfully recites that:

> "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.
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> An independent Parole Board conducts a review of the prisoner's sentence once the punitive element of the sentence is 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.
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> 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."

4. Mr. Craig was certainly serving a sentence of imprisonment in July, 2002 when it is alleged that he escaped from an open prison, H.M. Prison Sudbury, and made his way to Ireland. No question arises in this appeal regarding the order for surrender in respect of the charge of prison escape. The only question which arises, therefore, is in respect of his surrender and in respect of the *balance* of the sentence imposed for murder in circumstances where he had long since served the "tariff" element of the life sentence. The essential question, therefore, is whether the very act of surrender for this purpose amount to an unconstitutionality. Specifically, the question is whether, if Mr. Craig were returned to the UK, would this be for the purpose of serving a period of preventative detention in circumstances where, if this were to be replicated in this jurisdiction, this would be precluded by the personal liberty provisions of Article 40.4.1 of the Constitution?

5. In the High Court, Edwards J. examined these submissions in great detail and delivered an extremely thorough, comprehensive and illuminating judgment on 31st July, 2014: see *Minister for Justice and Equality v. Craig* [2014] IEHC 460. On 18th November, 2014, Edwards J. nonetheless certified the question set above for consideration by this Court.

Section 37(1)(b) of the European Arrest Warrant Act 2003

6. Section 37(1)(b) of the European Arrest Warrant Act 2003 ("the 2003 Act") provides:

> "A person shall not be surrendered under this Act if….
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> (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)."

7. Section 38(1) of the 2003 Act provides:

> "Subject to *subsection (2),* a person shall not be surrendered to an issuing state under this Act in respect of an offence unless
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> (a) the offence corresponds to an offence under the law of the State, and
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> > (i) under the law of the issuing state the offence is punishable by imprisonment or detention for a maximum period of not less than 12 months, or
> >
> > (ii) a term of imprisonment or detention of not less than 4 months has been imposed on the person in respect of the offence in the issuing state, and the person is required under the law of the issuing state to serve all or part of that term of imprisonment
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> or
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> (b) the offence is an offence to which paragraph 2 of Article 2 of the Framework Decision applies or is an offence that consists of conduct specified in that paragraph, and under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than 3 years."

8. It will be seen from the terms of s. 37(1)(b) of the 2003 Act that the very act of surrender must itself constitute a violation of the Constitution. It is true that to this extent this question presents, at least to some degree, the antecedent issue of the extent to which the Constitution may be said to have extra-territorial effect.

The Supreme Court decisions in *Brennan* and *Stapleton*

9. These questions have already been addressed by the Supreme Court in a number of earlier cases involving the 2003 Act. In *Minister for Justice, Equality and Law Reform v. Brennan* [2007] IESC 21, [2007] 3 I.R. 732, the respondent argued that if he were surrendered to the United Kingdom he would face a form of minimum mandatory sentencing which, had it been applied in this jurisdiction, would be unconstitutional. This argument was rejected by the Supreme Court, chiefly because the essential premise of the argument was held to be unfounded on the facts.

10. The Supreme Court nonetheless re-emphasised the point which it had made in its earlier decision in *Minister for Justice v. Altaravicius* [2006] IESC 23, [2006] 3 I.R. 148, namely, that the 2003 Act must be interpreted in the light of the objectives of the Framework Decision. The recitals in the preamble to that Decision make it clear that one of the objectives of the new procedure is "to remove the complexity and potential for delay inherent" in the pre-existing extradition arrangements between the Member States. Recital 6 (and, for that matter, Article 1(2)) acknowledges that the European arrest warrant procedure is founded on the principle of mutual recognition of judicial decisions, and Recital 10 emphasises that this procedure is grounded "on a high level of confidence between Member States."

11. It was against that background that the Supreme Court stressed that the residual power to refuse surrender contained in s. 37(1)(b) of the 2003 Act must be understood. It is plain that the Court considered that this provision was a residual power which was to be confined to exceptional cases. As Murray C.J. stated ([2007] 3 I.R. 732, 743), it could not constitute a breach of the Constitution to effect a surrender "simply because [the foreign] legal system of trial differed from ours as envisaged by the Constitution." The Chief Justice then continued ([2007] 3 I.R. 732, 743):

> "The effect of such an argument is that an order for surrender under the Act of 2003, and indeed any order for extradition, ought to be refused if the manner in which a trial in the requesting State including the manner in which a penal sanction is imposed, does not conform to the exigencies of our Constitution as if such a trial or sentence were to take place in this country. That can hardly have been the intention of the Oireachtas when it adopted s. 37(1) of the Act of 2003 since it would inevitably have the effect of ensuring that most requests for surrender or extradition would have to be refused. And indeed if that were the intent of the Framework Decision, which the Act of 2003 implements, and other countries applied such a test from their own perspective, few, if any, would extradite to this country.…
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> The manner, procedure and mechanisms according to which fundamental rights are protected in different countries will vary according to national laws and constitutional traditions. The checks and balances in national systems may vary even though they may have the same objective, such as ensuring a fair trial. There may be few, if any, legal systems which wholly comply with the precise exigencies of our Constitution with regard to these matters. Not all for example will provide a right to trial by jury in exactly the same circumstances as our Constitution does in respect of a trial for a non-minor offence. Rules of evidence may differ. The fact that a person would be tried before a judge and jury in this country for a particular offence could not, in my view, be a basis for refusing to make an order for surrender solely on the grounds that in the requesting State he or she would not be tried before a jury. The exceptions which we have to the jury requirement, as in trials before the Special Criminal Court, acknowledges that a fair trial can take place without a jury even though it is constitutionally guaranteed for most trials in this country.
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> That is not by any means to say that a court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may well be egregious circumstances such as a clearly established and fundamental defect in the system of justice of a requesting State where a refusal of an application for surrender may be necessary to protect such rights. It would not be appropriate in this case to examine further possible or hypothetical situations where this might arise. The sole matter which I wish to make clear here is that the mere fact that a trial or sentence may take place in a requesting State according to procedures or principles which differ from those which apply, even if constitutionally guaranteed, in relation to a criminal trial in this country does not of itself mean that an application for surrender should be refused pursuant to s. 37(2) of the Act."

12. This trend was continued in the subsequent decision of the Supreme Court in *Minister for Justice v. Stapleton* [2008] IESC 30, [2008] 1 I.R. 669. Here, the question was whether the respondent could invoke undue delay as a ground to resist surrender to the UK under s. 37 of the 2003 Act. In effect, the argument was that if he were now to face trial in this State he could invoke the jurisprudence arising from the due process provisions of Article 38.1 of the Constitution in order to demonstrate that any such trial would infringe his constitutional rights. Proceeding from that premise, the applicant then argued that his surrender to the UK would

amount to an infringement of his constitutional rights which was prohibited by s. 37(1)(b) of the 2003 Act.

13. In his judgment for the Supreme Court, Fennelly J. observed that the principle of "mutual confidence" in the respective legal systems was broader and went further than the systems of mutual political and judicial trust which had been contained in the European Convention on Extradition 1957 and, in our own legal system, the Extradition Act 1965, as it ([2008] 1 I.R. 669,689) "encompasses the system of trial in the issuing member state."

14. Fennelly J. further noted that the question of whether there had been any undue delay could be best resolved within the context of the legal system of the requesting state. The mere fact that there was a difference in criminal procedure between the two jurisdictions was not in itself enough. Fennelly J. then stated ([2008] 1 I.R. 669, 691-692):

> "I cannot see that any of the differences discerned by the trial judge between the right to seek prohibition of trial in the English courts and our own could amount to the establishment of an infringement of the right to fair trial, or fair procedures, whether by reference to the [European] Convention [of Human Rights] or to the Constitution. They certainly do not amount, to repeat the words of Murray C.J. [in *Brennan*], to 'a clearly established and fundamental defect in the system of justice of [the] requesting State.'
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> On the facts of this case, there is available to the respondent a procedure which will enable him, on surrender to the issuing Member State to seek a remedy based on the very long period of time which has elapsed since the alleged commission of the offences. Moreover, on the facts of the case, it is demonstrably more efficient and more convenient that those matters be debated before the courts of the country where the respondent is to be tried. The prosecuting and police authorities as well as other witnesses are available to and amenable to the jurisdiction of the courts of that country. Documentary evidence, of the type demanded by the respondent, will be more readily available there. If not, its absence may be more readily explained. There may, in addition, be arguments or points of domestic law, whether based on precedents or otherwise, which the respondent can advantageously argue or rely upon which may not be available to him in this jurisdiction and of which an Irish court might not necessarily be aware."

15. It is accordingly clear in the light of these cases that s. 37(1)(b) of the 2003 Act can only be successfully invoked by a respondent if it can be demonstrated that the very act of surrender would either itself *ex facie* amount to an unconstitutionality in the circumstances or where this Court, acting on the clearest of evidence, had significant grounds for apprehending that the respondent would, if surrendered, face a manifestly unfair trial which did not meet contemporary minimum standards presupposed by the Framework Decision itself. The latter situation obviously does not arise in the present appeal.

Would the very act of surrender amount *ex facie* to an unconstitutionality?

16. The real question, therefore, is whether it can be said that the very act of surrender of this respondent would *ex facie* amount to an unconstitutionality. It may well be that, as Lord Hope put it in *Pilecki v. Circuit Court of Legnica* [2008] UKHL 7, [2008] 1 W.L.R. 325, 335, it must not be supposed that:

> "… it was the purpose of the Framework Decision to require member states to change their sentencing practices. The principle of mutual recognition indicates the contrary."

17. One may equally agree that, from a penological point of view, the British system of structured sentences has a great deal to commend it. If it were a matter of purely personal opinion – which, of course, I must stress, it is not – I should hesitate prior to concluding that our system was in any way superior to theirs. Quite the contrary: the British system may be said to be more realistic and structured than ours in that it divides the sentence between the punitive element, as reflected in the tariff, and the preventative element, which is under the essential supervision of the (UK) Parole Board. So far as the latter issue is concerned, it is really no more than an endeavour to assess whether it is now safe to release into the community a prisoner who has previously been convicted of murder and who has already served a lengthy prison sentence since that conviction.

18. This, in practice, is probably little different from decisions which successive Ministers for Justice in this jurisdiction have taken in respect of persons convicted of murder and serving the mandatory life sentence prescribed by s. 2 of the Criminal Justice Act 1990 ("the 1990 Act"). Indeed, counsel for the Minister, Mr. McGuinness S.C., helpfully put before the Court statements from our own Parole Board which bear this out. Thus, for example, in its *Annual Report* 2012 at p.5 the Parole Board stated in the case of life sentenced prisoners that:

> "Public statements by the Parole Board in the past and by various Ministers for Justice did indicate that such life sentenced prisoners should normally serve a minimum of 15 years. However, during the last year, the Minister, on the recommendation of the Board, did agree that a particular life sentenced prisoner could be released on parole, subject to appropriate conditions. However, many life sentenced prisoners are not recommended for early parole because of, *inter alia*, the gravity and heinous nature of the offence and their risk of re-offending."

19. Yet both the form and the substance of the British sentencing system *does* present difficulties, *even* if cognisance is taken of Lord Hope's comments in *Pilecki* and *even* if the s. 37(1)(b) provision is read narrowly in order to achieve an *interpretation conformé* which is aligned with the objectives of the Framework Decision in the manner urged by Fennelly J. in *Stapleton*. This is clear from the Supreme Court's decision in *Lynch and Whelan v. Minister for Justice* [2010] IESC 34, [2012] 1 I.R. 1. In that case the plaintiffs (who had been both convicted of murder) challenged the constitutionality of the mandatory life sentence prescribed for murder by s. 2 of the 1990 Act. They also contended that this sentence was incompatible with the State's obligations under Article 5 of the European Convention of Human Rights and sought a declaration to this effect under s. 5 of the European Convention of Human Rights Act 2003.

20. These claims were rejected by the Supreme Court, with Murray C.J. stressing that the life sentence prescribed by s. 2 of the 1990 Act was *wholly punitive* in nature and does not – save, perhaps, in an incidental way - contain any element of preventative detention. The Court further stressed that preventative detention as a feature of sentencing was unconstitutional and that any sentence so providing would have to be set aside. In this regard, the Court expressly contrasted the two different regimes obtaining in both the UK and Ireland in the context of both the constitutional challenge and the challenge under the 2003 Act.

21. So far as the constitutional challenge was concerned, Murray C.J. rejected the argument that either the power to grant temporary release or the executive power of remission of sentence was tantamount in substance to an acknowledgment that there came a point where the life sentence ceased to be punitive and that the Minister was, in reality exercising a function of determining whether it was safe to release the prisoner from a form of preventative detention. As the Chief Justice stated ([2012] 1 I.R. 1, 23-27):

"In the Court's view these submissions are not well founded. First of all the life sentence imposed by a court is exclusively punitive. As Walsh J. pointed out in *The People v. O'Callaghan* [1966] I.R. 501 … preventative justice 'has no place in our legal system'.

In *The People (The Director of Public Prosecutions) v. Jackson (Unreported, Court of Criminal Appeal, 26th April 1993)* Hederman J., said … "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…

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.

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.

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] 1.R. 459 and *Dowling v. Minister for Justice, Equality & Law Reform.* 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.

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 section 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…

Finally, on this aspect of the matter the appellants 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 twelve are specified in s. 2 subs. 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."

22. Similar sentiments were also expressed by the Court when rejecting the challenge based on the 2003 Act. On this point, Murray C.J. stated ([2012] 1 I.R. 1, 28-29):

"In particular the [appellant's] rely on their assertions that the mandatory life sentence is an indeterminate sentence since it is ultimately left to the Minister to weigh up the range of prison terms possible and select the appropriate length of time to be served. In other words, the Ministers carry out a judicial function and determines the limits of the sentence imposed by the Court since the sentence is not in substance a fixed penalty and confers on the executive the power to determine the actual length of imprisonment. Moreover, the manner in which the length of the sentence which the [appellants] undergo is determined in an arbitrary fashion by a Minister many years after sentencing in a social and political context that may be entirely different from what it was at the time of the sentencing. The effect of s. 2 of the Act of 1990 is to submit the [appellants] to such a sentencing regime and constitute a breach of Articles 5(1) and 5(4) of the European Convention on Human Rights.

The relevant part of the Convention provides:

> "(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> (b) the lawful detention of a person after conviction by a competent court…"

Article 5.4 of the Convention provides as follows:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

> The Court reiterates that it is important to take account of the fundamental distinction between the sentence imposed by a court pursuant to s.2 of the Act of 1990 and any subsequent decision by the Minister to grant temporary release pursuant to the Act of 1960. The [appellants] were quite correct in submitting, as they did in relation to the constitutional issue, that the Court should not look simply at the formal provisions of the law but at the substance and effect of the law in practice concerning the sentence imposed on a convicted person. In this context the [appellants] attached significant importance to a number of decisions of the European Court of Human Rights which concerned the sentencing regime in England particularly as applied in the case of life sentences, including mandatory life sentences. The Court will make reference to those cases later in the judgment *but for present purposes it is sufficient to state that the relevant sentencing regime in England and Wales at least means that a life sentence comprises of a punitive period ("the tariff") and, when the "tariff" or punitive period has expired, a subsequent period of preventative detention. That is not and could not be the position in law in this country as has already been explained in the part of the judgment addressing the constitutional issues."* (emphasis supplied)

23. Similar statements are to be found later in the body of the judgment where the Court considered the impact of the ECHR jurisprudence and UK sentencing law. While it is true that these views were expressed in the somewhat different context of a challenge to the constitutionality and ECHR compatibility of the mandatory life sentence regime provided for by s. 2 of the 1990 Act, one cannot, I suggest, realistically regard these passages as anything other than a clear statement that the UK sentencing system insofar as it distinguishes between a punitive element and a preventative element would, if applied in this jurisdiction, offend our constitutional norms.

24. This is also strongly re-enforced by the Supreme Court's even more recent decision in *The People (Director of Public Prosecutions) v. Daniels* [2014] IESC 64, [2015] 1 I.L.R.M. 99. In this case a young offender received a life sentence for the attempted murder of a ten year old girl, even though he had pleaded guilty and was a first time offender. The Court rejected the argument that the sentence so imposed amounted to preventative detention. The Court nevertheless re-affirmed the principle that preventative detention of this kind would be unconstitutional, with Dunne J. stating ([2015] 1 I.L.R.M. 99, 104-105):

> "The substantive argument made on behalf of the applicant was to the effect that preventative detention was not constitutionally permissible in this jurisdiction. Counsel on behalf of the DPP accepted that the submissions made on behalf of the applicant to that effect were correct and that preventative detention as part of the sentencing process would be unlawful and unconstitutional. Thus it seems to me that it can be clearly stated having regard to the passages cited from the authorities referred to above that an individual being sentenced must be sentenced for the offence or offences before the Court and not on the basis that the sentence or any part of it is designed to prevent the commission of further offences in the future by that person. All sentences of imprisonment necessarily involve an element of preventative detention in the sense that when an offender is in prison, they are not at liberty to commit other offences and in this way, a sentence of imprisonment offers protection to society from the possible commission of other offences by that individual. However, the sentence imposed should not be longer than is necessary to punish the offender for the offence or offences concerned. The matter is well put in a joint decision of the Australian High Court, *Veen v. R* (No.2) (1988) 164 CLR 465, (Mason CJ, Brennan, Dawson and Toohey JJ.), where it was stated at p. 473:
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> > "It is one thing to say that the principle of proportionality precludes the imposition of a sentence beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention which is impermissible and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible."
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> Thus, preventative detention as an element of sentencing above and beyond what is appropriate to the particular offences or offences having due regard to the personal circumstances of the offender is not permissible."

25. Before voicing any conclusions on the ultimate issue, however, it is next necessary to consider the decision of the Supreme Court in *Caffrey v. Governor of Portlaoise Prison* [2012] IESC 4, [2012] 1 I.R. 637, a decision which post-dated *Lynch and Whelan*, but which pre-dated *Daniels.* In that case the applicant had been convicted of murder in the United Kingdom and a twelve year tariff had been specified by the trial judge. He subsequently requested and was granted a transfer to this jurisdiction pursuant to the provisions of the Transfer of Sentenced Persons Act 1995 during the currency of that 12 year period. Once, however, the 12 year tariff expired, the applicant maintained that his custody was unlawful since he was being held in a form of preventative detention which was unlawful under the Irish law.

26. This application was rejected by a majority of the Supreme Court. In her judgment for the majority, Denham C.J. distinguished between the *sentence* of life imprisonment imposed by the English court on the one hand and the *administration* of that sentence on the other hand. The sentence remained one of life imprisonment and the fact that there was "a twelve year tariff does not change the nature of the sentence." What was critical was that the sentence was now being administered by reference only to Irish law ([2012] 1 I.R. 637, 652):

> "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.
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> 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." (emphasis supplied)

27. Pausing at this point, it is clear from the judgment of Denham C.J. that she took the view that the sentence which had been imposed by the English courts was a life sentence, but *which now fell to be administered as such under Irish law*. It was as if for this purpose the prisoner had received a life sentence from an Irish court. In that respect, therefore, it was no consequence that a tariff of twelve years had been imposed by an English court, since that would only be of any relevance had the prisoner remained within the UK system and had his sentence fell to be administered under English law.

28. It is in the analysis of *Caffrey* that I find myself in disagreement with Edwards J. He said:

"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* … 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. "

29. With respect, I do not think that the majority of the Supreme Court quite said that. What Denham C.J. did say was that the sentence was a life sentence whose administration was now governed entirely by Irish law by reason of the transfer of the prisoner to this jurisdiction under the 1995 Act. It followed that the special English regime of a tariff coupled with a period of indefinite detention no longer had any application to that sentence. The issue which arises in present case is a different one and would only have arisen in *Caffrey* had the question of his surrender to the UK to serve the balance of the post-tariff life sentence as governed by English law somehow arisen. It is the latter issue, however, which falls to be determined on this appeal. This distinction is an admittedly narrow, but it is nonetheless a vital one: it lies is at the heart of the reason why I respectfully differ from the judgment of Edwards J. in the High Court.

30. Returning now to the judgment in *Caffrey*, it should also be noted that the dissent of Fennelly J. (with whom Murray J. agreed) is also of considerable interest. He stressed the different nature of the UK sentencing regime as compared with our own ([2012] 1 I.R. 638, 661-662)

"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.

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. Murray C.J., in delivering the judgment of this Court in *Lynch and Whelan v Minister for Justice, Equality and Law Reform* [2012] 1 I.R. 1, 29-30 stated:

> "Any convicted person on whom a sentence comprising a preventative element was imposed would be entitled to successfully appeal his sentence on that ground to the Court of Criminal Appeal or any such person who claimed that he was being detained in prison, by the executive or otherwise, as a form of preventative detention rather than punishment would be entitled to seek review of the lawfulness of that detention pursuant to Article 40 of the Constitution."

On one interpretation, that judgment is authority for the proposition that a sentencing judge is not entitled to include, even as one among a number of elements in imposing sentence, consideration of the continuing danger to the public of the person being sentenced and the consequent need to protect the public by detaining him in prison. That is one possible interpretation of the judgment of Carney J. *in The People (Director of Public Prosecutions) v Bambrick* [1996] 1 I.R. 265, 270. That learned judge stated in the course of his decision on sentence:

> "If I were to protect the community and at the same time protect the accused from himself it would be necessary for me to sentence him to life imprisonment with the possibility of his release after a substantial punitive period had expired when, but only when, the Minister's expert advisors were fully satisfied that he no longer posed a danger or threat to any member of the community and women in particular. This is the approach which I would wish to take to the case."

Following extensive review of a number of authorities, Carney J. concluded … that he was "precluded from approaching the case on the basis that over and above any considerations of punishment this dangerous accused should be preventively detained until in the opinion of the most qualified experts he is safe to be let back into the community." He appears, in that passage, to have had in mind a sentence structurally divided into distinct components somewhat on the English model, where the prisoner would be detained after an initial punitive period, for the further purpose of protecting the public. It is unnecessary, for the purposes of the present appeal to decide whether an Irish court could include protection of the public as one of a number of unsegregated elements in a sentence, since it is plainly the case that, since March 2008, the [appellant] is detained solely to serve preventative considerations.

On the authority of [*Lynch and Whelan*], his detention is unlawful and, as is clear from that case, he is entitled to apply to the Court pursuant to Article 40 of the Constitution for his release."

31. Contrary to the views of the Chief Justice, it will be seen that Fennelly J. regarded the sentence which had been imposed by the English court as, in reality, one of twelve years, followed by an indefinite period of detention which was designed for preventative purposes. In essence, therefore, the majority and the minority divided on the critical question as to how that English sentence should be characterised for the purposes of Irish law. Nevertheless, what is striking is that once again the two members of the Court who elected to approach the matter from the perspective of looking at the structure of the sentence (*i.e.*, the two dissenting judges, Murray and Fennelly JJ.) regarded the British bi-furcated sentencing system as constitutionally offensive.

Is there a clear nexus between the act of surrender and the unconstitutionality such as would trigger the application of s. 37(1)(b) of the 2003 Act?

32. Returning now to the present case, it is clear that the nexus between any act of surrender and the preventative detention which

would immediately ensue has not been broken. As Fennelly J. noted in *Stapleton*, in many other types of cases this nexus would simply not exist. This is why, for example, the surrender of an accused *for the purposes of trial* in another Member State would generally not infringe s. 37(1)(b) of the 2003 Act, even if the criminal procedure rules of that state did not provide for jury trial or for the existence of an exclusionary rule.

33. The decision of Edwards J. *in Minister for Justice and Equality v. Shannon* [2012] IEHC 91 provides a good example of this approach. In that case the respondent maintained that his surrender to the United Kingdom would violate s. 37(1)(b) of the 2003 Act by reason of the fact that, if surrendered, he would face trial under a regime where evidence of his previous convictions could be introduced with relative freedom. Following the approach of the Supreme Court in Brennan and Stapleton, Edwards J. rejected that argument, saying at para. 65 that for this argument to succeed it would have been necessary for the respondent to demonstrate that there would be an "egregious breach of his rights amount[ing] to a fundamental defect in the system of justice in the issuing state."

34. By contrast, the act of surrender in the present case would immediately deliver up the appellant into a form of preventative detention which, as the authorities make clear, is *ex facie* a form of unconstitutional detention. Accordingly, therefore, by reason of the two Supreme Court decisions in *Lynch and Whelan* and *Daniels* I find myself coerced to the conclusion that the surrender of the appellant to serve out the balance of the life sentence would - given that he has already long served the punitive element of that sentence as reflected in the tariff - be contrary to s. 37(1)(b) of the 2003 Act.

35. I also think that this conclusion is underscored by the Supreme Court's decision in *Minister for Justice and Equality v. Nolan* [2013] IESC 54, albeit that this decision deals with the parallel provisions of s. 37(1)(a) of the 2003 Act dealing with the State's obligations under the European Convention of Human Rights. In that case the applicant was facing surrender to the UK to serve out the balance of a sentence. Aspects of that particular sentencing regime had already been held by the European Court of Human Rights to be contrary to Article 5.1 of the European Convention of Human Rights insofar as it provided for detention beyond the tariff stipulated by the trial judge: see *James v. United Kingdom* [2012] ECHR 1706, (2013) 56 E.H.R.R. 12. (While there are similarities between the regime applicable to that case and the regime which is applicable in the present case, it is not suggested in the present case that this particular UK post-tariff detention regime violates Article 5.1 ECHR).

36. The Supreme Court held that to surrender the applicant in these circumstances would amount to a breach of s. 37(1)(a)(i) of the 2003 Act since it would be contrary to this State's obligations under the European Convention of Human Rights. In effect, therefore, the Court refused to effect the surrender of the respondent where he would be delivered up to complete the balance of a sentence which had been held to be non-ECHR compliant.

37. Of course, s. 37(1)(a) of the 2003 Act is a parallel provision to s. 37(1)(b), save that the former deals with the ECHR and while the latter deals with the Constitution. It can nevertheless be said that, by direct analogy with the Supreme Court's decision in *Nolan*, if the respondent were to be returned to face a substantive sentence which, if applied here, would contravene the Constitution, then in those circumstances likewise an order for surrender should not be made under s. 37(1)(b) of the 2003 Act.

38. I cannot say that I reach this conclusion with enormous enthusiasm, since I recognise that, as Lord Hope pointed out in *Pilecki*, it was not really the intention of the drafters of the Framework Decision that sentencing practices in the various Member States should have to change to accommodate the fundamental values of the requested State. One may also agree that the Framework Decision did not envisage that a particular and distinctive Irish perspective on human rights and personal liberty as reflected in Article 40.4.1 of the Constitution should – albeit indirectly – be imposed on other Member States, not least our nearest neighbours in the United Kingdom with whose legal system we have so much in common. Nor can I overlook the fact that the respondent is a UK domiciliary who committed the crime of murder in the UK and who, in effect, has taken refuge in this State.

39. I must also acknowledge the force of majority judgment which has just been delivered by Peart J. Attractive as that argument is, I dissent only because I consider that the form, structure and substance of the British sentencing regime for life sentenced persons would compromise fundamental constitutional values by providing for a form of preventative detention and that, by analogy with the Supreme Court's decision in *Nolan*, the very act of surrender for that purpose would amount in itself ex facie to an unconstitutionality. It is in these particular and unusual circumstances that I am compelled to say that this would be contrary to s. 37(1)(b) of the 2003 Act.

Conclusions

40. For the reasons stated, therefore, I would allow the appeal and answer the certified question posed by the High Court in the affirmative.