S25

Supreme Court of Ireland Decisions

Judgment

Title:	Balmer -v- The Minister for Justice and Equality
Neutral Citation:	[2016] IESC 25
Supreme Court Record Number:	29/2015
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Date of Delivery:	12/05/2016
Court:	Supreme Court
Composition of Court:	Denham C.J., O'Donnell Donal J., MacMenamin J., Dunne J., Charleton J., O'Malley J.
Judgment by:	O'Donnell Donal J.
Status:	Approved
Result:	Appeal dismissed
Details:	Dismiss and affirm High Court order. Judgment also by Judge Dunne.

Judgments by	Link to Judgment	Concurring
O'Donnell Donal J.	Link	Denham C.J., MacMenamin J., Dunne J., Charleton J., O'Malley J.

THE SUPREME COURT

[S.C. No. 29 of 2015]

Denham C.J.
O'Donnell J.
MacMenamin J
Dunne J.
Charleton J.
O'Malley J.

Between

Michael Anthony Balmer

Appellant

and

The Minister for Justice and Equality

Respondent

Judgment of O'Donnell J. delivered on the 12th day of May 2016

1 Michael Anthony Balmer is a subject of the United Kingdom ("UK") and of British nationality. He was born in 1951 and has resided and lived most of his life in the United Kingdom. On the 26th of July, 1983, when he was 32 years of age, he entered the house of a 62 year old female neighbour on false pretences, intending to steal car keys. His neighbour resisted and he attacked her, strangled her, and later sexually assaulted the body. On the 26th of March, 1984, he was convicted of murder at Exeter Crown Court and received a sentence of life imprisonment, which was the mandatory sentence for the offence of murder in the UK as indeed it is in Ireland.

2 While the terms and the precise statutory regime under the law of England and Wales may require further explanation, it is sufficient for present purposes to say that a "tariff" was fixed at the time of sentencing at 12 years initially, but was later extended by ministerial decision (which was then permissible under UK law) to 15 years. This was the minimum period a convicted person was required to serve before becoming eligible to be considered for parole. The tariff is said to reflect the "punitive" element of the sentence. After expiry of the tariff period, a life sentence prisoner can only be detained further if it is considered, originally by the Secretary of State for Home Affairs and subsequently by an independent parole board, that he or she poses a risk to the community if released. If it is considered that the convicted person does not pose such a risk, then he or she is released on licence which remains in force for the remainder of their life. The licence can be revoked at any time if it is considered necessary on public protection grounds. The process is subject to review at a number of points. An independent parole board chaired by a judge must consider the case and may refuse to reactivate the sentence. At that hearing, the prisoner has a right to be present, to be legally represented, and to call and question witnesses. When a life sentence prisoner ("lifer") is released on licence and then recalled, he will then be given confirmation of the reasons for the recall, the information upon which the decision was based, and information as to how to make representations or to appeal to the parole board against the decision. During that process, however, the lifer is in custody.

3 In Mr. Balmer's case, the extended tariff expired in 1999. Thereafter, he was detained for what was described as the 'risk' phase of the sentence. On the 2nd of March, 2011, presumably on the advice of the Parole Board, Mr. Balmer was released on licence on standard, although strict terms, including permanent residence at a specific location, and a requirement not to travel outside the United Kingdom without prior permission of a supervising officer. There was also a requirement to report on a regular basis, and to only undertake work with the permission and approval of the supervising officer, and further to notify the supervising officer of any developing relationships with women or men. Finally, there was a requirement not to enter a defined area in Exeter save for the purpose of transit. These conditions make it clear, therefore, that the life sentence continued to have effect for the life of the convicted person even when released into the community.

4 Just over one year later, on the 19th of March, 2012, Mr. Balmer's licence was revoked. The revocation notice issued to him was a standard form containing a number

of boxes identifying possible reasons for revocation. Two of these were ticked, namely "allegedly committed a further offence" and "poor behaviour". The form also stated that the person would be given confirmation of the reasons why they had been recalled to prison, the information upon which the decision had been taken, and an explanation of how to make representation to the Parole Board against the decision to recall. No other information was contained in the notification of revocation.

5 Mr. Balmer is now resident in Ireland. It is not clear if Mr. Balmer travelled to Ireland before or after the revocation; nor is it clear whether entry into this jurisdiction was itself a breach of a term giving rise to revocation. It is also not suggested that Mr. Balmer has any other connection to this jurisdiction other than his arrival here at some point between his release on licence and his arrest. A European Arrest Warrant ("EAW") was issued for his arrest on the 31st October, 2012, and endorsed for execution in this State on the 21st of November of that year. It was eventually executed in Cork on the 11th of June, 2013, and Mr. Balmer was brought before the High Court the following day. Since that date he has been remanded in custody, pending the outcome of these proceedings.

6 Mr. Balmer has objected to surrender on grounds that the surrender would constitute a contravention of the Irish Constitution insomuch as his return would be to serve a sentence which at this stage would be purely preventative in nature. It is also said that return would contravene the Constitution and be incompatible with the State's obligation under the European Court of Human Rights in that the United Kingdom's procedures did not provide for any hearing before a licence was revoked and a person recalled to custody.

7. The matter came before the High Court together with a similar case, which has now been discontinued due to the death of the respondent. Edwards J. delivered a lengthy judgment, relying on the majority judgment of this Court in *Caffrey v. Governor of Portlaoise Prison* [2012] 1 I.R. 637 ("*Caffrey*") and distinguishing his own judgment in *Minister for Justice and Equality v. Nolan* [2012] IEHC 249 ("*Nolan*") in rejecting the grounds of opposition and making an order for surrender. It may be useful at this point to deal briefly with the terms of the *Caffrey* and *Nolan* judgments, since they figured prominently in the argument in this case.

The decisions in *Caffrey* and *Nolan*

8 *Caffrey* dealt with a situation which might be considered to be the reverse of this case. There, a prisoner serving a life sentence in the United Kingdom regime, having had a tariff fixed by the presiding judge, sought and obtained transfer to Ireland under the provisions of the Transfer of Sentenced Persons Acts 1995-1997. He argued that he was entitled to be released once the UK tariff period had passed on the grounds that, as he contended, service of the sentence for the purposes of prevention was incompatible with Irish law. A minority of the Supreme Court (Murray and Fennelly JJ.) agreed. However, the majority (Denham C.J., Hardiman and Macken JJ. concurring) held that the sentence involved was a life sentence which was not incompatible with Irish law, and could accordingly be administered in accordance with Irish law. In essence, this was a conclusion that the concept in the practice in the UK of a tariff, and the punitive/risk distinctions, which did not exist in Irish law, were matters of administration of a life sentence and did not concern its legal nature.

9 *Nolan* was concerned with a separate development in sentencing law in the UK which had followed, it seems, from the manner in which the law on life sentences had developed. The fact that the decision on the length of time a prisoner spent in prison was made on an assessment of the risk that person posed to the community (or more accurately, the fact that release was only possible if it was considered the prisoner did not pose a risk), which was a consequence of the mandatory life sentence, was sought

to be expanded into other areas of sentencing. In *Nolan*, the respondent had pleaded guilty to rape, and was sentenced in November, 2005. Earlier that year, a new and novel sentencing regime had been introduced for 'serious cases', which allowed the court in certain circumstances to impose a sentence of imprisonment for public protection (IPP). Such sentences were open-ended and depended on an assessment of future risk. The parole board could only direct release once an individual prisoner was considered no longer to be a risk to the public.

10 In *Nolan*, the respondent was sentenced to a two-and-a-half year determinate sentence followed by a sentence of indeterminate detention for protection of the public. The two-and-a-half year period was akin to the tariff insomuch as it set a minimum period before which it was not possible to make an application to the Parole Board. It does not appear that this was intended to represent the punitive element of a sentence, but merely to fix a minimum time before which it was not possible to make an application to the Parole Board. In *Nolan*, the respondent first made an application to the Parole Board after four-and-a-half years' imprisonment, which was refused. After five years and three months, he absconded while on temporary release and fled to Ireland. In due course, an EAW was issued and his surrender was sought. The High Court (Edwards J.) refused to make an order for surrender, holding that the IPP sentence was a breach of a guarantee of liberty under the Irish Constitution. Having considered the judgment of this Court in *Northamptonshire County Council v. B* [2013] 4 I.R.662, Edwards J. concluded that, whereas a guarantee such as trial by jury under Article 38 was limited to the territorial limits of the State, a guarantee that a citizen should not be deprived of liberty save in due course of law was a personal right and a fundamental guarantee of universal application, and therefore applied to the applicant and to the sentencing process in the United Kingdom. He considered that the IPP sentence breached that principle because it permitted preventive detention and, accordingly, surrender was prohibited by s.37(1)(b) of the European Arrest Warrant Act 2003 which provides, so far as is relevant:

> "A person shall not be surrendered under this Act if -
>
> …
>
> (b) his or her surrender would constitute a contravention of any provision of the Constitution …"

11 The decision in *Nolan* was appealed to the Supreme Court, where the decision was upheld, but on substantially narrower grounds. Matters had developed considerably in the United Kingdom since the introduction of the IPP sentence in 2005. By 2011, the Secretary of State for Justice had described the IPP as arbitrary and unfair, and a "stain on the system". A system was introduced in place of IPP sentences with prospective effect which permitted for a determinate sentence in 'serious cases' which would require a person to serve two-thirds of the sentence pronounced, rather than one-half of the sentence in what might be described as 'ordinary cases'. Furthermore, an offender sentenced under this regime would only be eligible for release on licence if a parole board considered it safe to do so. Dangerous offenders committing a second serious criminal offence would receive mandatory life sentences. This scheme was devised to address some of the perceived defects of the IPP regime. The scheme nevertheless still contained elements where continued detention could be enforced based on an assessment of risk only.

12 The judgment of this Court in *Nolan* recorded that the UK Secretary of State for Justice had expressed the view that it was surprising that the existing IPP system (under which Nolan had been sentenced) had not been struck down on judicial review. In fact, in due course, in *James, Wells and Lee v. UK* [2012] ECHR 1706, the European

Court of Human Rights ("ECtHR") decided that the IPP system, as applied to the applicants in that case, infringed the European Convention on Human Rights ("ECHR" or "the Convention"). In the circumstances of the case, the ECtHR considered:

> *"…that following the expiry of the applicants' tariff periods and until steps were taken to progress them through the prison system with the view to providing them with access to appropriate rehabilitative courses … their detention was arbitrary and therefore unlawful within the meaning of Article 5.1 of the Convention." (para. 221)*

It should be noted at this point that the ECtHR did not find that the IPP sentence was incompatible with the Convention on the grounds that detention based on risk was per se incompatible with the Convention. There are a number of countries in Europe where the criminal justice system involves some element of preventive detention, and those regimes have been upheld as compatible with the ECHR.

13 In the light of these developments, the Supreme Court upheld the order of the High Court in *Nolan*, but on the narrower ground that the IPP regime as applied to the respondent in that case was effectively conceded to be inconsistent with the ECHR, and had been found to be non-compliant. Therefore, the order of the Court was made under s.37(1)(a) of the EAW Act on the basis that surrender to serve the balance of an IPP sentence would be incompatible with the Convention, rather than on the s.37(1)(b) ground that surrender would breach the constitutional rights of the applicant. The court clearly stopped short of endorsing the wide ranging judgment in the High Court.

The consideration of *Caffrey* and *Nolan* in the High Court

14 In the High Court, Edwards J. distinguished his own decision in *Nolan* by reference to the decision in *Caffrey*, holding that the United Kingdom's tariff scheme was not inconsistent with the Irish Constitution, since its legal nature was determined to be a life sentence akin to the life sentence imposed in Irish law. Accordingly, the High Court dismissed the objection and made an order for surrender. However, it certified that the judgment involved a point of law of exceptional public importance as follows:

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

Decision in the Court of Appeal and Grant of Leave

15 The Court of Appeal, by a majority (Peart and Mahon JJ.), upheld the decision of the High Court and dismissed the appeal. Hogan J. dissented, and held that *Caffrey* was not determinative of the matter since it turned on the characterisation of the United Kingdom sentence, by the majority in that case, as a life sentence. Adopting the approach of the High Court in *Nolan*, Hogan J. referred to a number of statements of this Court and the High Court to the effect that preventive detention was contrary to the Constitution, and concluded that surrender should be refused under s.37(1)(b) of the EAW Act 2003.

16 The Court of Appeal delivered judgment on the 21st of May, 2015. An application was made to this Court under Article 34.5.3 of the Constitution, and by a determination of the 20th of July, 2015, this Court allowed and certified the bringing of an appeal on the following points:

> "Where a prisoner has been sentenced in another jurisdiction to a life sentence and has served the portion of the sentence described as consisting of the entirety of the punitive element of the sentence, in conformity with Article 40.3 and Article 40.4 of the Constitution is it possible to take any further step in this State to enforce an apparent remaining element of the sentence which is ostensibly that of prevention or deterrence?
>
> Where a prisoner has been released on licence prior to the full expiry of their sentence and is sought to be recalled because of an apparent breach of licence, is it necessary, and to what extent is it required, to have a hearing prior to or immediately proximate to that recall for such ostensible deprivation of liberty to be in conformity with Article 40.4 of the Constitution and Article 5 of the European Convention on Human Rights." [2015] I.E.S.C. DET. 34 (para.18)?"

17 In this Court, the appellant advanced argument on both issues, but the bulk of the argument was directed towards the first issue. It is, I hope, no discourtesy to the range and force of the argument articulated by both sides to say that, in essence, the appellant adopted the analysis contained in Hogan J.'s dissenting judgment in the Court of Appeal, and the respondent Minister hewed to the line taken in the High Court judgment and in the majority judgment in the Court of Appeal, with some important additional nuances.

Observations on Appeal

18 There is no doubt that this appeal raises some points of considerable importance. The facts in this case focus the issue with particular clarity, since it is clear that Mr. Balmer, if returned to custody, would be in detention as determined by the assessment of his risk to the public. However, if the appellant is correct, it would appear difficult to surrender anyone to the United Kingdom if charged with murder, and conceivably to surrender any person to a country which has in its sentencing regime elements of prevention, or at least explicit periods of detention, dependent on an assessment of risk. This is obviously of enormous practical importance, but at a broader level, the case is also important because it requires further consideration of an important conceptual question in relation to the extent and nature of the intersection between the guarantees contained in the Irish Constitution and matters occurring abroad pursuant to the law of states with whom this country has made agreements, whether directly, or indirectly as a consequence of membership of the European Union.

19 The appellant's argument has a number of steps. First, it is said that if surrendered, the detention to which Mr. Balmer would be returned would be professedly preventive in nature since the tariff element of his sentence has long expired. Second, such a regime could not be introduced in Ireland, consistent with a constitutional guarantee of liberty. In particular, the appellant relied in this regard on *dicta* in the judgment of this Court in *Lynch & Whelan v. The Minister for Justice, Equality and Law Reform* [2012] 1 IR 1 in support of his contention that the specific United Kingdom sentencing regime in respect of life imprisonment would, if introduced in Ireland, be clearly incompatible with the Irish Constitution. Third, it is argued that, while it must be conceded, in the light *of Minister for Justice, Equality and Law Reform v. Brennan* [2007] 3 IR 732 and

Nottinghamshire County Council v. B [2013] 4 I.R.662, that an Irish court is not precluded from ordering the surrender of a person to a country which does not have the same constitutionally protected trial system as Ireland, such as for example jury trial for non-minor offences, nevertheless, the prohibition on preventive detention flows from the presumption of innocence, which is a fundamental value of universal application, as found by the judgment of the High Court in *Nolan*. Accordingly, it was argued that surrender in this case is precluded by s.37(1)(b) of the EAW Act 2003.

The decision in *Brennan*

20 In recent years, this Court has had to address complex issues of law arising from the interaction between this jurisdiction and the legal systems of other countries. In *Minister for Justice, Equality and Law Reform v. Brennan* [2007] 3 IR 732, this Court delivered an important judgment on the application of s.37(1)(b) of the EAW Act. There, the respondent had absconded from prison in the United Kingdom. An EAW was issued, seeking his surrender for, *inter alia,* the offence of escape from lawful custody. The warrant delivered stated that escape from lawful custody was a common law offence, and the maximum sentence, therefore, was life imprisonment. The warrant also explained the sentencing regime in the United Kingdom in respect of life sentences, and explained the system of tariff-setting and subsequent detention. This was a somewhat abstract explanation of the provisions of the life sentence in the UK legal system in the particular case, since a life sentence must have been unlikely on the facts. However, the explanation of the EAW, and the reference to the maximum sentence available, led to the argument being made on behalf of the respondent that such a sentence was incompatible with the Irish Constitution. The setting of a minimum tariff under the United Kingdom regime did not, it was alleged, take account of the circumstances of the crime, or the respondent's culpability, personal circumstances or age, which, it was argued, were essential components of sentencing under the Irish Constitution.

21 This Court rejected this analysis of the United Kingdom sentencing regime, but in any event also addressed the premise upon which the argument was based, namely, that if it could be established that the sentencing regime in the United Kingdom was not compatible in principle with the Irish Constitution, that the Court was obliged to refuse surrender under s.37(1)(b) of the EAW Act. In an important passage, Murray C.J. stated, at pp.743-744:

> "37 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.
>
> 38 Indeed it may be said that generally extradition has always been subject to a *proviso* that an order for extradition, as with any order, should not be made if it would constitute a contravention of a provision of the Constitution. I am not aware of any authority for the principle that the extradition or surrender of a person to a foreign country would contravene the Constitution simply because their legal system and system of trial differed from ours as

> envisaged by the Constitution.
>
> 39 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.
>
> 40 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."

Further Observations on Appeal

22 While this type of issue arises most obviously in the field of extradition or surrender under an EAW, it is also capable of arising in any other field where Ireland has entered into agreements or undertaken obligations to cooperate with another state. In most cases, this may involve cooperation between courts, but in principle, the issue can also arise in other areas of contact or cooperation between states. As travel and contact between people in different countries becomes easier and speedier, the need for international cooperation becomes more important. However, the difference between legal systems can be substantial, and the opportunity for misunderstanding is great. Even systems with shared roots can diverge in significant ways. At the same time, there is an increasing awareness of the international dimension to the protection of human rights.

23 Ireland is by no means the only country which has grappled with this issue. In principle, a similar type of problem may arise if it is alleged that surrender would result in treatment or procedures that would constitute a breach of the ECHR. However, surrender, at least within the EU pursuant to an EAW, or indeed to countries which are Member States of the Council of Europe, may pose fewer problems for courts in

practice. The rights guaranteed by the Convention apply in the requesting state. Those states are obliged to enforce the rights under the ECHR, and *prima facie* are best placed to do so - see *Minister for Justice, Equality and Law Reform v. Stapleton* [2008] 1 IR 669. Furthermore, there is a system of scrutiny, review and reporting on the protection of rights under the Convention, and ultimately a supranational court which can definitively rule on the compliance of a particular system with the Convention. Moreover, since the Convention applies in many different legal systems, its guarantees are expressed at a level of generality, and a margin of appreciation applies which allows for differences between contracting states. It is rare for a national court to have to consider for the first time, and without assistance, and to pass judgment upon the compatibility with the Convention of the legal or administrative system of another contracting state. Indeed, in those rare and, perhaps, egregious cases where the issue raised could justify a refusal to surrender, the residual jurisdiction of a court to refuse to surrender a person because of an anticipated breach of rights guaranteed under the Convention may be a salutary element in the enforcement of rights which the requesting state is obliged to uphold.

24 However, the problem is much more acute at the level of national constitutional protections. Given the nature of fundamental rights, there will often be a significant overlap between the rights guaranteed in a national constitution and those guaranteed at a supranational level. In many cases, little practical difficulty may arise from this overlap. If the substance of the rights is the same, then the obligation of the requesting state to vindicate rights under the Convention will mean that there should be little, if any, scope for separate possible conflict with the same rights guaranteed under the national constitution. However, national constitutions may express guarantees which are more extensive and demanding than, or merely different to, the guarantees under the Convention, and, in any event, which may be expressed in the text or in the case law at a level of much greater detail. For example, the proceedings involved in the investigation and trial of criminal offences in Ireland are regulated much more closely and directly by the demands of the Irish Constitution than by rights guaranteed under the Convention. In cases where it is alleged that what occurs in another state, although valid by the laws of that state and compliant, perhaps, with the ECHR, is nevertheless something which would be incompatible with the Irish Constitution if carried out here, then difficult questions arise.

25 The proposition that Ireland will not refuse to surrender a person to another country with whom it has an agreement, whether bilateral, multilateral, or pursuant to the obligations of membership of the European Union, merely because it is said that the manner in which that person would be treated would not be permitted here under the Constitution, is one which is, by now, well established. At the same time, it is clear that there are circumstances in which a court obliged to uphold the Constitution must refuse to transfer a person or cooperate with another jurisdiction. However, neither the precise dividing line between cases of surrender and non-surrender, nor the principle justifying such a distinction, has been articulated in any detail in the decisions. These courts, perhaps wisely, have proceeded incrementally. In *Nottinghamshire County Council v. B* [2013] 4 I.R.662, this Court had to address Article 20 of the Hague Convention, which permitted the refusal of the return of a child to a requesting state in circumstances where it would not be permitted by the fundamental principles of the requested state. In my judgment in that case, I said, at para. 157:

> "In the light of the limited authority and commentary and the relatively narrow range of authority cited in this case, it seems particularly inappropriate to attempt to seek to provide in this judgment the single all encompassing theory to which some of the commentary aspires. On the contrary, the approach suggested in this judgment is necessarily tentative, and may well require

> refinement in the light of more precise and focussed argument in particular cases."(p.716)

That approach is desirable also in this context. Some guidance can, however, be obtained from the decided cases.

26 An interesting early case is *The People (DPP) v. Campbell* (1983) 2 Frewen 131, referred to in *Nolan*. That case involved a trial in this jurisdiction under the Criminal Law (Jurisdiction) Act of 1976 of acts committed in Northern Ireland. The offences related to escape from lawful custody. At the trial, issue was taken in relation to the legality of the accused's detention in Northern Ireland by reference to Irish constitutional standards. The Court of Criminal Appeal rejected the contention that constitutional norms required under the Irish Constitution ought to be applied to foreign criminal processes. Hederman J. said, at pp.142-143:

> "The point now raised is an entirely different one; namely, whether in adjudicating on the lawfulness of an act in Northern Ireland (i.e. in this case, the lawfulness of the accused's custody) the Courts here can decide that the act is unlawful if it does not accord with our laws (constitutional or otherwise). As to the rights which Irish citizens are granted by the Constitution, the judgment of the Supreme Court [in re *The Criminal Law (Jurisdiction) Bill* 1975 [1977] I.R. 129] makes it clear that the right to obtain "constitutional justice" from tribunals (judicial and non-judicial) is a right which does not extend to tribunals established outside the jurisdiction of the state. The lawfulness of the custody in Northern Ireland of an Irish citizen cannot therefore be impugned by reference to a non-existent right. The conclusions of the Supreme Court with regard to the right to constitutional justice apply with equal force to any of the other unspecified personal rights which an accused person may enjoy by virtue of Article 40.3 of the Constitution in relation to criminal proceedings in this State."

27 In the context of the EAW, the Supreme Court in *Brennan*, as already referred to, explicitly stated that it was only egregious circumstances, such as a clearly established and fundamental defect with a system of justice, which would justify non-surrender. It is, perhaps, relevant that this statement was made in the specific context of a consideration of the life sentence regime in the United Kingdom, including the fixing of a tariff and a period of detention thereafter. In *Minister for Justice, Equality and Law Reform v. Murphy* [2010] 3 IR 77 (also referred to in *Nolan*), the respondent had escaped from hospital detention and a surrender was sought by the United Kingdom authorities. He had been convicted in the United Kingdom on rape and assault charges and was sentenced to a "hospital detention order" coupled with a "restriction order". The EAW stated that the defendant was to be "detained indefinitely". The effect of this was that he was to be detained in a psychiatric hospital with his discharge being at the discretion of the Mental Health Tribunal and the Secretary of State. Nevertheless, the respondent's surrender was ordered. The judgment of Denham J. in the Supreme Court established that only part of the sentence which the respondent would have to serve involved preventing further harm to society. At para. 49, p. 90, she stated:

> "The law relating to sentencing is not identical in all member states. In this case the law of the United Kingdom enables a sentence to be one of detention by way of a hospital order. Such a detention order apparently involves elements of protection for society."

Significantly in the present context, this did not prevent surrender.

28 In *Minister for Justice and Equality v. Shannon* [2012] IEHC 91, Edwards J. rejected

a contention that due to the fact that the prosecution would be entitled to introduce evidence of the respondent's previous convictions in a trial in the United Kingdom, the courts should refuse to surrender him under s.37(1)(b) of the EAW Act. Edwards J. considered the argument was:

> "…fundamentally misconceived because it asks the Court to engage in a completely artificial, and indeed inappropriate, exercise and that is to exercise a supposed jurisdiction that is premised on the application of the Constitution to the laws of England and Wales and to pore over the issuing state's criminal justice process to determine as the court is invited to do, that it differs in different respects from what is constitutionally mandated in this jurisdiction. In this Court's view, it is clear from the Supreme Court judgments both in Minister for Justice, Equality and Law Reform v. Brennan and in Minister for Justice, Equality and Law Reform v. Stapleton that to do so would be entirely inappropriate."

29 Recently, in *Minister for Justice and Equality v. Buckley* [2015] IESC 87, this Court rejected a similar challenge to surrender where it was contended that the potential right of the prosecution in the United Kingdom to introduce evidence of an alleged co-conspirator's conviction in a trial for conspiracy would be incompatible with the Irish Constitution. It was said that the deployment of those provisions in a trial would be a denial of the respondent's right to hear evidence presented in the context of a trial and to contest such evidence by cross-examination, relying on *Borges v. Fitness to Practice Committee of the Medical Council* [2004] 1 IR 103. The judgment of MacMenamin J. (*nem diss)* rejected that challenge, stating at para. 24-25:

> "Both *Brennan* and *Nottinghamshire County Council* are authority, therefore, for the proposition that, absent some matter which is fundamental to the scheme and order of rights ordained by the Constitution, or egregious circumstances, such as a clearly established and fundamental defect, or defects, in the justice system of a requesting state, the range and focus of Article 38 must be within the State and not outside it. The Court is presented, here, with what, at its height, can only be characterised as a 'different rules of evidence case'; but no more.
>
> I would, therefore, summarise matters this way. First, the case advanced by the appellant is hypothetical, in that its actual or likely impact on the respondent is unclear, and certainly no capable of being characterised as a defect in the system of justice of the requesting state. Second, even if, hypothetically, ss.74 and s.75 P.A.C.E. 1984 are not in accordance with the values found in Article 38; it is immaterial, if the appellant cannot show what would be at issue would be, or is likely to be, an "egregious" departure amounting to a denial of fundamental or human rights (per Murray C.J. in *Brennan* [2007] 3 IR 732 at p. 744 par. 40). There would have to be significantly more: a real and substantive defect in the system of justice, where fundamental rights were likely to be placed at risk, or actually denied. As Murray C.J. pointed out in *Brennan*, rules of evidence "may differ" between states, and that alone does not at all lead to the necessary conclusion that there is a breach of fundamental rights in the requesting state. Finally, and again as held in *Brennan* and *Nottinghamshire County Council*, the reach of Article 38, save in exceptional circumstances, goes no further than the boundary of

> the State. There is nothing in Article 38 to suggest anything beyond that. What is in question, then, is the lawfulness of the *surrender* of the appellant in this jurisdiction. I would, therefore, answer the question in the negative."

30 These cases are all examples of circumstances where objections under s.37 have failed. In each case, even assuming that the impugned foreign provision would have been found to be incompatible with the Irish Constitution if enacted in Irish law, the court in each case nevertheless found that surrender of such a person was not prevented by s.37, or indeed, by the Constitution of its own force. The undesirability and inappropriateness of scrutinising foreign laws by reference to Irish constitutional standards is itself consistent with the approach taken in *Campbell* where, notwithstanding the fact that the trial occurred in the jurisdiction of the courts, the court did not apply Irish constitutional standards to the detention of suspects in Northern Ireland. Even though these cases are individual instances, they form a broadly consistent line of authority. They illustrate an approach which is, moreover, compatible with the observations of Murray C.J. in *Brennan*, and, indeed, both the observations made and the decision in *Nottinghamshire County Council v. B*.

31 A case which may fall on the other side of the line is the High Court decision in *Nolan*. In that case, the High Court had to consider the operation of controversial "IPP" sentences introduced in the United Kingdom pursuant to the provisions of the Criminal Justice Act 2003. As discussed earlier in this judgment, the respondent had been convicted on a charge of attempted rape and sentenced to detention "for public protection" with a "specified period" of two years and six months' imprisonment. The effect of this sentence was that after the offender had served the appropriate minimum period, reflecting what was described as the "punitive element of the sentence", the offender entered into the "risk" element of the sentence, and could be detained if, but only if, he continued to represent a risk to the public. An independent parole board conducted a review of the detained prisoner's sentence once the punitive element of the sentence had expired. The court considered that the continued detention of the offender after the expiry of the tariff period amounted to preventive detention, and thus was incompatible with Article 40 of the Constitution guaranteeing the right to liberty and the personal rights of a citizen, one of which was the presumption of innocence. In particular, he considered that preventive detention in the criminal justice context was "something that the Irish Constitution forbids absolutely (though of course it is permitted in the health protection context, but that is a completely different matter)". The presumption of innocence was not merely a part of Article 38, which was, the Court considered, limited territorially to the jurisdiction of the State, but was in itself a "higher legal principle of universal application". It was "much more that a mere procedural trial right". Moreover, since it was a personal right, it could apply extraterritorially. The conclusion was stated at para. 132:

> "In the Court's view because of the presumption's status as a principle of higher law, any measure affecting the personal liberty of the citizen that fails to respect it must be regarded as being repugnant to the Constitution, and specifically Article 40.4.1º thereof, notwithstanding the fact that Article 38 does not have extra-territorial effect."

Accordingly, surrender was refused under s.37(1)(b) of EAW Act.

32 This judgment was, understandably, heavily relied on by the appellant in this case, and it will be necessary to consider the underlying reasoning in due course. However, in that regard, it is important to recognise, as already noted, that the Supreme Court in *Nolan*, while upholding the decision, stopped notably short of endorsing the reasoning in that case. Instead, due to subsequent developments in the United Kingdom which

strongly suggested, if not conceded, the incompatibility of the IPP regime with the European Convention of Human Rights, as well as the repeal of that regime, the court dismissed the appeal against the order of the High Court. Furthermore, it is also important to note that in the present case in the High Court, Edwards J. (who was the trial judge in *Nolan*) distinguished that decision in dismissing the objection under s.37 of the EAW Act.

33 The argument on behalf of the appellant followed closely the approach of the High Court in *Nolan*. First, it was argued that it was clear that the regime of detention for a life sentence in the United Kingdom, after the expiry of the punitive tariff set by the sentencing judge, contained an element that was purely preventive detention. Preventive detention is fundamentally inconsistent with the Irish Constitution. It has "no place in our legal system" per Walsh J. in *People (Attorney General) v. O'Callaghan* [1966] I.R. 501, at p. 516. Indeed, it had been stated, most clearly in *dicta* contained in the judgment of the Supreme Court delivered by Murray C.J. in *Lynch & Whelan v. Minister for Justice* [2012] 1 IR 1, that the regime in the United Kingdom in respect of life sentences "is not *and could not* be the position in this jurisdiction". (Emphasis added). It was argued, therefore, that the imposition of such a sentence in the United Kingdom in this case was a breach of the Irish Constitution. That was all the more clear since the tariff period had long since expired and, if surrendered, the respondent would thereafter serve the portion of the sentence which was purely preventive. The prohibition on preventive detention contained in the Irish Constitution was not merely a fair trial right under Article 38 of the Constitution, which, it was accepted for the purposes of the argument, was limited in its effect to trials carried out in the jurisdiction. It was derived from the presumption of innocence which was a personal right universally recognised and applied, and could be traced back to Roman law, if not further. Moreover, Article 40.3 of the Constitution applied, in principle, outside the territory of the State since it protected personal rights. There could, of course, be practical limits on enforceability by reason of the fact that the events occurred outside the jurisdiction of the court, but this posed no difficulty or valid objection to the argument that the rights applied outside the jurisdiction, because the obligation to defend and vindicate the rights of the citizen was subject to the qualification that such a constitutional guarantee was to be vindicated "as far as practicable". It was generally impracticable to control detention carried out in other countries. Therefore, the remedy of an inquiry under Article 40.4 might not be available, but there was no issue of practicability here where the assistance of an Irish court was sought for the surrender of an individual. The respondent was within the jurisdiction, and the courts were obliged to defend and vindicate his rights, which meant in this case that he should not be surrendered. Taken one step further, it was argued that this approach might explain the decision in *Brennan* as an example of impracticability, since it was not feasible to seek to control the conduct of a trial in another jurisdiction. On this more general approach, the rights under the Irish Constitution (or at least the right in issue here) applied everywhere and the enforcement of those rights was limited only by considerations of practicability. This, it was suggested, explained why the Constitution applied (or was enforceable) with full force within the jurisdiction of the courts but more haphazardly in respect of events occurring abroad.

34 The respondent's argument in this regard was clearly derived from aspects of the decision of the High Court in *Nolan* but seemed to enlarge on it somewhat. It was met by an equally robust argument that the Constitution was limited territorially, only applied within the jurisdiction of the courts, and stopped, as it were, at the point of departure from the national territory.

35 Much of our daily life and our reasoning processes involve shortcuts, rules of thumb, statements of principle and generalisations. The various statements that preventive detention has no place in our law, that the Constitution has territorial limits, that rights

such as the presumption of innocence are universally recognised, and have been respected in different cultures at different times, all contain important truths. But it is necessary for a court to satisfy itself that they are well founded and applicable in every conceivable situation before it could be correct to decide a case merely on the invocation of generalised statements, however eminent the original source. The arguments advanced in this case would have very far reaching consequences, if accepted. They require careful analysis.

36 In the first place, I do not think that it is sufficient to argue that the Constitution stops at the boundaries of the State. There may well be circumstances where the Constitution may affect matters occurring abroad; equally, there may be many more situations where events abroad may have constitutional consequences for Ireland. For example, if the Irish State were to become involved in activities which confiscated the property of citizens (or indeed, possibly non-citizens) abroad or deprived them of their liberty, it would be surprising if it were the case that such actions could never give rise to actions against the State, enforceable in an Irish court. Similarly, if Irish forces are deployed abroad, questions may well arise as to their rights, and the rights of those with whom they interact. Since it seems that the Constitution conceives of some element of horizontal applicability (see *Meskell v. CIE* [1973] I.R. 121), it cannot perhaps be ruled out in principle that a constitutional tort could be committed abroad. If, on the other hand, evidence were obtained abroad of a clear violation of fundamental norms guaranteed by the Constitution, it would be surprising if it were contended that no possible issue arose under the Constitution if that evidence were sought to be deployed in an Irish court. And, of course, as s. 37 of the EAW Act and Article 20 of the Hague Convention illustrate, it may be necessary to consider what might happen abroad when determining whether it is a breach of the constitutional rights of an individual to surrender that person under an EAW or to extradite them under an extradition agreement, or to return a child pursuant to the Hague Convention. The fact that matters occurring abroad may well have different consequences under the Constitution than if they occur here does not mean that they are necessarily always, and in all cases, legally and constitutionally irrelevant. I do not think, therefore, that this case can be disposed of by the simple proposition that the Constitution only has relevance to matters within the jurisdiction, however defined.

37 I have, if anything, greater difficulty in accepting the argument that preventive detention infringes a fundamental right of universal application, and that accordingly, any such detention, wherever it may occur, is a breach of the Irish Constitution, limited only by considerations of the practicability of vindicating the rights involved. In my view, there is nothing in the Constitution to justify the distinction between "mere" procedural rights and "higher rights of universal application". Nothing in the Constitution suggests an entitlement to disregard one right and enforce the other. The obligation on a court is to defend and vindicate *all* the rights of the citizen. Indeed, until now I would have regarded the Article 38 right of trial by jury as one of the basic rights guaranteed by the Constitution. It is, after all, derived from the right of trial in due course of law which can be traced to Magna Carta. The specific right of trial by jury was celebrated by Lord Devlin as "more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives": P Devlin, *Trial by Jury*, (London, 1956) at p.164. I would find it hard to conceive of a value system that ranked this right as decisively inferior to other rights, and I do not know where in the Constitution such a table of values is to be found. It is also strange if an unenumerated personal right under Article 40.3 may be weighed as more valuable than a right specifically enumerated in the Constitution. The superficial distinction between rights guaranteed under Article 38 (and limited to the territory of the State) and rights guaranteed as personal rights (which are not) is, in any event, too porous to be a serviceable concept. It is always possible, as the example of the presumption of innocence shows, to characterise a right in slightly different terms, as a personal right guaranteed by Article 40.3 to fair procedures, or a fair trial right under Article 38, or a

component of the administration of justice under Article 34. The particular distinction asserted between procedural rights applicable at the trial (and *prima facie* unenforceable abroad) and rights in respect of detention (and *prima facie* enforceable) would also have the consequence that the Constitution did not control any part the trial of an individual abroad, but did purport to control his or her sentence.

38 The concept that there are rights of universal application having an international application poses more difficulties. While there might be broad agreement between civilised countries on headline principles (and this is itself a large assumption), there are, at a practical level, significant divergences between states on what those principles require. If, by way of example, the inclusion in a sentence for a crime of any element of detention for the protection of the public is a violation of a principle of universal application, it would be surprising if it was then adopted in countries like the United Kingdom and Germany and was found to be compatible with the European Convention on Human Rights. If it is a right of universal application, then one would expect to see it universally applied. It is no answer to this problem to say that the Irish antipathy to preventive detention in this case is derived from a widely accepted principle: the presumption of innocence. By the same token, it is possible to say that the right to trial by jury for non-minor offences is derived from a principle of due process which is itself of universal application. The issue in every case is what those general principles require in specific circumstances, which is something upon which countries can and do differ. It is not possible to justify the imposition of our choices in this regard on others, or to condemn their choices, simply on the basis that we all adhere to some general principles which are not in dispute. This is particularly so in the case of a right expressed or developed in a singular way in the constitutional jurisprudence of one country. By definition, the right is not universally recognised. Universal applicability cannot be the basis for its application to other countries.

39 The concept that some, or perhaps all, of the provisions of the Irish Constitution apply to actions occurring abroad, and are limited only by considerations of practicability of enforcement, is also troubling. At one level, it might appear to make no practical difference whether a court considers that the Constitution does not apply to actions occurring in a foreign state, or does apply but cannot be enforced. However, there is a very significant difference, not least because of the strong terms in which the courts under the Constitution are obliged to enforce and vindicate constitutional rights. It was said by Ó Dálaigh C.J. in *State (Quinn) v. Ryan* [1965] I.R. 70 that the powers of the courts were as ample as the defence of the Constitution required.

40 It is only one objection to this argument that it cannot explain the reasoning in *Brennan*. While it was suggested in argument that it is not practicable to enforce the right to trial by jury for non-minor offences abroad, this is not a persuasive explanation since the right involved could be vindicated by refusing to surrender a person to such a regime. On the other hand, the conception that only parts of the Constitution are applicable abroad and subject to a limitation of practicability cannot be supported by the text or structure of the Constitution or its interpretation, at least until now. Assuming, for this portion of the argument, that the detention of an individual for a life sentence after the expiry of a tariff period is a breach of the Irish Constitution, and that the Constitution applies abroad, then the question arises whether anyone involved in that detention could be sued for false imprisonment, or deprivation of constitutional rights if they happened to come to Ireland, and were thereby or otherwise within the jurisdiction of the Irish courts. Could the judge and jury and any other participants in a trial be sued for failing to vindicate the constitutional rights of the citizen? Until now, such proceedings would immediately be struck out on grounds of sovereign immunity. But sovereign immunity is a common law principle (albeit derived from international law). Would it have to be modified to allow a remedy to vindicate constitutional rights? Again, if the position is looked at in reverse, could it be said as a consequence that the

constitutions of all other countries apply in Ireland with the effect that actions lawful by the law of Ireland may yet be a breach of constitutional guarantees of other countries, having legal consequences if jurisdiction can be enforced? It is not necessary to labour this point further. It is sufficient to say that I cannot accept that such a wide ranging proposition is sufficiently grounded in the text of the Constitution. Indeed, in its baldest form, as advanced in argument in this case, it is, in my view, inconsistent with it.

A Narrower Argument

41 It might be argued (although it was not argued in this case) that it is not necessary to make such an ambitious claim to explain why surrender should be refused under s.37(1)(b) of the EAW Act. It might be argued that what is involved here is the application of constitutional guarantees *in* Ireland, which is not only unobjectionable, but on one view, required. The Irish court is being requested to surrender a person within its jurisdiction, and it is bound by the provisions of the Irish Constitution. There is no question, therefore, of a troubling extraterritorial effect: the Constitution is merely being applied intraterritorially, and surrender would be refused, not because the sentence itself was a breach of the Irish Constitution, but because it would be a breach of the Irish Constitution (and the courts' obligation to vindicate the rights of persons under the Constitution) to surrender someone if the result would be that he or she would be dealt with by a process which would not itself be permitted under the Irish Constitution.

42 That more modest argument would, however, lead to a situation where the Constitution applied with full force in cases of surrender, extradition, deportation and return under the Hague Convention and in other similar situations. For reasons discussed elsewhere, that would significantly restrict, if not indeed nullify, the process of surrender under the EAW system, because few, if any, countries have a criminal justice system which is identical to ours, even in those respects which are derived from the Constitution. The formulation of offences and defences, the process of investigation and evidence gathering, the rules governing arrest, detention and questioning, the representation of a suspect prior to and at trial, the manner in which the proceedings are conducted, the person before whom they are conducted, the circumstances in which a jury is required, the composition of a jury, the requirements for a verdict, and finally, the question of sentence and imprisonment, are all matters regulated in this jurisdiction by either the express terms of the Constitution or the interpretation given to it. By the same token, it could have a significant effect on requests made by Ireland in other jurisdictions if those jurisdictions were to take a similar approach. Similar issues arise in other areas of international cooperation. Even more fundamentally, such an argument is incompatible with the line of authority which crystallised forcefully in *Brennan*, which holds that it is only in egregious circumstances that surrender must be refused under s.37(1)(b) of the EAW Act. The question remains, however, why that is so.

43 In my view, these are the reasons why it can be said that the Irish Constitution does not, in general, apply abroad. It also explains why the *Brennan* test applies to surrender. Irish constitutional law (and therefore s.37(1)(b) of the EAW Act) distinguishes between events occurring abroad and those occurring here, not merely because they do occur abroad, and therefore, are observed rather than controlled by Irish law: it is also, and more importantly, because, particularly in the field of criminal law, they are controlled by the law of a foreign sovereign state. In this case, the execution of a sentence lawfully imposed, the trial of an offence contrary to law, and the enactment of laws providing for definitions of offences, punishments and administration of sentences, are all fundamental and central attributes of sovereignty. The comity of courts is not merely a matter of politeness between lawyers, or an end in itself: it is an aspect of the relationship between sovereign states. An essential corollary of sovereignty is the equality of states, expressed in the 14th century maxim "*non enim una civitas potest facere legem super alteram, quia par in parem non habet imperium*" (For it is not for one city to make the law upon another, for an equal has no power over

an equal) Brownlie's *Principles of Public International Law*, 8th Ed (Oxford, 2012), at p. 448. Article 5 of the Constitution asserts, in words that were by no means rhetorical in 1937, that Ireland is a sovereign, independent state. By Article 1 of the Constitution, the nation affirms its sovereign right to determine its relations with other nations. The conduct of external relations of the State raises separate constitutional issues, and requires a wider constitutional focus than the question of whether a certain procedure would be permissible within the jurisdiction.

44 Article 29 of the Constitution outlines that Ireland affirms its "devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality". This statement encapsulates a key principle applicable to the circumstances of this case. Cooperation implies some give and take. It also focuses attention on reciprocity, and the equality of sovereign states. The making of an extradition treaty, adherence to a convention on extradition, the implementation of a framework decision, and adherence to international decisions in areas of family law may all raise issues when surrender or return is sought. It is also necessary to appreciate that those issues arise under the same instrument which permits Ireland to seek the surrender of suspects for trial of offences alleged to have occurred in Ireland in respect of which Ireland has jurisdiction, or for the return of individuals to the jurisdiction of the Irish courts. It is not, therefore, a case of the Irish Constitution controlling events abroad (in which case the only question would be whether the acts alleged amount to a breach of the Constitution); it is, as already observed, rather that the Irish court is observing events abroad. Moreover, those events are observed through the lens of Article 29, requiring friendly cooperation, and Articles 1 and 5, which, in asserting sovereignty, require the respect of the sovereignty of other countries. The events, with which we are concerned here, are not private transactions between individuals. They are, by definition, the application of the criminal law within the territory of a sovereign state (in most cases to, and in respect of, its own citizens), or the execution of sentences imposed by their courts. These are key attributes of sovereignty of foreign friendly states, whose sovereignty we are bound by the Constitution to respect, in the same way as we expect respect for matters within our own jurisdiction. This is why, in my view, it is correct to speak of s.37 of the EAW Act as applying only to matters of "egregious" breach of fundamental principles of the Constitution or when something is so proximate a consequence of the court's order and so offensive to the Constitution as to require a refusal of surrender or return. It may be that the concept of friendly cooperation may also permit or require steps to be taken which would not have been taken in an earlier age, and not merely because the provisions of the Irish Constitution have been altered, but also because the area and content of international cooperation has extended. Such cooperation is, however, not unlimited. It is, for example, by the terms of the Constitution itself subject to justice and morality. There are also examples of limitations on this principle by consent, or international agreement or otherwise. It neither necessary nor desirable to explore these circumstances here, since they were not adverted to in argument. It is enough to identify the focus of the analysis for the purpose of s.37, which, in my view, explains the application of the *Brennan* approach.

45 This suggests that this area cannot be subject to absolute bright line rules, and further, that progress should be careful and incremental, and in contested cases, should involve close consideration of the relevant facts. It is necessary, therefore, in my view, to look much more closely at the sentencing regime in the United Kingdom and to consider equally carefully the constitutional law on preventive detention in this jurisdiction than the argument on either side would permit before coming to a conclusion as to whether or not Mr. Balmer's surrender is prohibited under the Constitution, and therefore under s.37 of the EAW Act.

The Life Sentence in the UK.

46 The regime of life sentences in the United Kingdom is a matter of foreign law and

requires proof unless it is not contested. Here, the Court has had the considerable benefit of a detailed and lucid statement of the United Kingdom law contained in the affidavit of Ms. Amelia Nice, a barrister of the Bar of England and Wales. I have found this particularly helpful because I had thought I had a general, if indirect, understanding of the United Kingdom system from the decisions on aspects of the regime found in the decisions of the European Court of Human Rights, and indeed, in the Superior Courts of the United Kingdom. However, the exercise carried out in this case of considering the detailed provisions of the law of the United Kingdom shows the critical importance of understanding clearly the precise foreign law before offering generalisations on its compatibility with Irish constitutional law or fundamental rights principles more generally. What follows is, I hope, an accurate account of the uncontested evidence.

47 The death penalty was abolished in the United Kingdom in 1965 by the Murder (Abolition of Death Penalty) Act of that year. The Act substituted a mandatory life sentence on conviction for murder for the previous mandatory sentence of death. Section 1(2) of the Act permitted the court, on imposing the sentence, to declare the period "which it recommends to the Secretary of State as the minimum period which in its view should elapse before the Secretary of State orders the release of that person on licence under section 27 of the Prison Act 1952". It is reasonable to speculate that the purpose of this provision was to avoid, or at least to make more difficult, the undermining of the new life sentence by an unduly lenient approach to release on the part of the Home Secretary. Ms. Nice comments:

> "The terms "tariffs" and "punitive element of the sentence" are used in Section h of the European Arrest Warrant to explain the process for the review of a life sentence. They are not statutory terms but describe what is referred to in section 28 of the Crime (Sentences) Act 1997 and Schedule 21 to the Criminal Justice Act 2003 as the "minimum term" and is the period of imprisonment which the offender has to serve before he can be considered for early release by the Parole Board."

So far, it is clear that what was colloquially described as the tariff was the minimum term recommended by the sentencing judge, which indicated the period before which it would not be appropriate to release.

48 The concept of a tariff period setting the punitive period of detention after which detention was justified by reference to risk to the public is a colloquial description, and follows from administrative arrangements introduced by the Home Secretary in 1983, under which the government sought to fix the period which had to expire before application for release could be made to (or considered) by the Parole Board. Again, as described by Ms. Nice:

> "Under those arrangements, Home Office Ministers set a minimum period of imprisonment - known colloquially as the "tariff" - to satisfy the requirements of retribution and deterrence and specified that period which had to be served in full before an offenders release could be considered by the Parole Board.
>
> …
>
> … Thus, life sentences were often referred to as encompassing a "punitive" period, represented by the tariff length and a "preventative" period during which release and liberty on licence was dependent on the assessment of risk."

In other words, the terms had no statutory significance, but described an exercise in

which an official could determine prospectively the period an individual might serve in prison.

49 It is not surprising that this regime was challenged, and in 2002, the United Kingdom House of Lords held that tariff-setting was a sentencing exercise which should be performed by a judge. Tariffs set by ministers were found by the House of Lords to be incompatible with the ECHR, but not illegal so as to invalidate sentences imposed - *R (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837. Since 2003, minimum terms are set in open court by the trial judge. The law of England and Wales imposes a duty to release certain life prisoners when he or she has served the relevant part of his or her sentence and the parole board has directed release. The board may direct such release if "satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined". A life prisoner can require the Secretary of State to refer his case to the parole board at any time after he has served the relevant part of his sentence, being the minimum term now set by the trial judge. Once released, a prisoner is not entirely at liberty. The sentence remains in force for the rest of his or her life, and could be revoked, and the licensee returned to prison at any time if he/she "no longer represents a safe enough risk to remain in the community". Any such recall could be recommended by the parole board, and if recall is instituted by the Secretary of State, it must be referred to the parole board.

50 As I understand the system, the person found guilty of murder in the United Kingdom must be sentenced by the court to life imprisonment. On sentencing, the judge now sets the minimum period of detention. The prisoner cannot be released before that date. The prisoner must be released if, after that date, a parole board directs his release. The board can only direct release if satisfied that detention is no longer necessary for protection of the public. If released, the former prisoner remains on licence and may be recalled to serve the balance of the sentence. Any such recall is either recommended by the parole board or must be referred to the parole board. References to tariffs and punitive periods of imprisonment are not statutory terms.

The UK regime compared to the Irish life sentence

51 This regime can be compared to the provisions of Irish law. Both systems of law in relation to the life sentence clearly come from the same source. In particular, the development of the law has clearly been influenced by the introduction of a mandatory life sentence in replacement of the death penalty. Irish law requires a judge to impose a sentence of life imprisonment on a conviction for murder. There is, however, no provision permitting or requiring the sentencing judge to fix or recommend any minimum period before which the prisoner can apply for release. As a matter of practice, it is seven years before consideration is given to release. The decision is made by the Minister for Justice on the advice of the parole board. The relevant provisions were described in a statement made by the Minister for Justice in 2006, as quoted in *Lynch & Whelan v. Minister for Justice* (High Court) [2008] 2 IR 142, at p. 170:

> "The Parole Board's principle function is to advise me in relation to the administration of long term prison sentences. This, of course, includes persons serving life sentences for murder who are eligible to have their cases reviewed by the Board after seven years. Sometimes the timeframe for the first review of a life sentenced prisoner by the Parole Board after a seven year period has led - wrongly - to an assumption that life sentence prisoners are then released. This is entirely without foundation."

This statement went on to identify periods of detention which could be expected in respect of particularly serious instances. The Minister continued:

> *"Likewise, where the perpetrator, by his crime or by his personality or behaviour remains an obvious risk to the safety of others, the public good will be protected by extended imprisonment." (emphasis added)*

He concluded, at p.170-171:

> "Even when released, life sentenced prisoners remain subject to supervision indefinitely. This supervision is carried out on behalf of my Department by the probation and welfare service. In all such cases there is the condition that the person released must be of good behaviour. If he or she comes to the attention of the authorities for any breach of temporary release conditions, he or she may be arrested without warrant and taken back into custody without the need for fresh proceedings and may be held in custody thereafter at my discretion."

52 The statement of the Minister also explained that release of a prisoner sentenced to life imprisonment is considered to be made pursuant to the provisions of the Criminal Justice (Temporary Release of Prisoners) Act 2003. The relevant provisions of the statute are set out in the judgment of the Supreme Court delivered by Murray C.J. in *Lynch & Whelan v. Minister for Justice Equality and Law Reform* [2012] 1 IR 1, at p.8-10 as follows:

> "(1) The Minister may direct that such person as is specified in the direction (being a person who is serving a sentence of imprisonment) shall be released from prison for such temporary period, and subject to such conditions, as may be specified in the direction or rules under this section applying to that person—
>
> (a) for the purpose of—
>
> (i) assessing the person's ability to reintegrate into society upon such release,
>
> (ii) preparing him for release upon the expiration of his sentence of imprisonment, or upon his being discharged from prison before such expiration, or
>
> (iii) assisting the Garda Síochána in the prevention, detection or investigation of offences, or the apprehension of a person guilty of an offence or suspected of having committed an offence,
>
> (b) where there exist circumstances that, in the opinion of the Minister, justify his temporary release on—
>
> (i) grounds of health, or
>
> (ii) other humanitarian grounds,
>
> (c) where, in the opinion of the Minister, it is necessary or expedient in order to—

(i) ensure the good government of the prison concerned, or

(ii) maintain good order in, and humane and just management of, the prison concerned, or

(d) where the Minister is of the opinion that the person has been rehabilitated and would, upon being released, be capable of reintegrating into society.

(2) The Minister shall, before giving a direction under this section, have regard to—

(a) the nature and gravity of the offence to which the sentence of imprisonment being served by the person relates.

(b) the sentence of imprisonment concerned and any recommendations of the court that imposed that sentence in relation thereto,

(c) the period of the sentence of imprisonment served by the person,

(d) *the potential threat to the safety and security of members of the public (including the victim of the offence to which the sentence of imprisonment being served by the person relates) should the person be released from prison*,

(e) any offence of which the person was convicted before being convicted of the offence to which the sentence of imprisonment being served by him relates,

(f) the risk of the person failing to return to prison upon the expiration of any period of temporary release,

(g) the conduct of the person while in custody, while previously the subject of a direction under this section, or during a period of temporary release to which rules under this section, made before the coming into operation of the Criminal Justice (Temporary Release of Prisoners) Act 2003, applied,

(h) any report of, or recommendation made by—

(i) the governor of, or person for the time being performing the functions of governor in relation to, the prison concerned,

(ii) the Garda Síochána,

(iii) a probation and welfare officer, or

(iv) any other person whom the Minister

considers would be of assistance in enabling him to make a decision as to whether to give a direction under subsection (1) that relates to the person concerned.

(i) the risk of the person committing an offence during any period of temporary release,

(j) the risk of the person failing to comply with any conditions attaching to his temporary release, and

(k) the likelihood that any period of temporary release might accelerate the person's reintegration into society or improve his prospects of obtaining employment.

(3) The Minister shall not give a direction under this section in respect of a person—

(a) if he is of the opinion that, for reasons connected with any one or more of the matters referred to in subsection (2), it would not be appropriate to so do …" (emphasis added)

In the judgment of the Court, Murray C.J. commented, at p.27:

"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. … 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." (emphasis added)

Earlier, at para. 63, the Court had held:

"63 In the court's view a life sentence imposed pursuant to s.2 of the [Criminal Justice] Act of 1990 is a sentence of a wholly punitive nature and does not incorporate any element of preventative detention.

64 It is a sentence which subsists for the entire life of the person convicted of murder. That person may, by virtue of a discretionary power vested in the executive, be temporarily released under the provisions of the relevant legislation on humanitarian or other grounds but he or she always remains liable to imprisonment on foot of the life sentence should the period of temporary release be terminated for good and sufficient reason." (p.25-26)

53 It is clear, therefore, that although sharing a common source and many comparable features, the system for the administration of life sentences has diverged considerably between Ireland and the United Kingdom. The primary sentence for murder in both jurisdictions remains a life sentence, which meant that in *Caffrey v. Governor of*

Portlaoise Prison [2012] 1 I.R. 637, Denham C.J. was able to say that there was no "incompatibility between the sentence received in England and the penalty prescribed by the law of this State for a similar offence". However, there are divergences, particularly in the management of the sentence. The fixing of a minimum period in the United Kingdom has the effect that detention after that period, while still under a life sentence, is subject to a recommendation from the parole board, which itself is referable to only one criterion, and then by a negative standard: the prisoner cannot be released unless the parole board is satisfied that he or she no longer poses a risk to society. These are significant distinctions, which led both the High Court and the Supreme Court in *Lynch and Whelan* to distinguish the Irish regime from that in the United Kingdom. However, the similarities are also noteworthy. The sentence in both jurisdictions remains a life sentence. The references to tariff and punitive element are descriptive and colloquial rather than statutory; and the Irish regime does provide for consideration of risk to the public both on sentence and in the consideration of continued detention.

Preventive Detention in Irish Law

54 The focus in Irish law on the constitutional position in relation to preventive detention can be traced to the important decision of the *People (Attorney General) v. O'Callaghan* [1966] I.R. 501. As is well known, that case held that it was impermissible to consider a propensity to commit further crimes as a ground for the refusal of bail. The leading judgment was that delivered by Walsh J. The key portion of the judgment is at p. 516-517:

> "Ground number 4 of the learned Judge, that is to say, the likelihood of the commission of further offences while on bail, is a matter which is in my view quite inadmissible. *This is a form of preventative justice which has no place in our legal system and is quite alien to the true purposes of bail*. (emphasis added)… In this country it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter upon which he has not been convicted or that in any circumstances he should be deprived of his liberty upon only the belief that he will commit offences if left at liberty, save in the most extraordinary circumstances carefully spelled out by the Oireachtas and then only to secure the preservation of public peace and order or the public safety and the preservation of the State in a time of national emergency or in some situation akin to that."

55 This is an important decision, although today it must be considered in light of the fact that the judgment is now reversed by the passage of the 16th Amendment of the Constitution in 1996, which inserted subparagraph 6 into Article 40.4:

> "Provision may be made by law for the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person."

It is, however, necessary to observe that the general statement in *O' Callaghan*, upon which the appellant places most reliance, was made in the context of the principles applicable to bail. The case cannot be taken as establishing a principle that any question of protection of the public cannot be considered in the context of sentencing. It is common place, for example, for pleas in mitigation to refer to the absence of risk to the public posed by the accused, and not uncommon for sentencing judges to refer to the risk to the public as justifying a custodial sentence. As the matters referred to above show, risk to the public is considered when deciding on the temporary release of sentenced persons, and also on the question of the release of persons serving life sentences. Even in the context of bail, the principle was not absolute. The extracts contemplate that it could be permissible to deprive a person of his liberty on a belief that he might commit offences if left at liberty, in admittedly extraordinary circumstance carefully spelled out by the Oireachtas, to secure the preservation of public peace and

order. The decision also contemplates that bail could be refused because of the likelihood of the accused person failing to turn up at trial, or interfering with witnesses. Refusal of bail on such grounds of objection necessarily involves elements of prediction and prevention.

56 In *In re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, Keane C.J. speaking on behalf of the Supreme Court said "that it has been a long established principle of our constitutional jurisprudence that the courts would not uphold what is known as "preventive detention". In that case however, the Court expressly upheld the provisions of the Bill amending s.5 of the Immigration Act 1999, permitting the Garda Síochána to detain a person against whom a deportation order has been made for a period of up to eight weeks, in circumstances where the member of the gardaí with reasonable cause suspected that the person intended to leave the State or had destroyed his or her identity documents or was in possession of forged identity documents or intended to avoid removal from the State. In two of these instances, detention is permitted because it is anticipated what a person may do, and an order is made to prevent it from occurring. Another clear example arises under of the Mental Health Act 2001, a person falling within the definition of s.3 may be detained "*where there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons*". (emphasis added)

57 As a result of this analysis, I think it can be said that the Irish and United Kingdom regimes for life sentences share many common features, and indeed it might be said that, in their essential character, they are very similar. Hogan J. in the Court of Appeal reminded himself of the observations of Lord Hope in the House of Lords in *Pilecki v. Circuit Court of Legnica* [2008] UKHL 7, that 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". All of this, as Hogan J. put it at para. 18 of his judgment in the Court of Appeal, means that "in practice, [what happens in the UK] 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".

58 The Irish approach to these matters was aptly stated by Dunne J. in *D.P.P. v. Daniels* [2015] I.L.R.M. 99. Dunne J. stated, at pp.104-105:

> "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. …"

She adopted with approval the statement of principle in the joint decision of the Australian High Court in *Veen v. R (No. 2)* (1988) 164 C.L.R. 465 (Mason C.J., Brennan, Dawson and Twohey JJ.), where it was stated at p. 473:

> "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."

This statement was cited with approval in the Court of Criminal Appeal in *People (DPP) v. Anthony McMahon* [2011] 3 IR 774, and was quoted in the Court of Appeal by Hogan J. in *Minister for Justice, Equality and Law Reform v. Craig* [2015] IECA 89, which is the case that was initially joined with the current matter. It encapsulates a principle, which

in Ireland has constitutional significance, that risk to the public can be a factor in sentencing and release but cannot be the sole object. The difference may be a matter of degree, but it is, however, a difference with constitutional significance.

59 While in the absence of a concrete case this is somewhat speculative, I am prepared to approach this case on the basis that the introduction in Ireland of a similar regime to that which now obtains in relation to the management of life sentences in the UK would not be permissible under the Irish Constitution. On this approach, while protection of the public may be a component of the sentence and consequent release decision, it would be impermissible to impose a sentence or a separate period of a sentence for purely preventive reasons, sometimes described as incapacitation. This is particularly so if, as under the UK regime, the offender is to be detained unless a parole board or other decision maker is satisfied that he does not pose a risk to the public, which given the nature of the inquiry might be a difficult standard to satisfy. It should also be noted that in *D.P.P. v. Daniels*, the DPP conceded the principle, and therefore there was no exploration of the precise justification for, and limits of, the prohibition on preventive detention in the context of sentence. However, this conclusion is not an end to the Court's inquiry. It is clear that the position is more nuanced than the simple statement that preventive detention has no place in our legal system might suggest. The fundamental and difficult issue for an Irish court is whether that difference, and putative unconstitutionality, is, in the words of *Brennan*, so egregious, and such a fundamental defect in the legal system, or is something which departs "so markedly from the scheme and order envisaged by the Constitution" (*Nottinghamshire*) as to require a court to refuse to surrender a person under an EAW, either for trial, where conviction would lead to such a regime being imposed, or, as here, to serve a sentence imposed and managed under that regime.

***Caffrey* Considered**

60 In addressing this question, the High Court judge and the majority of the Court of Appeal considered that this issue was resolved conclusively by the decision of the majority of this Court in *Caffrey*. In essence, if, notwithstanding the differences between the jurisdictions, one life sentence prisoner in the UK could be transferred to Ireland to serve his sentence here, another life sentence prisoner could be returned from Ireland to serve the remainder of his sentence there. The *Caffrey* case did involve close consideration of the United Kingdom regime for life sentences, but in a different statutory context. The particular question arose because the Irish legislation opted for a continued enforcement model. The question was whether a prisoner serving a life sentence in the UK could be transferred to Ireland, and his sentence continued and enforced in Ireland. The majority of the Supreme Court (Denham C.J., Hardiman and Macken JJ. concurring; Murray and Fennelly JJ. dissenting) held that the essential sentence imposed was a life sentence, which could be enforced in Ireland. As Denham C.J. observed at para. 26:

> "The applicant was convicted for murder and sentenced in England to a mandatory sentence, imprisonment for life. This is, in fact, the same sentence as a court would impose on a conviction for murder in this jurisdiction, life imprisonment. The court in England, and in Ireland, has no discretion. It is a mandatory sentence. The primary necessary finding is that the sentence imposed in England was a mandatory sentence and was imprisonment for life."(p.649)

At para. 29 Denham C.J, continued:

> "In fact this mandatory sentence is similar to the sentence a person convicted for murder would receive in the State, imprisonment for life. It is a mandatory sentence in Ireland also. There is no incompatibility between the sentence received in England and the penalty prescribed by the law of the State for a similar offence."(p.652)

The provisions as to tariff, risk and release were matters going to management of the

sentence, but the sentence itself was the life sentence. The Transfer of Sentenced Persons Act 1995 (as amended) then required this sentence to be managed in accordance with Irish law. At para. 32:

> "The applicant is serving a valid sentence of imprisonment for life, in Ireland. The management of that sentence is now governed by Irish law. The management scheme adopted in England is no longer relevant. Irish authorities could not apply the English law. It is inappropriate for the Irish State to make reference to any minimum period in the United Kingdom within which the applicant would be denied parole review. In this case, no issue of inappropriate considerations on the part of the State that detrimentally affect the applicant arise because the 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 applicant's life sentence."(p.652)

While Murray and Fennelly JJ. dissented, they did so because they viewed the question of detention and risk as a matter going to the legal nature and effect of the sentence rather than its management. Such a sentence could not be administered in Ireland, at least without adaptation. The majority did not disagree with that analysis, if it was correct to view the tariff and subsequent release provisions as part of the sentence. For present purposes, however, it seems clear that the approach of the majority of the Supreme Court was that what might be described as the problematic aspects of (at least from the Irish Constitutional point of view) the UK sentences as managed were not parts of the sentence which the Irish system were obliged to enforce. Accordingly, the case does not amount to a decision that the life sentence as enforced and managed in the UK (as Mr. Balmer's will be if he is surrendered) is compatible with the values contained in the Irish Constitution.

61 Taking this view of *Caffrey*, I cannot therefore agree with the High Court judge or the majority of the Court of Appeal that the decision in *Caffrey* is dispositive of this case. Instead, I agree with Hogan J., that *Caffrey* does not conclude that a UK sentence as managed in that jurisdiction is compatible with the Irish Constitution. The effect of the division between legal nature and effect, on the one hand, and management on the other, meant that those aspects of the UK sentence involving preventive detention were considered as part of the management of a life sentence. Since management of the sentence under The Transfer of Sentenced Persons Act 1995 would be carried out in accordance with Irish law, there was then no question of potential incompatibility with the Irish Constitution. The transfer of the prisoner, involving transfer of the management of his sentence, had the effect of curing or removing any potential incompatibility. It follows, therefore, that *Caffrey* did not decide that the UK life sentence in all its components was entirely compatible with the Irish Constitution. It is, therefore, not dispositive of this case. The fact that UK life sentence prisoners can be transferred to Ireland does not mean, by itself and without more, that a person must be surrendered to face or serve a UK life sentence. Nevertheless, *Caffrey* is helpful in resolving the issue for this Court insomuch as it analyses the legal nature of the UK life sentence as essentially similar to a life sentence in Ireland.

62 Further assistance can, in my view, be obtained from the decision of this Court in *Minister for Justice, Equality and Law Reform v. Murphy* [2010] 3 IR 77. That case dealt with an application for surrender under an EAW of a person convicted in the United Kingdom of rape and assault charges. The person in question had been sentenced to what was described as a "hospital detention order" and was to be detained indefinitely in a psychiatric hospital at the discretion of the Mental Health Tribunal and the Secretary of State. Both the High Court and this Court on appeal held that the individual could properly be surrendered under the EAW. It is right to observe that the specific issue

there was that it was suggested that the hospital order was not an order for detention for the purposes of s.10 of the EAW Act. The decision does, however, consider the question of the compatibility of the preventive element of such a sentence with the Constitutional scheme.

63 A hospital order could be made by a Crown Court where it appeared to the court, having regard to the nature of the offence, the antecedence of the offender and "the risk of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm so to do". The court could order that the offender be subject to a restriction order and detained in a hospital until duly discharged. At p. 90 of her judgment, Denham C.J. stated:

> "47 A detention order arising outside the criminal process, or not relating to extraditable offences, could not be the subject of [surrender] under the Act of 2003. I would affirm the statement of the High Court Judge that a person who has been made the subject of a detention order solely in a mental health context, and who escapes from that detention, could not be sought to be surrendered by means of an European arrest warrant.
>
> 48 *Similarly, I would distinguish the situation addressed in The People (Attorney General) v. O'Callaghan [1966] I.R. 501. That case arose on a bail motion where a prisoner had been returned for trial. The issue was whether the applicant could be held in preventative detention prior to his trial; it was submitted that if he were released on bail he might commit further offences. Walsh J. held that such detention would be a form of preventative justice which has no place in our legal system and is alien to the purposes of bail. The facts and issues of that case are entirely different to the situation addressed in this warrant where there have been convictions for serious offences and for which the appellant has been ordered to be detained.*
>
> 49 Sentencing is a complex matter. All the facts and circumstances of a case require to be considered by a court, and then the court applies the law as appropriate. This may involve aspects of retribution, deterrence, *protection*, reparation and/or rehabilitation. A sentencing court considers the offence, the offender, the victim, all the circumstances of the case, and makes a decision according to the law. The law relating to sentencing is not identical in all Member States. In this case the law of the United Kingdom enables a sentence to be one of detention by way of a hospital order. *Such a detention order apparently involves elements of protection for society*." (p.90) (emphasis added)

Peart J. in the Court of Appeal considered that this decision was helpful in considering the issue before the Court in this case, and I agree.

64 In the light of these observations, and the fact that the position in relation to detention and sentencing is rather more nuanced than the statement that it has no place in our legal system might suggest, I conclude that the regime as described by Ms. Nice BL, does not require an Irish court to refuse to surrender Mr. Balmer under s.37(1)(b). The regime for life sentences in the UK has considerable similarities to the scheme in this jurisdiction. Decisions on release are, as Hogan J. observed, in practice perhaps little different from those made in this jurisdiction. The Irish constitutional objection to preventive justice is more nuanced, particularly in the field of sentencing and release,

than a statement of blanket incompatibility might suggest. The constitutional concepts of sovereignty and friendly cooperation with other nations means that Ireland is in general unwilling to seek to apply its constitution to another sovereign state or to object to the application by another friendly state of its own laws to crimes committed to or by its own citizens within its territorial jurisdiction. In the comparable case of surrender by an ECHR country to a non-Convention country, the ECtHR has held that due regard must be had to the fact that sentencing practices vary greatly between states, and it will, for example, be in only very exceptional cases that an applicant will be able to demonstrate that a sentence in a non-contracting state would be grossly disproportionate and thus contrary to the Convention. In the circumstances, I do not consider that the UK life sentence regime, even assuming it would not be permissible in this jurisdiction, should be considered to be a fundamental defect in the justice system so as to require that surrender must be refused under s.37(1)(b).

65 Since I have accepted much of the analysis of Hogan J. in the Court of Appeal but differ from him as to the result, it may be useful, for future application of the test in *Brennan*, to explain why I have come to a different conclusion on the resolution of the issue in this case. First, it is clear that Hogan J. reached his conclusion with considerable reluctance. As already observed, he acknowledged the force of the majority judgment, and stated at p. 38 that he reached his conclusion with no "enormous enthusiasm". Hogan J. recognised that it was inconsistent with the philosophy behind the EAW system, and that it was not the intention of the drafters of the Framework Decision that sentencing practice in various Member States should have to change to accommodate the fundamental values of the requested state. Indeed, it is unrealistic to expect Member States to change their sentencing regimes as applicable to all offenders to accommodate those rare incidences where an offender absconds to Ireland. In those circumstances, the result will simply be the inability of the Member State to secure the surrender of the offender who will then have a limited immunity so long only as he or she remains in Ireland. That is an unattractive outcome, and it is understandable that Hogan J. so regarded it. Furthermore, the regime in the UK, as he observed, was not fundamentally different in practice from what might occur in Ireland. Again, it would be surprising, therefore, that in a system which tolerates and expects considerable differences between the practices in different Member States, that surrender would be refused between systems which are in large respects very similar, and even in their areas of divergence contain significant points of similarity.

66 It is clear that Hogan J. felt driven to refuse surrender because he considered there was a direct analogy with the decisions of this Court made under s.37(1)(a) of the EAW Act, in particular in *Nolan*, in respect of IPP sentences. At para. 37 of his judgment in *Minister for Justice and Equality v. Craig* [2015] IECA 89, he said:

> "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."

I do not agree, however, that such an analogy is appropriate or consistent with authority or indeed with the principles outlined earlier in this judgment. When an issue under s.37(1)(a) arises in respect of surrender to another contracting state, there is no question of Article 29 requiring a degree of tolerance, or some relative test as approved by this Court in *Brennan and Buckley*. Unlike the Irish Constitution, the ECHR applies with full force in the requesting state. The only question, therefore, for the requested court, is whether the requesting state will comply with its own obligations under the

Convention. The potential for international friction is further reduced by the existence of institutions which are entitled to report, and in the case of European Court of Human Rights, to determine, whether or not a regime is compatible with the dictates of the Convention. Furthermore, the Irish court is entitled to apply a presumption that the national court of the requesting state is best placed to make a determination as to compatibility, at least in the first place. Such a state has, after all, the obligation of conducting the trial and administering the sentence. It may be rare, therefore, for a national court to have to address the question equivalent to a determination under s.37(1)(a) of the EAW Act without the benefit of reports and decisions from the institutions of the Council of Europe or in circumstances where it is not entitled to rely, at least in the first place, on the existence of national courts bound to uphold the provisions of the Convention. However, where such an issue does arise, the question for the national court would be whether the particular provision in issue is a breach of rights guaranteed in the Convention. That is an entirely distinct test from the test posed under s.37(1)(b) of the EAW Act, which is whether what is proposed is both such a direct consequence of surrender, and would, if it occurred in Ireland, be so egregious in breaching the guarantees of the Irish Constitution that the Court cannot, consistently with its constitutional obligations, order surrender. This test was not applied by Hogan J. Instead, the false analogy with s.37(1)(a) of the EAW Act led the learned judge to simply address the question of whether the regime for life sentences in the UK would, if enacted in Ireland, be contrary to the Irish Constitution.

67 It is necessary to make some concluding observations. It is clear that in cases in which it arises, s.37(1)(b) of the EAW Act requires close analysis and sometimes fine judgments which can be markedly affected by the facts. I would venture to suggest that some of the difficulties with the UK regime, at least from the perspective of Irish constitutional law, are not merely the labelling and the colloquial description of detention as being purely preventive, but also follow from the fact that such detention is maintained *unless* the parole board is satisfied that a person poses no risk. Given the difficulty of any analysis of, and adjudication on, propensity, and given the nature of decision making, this can lead to a situation of prolonged incarceration for periods well in excess of what a person convicted of a similar offence in Ireland would expect. Length of sentence is a matter specifically addressed by the Framework Decision and is clearly a matter of some concern to Member States. This judgment only addresses the argument of principle that the UK tariff-setting system requires refusal of surrender under section 37(1)(b). Just as under the ECHR, it cannot be ruled out that exceptional cases on the facts may arise in which the courts may have to consider the obligation of surrender in the light of the length of the sentence served.

68 In that regard, it is also necessary to point out that Mr. Balmer was released from custody in the United Kingdom. What is involved here is recall by the authorities, although such recall will, if effected, be immediately referred to the Parole Board for its advice. The circumstances giving rise to the recall are identified in only the scantiest detail. The Court was provided with a copy of the licence revocation and recall to custody. The only information contained in the revocation notice is the general statement that "your licence has been revoked from the 2nd of March 2011 and you are recalled to custody because you have", coupled with two ticked boxes stating "allegedly committed a further offence" and "poor behaviour". The form also states that the Public Protection Casework Section will send the individual confirmation of the reasons for recall and information on how to make representations and/or appeal to the Parole Board, and that furthermore, he or she will be provided with the information on which the decision to recall was taken. This Court has no reason to doubt the decision to recall the appellant. However, there is no reason in principle why more information should not be provided to a court which is required to consider whether such an order for surrender is in accordance with both the Constitution and the Convention.

69 The conclusion I have come to in this case means that this Court does not have to address any issue of the interpretation of s.37 by reference to the Framework Decision,

and in particular it is not necessary to here consider the impact of the decision of the Grand Chamber of the ECJ in *Melloni v. Ministerio Fiscal* (Case C- 399/11). Of course, it might be said that the obligation to give a conforming interpretation to implementing legislation as laid down in *Pupino* cannot permit a court to give an interpretation that is *contra legem*, and s.37 is apparently clear in its terms. This issue was not addressed in the course of argument, but it is something which the Court itself recognises. Issues may yet arise for the Court as to the interpretation to be given to section 37. It cannot be too readily resolved by invocation of undoubted principles of primacy, unity and effectiveness of European law since Article 6.3 of the Treaty of the European Union recognises fundamental rights resulting from constitutional traditions common to Member States as a general principle of that same European law. Furthermore, the fair trial guaranteed by Article 47 of the Charter of the European Union might be considered to extend to the process both in the executing state and in the trial state. In principal, the primacy and effectiveness of European law is not necessarily compromised by decisions to refuse surrender because of the impact of any such decision in the executing state on long established principles derived from fundamental values. This is a matter which may require careful consideration in an appropriate case, and indeed sensitive and respectful dialogue between national courts and the ECJ. It may also require to be addressed at national level since the terms of the Framework Decision are ultimately matters which can be determined at national level. I have thought it preferable, therefore, to address the question of any potential breach of the Constitution at the outset, since it is only if this Court considered that surrender would constitute a breach of the Constitution that the issue arises at all, and it would then become necessary to address these difficult and sensitive issues.

70 In its determination of the 20th of July 2015, [2015] I.E.S.C. DET. 34, the Court granted leave to appeal:

> "Where a prisoner has been sentenced in another jurisdiction to a life sentence and has served the portion of the sentence described as consisting of the entirety of the punitive element of the sentence, in conformity with Article 40.3 and Article 40.4 of the Constitution is it possible to take any further step in this State to enforce an apparent remaining element of the sentence which is ostensibly that of prevention or deterrence?
>
> Where a prisoner has been released on licence prior to the full expiry of their sentence and is sought to be recalled because of an apparent breach of licence, is it necessary, and to what extent is it required, to have a hearing prior to or immediately proximate to that recall for such ostensible deprivation of liberty to be in conformity with Article 40.4 of the Constitution and Article 5 of the European Convention on Human Rights?"(para. 18)

71 It follows from the discussion above that it is possible for this State to surrender, in accordance with the EAW, a person sentenced in another jurisdiction to a life sentence who has served a portion of that sentence described colloquially as consisting of the entirety of the punitive element of the sentence. In relation to the second issue, it is not necessary to speculate on what is required in the abstract. The Court is satisfied that the provision of information and the capability to review or appeal a decision to recall, both of which apply in this case, are sufficient to comply with any requirement of fair procedures under either the Constitution or the Convention.

In the circumstances I would dismiss the appeal.