

**THE HIGH COURT
IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2° OF THE
CONSTITUTION OF IRELAND**

[2021] IEHC 208
[2021 No. 295 SS]

BETWEEN

HASNAIN SAQLAIN

APPLICANT

AND

**THE GOVERNOR OF CLOVERHILL PRISON
AND IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

JUDGMENT of Mr. Justice Paul Coffey delivered on the 19th day of March 2021.

Background

1. This case raises issues concerning the lawfulness of the extradition arrangements that have come into existence between Ireland and the United Kingdom of Great Britain and Northern Ireland ("the UK") in the wake of Brexit and the departure of the UK from the European Union ("the Union") on the 1st February 2020. Whereas the surrender of requested persons who were arrested before midnight (Central European Time) on 31 December 2020 is provided for by Article 127.1 and Article 62.1(b) of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] O.J. C384/1 ("the Withdrawal Agreement"), the surrender of requested persons arrested after that time and date is provided for by Title VII of Part Three of 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 TCA") insofar as the said agreement has been signed and provisionally applied by the European Council prior to its conclusion or entry into force.

2. The Withdrawal Agreement sets out the arrangements for the withdrawal of the UK from the Union and from the European Atomic Energy Community. It came into force on 1 February 2020 and provided for a transition or implementation period which by virtue of Article 126 of the Withdrawal Agreement started on the day of entering into force and ended on 31 December 2020. Article 127.1 of the Withdrawal Agreement made EU law and therefore the Framework Decision 2002/584/JHA of 30 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] O.J. L190/1 ("the Framework Decision") applicable to and in the UK during the transition period. In order to make provision for the surrender of requested persons who had been arrested but not surrendered during the transition period, Article 62.1(b) of the Withdrawal Agreement further applied the Framework Decision to the UK in respect of European arrest warrants where the requested person was arrested before the end of the transition period for the purpose of the execution of the European arrest warrant ("EAW") irrespective of whether the person was remanded in custody or released on bail. In order to facilitate transition and separation, Article 7 of the Withdrawal Agreement provided that all references to Member States and competent authorities of Member States in

provisions of Union law made applicable by the Agreement "shall be understood as including the United Kingdom and its competent authorities..."

3. Title VII of Part Three of the TCA on SURRENDER sets out the surrender arrangements which are to apply between the Union and the UK and which have been applied provisionally in respect of the surrender of persons arrested after 31 December 2020 and are in substance identical to the extradition arrangements which are provided for under the Framework Decision.
4. Whereas the Withdrawal Agreement was adopted by the European Council on behalf of the Union under Article 50 of the Treaty of European Union ("TEU"), the TCA is an association agreement under Article 217 of the Treaty on the Functioning of the European Union ("TFEU") which has been signed and provisionally applied by unanimous decision of the European Council pursuant to Article 218.5 of the TFEU pending the obtaining of the consent of the European Parliament as required by Article 218.6(a)(i) TFEU and prior to adoption of the Agreement by the European Council pursuant to Article 218.8 TFEU.
5. The applicant's case is that the Union did not have supranational competence to conclude the Withdrawal Agreement or provisionally apply Title VII of Part Three of the TCA insofar as the relevant agreements purport to apply extradition measures in the area of freedom, security and justice to Ireland.
6. It is contended that insofar as Article 62.2(b) of the Withdrawal Agreement and Title VII of Part Three of the TCA are initiatives in the area of freedom, security and justice, both are measures pursuant to Title V of Part Three TFEU which are, it is argued, subject to Protocol No. 21 annexed to both the TEU and TFEU ("the Protocol") whereunder, it is further argued, such measures are not binding on or applicable to Ireland unless Ireland has opted into the relevant measures, which it has not done. It is common case that if the relevant measures are not binding and applicable to Ireland, then the relevant implementing measures in Irish national law are of no legal effect. Whereas Article 127.1 and Article 62.1(b) of the Withdrawal Agreement are transposed into domestic law respectively by S.I. No. 4 of 2004 European Arrest Warrant Act 2003 (Designated Member States) Order 2004 and by S.I. No. 719 of 2020 European Arrest Warrant Act 2003 (Designated Member States) (Amendment) 2020 ("S.I. No. 719 of 2004") made under the European Arrest Warrant Act 2003 ("the EAW Act of 2003") to which the anticipatory interpretation provisions of s.98(1) of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019 apply, Title VII of Part Three TCA is implemented by S.I. No. 720 of 2020 European Arrest Warrant (Application to Third Countries) (United Kingdom) Order 2020 ("S.I. No. 720 of 2020") made under s.2 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012 ("the EAW Act of 2012").

Introduction

7. The applicant is the subject of an EAW dated 5 October 2020 which was issued by a judicial authority in the United Kingdom and endorsed for execution pursuant to s.13 of the Act of 2003 by the High Court on 14 December 2020. The applicant was arrested

within the State on 25 February 2021 and brought before the High Court on 26 February 2021 when the applicant was remanded in custody pending the hearing of an application for his surrender pursuant to s.16 of the 2003 Act. The applicant did not make an application for bail.

8. On 5 March 2021 the High Court directed an inquiry pursuant to Article 40.4.2° of the Constitution into the legality of the applicant's detention upon the grounds set out in the affidavit of complaint sworn by the applicant's solicitor on 1 March 2021.
9. The applicant challenges the legality of his detention on the following two grounds which are set out at paragraph 9 of his written submissions: -
 - (1) that the EAW pursuant to which the applicant was initially arrested was invalid and was not lawfully endorsed for execution in the State because Ireland did not execute an opt-in pursuant to the provisions of the Protocol in respect of Article 62.1(b) of the Withdrawal Agreement, which therefore had no application to Ireland ("the Withdrawal Agreement Ground"); and
 - (2) that the surrender of the applicant pursuant to the provisions of the TCA would be contrary to Union law and to the provisions of the Constitution on the basis that Ireland did not execute an opt-in pursuant to the provisions of the Protocol in respect of Title VII of Part 3 TCA, which therefore has no application to Ireland, thus rendering S.I. No. 720 of 2020 invalid ("the Trade and Cooperation Agreement Ground").

The Withdrawal Agreement Ground

10. It is accepted by the applicant that the lawfulness of his detention depends on the validity of the endorsement by the High Court of the EAW for execution within the State. It is contended on that basis that the EAW under which the applicant was arrested and the order under which he was thereafter detained were both invalid by reason of Article 62.1(b) having no application in Irish law at the relevant time. This ground of complaint was advanced before judgment was delivered in *Shahzad v. Governor of Mountjoy* (Unreported, High Court, Coffey J., 19 March 2021) in which I determined that the Protocol had no application to Article 62.1(b) which I found was binding on and applicable to Ireland. Insofar as this ground continues to be relied upon by the applicant, therefore, it is rejected.
11. It appears to me, however, that the applicant's reliance on Article 62.2(b) of the Withdrawal Agreement is misconceived. Article 62.1(b) is a separation provision of the Withdrawal Agreement and has relevance only to the application of the Framework Decision after the end of the transition period provided for in the Withdrawal Agreement. It therefore has no relevance to the validity of the order of endorsement that is impugned in these proceedings which was made on 14 December 2020 and, therefore, not after but during the transition period when Union law including the Framework Decision was applicable to and in the UK by virtue of Article 127.1 of the Withdrawal Agreement. Accordingly, the issue to be decided is whether it was within the competence

of the Union under Article 50 TEU to adopt Article 127.1 of the Withdrawal Agreement insofar as it purports to apply the Framework Decision during the transition period to extradition between the UK and Ireland.

12. Protocol 21 to the TEU and TFEU provides as follows: -

“Article 1

Subject to Article 3, the United Kingdom and Ireland shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union...

Article 2

In consequence of Article 1 and subject to Articles 3, 4 and 6, none of the provisions of Title V of Part Three of the Treaty on the Functioning of the European Union, no measure adopted pursuant to that Title no provision of any international agreement concluded by the Union pursuant to that Title and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland; and no such provision, measure or decision shall in any way affect the competences, rights and obligations of those States; and no such provision, measure or decision shall in any way affect the Community or Union acquis nor form part of Union law as they apply to the United Kingdom or Ireland.

Article 3

1. The United Kingdom or Ireland may notify the President of the Council in writing, within three months after a proposal or initiative has been presented to the Council pursuant to Title V of Part Three of the Treaty on the functioning of the European Union, that it wishes to take part in the adoption in application of any such proposed measure, whereupon that State shall be entitled to do so...

Article 4

The United Kingdom or Ireland may at any time after the adoption of the measure by the Council pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union notify its intention to the Council and to the Commission that it wishes to accept the measure. In that case the procedure provided for in Article 33.1(1) of the Treaty on the Functioning of the European Union shall apply mutatis mutandis.

Article 8

Ireland may notify the Council in writing that it no longer wishes to be covered by the terms of this protocol. In that case, the normal Treaty provisions will apply to Ireland.”

13. The State can only exercise the options or discretions under the Protocol with prior parliamentary approval by virtue of Article 29.4.7° of the Constitution which states: -

“The State may exercise the options or discretions –

- (iii) under Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice so and next including the option that the said Protocol No. 21 shall, in whole or in part, cease to apply to the State,
that any such exercise shall be subject to the prior approval of both Houses of the Oireachtas.”

14. As Article 127.1 of the Withdrawal Agreement was neither proposed nor adopted pursuant to Title V of Part Three TFEU, the issue to be decided is whether the European Council made an error in adopting the entirety of the Withdrawal Agreement including Article 127.1 under Article 50 TEU. In addressing this issue, I adopt and rely on the findings and statements of law that I made in *Shahzad* insofar as they are relevant to the scope of the competence that is given to the Union by Article 50 TEU, the aims and contents of the Withdrawal Agreement and the legal test to be applied where the correct legal basis of a measure is contested.

15. Accordingly, the primary issue to be determined is whether the relevant measure which provides for a transition period during which Union law including the Framework Decision is made applicable to the UK serves a purpose which is incidental to the main or predominant objective of the Withdrawal Agreement which is to provide for and ensure an orderly withdrawal of the UK from the Union whilst also taking account of the framework of their future relationship. I am satisfied that the relevant transition provisions which are further facilitated by Article 7 and Article 126 of the Withdrawal Agreement, serve a purpose that is designed to provide and ensure an orderly withdrawal such that the relevant measure is manifestly incidental to that objective. It follows from this that I am satisfied that the Article 127.1 has its legal basis in Article 50 TEU to which the Protocol does not apply and that the matter is *Acte Claire*. It follows from this that Article 127.1 of the Withdrawal Agreement is binding on and applicable to Ireland.

16. Section 3 of the Act of 2003 provides that the Minister for Foreign Affairs may, by order, designate “a Member State” that has, under its national law, given effect to the Framework Decision. “Member State” is defined by s.2 of the Act of 2003 as “a Member State of the European Communities”. Section 98(1) of the Withdrawal of the United Kingdom from the European Union (Consequential) Provisions Act 2019 (“the Act of 2019”) is an interpretation provision which anticipates the making of a withdrawal agreement and provides that: -

“(1) Where, immediately before the coming into operation of this part, a reference in an enactment to a Member State included a reference to the United Kingdom by virtue of that State being a Member State of the European Communities (emphasis added)...then, on the coming into operation of this Part, the reference to the

enactment shall, insofar as is necessary to give effect to the terms of a withdrawal agreement, (emphasis added), continue to include a reference to the United Kingdom.”

17. I am satisfied that Article 127.1 of the Withdrawal Agreement is given legal effect in national law by S.I. No. 4 of 2004 which designates the UK for the purposes of s.3 of the Act of 2003 to which the anticipatory interpretation provisions of s.98(1) of the Act of 2019 apply. It follows from this that the UK was lawfully designated as a Member State for the purposes of s.3 of the Act of 2003 on 14 December 2020 when the High Court made the order endorsing the EAW for execution within the State pursuant to s.13 of the Act. I am, therefore, satisfied that the endorsement of the warrant was valid and that the applicant’s detention pursuant to that valid endorsement is lawful.

The Trade and Cooperation Agreement Ground

18. What remains is the contention that the surrender of the applicant pursuant to the TCA at some unknown time in the future would not be lawful because Ireland has not opted into the freedom, security and justice provisions of the TCA which are contained in Title VII of Part Three of the Agreement. This is manifestly an issue which can and ought to be raised by the applicant before the High Court when an application is moved pursuant to s.16 of the Act of 2003 to surrender him to the UK and is not therefore a matter that is amenable to relief under Article 40.4.2° of the Constitution.
19. Assuming without deciding that I am incorrect in so finding, I am nonetheless satisfied that Title VII of Part Three of the TCA is binding on and applicable to Ireland for the reasons set out hereunder.
20. The TCA is an association agreement under Article 217 TFEU which has been signed and provisionally applied on behalf of the Union by a unanimous decision of the European Council made pursuant to Article 218.5 TFEU and Article 218.8 TFEU. It follows from this that the contested measure, namely, Title VII of Part Three of the TCA is not a measure that was proposed or adopted pursuant to Title V of Part Three TFEU to which the Protocol applies.
21. Article 218.11 TFEU provides: -
- “A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended by the Treaties or revised”.
22. To date no Member State or any of the nominated institutions have sought the opinion of the CJEU pursuant to Article 218.11 TFEU or suggested in any public utterance that the TCA or Title VII of Part Three thereof is incompatible in any way with the Treaties.
23. It is against this background that the applicant contends that Title VII of Part Three of the TCA ought to have been proposed and adopted pursuant to Article 82 TFEU which is

comprised in Title V of Part Three TFEU to which the Protocol applies. It is therefore contended that an error has been made by the Council in authorising the signature and provisional application of the TCA insofar as it includes Title VII of Part Three under Article 217 TFEU to which the procedures provided for in Article 218 TFEU apply, because, it is argued, the principle of conferral enshrined in Article 5(2) TEU does not allow the Union to provisionally apply, even within the framework of what is manifestly a very broad association agreement under Article 217 TFEU, a measure which exceeds the limits of the powers that the Member State have conferred on it in the Treaties.

24. The principles which apply to the resolution of this issue are reviewed and set out in my judgment in *Shahzad* and may be summarised *mutatis mutandis* as follows:
- (1) the Protocol is not capable of having any effect whatsoever on the question of the correct legal basis for the adoption of the contested measure;
 - (2) where the stated legal basis for a measure in a legal instrument is contested, recourse to a dual or multiple legal basis is exceptional;
 - (3) exceptionality will only arise where the following cumulative conditions are met:
 - (i) the relevant procedure pursues objectives which are not incidental to a main or predominant objective to which the stated legal basis for the legal instrument corresponds; and
 - (ii) the procedure laid down for each legal basis are compatible with each other.
25. It is manifest from an examination of the aim and contents of the TCA that its overarching purpose is to establish a new legal basis for a very broad relationship between the Union and a recently departed Member State to replace a previous and necessarily closer relationship that had existed prior to the date from which the TCA was provisionally applied. The TCA therefore does not seek to create a new legal relationship where none previously existed but aims instead 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 UK and the Union including trade in goods and services, digital trade, public procurement, intellectual property, road transport, aviation, fisheries, energy, social security coordination and judicial cooperation in criminal matters. It is clear that this is the specific context in which Title VII of Part Three on SURRENDER has been included in the TCA, a fortiori as it provides for surrender arrangements that are substantially no different to those that previously existed. It follows from this that the contested measure pursues a purpose that is not distinct from but rather incidental to the overarching purpose of the TCA.
26. Assuming without deciding that I am incorrect in this finding, I am nonetheless satisfied that the procedure laid down for Article 82 TFEU is incompatible with the procedure laid down by Article 218 TFEU for the signing, provisional application and eventual conclusion and adoption of an association agreement under Article 217 TFEU. Whereas Article 82 TFEU applies the ordinary legislative procedure and qualified majority voting, the

procedure prescribed by Article 218.5 TFEU for the signature and provisional application of an association agreement under Article 217 TFEU requires the European Council to act unanimously. I am further satisfied that this matter is *Acte Clair*.

27. I am therefore satisfied that Title VII of Part Three of the TCA insofar as it has been provisionally applied by the European Council from 1 January 2021 is binding and applicable on Ireland. Although it is not in dispute, I nonetheless further find that Title VII of Part Three of the TCA has been given legal effect in national law by S.I. No. 720 of 2020 made under s.2 of the European Arrest Warrant (Application to Third Countries an Amendment) and Extradition (Amendment) Act 2012.
28. I will therefore refuse the relief sought.