THE SUPREME COURT

[Appeal Nos 32.21
33.21:]

Clarke C.J.
O'Donnell J.
MacMenamin J.
Dunne J.
Charleton J.
O'Malley J.
Baker J.

Between/

Hasnain Saqlain

Applicant/Appellant

v

The Governor of Cloverhill Prison

Respondent

And

Salman Shahzad

Applicant/Appellant

v

The Governor of Mountjoy Prison

Respondent

Judgment of Mr. Justice Clarke, Chief Justice, delivered the 20th of July, 2021.

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1. Introduction

1.1 The departure of the United Kingdom from the European Union has given rise to many complications across disparate aspects of life. Legal issues arise in many such areas. These appeals are connected with one such area, being the consequences for the operation of the European Arrest Warrant system between those states which continue to be members of the European Union, on the one hand, and the United Kingdom, on the other.

1.2 There are potentially particular problems which arise in that context in respect of Ireland. The first is the purely practical consideration that, given proximity, there are many requests for surrender under the European Arrest Warrant system between Ireland and the United Kingdom. However, of particular relevance to these appeals, is the fact that Ireland is the subject of Protocol No. 21, annexed to the Treaty on European Union ("TEU") and the Treaty on the Functioning of the European Union ("TFEU"), which provides for the reservation of sovereignty by Ireland in respect of the so-called Area for Security, Freedom and Justice ("ASFJ").

1.3 The Protocol does provide a mechanism whereby Ireland can opt in to any measures within the ASFJ, either at the time when the measure in question is under consideration or at some later stage. The importance of the distinction between the timing of Ireland's opting in stems from the fact that, in cases where Ireland does not opt in at the time of the adoption of the relevant measure, Ireland does not have a right to participate in the adoption process.

1.4 While it will be necessary to address the measures adopted by the European Union in respect of the operation of the European Arrest Warrant system with the United Kingdom post-Brexit in due course, both the Agreement on the Withdrawal of

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the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] O.J. C384l/1 ("the Withdrawal Agreement"), which governed relations between the European Union and the United Kingdom during what has come to be known as a transition period between the departure of the United Kingdom from the European Union on February 1, 2020 and December 31, 2020, and the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community and the United Kingdom of Great Britain and Northern Ireland [2020] O.J. L444/14 (" the Trade and Cooperation Agreement"), which governed relations thereafter, provide for the continuance of the European Arrest Warrant system. It is accepted that Ireland did not exercise an opt in under Protocol No. 21 in relation to either of those measures. At the core of the case made both by Mr Saqlain and by Mr Shahzad is the contention that the European Union did not have competence to bind Ireland, in either the Withdrawal Agreement or the Trade and Cooperation Agreement, to measures within the ASFJ without Ireland having exercised such an opt in.

1.5 In addition, there is an issue dealt with in the High Court judgment in both cases concerning the question of whether these questions of European law properly arise in these proceedings. The underlying factual situation which gives rise to that contention in the case of the applicant/appellant in the first case ("Mr. Shahzad") stems from the fact that, in the ordinary way, hearings were conducted before the High Court in relation to his surrender. During the hearing in question, the arguments now sought to be advanced on his behalf were not raised. Both of these proceedings involve respective applications under Art. 40 of the Constitution seeking an inquiry into the lawfulness of the detention of the appellants, having regard to the suggestion that there is no valid legal basis for the continuance of the European Arrest Warrant

system between Ireland and the United Kingdom. In Mr. Shahzad's case it is said that he should now be prevented from raising these issues through the medium of an Art. 40 application when they could and, it is said, should have been raised in the course of the previous proceedings concerning his surrender. The position in respect of the applicant/appellant in the second case ("Mr. Saqlain") is somewhat different. In his case the trial judge found that these matters could not be raised in an Art. 40 application because the proceedings concerning his surrender were still in being so that the relevant points could be raised in the course of those proceedings. Ultimately the respective cases of Mr. Shahzad and Mr. Saqlain failed in the High Court. Appeals in both cases were heard together in this Court.

1.6 Insofar as issues of European Union law arise, it is argued on behalf of both appellants that this Court should make a reference to the Court of Justice of the European Union ("CJEU") under Art. 267 TFEU. That suggestion is resisted on behalf of the State.

1.7 It is first appropriate to briefly set out the facts.

2. The Facts

2.1 Mr. Shahzad and Mr. Saqlain are the subject of European Arrest Warrants ("EAWs") seeking their surrender to the United Kingdom. On foot of the execution of both of these EAWs in the High Court, Mr. Shahzad and Mr. Saqlain were arrested and are now detained pending their surrender. In both of these proceedings the relevant applicant challenged the legality of their respective detentions on the basis that, in their submission, the EAWs under which they had been arrested were not lawfully executed as Ireland had not opted into the provisions of the Withdrawal Agreement and the Trade and Cooperation Agreement insofar as those agreements

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related to measures within the ASFJ, which, it was argued, means that the provisions of these agreements pertaining to surrender have no valid application to Ireland.

2.2 Mr. Shahzad is the subject of a EAW dated March 20, 2020 issued by a judicial authority of the United Kingdom, which seeks his surrender to the United Kingdom to serve a prison sentence of eight years. The EAW was endorsed for execution by the High Court under s. 13 of the European Arrest Warrant Act 2003 ("the 2003 Act") on August 18, 2020 and Mr. Shahzad was duly arrested and brought before the High Court on September 9, 2020. On February 8, 2021, Burns J. in the High Court made an order under s. 16(1) of the 2003 Act for Mr. Shahzad's surrender to the United Kingdom and a consequent order, under s. 16(4) of the Act, committing him to prison pending his surrender (see, *Minister for Justice and Equality v. Shahzad* [2021] IEHC 89). On February 16, 2021, Burns J. directed an inquiry under Art. 40.4.2° of the Constitution into the legality of Mr. Shahzad's detention. Burns J. considered that it would be more appropriate for the Art. 40 application to be heard by a different judge on the basis that those proceedings might be considered to be a collateral attack on his own judgment in the s.16 proceedings. Accordingly, the matter was transferred to Coffey J.

2.3 For his part, Mr. Saqlain is the subject of an EAW dated October 5, 2020, which seeks his surrender to the United Kingdom for the prosecution of 14 separate offences. The EAW was endorsed for execution by the High Court of December 14, 2020. He was arrested on February 25, 2021 and brought before the High Court on February 26, 2021, at which stage he was remanded in custody pending the hearing of the application for his surrender under s. 16 of the 2003 Act. The s. 16 hearing in Mr. Saqlain's case has been adjourned pending the determination of the present

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proceedings. He remains in custody. On March 5, 2021, the High Court directed an inquiry under Article 40.4.2° of the Constitution into the legality of Mr. Saqlain's detention. The Art. 40 proceedings were initiated and heard in the High Court by Coffey J. immediately after the conclusion of the proceedings in Mr. Shahzad's case.

2.4 It should be noted, therefore, that neither case was before the Irish courts as of the date of the withdrawal of the United Kingdom from the European Union. The process involving Mr. Shahzad operated entirely under the Withdrawal Agreement. The process involving Mr. Saqlain commenced while the Withdrawal Agreement was in force but, as it has been adjourned, will come to a conclusion after that agreement had ceased to have effect and thus any surrender ordered would necessarily be under the authority of the Trade and Cooperation Agreement.

2.5 Before going on to consider the judgment of the High Court, it seems to me to be appropriate to briefly outline the basic relevant legal structures.

3. **The Measures**

3.1 The European Arrest Warrant regime is provided for at European Union level by Council Framework Decision of 13 June 2002 on the European Arrest Warrant and Surrender Procedures between Member States ("the Framework Decision"), which aims to simplify the judicial procedure for returning individuals accused of committing a serious crime to another European country by replacing extradition with the EAW. An EAW requires each national judicial authority to recognise and act on, with a minimum of formalities and within a set deadline, requests made by the judicial authority of another EU country to allow for a criminal prosecution to be conducted or for the person to be placed in detention.

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3.2 The Framework Decision was transposed into Irish Law by the European Arrest Warrant Act 2003 ("the 2003 Act"), which provides a regime for the surrender of persons to other Member States of the European Communities that have been designated by the Minister for Foreign Affairs. Under s. 3(1) of the 2003 Act, the Minister for Foreign Affairs is empowered to designate, by order, a Member State that has given effect to the Framework Decision under its national law. The United Kingdom was designated accordingly in the European Arrest Warrant Act 2003 (Designated Member States) Order 2004 ("the 2004 Order").

3.3 The Minister for Foreign Affairs and Trade may also designate a non-Member State for the same purposes by virtue of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012 ("the 2012 Act"), s.2 of which empowers the Minister to provide, by order, and after consultation with the Minister for Justice and Equality, that all or any of the provisions of the 2003 Act, which would usually apply only in relation to Member States of the European Union, may apply in relation to a third country. S. 2(3) of the 2012 Act provides that such an order can only be made "where there is in force an agreement between the third country concerned and the European Union for the surrender of persons wanted for prosecution or punishment".

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3.4 Following the decision of the United Kingdom to withdraw from the European Union, Art. 127(1) of the Withdrawal Agreement made EU law, including the Framework Decision, applicable to and in the UK during the transition period. Art. 62.1(b) of the Withdrawal Agreement specifically provided for the continued implementation of the Framework Decision in respect of EAWs as follows:-

> "62.1. In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, the following acts shall apply as follows:

> …(b) Council Framework Decision 2002/584/JHA shall apply in respect of European arrest warrants where the requested person was arrested before the end of the transition period for the purposes of the execution of a European arrest warrant, irrespective of the decision of the executing judicial authority as to whether the requested person is to remain in detention or be provisionally released;"

In so providing, Art. 62.1(b) accounts for cases that were still in the system at the end of the transition period.

3.5 Domestic effect was given to Art. 62.1(b) of the Withdrawal Agreement by the European Arrest Warrant Act 2003 (Designated Member States) (Amendment) Order 2020 ("S.I. No. 719 of 2020") and s.98(1) of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019. Art. 3 of S.I. No. 719 of 2020 amended the previous 2004 Order by the insertion of the following provisions: -

> "2A(1) The United Kingdom of Great Britain and Northern Ireland is, in respect of a European Arrest Warrant that satisfies the condition specified in paragraph (2), designated for the purposes of the European arrest warrant Act 2003 (No. 45 of 2000).
>
> (2) In relation to a European arrest warrant, the conditions referred to in paragraph (1) are –
>
> (a) that the European arrest warrant has been issued by a judicial authority in the United Kingdom of Great Britain and Northern Ireland, and
>
> (b) that the person in respect of whom the European arrest warrant is issued is arrested before 11:00pm on the 31st day of December 2020 for the purposes of the execution of the European arrest warrant."

3.6 In respect of the Trade and Cooperation Agreement, Title VII of Part Three of this agreement sets out the surrender arrangements which are to apply between the European Union and the United Kingdom (and which have been applied provisionally

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in respect of the surrender of persons arrested) after the end of transition period on December 31, 2020. The provisions of Title VII of Part Three are, in substance, identical to the extradition arrangements which are provided for under the Framework Decision.

3.7 Title VII of Part Three TCA was implemented in domestic law on December 31, 2020 by S.I. No. 720 of 2020 being the European Arrest Warrant (Application to Third Countries) (United Kingdom) Order 2020 made under s.2 of the 2012 Act, purporting to designate the United Kingdom as a third country to which the 2003 Act applies.

3.8 Against the background of those legal measures it is appropriate to turn to the views expressed by the trial judge in his judgments.

4. **The High Court Judgments**

4.1 In the High Court, Coffey J. found against Mr. Shahzad and Mr. Saqlain on the basis that the surrender provisions of both the Withdrawal Agreement and of the Trade and Cooperation Agreement were incidental to the overarching purpose of these agreements and that the opt-in provisions of Protocol No. 21 did not, therefore, apply to the legal bases upon which the agreements were adopted.

4.2 In the case of Mr. Shahzad (see, *Shahzad v. The Governor of Mountjoy Prison* [2021] IEHC 209), Coffey J. determined that the two main issues which arose for consideration by the High Court were, first, whether Mr. Shahzad could avail of the remedy of Art. 40.4.2° of the Constitution and, second, whether the matters provided for by Article 62.1(b) of the Withdrawal Agreement fell within the exclusive

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competence of the European Union under Art. 50 TEU, such that its provisions were binding on and applicable to Ireland.

4.3 In respect of the first issue, Coffey J. concluded that an Art. 40.4.2° remedy was available to Mr. Shahzad as an exception to the general rule outlined by Denham C.J. in *FX v. Clinical Director of the Central Mental Hospital* [2014] IESC 1, 1 I.R. 280. At para. 66 of her judgment in *FX*, Denham C.J. stated:-

> "An order of the High Court which is good on its face should not be subject to an inquiry under Article 40.4.2° unless there has been some fundamental denial of justice. In principle the appropriate remedy is an appeal to an appellate court, with, if necessary, an application for priority. Thus, the remedy under Article 40.4.2° may arise where there is a fundamental denial of justice, or a fundamental flaw, such as arose in the *State (O) v. O'Brien* [1973] 1 I.R. 50, where a juvenile was sentenced to a term of imprisonment which was not open to the Central Criminal Court."

4.4 Coffey J. was satisfied that, while the committal order made by Burns J. in this case was good on its face, the flaw complained of by Mr. Shahzad was not only fundamental, but systemic insofar as it related to extradition between Ireland and the United Kingdom under Art. 62.1(b) of the Withdrawal Agreement. Accordingly, he concluded that Mr. Shahzad's challenge was permitted under the exception established by Denham J. in *FX*.

4.5 Coffey J. further concluded that the State could not rely on the rule in *Henderson v. Henderson* (1843) 3 Hare 100, under which the court has an inherent discretion to prevent a party to litigation from raising an issue, including a matter of defence, which could have been raised in previous connected proceedings. Coffey J. acknowledged that Mr. Shahzad had not raised the point of objection on which he then sought to rely at any point during the s. 16 proceedings before Burns. J, and this

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point ought properly to have been the subject of an application for a certificate of appeal during these previous proceedings. However, Coffey J. was nonetheless loathe to apply the rule in *Henderson v. Henderson* in light of the exceptional nature of Mr. Shahzad's case, which he regarded as raising systemic issues that would inevitably fall to be considered by the High Court at some point in the future. Coffey J. also had regard to the fact that Mr. Shahzad's legal team had changed following the making of the s. 16 orders by Burns J., and he observed that there was no evidence to indicate that Mr. Shahzad's previous lawyers had considered the argument which was now being made.

4.6 Turning to the second issue arising for consideration in Mr. Shahzad's case, relating to any competence the EU might have to bind Ireland on the surrender provisions contained in Article 62.1(b) of the Withdrawal Agreement, Coffey J. began by considering the legal basis upon which the Withdrawal Agreement was adopted. It was not contested by the parties that the Withdrawal Agreement was adopted under Art. 50 TEU and that Ireland took part in, and give assent to, the adoption of the Agreement on that basis. However, it was Mr. Shahzad's case that Art. 62.1(b) of the Withdrawal Agreement should correctly have been adopted under Title III of Part 5 of the TEU, and specifically Art. 82 TEU which is contained in that title, to which Protocol No. 21 applies.

4.7 Coffey J. held that, in circumstances where the stated legal basis for the adoption of a measure under EU law is contested, the applicable legal principles for the identification of the correct legal basis are to be found in *European Parliament v. European Council* (Case C-130/10) ECLI:EU:C:2012:472, at paras. 42-45 of which the CJEU held as follows:-

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"42. According to settled case-law, the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review, which includes the aim and content of that measure (see, in particular, *Parliament v. Council* paragraph 34 and case law cited).

43. If examination of a measure reveals that it pursues two aims or that it has two components and if one of those aims or components are identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant aim or component (see, in particular, *Parliament v. Council* paragraph 35 and case law cited).

44. With regard to a measure that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one being incidental to the other, the Court has held that, where various provisions of the Treaty are therefore applicable, such a measure will have to be founded, exceptionally, on the various corresponding legal basis (see, in particular, *Parliament v. Council*, paragraph 36 in case law cited).

45. Nonetheless, the Court has held also, in particular in paragraph 17 to 21 of case C-300/89 *Commission v. Council* [1991] E.C.R. I-2867 ('Titanium Dioxide'), that recourse to a dual legal basis is not possible where the procedure laid down for each legal basis are incompatible with each other (see, in particular, *Parliament v. Council,* paragraph 37 in case law cited)."

4.8 In light of that judgment, Coffey J. concluded that, where a court is required to determine the correct legal basis for a particular measure, recourse to a dual or multiple legal basis is exceptional. He held that a measure can only be considered to have more than a single legal basis in circumstances where that measure pursues objectives which are not incidental to a main or predominant objective to which the stated legal basis for the legal instrument corresponds and where the procedures laid down for each legal basis are compatible with each other. Adopting this analysis, Coffey J. concluded that Art. 50 TEU was the unimpeachable legal basis for the

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Withdrawal Agreement, unless Mr. Shahzad could demonstrate either that Art. 50 was merely procedural (thus conferring no competence at all) or that Art. 62.1(b) of the Withdrawal Agreement pursued objectives which were not incidental to the main or predominant objective of the Agreement and that the procedure laid down for Art. 50 TEU and Art. 82 TFEU were compatible.

4.9 Having regard to the judgment of the CJEU in *Wightman v. Secretary of State for Exiting the European Union* (Case C-621/18) ECLI:EU:C:2018:999, Coffey J. found that Art. 50 pursues two objectives. The first was to enshrine the sovereign right of a Member State to withdraw from the European Union. The second was to establish a procedure that enables this withdrawal to take place in an orderly fashion. Coffey J. determined that Art. 50 necessarily empowers the European Union to negotiate and conclude a withdrawal agreement which settles all such matters as are necessary to allow for the orderly withdrawal of a departing Member State, whilst also taking account of the framework for that state's future relationship with the European Union. As such, Coffey J. concluded that Art. 50 confers on the European Union a "supranational competence" that is commensurate to the task of concluding an agreement which settles all issues that can arise from all areas of the disentanglement of a departing Member State from the Union, together with a competence to do so in such a way that takes account of the future relationship between the two.

4.10 Coffey J. further concluded that the procedure under Art. 50 is unitary in nature and is, therefore, not subject to the possibility of different procedures, protocols or ratifications. Rather, he found that Art. 50 provides that any withdrawal agreement must be concluded on behalf of the Union by the Council, acting by a

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qualified majority, after obtaining the consent of the European Parliament. Coffey J. held that, in so providing, Art. 50 envisages the exercise of an exceptional but all-encompassing supranational competence by the Union over which the Member States exert some influence, but only to the extent provided for by Art. 50(2).

4.11 In light of the forgoing, and having read the recitals of the Withdrawal Agreement in accordance with Art. 50, Coffey J. held that it was manifestly clear that the purpose and objective of the Withdrawal Agreement was to set out the arrangements for the withdrawal of the UK from the European Union and Euratom, taking account of the framework for their future relationship in order to ensure "an orderly withdrawal".

4.12 In regard to the provisions of Art. 62.1(b) of the Withdrawal Agreement, Coffey J. held that they did no more than continue existing surrender arrangements between Ireland the United Kingdom in a way that was mandated by Art. 50 TEU to provide for an orderly withdrawal, while also taking account the future relationship between the European Union and the United Kingdom. As such, Coffey J. determined that Art. 62.1(b) was not a free-standing new initiative in the ASFJ, but that it was rather a necessary part of a suite of measures that had been included in the Withdrawal Agreement to fulfil the mandate given to the Union under Art. 50. In light of this analysis, Coffey J. concluded that the surrender provisions in Art. 62.1(b) serve a purpose that is incidental and subordinate to the objective of the Withdrawal Agreement under Art. 50, being to achieve an orderly withdrawal whilst taking account of the future relationship between the contracting parties. Coffey J. was also satisfied that the provisions of Art. 62.1(b) were proportionate to the objective of achieving an orderly withdrawal. It follows that Coffey J. did not accept that Art.

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62.1(b) had its legal basis in Art. 82 TFEU, meaning that its provisions were not subject to Protocol No. 21, as contended for Mr. Shahzad.

4.13 Finally, in respect of the High Court proceedings in Mr. Shahzad's case, Coffey J. was satisfied that, insofar as Art. 267 TFEU was engaged by the issue raised in Mr. Shahzad's case, there was no scope for any reasonable doubt as to the manner in which the question raised is to be solved, rendering the matter *Acte Clair* within the meaning of the doctrine established in *CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* (Case 283/81) ECLI:EU:C:1982:335.

4.14 Turning to the judgment of Coffey J. in the *Saqlain* proceedings (see, *Saqlain v. The Governor of Cloverhill Prison & Ors* [2021] IEHC 208), Mr. Saqlain raised two principal grounds of complaint. First, Mr. Saqlain also challenged the validity of the EAW under which he was arrested on the basis that Ireland had not opted into Art. 62.1(b) of the Withdrawal Agreement pursuant to Protocol No. 21, and second, he challenged the legitimacy of his detention on the grounds that his surrender pursuant to the provisions in Title VII of Part Three of the Trade and Cooperation Agreement would be contrary to EU law and to the provisions of the Constitution on the basis that Ireland had not executed an opt in pursuant to Protocol No. 21, meaning these provisions have no application in Irish law.

4.15 In respect of the first ground of complaint advanced by Mr. Saqlain, relating to Art 62.1(b) of the Withdrawal Agreement, Coffey J. rejected this argument by applying the same principles he had outlined in *Shahzad* to find that that Art. 62.1(b) was binding on and applicable to Ireland. Coffey J. further concluded that Mr. Saqlain's reliance on Art. 62.1(b) of the Withdrawal Agreement was misconceived on the basis that this provision only applies the Framework Decision to the UK *after* the

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end of the transition period, which was December 31, 2020. The EAW of Mr. Saqlain was endorsed for execution on December 14, 2020 and accordingly it was made *during* the transition period, when the Framework Decision was applicable to the UK by virtue of Article 127.1 of the Withdrawal Agreement. On this basis, Coffey J. found that the correct issue to be decided was whether the European Union had the competence under Art. 50 TEU to adopt Art. 127.1 of the Withdrawal Agreement insofar as it purports to apply the Framework Decision during the transition period. Again applying the same findings he had previously reached in *Shahzad*, Coffey J. concluded that the transition provisions contained in Art. 127.1 serve a purpose designed to provide for an orderly withdrawal of the United Kingdom from the European Union, meaning that Art. 127.1 has its legal basis in Art. 50 (to which Protocol No. 21 does not apply) and, accordingly, that it is binding on Ireland.

4.16 Coffey J. was further satisfied that Art. 127.1 of the Withdrawal Agreement had been given legal effect in Irish national law by the 2004 Order, which designated the UK for the purposes of s. 3 of the 2003 Act. Accordingly, he concluded that the UK was lawfully designated as a Member State at the time when the EAW of Mr. Saqlain was executed on December 14, 2020, and that Mr. Saqlain's subsequent detention pursuant to that EAW was lawful.

4.17 In respect of the second ground of complaint raised by Mr. Saqlain in the High Court, relating to lawfulness of his detention in light of Ireland not having opted in to the surrender provisions contained in Title VII of Part Three of the Trade and Cooperation Agreement, Coffey J. held that this was an issue which could and should be raised during the s. 16 proceedings before Burns J., which, as mentioned, have been adjourned pending the outcome of the present proceedings. As such, Coffey J.

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held that this was not a matter that was amenable to relief under Art. 40.4.2° of the Constitution.

4.18 Coffey J. further concluded that, even had an Art. 40 remedy been available to Mr. Saqlain in respect of his complaint relating to the Trade and Cooperation Agreement, he was satisfied that Title VII of Part Three of the Agreement was nonetheless binding on and applicable to Ireland. Coffey J. held that the Trade and Cooperation Agreement was an association agreement under Art. 217 TFEU, which had been signed and applied on behalf of the European Union by a decision of the European Council made under Art. 218 TFEU. On this basis, Coffey J. held that the surrender provisions in Title VII of Part Three of the Trade and Cooperation Agreement were not proposed or adopted under Title V of Part Three of the TFEU, to which Protocol No. 21 applies.

4.19 Mr. Saqlain argued that Title VII of Part Three of the Trade and Cooperation Agreement ought correctly to have been adopted under Art. 82 TFEU, to which Protocol No. 21 applies. In respect of this argument, Coffey J. referred once again to the principles he had outlined in *Shahzad* and concluded that the overarching purpose of the Trade and Cooperation Agreement was to establish a new legal basis for a broad relationship between the European Union and the United Kingdom in order to replace the previous closer relationship that had existed prior to the Agreement's application. In this regard, Coffey J. found that the Trade and Cooperation Agreement did not seek to create a new legal relationship where none had previously existed, but rather to provide a new legal framework for trade and cooperation over a very broad range of areas in which there had been an ongoing relationship between the European Union and the United Kingdom. In respect of the surrender provisions

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contained in Title VII of Part Three, Coffey J. determined that these surrender arrangements were substantially no different to those that had previously existed and that, consequently, they pursued a purpose that was incidental to the overarching purpose of the Trade and Cooperation Agreement. Coffey J. was further satisfied that the procedure laid down by Art. 218 TFEU was the correct procedure for the adoption of an association agreement and that the matter was *Acte Clair*. On these bases, he refused the relief sought by Mr. Saqlain.

4.20 It was from those judgments that the respective appellants sought leave to appeal to this Court.

5. The Grant of Leave

5.1 By two separate determinations dated May 14, 2021, (*Saqlain v. The Governor of Cloverhill Prison* [2021] IESCDET 58 and *Shahzad v. The Governor of Mountjoy Prison* [2021] IESCDET 59) this Court granted both Mr. Saqlain and Mr. Shahzad leave to appeal the decisions of the High Court in their respective cases on the following grounds:-

> "7. It is clear that important legal issues arise as to the arrangements now said to be in place for the surrender of persons to the United Kingdom subsequent to the departure of the United Kingdom from the European Union. Those issues have the potential to affect very many cases. In those circumstances, the Court is satisfied that an issue of general public importance arises.
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> 8. The Court is also satisfied that it is important that the maximum clarity be brought to these issues as quickly as possible for, as long as the legal issues which potentially arise on this appeal remain outstanding, it may well be that a

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significant number of similar cases will remain backed up in the High Court including, potentially, cases in which persons may be in custody. In those circumstances, the Court considers that it is appropriate to grant leave to appeal directly to this Court."

5.2 It is clear that it would be unnecessary to address the important issues of European Union law which potentially arise on these appeals if it were to be correct that the appellants cannot raise these matters in Art. 40 proceedings by reason, in the case of Mr. Shahzad, of their not having been raised when the surrender proceedings in his case were before the High Court and, in the case of Mr. Saqlain, because those issues can still be raised in the surrender proceedings in his case. In those circumstances it is appropriate to turn first to that issue.

6. <u>Can the Issues be raised?</u>

6.1 I will turn first to the issue as it arises in the case of Mr. Shahzad. Difficult issues can arise in situations where it is suggested that a person cannot be heard to argue about the lawfulness of their detention by virtue of a contention that they could and should have raised the matter sought to be relied on in earlier proceedings. On the one hand, it may be said that a person is validly held in custody on foot of an ostensibly valid order of a court of competent jurisdiction. There may be limits to the extent to which it is permissible to seek to go behind such an order and, in particular, to seek to do so on the basis of arguments that could have been raised in whatever proceedings led to the making of the order concerned.

6.2 On the other hand, there have been cases in which the courts have expressed the view that validity cannot be conferred on a fundamentally flawed order

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committing someone to prison simply because of what might be described as procedural failures.

6.3 It would certainly be undesirable if, in all cases, a party were entitled to completely ignore a potential issue when the High Court was considering whether they should be surrendered on foot of an EAW and then subsequently raise issues which could and should have been advanced in those proceedings by means of bringing a subsequent application under Art. 40 of the Constitution. The precise balance to be struck in such circumstances would require very careful consideration.

6.4 However, for the purposes of these appeals, I am satisfied that it would not be appropriate to treat either appellant as being estopped from raising the arguments which they seek to raise. When leave to appeal to this Court was sought, the State accepted that it was appropriate to grant leave and, as such, the State did not oppose the appellants' applications for leave to appeal (see the respondents' notices in both cases, which were published alongside the determinations of this Court). Having regard to the particularly important issues which arise, that was an entirely appropriate position to adopt. It is important that clarity be brought to these issues one way or the other, for they have the potential to impact on any EAWs between Ireland and the United Kingdom.

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6.5 It should also be emphasised that so-called *Henderson v. Henderson* estoppel (see, *Henderson v. Henderson* (1843) 3 Hare 100) has consistently been held not to provide for an absolute barrier, but rather to enable the Court to exercise a discretion to refuse to permit a party to raise an issue which is in breach of the principles set out in the case law. In that context there is a distinction between *res judicata* and *Henderson v. Henderson* estoppel (see, *Mount Kennett Investment Company & anor*

v. O'Meara & ors [2010] IEHC 216). The point is that *res judicata* precludes further proceedings save in those very limited circumstances where it is possible to set aside a final judgment on grounds such as fraud. If fresh proceedings are caught by the principles of *res judicata*, then they cannot be progressed unless and until the plaintiff has successfully set aside the previous order of the Court which acts as a barrier to the bringing of such fresh proceedings.

6.6 On the other hand, *Henderson v. Henderson* estoppel allows the Court to take into account a wider range of factors so as to determine whether it truly is an abuse of process to attempt to litigate a new point which could and should have been raised in previous proceedings. In many cases such a course of action will amount to an abuse of process, but the Court does have a wider discretion to take into account additional factors in determining whether that is truly the case.

6.7 Having regard to the history of these proceedings and the important issues which they raise, I am satisfied that it would not, in the very particular circumstances of these proceedings, be an abuse of process to permit Mr. Shahzad to pursue the issues of European Union law which they have sought to raise.

6.8 It is true that, as the trial judge found, it would be open to Mr. Saqlain to raise the issues which lie at the heart of this appeal when the substantive s.16 proceedings concerning his surrender, which stand adjourned, are back before the High Court. In most cases that would be the appropriate procedure to follow. A person who is the subject of an EAW has a full opportunity to raise any points that they wish concerning the issue of whether they should be in fact surrendered on foot of the warrant concerned. However, there are a number of unusual circumstances arising in the context of these proceedings which lead me to the view that this Court should,

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exceptionally, consider the merits of Mr. Saqlain's European Union law case on this appeal.

6.9 First, it is important to note that the trial judge did go on to consider, and indeed reject, Mr. Saqlain's submissions in that regard, notwithstanding the view of the trial judge that they could not properly be raised in Art. 40 proceedings. The Court has, therefore, the benefit of a reasoned High Court judgment and full argument from the parties. In addition, the points already mentioned in respect of Mr. Shahzad in this regard also apply in Mr. Saqlain's case. This Court has heard in full an appeal on the merits and it would not appear, in those unusual circumstances, to be an appropriate use of scarce judicial resources, to have the matter go back to be heard again in the High Court with the real prospect of a further appeal.

6.10 In those circumstances I am satisfied that it is appropriate, in the particular circumstances of this case, to also consider on the merits Mr. Saqlain's appeal in respect of the European Union legal issues raised. It follows that I consider that both appeals should be fully considered and, in those circumstances, it is necessary to turn to the issues of European Union law raised.

7. European Union Law

7.1 Given the differences between the parties as to whether a reference under Art. 267 TFEU is required, it is first necessary to consider whether the issues raised, insofar as they relate to matters of European Union law, are clear in the sense in which that term is used in *CILFIT*.

7.2 In one sense, the argument made on behalf of the appellants is straightforward and simple. It is said that matters concerning the operation of the European Arrest

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Warrant system come within the ASFJ. On that basis, it is said that, in the absence of an opt in by Ireland, such measures cannot be adopted in a way which binds Ireland. It being clear that Ireland has not opted in to the measures with which the Court is concerned in these proceedings, it is said that it clearly follows that the European Union exceeded its competence in binding Ireland to those measures without an opt in under Protocol No. 21.

7.3 Against that proposition counsel for the State draws attention to Art. 50(2) TEU, which confers the power on the European Union to negotiate and conclude a withdrawal agreement with a departing Member State, and also to Art. 217 TFEU, which is said to provide a substantive legal basis for the conclusion of international agreements in any area of the Union treaties. On that basis, it is said that the European Union had the competence to enter into both the Withdrawal Agreement and the Comprehensive Trade Agreement. At a general level, counsel for the appellants did not dispute that competence for it clearly derives from the provisions of the relevant articles just cited.

7.4 However, the real question is as to whether that general competence can extend to binding Ireland to aspects of either a withdrawal agreement or an agreement concluded under Art. 217 where the agreements concerned involve issues arising in the context of the ASFJ in respect of which Ireland has not exercised an opt in.

7.5 Counsel drew the Court's attention to a line of authority from the CJEU which was concerned with identifying the proper legal basis for international treaties, most particularly where a number of objectives or purposes underlie the treaty concerned. It must, of course, be recalled that the identification of the appropriate legal basis can have consequences beyond the technical identification in the measures concerned of

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the provisions of the treaties which are said to provide that legal basis. For example, different procedures or different voting mechanisms may apply depending on the legal basis adopted. In addition, issues, such those which arise on these appeals, can come into focus where certain Member States may not, *prima facie*, have surrendered sovereignty in a particular area to the European Union.

7.6 Counsel for the State sought to rely on the judgment of the CJEU in *Parliament v. Council* (Case C-130/10), in which that Court determined that the legal basis of a measure of European law must rest on objective factors which are amenable to judicial review, including the aim and content of the measure. In this regard, the CJEU held that a measure should be founded on a single legal basis corresponding to its predominant aim, save in exceptional circumstances where a measure may be found to have a dual legal basis if it pursues several compatible aims which are inseparably linked without being incidental to each other. In the CJEU's judgment in *Commission v. Council (Philippines)* (Case C-377/12) (ECLI:EU:C:2014:1903), on which Counsel also sought to rely, the CJEU held that the Council had acted unlawfully in adding multiple legal bases to a Framework Agreement on Partnership and Consideration between the Member States of the European Union and the Republic of the Philippines. The Court found that provisions of the Agreement relating to the readmission of nationals, transport and the environment contributed to the predominant aim of the Agreement, being development cooperation, and that these provisions therefore did not constitute distinct objectives such that they required the Agreement to be founded in more than a single legal basis.

7.7 The final authority of the CJEU relied on in a significant way by Counsel in respect of the identification of the correct legal basis was the judgment in *United*

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Kingdom v Council (EEC–Turkey Association Agreement (Case C-81/13) (ECLI:EU:C:2014:2449), in which the United Kingdom, supported by Ireland, contested the legal basis on which the European Union adopted a Council Decision relating to further provisions to be taken on social security systems in an existing association Agreement between the European Economic Community and Turkey. In this case, the CJEU held that a court should have regard to the context of a measure when striving to determine its legal basis. The CJEU further concluded that a consideration of the legal basis used for the adoption of other, similar European Union measures was irrelevant, for the legal basis of a measure can only be determined by having regard to that measure's own aim and content.

7.8 It is clear that the Union institutions considered that Art. 50 provided the legal basis for the Withdrawal Agreement and, importantly, that Art. 217 TFEU provided the legal basis for the Trade and Cooperation Agreement. The Recitals of the Preamble to the Withdrawal Agreement refer twice to Art. 50 TEU and four times to an "orderly withdrawal" of the United Kingdom, which includes an express statement that, "… the objective of this Agreement is to ensure an orderly withdrawal of the United Kingdom from the Union and Euratom". In respect of the Trade and Cooperation Agreement, the Commission Proposal for a Council Decision on the conclusion of the Agreement proposed that, "The substantive legal basis for the proposed Council Decision on conclusion is Article 217 TFEU. This legal basis is the most appropriate given the broad scope of the envisaged partnership." The Council Decision that was subsequently adopted, being Council Decision (EU) 2020/2252 of 29 December 2020 on the signing, on behalf of the Union, and on provisional application of the Trade and Cooperation Agreement ("Council Decision 2020/2252"), provided for signing of the Trade and Cooperation Agreement and its

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provisional application as of 1 January 2021, pending the consent of the European Parliament and conclusion by Council decision. Council Decision 2020/2252 sets out on its face the substantive and legal basis for the decision as follows:-

> "Having regard to the Treaty on the Functioning of the European Union, and in particular Article 217, in conjunction with Article 218(5) and the second subparagraph of Article 218(8) thereof […]."

Furthermore, Recital (5) of Council Decision 2020/2252 states:-

> "The Trade and Cooperation Agreement establishes the basis for a broad relationship between the Union and the United Kingdom involving reciprocal rights and obligations, common actions and special procedures. … The decision on the signing of the Trade and Cooperation Agreement and the Security of Information Agreement (the 'Agreements') should therefore be based on the legal basis providing for the establishment of an association allowing the Union to enter into commitments in all areas covered by the Treaties.

7.9 In addition, the first Article of the Trade and Cooperation itself, headed *"Article COMPROV.1: Purpose"* provides as follows:-

> "This Agreement establishes the basis for a broad relationship between the Parties, within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on co-operation, respectful of the Parties' autonomy and sovereignty."

On that basis it is said that, consistent with the authorities referred to, both treaties had the capacity to include measures from the ASFJ binding on Member States, such as Ireland, which are not otherwise bound in that sphere, by reason of the agreements having as their principal or dominant purpose respectively the making of arrangements for the orderly departure of the United Kingdom under the Withdrawal Agreement and the development of comprehensive arrangements between the Union and the United Kingdom under the Trade and Cooperation Agreement.

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7.10 Against that, counsel for the appellants suggests that it would be anomalous if the Union could bind a state such as Ireland, which has the benefit of a protocol such as Protocol No. 21, into arrangements within the ASFJ entered into with a third country, simply by including those arrangements in a wide ranging treaty. It is clear that similar arrangements could not be made, without an opt in, in respect of states within the Union itself. Thus, counsel argued, if the position adopted by the State was correct, the Union could, without an opt in, bind Ireland to a new European Arrest Warrant regime with non-Member States in circumstances where Ireland clearly could not be bound by such a regime in respect of Member States.

7.11 Leaving aside that high level debate, it is also possible that the fact that Ireland had already agreed to a European Arrest Warrant regime involving the United Kingdom might be material to such considerations. In addition, it may be possible to distinguish between the proper approach to the Withdrawal Agreement, on the one hand, and the Trade and Cooperation Agreement, on the other. Clearly the Withdrawal Agreement has, as its backdrop, the fact that there will inevitably be many mechanisms through which the affairs of the remaining states and a withdrawing state have become intermeshed during the period of the membership of the withdrawing state of the Union. It may be that this context might justify measures in a withdrawal agreement concluded under Art. 50 which might not be permissible in an agreement entered into under Art. 217 TFEU. In addition, counsel for the State places reliance on the fact that the European Union actually entered into the two agreements concerned with the United Kingdom which agreements are, therefore, binding between the Union and the United Kingdom as a matter of international law. In those circumstances it is said that, as a matter of European Union law, the measures

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must be taken to be binding on all states for, if it were to be otherwise, the Union itself would be in breach of international law.

7.12 Against the backdrop of those arguments, it is appropriate to turn to an analysis of the issues raised.

8. <u>Analysis</u>

8.1 It is first necessary to set out the reasons why, as a matter of Irish law, the questions of European Union law potentially arising in these proceedings are crucial to the final decision which this Court must make.

8.2 In that context, it is appropriate to start by recalling that both of these proceedings involve applications under Art. 40 of the Constitution seeking the release of the respective appellants on the basis that their continued detention is unlawful. The detention of each of the appellants is based on, and said to be justified by, the fact that there are valid proceedings concerning their surrender to the UK in being, and that their continued detention is in accordance with court orders made in those proceedings. If it were to be the case that the regime for the implementation of EAWs between Ireland and the United Kingdom no longer has a valid legal basis, then it would clearly be impermissible to imprison persons on foot of orders made in the context of that regime. It follows in turn, therefore, that the existence of a valid legal basis for the operation of the European Arrest Warrant system between Ireland the United Kingdom is essential to the validity of the imprisonment of Mr. Shahzad and Mr. Saqlain.

8.3 Next it is necessary to consider the basis in Irish law for the suggestion that the European Arrest Warrant regime continues to apply to the United Kingdom.

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Somewhat different provisions apply to respectively the Withdrawal Agreement and the Trade and Cooperation Agreement. As already noted, the 2012 Act provides that the Minister for Foreign Affairs and Trade may make orders under that legislation extending the European Arrest Warrant regime to states which are not Member States of the European Union, but only in circumstances where there is in existence an agreement between the European Union and the third country concerned which provides for the operation of the European Arrest Warrant system in respect of that third country. As also already noted, the Minister, for the purposes of implementing the Trade and Cooperation Agreement, has made a relevant order under that legislation extending the European Arrest Warrant regime to the United Kingdom. On its face that order would, *prima facie*, appear to provide a legal basis for the continuation of the European Arrest Warrant regime between Ireland and the United Kingdom. In addition, the S.C. 719 of 2020 purports to provide a legal basis for the continuance of the regime during the transition period provided for in the Withdrawal Agreement.

8.4 However, in order for the relevant measures to be valid, both sides agreed that the proper interpretation of the legislation in question is to the effect that measures can only be adopted in respect of a third country where any relevant agreement between the European Union and that third country in respect of the European Arrest Warrant regime is binding on Ireland. I would agree with that interpretation. The purpose of the legislation stems from the need to provide a mechanism in Irish law to enable Ireland to comply with European Union measures binding on Ireland in respect of the scope of application of the European Arrest Warrant regime to third countries (including countries departing from the European Union). If Ireland does not have a

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binding obligation in respect of a third country, then it follows that there is no proper legal basis in national law to extend the regime to the third country in question.

8.5 It, therefore, follows that the validity of the legal basis on which the European Arrest Warrant regime purports to continue in place between Ireland the United Kingdom rests on the question of whether respectively (depending on the time in question) the Withdrawal Agreement and/or the Trade and Cooperation Agreement bind Ireland to the continuance of the regime in respect of the United Kingdom. If those measures do so bind Ireland, then it follows that Ireland was entitled (and, indeed, was obliged as a matter of European Union law) to adopt appropriate measures extending the regime to the United Kingdom as a, by then, third country outside the Union. In such circumstances, there clearly would be a legal basis for the continuance of the regime in question between Ireland and the United Kingdom and there would, therefore, be no basis for questioning the legitimacy of the imprisonment of the respective appellants.

8.6 On the other hand, if, as a matter of European Union law, the relevant agreements cannot be properly said to bind Ireland, then there is no proper legal basis for the respective relevant measures continuing the regime in respect of the United Kingdom so far as Ireland is concerned and, thus, no proper legal basis for the continued detention of either appellant.

8.7 On foot of that analysis, it is clear that the validity or otherwise of the continued detention of both appellants depends solely on the question of whether, respectively, the Withdrawal Agreement and the Trade and Cooperation Agreement can be said to validly bind Ireland as a matter of European Union law insofar as those agreements relate to matters within the ASFJ and, in particular, the European Arrest

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Warrant regime. It follows, in turn, that a resolution of that question is necessary to the final disposition of these proceedings.

8.8 In those circumstances, in light of *CILFIT*, there is an obligation on this Court to refer questions concerning those matters to the CJEU unless this Court is satisfied that the matter is *Acte Clair*. It is, therefore, that question which must be addressed.

8.9 I note the careful argument made by counsel on behalf of the State to the effect that the proper legal basis for agreements entered into between the Union and third countries must be analysed by reference to the main purpose of the agreement concerned so that matters which are incidental may also be included in an agreement adopted on foot of the legal basis which justifies that main purpose, even though a different legal basis might have been relevant had the incidental measure in question been the sole or main purpose of a different agreement. That such an analysis is established in the jurisprudence cannot be doubted.

8.10 However, it does not appear to me to be clear that this analysis necessarily applies in the very wide manner argued for on behalf of the State. It would seem arguable that the conclusion of an agreement between the European Union and a third country which was concerned only with the incorporation of the third country concerned into the European Arrest Warrant system would have to be concluded under the regime provided for in respect of the ASFJ. In such circumstances, it is arguable that no such agreement could be entered into between the Union and such a third country which could be binding on Ireland in circumstances where Ireland had not exercised the opt in provided for in Protocol No. 21. If that be so, it must at least be open to some debate as to whether it is possible to introduce a measure which comes within the ASFJ, and which is significant in its own right, by means of its

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incorporation into a much wider agreement providing for a whole range of arrangements across areas of Union competence. If this were to be possible, then it would have the effect of significantly watering down any protocols negotiated in respect of the ASFJ and could, indeed, have implications for any other areas of competence where a Member State or Member States had negotiated a retention of sovereignty by means of a protocol.

8.11 In that context it must be recalled that, where treaty amendments are agreed between the Member States, each state must subject the measures agreed to whatever may be the appropriate ratification procedures under national constitutions. In Ireland's case, at least where the treaty amendments are significant and involve a further conference of significant competence on the Union, such matters require an amendment to the Constitution which can only be passed by referendum. However, whatever ratification measures are in place, it can hardly be doubted that the existence of relevant protocols may well play a part, and sometimes a significant part, in the debate concerning ratification. A suggestion that the provision of protocols could be circumvented by relevant measures being included in broad comprehensive agreements could well impact the strength which the existence of a protocol, freely negotiated by the Member State concerned, might play in any such ratification debates.

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8.12 Be that as it may, it does not seem to me to be clear that the jurisprudence to which the State refers can, in substance, necessarily allow significant measures in the ASFJ to be included in agreements with third countries, without a relevant opt in, simply by the inclusion of such measures in an agreement which is sufficiently wide ranging to enable those significant measures to be considered to be less than central.

8.13 However, other questions also arise. As the trial judge pointed out, the situation underlying the issues in these proceedings is not simply one which arises in the context of a case where the Union enters into an agreement with a third country in circumstances where there never were similar arrangements in the past. Even if it may not always be permissible for the Union to agree measures which would, in principle, be in breach of a protocol excluding Union competence in respect of a particular Member State in a particular area, by means of the inclusion of relevant measures in a comprehensive agreement, it does not follow that there may not still be circumstances where this is permissible. The analysis of whether a measure can be considered incidental may include such considerations. In other words, it may be possible that a measure may, in itself, be sufficiently significant so that it could not be regarded as incidental to an agreement touching on other areas, but where the same measure could be regarded as incidental if its inclusion were merely to continue arrangements already in being. It should be noted that the trial judge did consider that the fact that the relevant provisions of both the Withdrawal Agreement and of the Trade and Cooperation Agreement, concerning the continuance of the European Arrest Warrant regime with the United Kingdom, could indeed be considered incidental on that very basis.

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8.14 Ireland did subscribe to the Framework Agreement and thus agreed to implement an EAW system involving the United Kingdom as a then member of the Union. Thus both the arrangements set out in the Withdrawal Agreement and the Trade and Cooperation Agreement provide for the continuance of a pre-existing arrangement into which Ireland had lawfully and properly entered rather than providing for the creation of a new arrangement not previously in existence. It can be argued that these factors represent an important distinction between this case and a

case where the Union entered into an agreement with a third country in respect of which no relevant pre-existing agreement was in place.

8.15 In addition, there are arguments about whether different considerations might apply in relation to, respectively, the Withdrawal Agreement and the Trade and Cooperation Agreement. As the trial judge pointed out, the purpose of a withdrawal agreement is to allow for the orderly departure of a Member State which chooses to exercise its entitlement to depart from the Union under Art. 50. There is, of course, no necessary legal obligation for a withdrawal agreement to come into place so that the relations between the Union and a departing Member State may revert to the ordinary provisions of international law applicable in the event that no such agreement is entered into. Likewise, there is no legal necessity for there to be a separate withdrawal agreement covering a relatively short transition period followed by a separate agreement designed to cover ongoing relations thereafter. There may well have been practical reasons why there were two agreements in the context of the departure of the United Kingdom from the Union, for it may well not have been considered possible to negotiate all of the terms applicable to a long term arrangement within the time frame of the expiry of the notice delivered under Art. 50. However, it is, in principle, possible that all of the arrangements concerned could have been concluded in a single withdrawal agreement which could have provided not only for short term but also long term arrangements. Notwithstanding that analysis it remains possible that, as the legal basis for a withdrawal agreement differs from that which underlay the Trade and Cooperation Agreement, different considerations might apply.

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8.16 There are, indeed, other issues such as the point made by counsel for the State which is to the effect that both agreements would appear to be binding, as a matter of international law, between the European Union and the United Kingdom.

8.17 At the end of the day, it does not seem to me that it can safely be said that the competence of the Union to bind Ireland, without a specific opt in under Protocol No. 21, into arrangements with the ASFJ, such as are at issue in these proceedings, in either a withdrawal agreement or an agreement entered into under Article 218 TFEU, is sufficiently clear to meet the *CILFIT* test. In those circumstances, it seems to me to be appropriate to refer questions in that regard to the CJEU to bring clarity to the issues concerned. I would propose, therefore, that separate questions be asked in relation to, respectively, the Withdrawal Agreement and the Trade and Cooperation Agreement, having regard to the possibility that different considerations might apply in each respective case.

9. Conclusions

9.1 For the reasons set out earlier in this judgment, I propose that the Court should, in the unusual and exceptional circumstances outlined, consider the issues of European Union law raised within the confines of these Art. 40 proceedings.

9.2 In addition, I have set out the reasons why I consider that a resolution of those question of European Union law, being as to whether either or both of the Withdrawal Agreement and the Trade and Cooperation Agreement are binding on Ireland in the absence of an opt in by Ireland under Protocol No. 21, are necessary to the determination of whether the continued imprisonment of both Mr. Shahzad and Mr. Saqlain is lawful.

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9.3 I have also concluded that the answers to those questions of European Union law are not clear within the meaning of the *CILFIT* jurisprudence. In those circumstances, I propose that the Court should refer questions concerning those matters to the CJEU. Separate questions should be asked in relation to, respectively, the Withdrawal Agreement and the Trade and Cooperation Agreement. I propose that a draft reference be submitted to the parties no later than the 22 July and that the parties be given an opportunity to make such observations as they wish on the text no later than the 28 July.

9.4 It should be emphasised that the finalisation of the text of the reference, including the questions to be referred, is ultimately a matter for the Court. Having considered any observations which may be received within the timeframe referred to, the Court will finalise the terms of the reference document and submit it to the CJEU. In light of the fact that both Mr. Shahzad and Mr. Saqlain are in prison the Court will respectfully suggest to the CJEU that the urgent preliminary ruling procedure should be adopted in this case.

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