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## Judgment

**Title:** Minister for Justice -v- O'Connor

**Neutral Citation:** [2018] IESC 3

**Supreme Court Record Number:** 131/2017

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**Court:** Supreme Court

**Composition of Court:** Clarke C.J., O'Donnell Donal J., MacMenamin J., Dunne J., O'Malley Iseult J.

**Judgment by:** Clarke C.J.

**Status:** Approved

**Result:** Other

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## THE SUPREME COURT

**Clarke C. J.  
O'Donnell J.  
MacMenamin J.  
Dunne J.  
O'Malley J.**

**In the matter of the European Arrest Warrant Act 2003 (As amended)**

**And**

**In the matter of Thomas Joseph O'Connor  
Between/**

**The Minister for Justice and Equality**

**And**

**Applicant/Respondent**

**Thomas Joseph O'Connor**

**And**

**Respondent/Appellant**

**Judgment of the Court delivered by the Chief Justice on the 1st February 2018**

**1. Introduction**

1.1 There must be no one in Ireland who is not by now aware that there may potentially be significant complications arising in a whole range of areas as a result of Brexit. This application concerns one such potential issue. The respondent/appellant ("Mr. O'Connor") was the subject of a request from the United Kingdom for his surrender to that country on foot of a European arrest warrant. The lengthy history of the attempts to thus secure Mr. O'Connor's surrender to the United Kingdom is fully set out in the High Court judgment in this matter delivered by Donnelly J. on the 25th July, 2017 (*Minister for Justice and Equality v. O'Connor* [2017] IEHC 518). Mr. O'Connor has sought leave to appeal to this Court from the decision of Donnelly J. which had the effect of affirming, for the reasons set out in that judgment, a previous order for surrender made by Edwards J., which previous order had been affirmed by this Court. Thus, the net consequence of the decision of the High Court was that Mr. O'Connor should be surrendered.

1.2 In accordance with the Court's normal practice in respect of applications for leave to appeal, the notice of application filed on behalf of Mr. O'Connor and the respondent's notice filed on behalf of the applicant/respondent ("the Minister") will be published along with this judgment.

1.3 As appears from those notices, the central issue asserted on behalf of Mr. O'Connor as meeting the constitutional threshold for leave to appeal is what is described as "the Brexit point". Put at its simplest, it is argued that an issue arises on this potential appeal concerning the effect or potential effect of Brexit on this European arrest warrant proceeding such that the constitutional threshold for leave to appeal to this Court is met.

1.4 It will be necessary to say something more about what is meant by the Brexit point in due course. However, it is said that the fact that the United Kingdom has given notification under Article 50 of the Treaty on European Union ("TEU"), so as to lead to the departure of the United Kingdom from the Union, gives rise to a situation where Mr. O'Connor, as a citizen of the European Union, will be surrendered to another jurisdiction in circumstances where there is a risk that he will be required to serve a period of imprisonment and thus be detained beyond the time when the United Kingdom remains a member of the Union. The notification in question was given on the 29th March, 2017, by means of a letter from the Prime Minister of the United Kingdom to the President of the European Council. The effect of that notification is to cause the United Kingdom to withdraw from the European Union (in accordance with the provisions of Article 50 of the TEU) as of the 29th March, 2019. In those circumstances it is said that the rights

which Mr. O'Connor might otherwise enjoy as a European Union citizen, having been surrendered to another European Union jurisdiction on foot of the European arrest warrant regime, will no longer be capable of enforcement by him at least as matters of European law. On that basis, it is argued that his surrender is no longer legally permissible.

1.5 As already noted, the Court is currently concerned only with an application for leave to appeal.

## **2. The Application for Leave to Appeal**

2.1 The general principles applied by this Court in determining whether to grant or refuse leave to appeal having regard to the criteria incorporated into the Constitution as a result of the 33rd Amendment have now been considered in a large number of determinations and some judgments and are fully addressed in both a determination issued by a panel consisting of all of the members of this Court in *B.S. v. Director of Public Prosecutions* [2017] IESCDET 134 and in a unanimous judgment of a full Court delivered by O'Donnell J. in *Pricewaterhousecoopers (a firm) v. Quinn Insurance Limited (Under Administration)* [2017] IESC 73. As this is an application for leave to appeal directly from the High Court, the additional criteria required to be met in order that a so-called "leapfrog appeal" direct to this Court can be permitted also need to be taken into account. Those criteria were addressed, again by a full panel of the Court, in *Wansboro v. Director of Public Prosecutions* [2017] IESCDET 115. However, it should be noted that the Court in *Wansboro* indicated that it was not in that determination dealing with the sub-category of potential leapfrog appeals which have come to be described as appeals in "certificate" cases.

2.2 In that context, it should be noted that Mr. O'Connor sought the certificate which would have been required to appeal the decision of Donnelly J., to which reference has already been made, to the Court of Appeal. That application was refused for the reasons set out in an *ex tempore* judgment of Donnelly J. delivered on the 28th July, 2017 (Unreported, High Court, Donnelly J., 28th July, 2017). It follows that the only route available to Mr. O'Connor is to seek leave to bring a "leapfrog" appeal to this Court. On the other hand, as the Court has pointed out on a number of occasions (see, for example, *Grace & anor v. An Bord Pleanála & ors* [2016] IESCDET 29), a party, who satisfies this Court that they meet the general constitutional threshold by establishing that their appeal raises an issue of general public importance or that it is in the interests of justice that there be an appeal to this Court, may well be able to establish the additional exceptional circumstances required to justify a direct appeal to this Court if they have no other means of pursuing the issues which the Court is satisfied meet the general constitutional threshold. In the context of the refusal of a certificate by the High Court in this case it should, however, be reiterated, as this Court pointed out in its judgment in *Grace*, that the threshold or test by reference to which a certificate is to be given by a High Court judge in a case such as this is different than the threshold which this Court is required to apply. This Court will always consider the reasons given by the High Court for refusing a certificate. However, even if this Court comes to a different conclusion on the question of whether leave to appeal should be granted by it, it does not follow that this Court necessarily disagreed with the High Court judge who refused a certificate precisely because that High Court judge was required, by law, to apply a different though clearly related test.

2.3 In any event, it is possible that there may be circumstances where it would not necessarily follow that, in such a certificate case, "leapfrog" leave would have to be allowed where the general constitutional threshold is met but a certificate is refused by the High Court. However, it seems clear that, in the circumstances of this case, it would be appropriate to allow an appeal to this Court if the general constitutional threshold is met. If a Brexit type issue truly arises in the circumstances of this case and if a

resolution of that issue would be “necessary” to the proper determination of the question of whether Mr. O’Connor should be surrendered to the United Kingdom, then it would be wrong that Mr. O’Connor would be deprived of the opportunity of pursuing that issue by a finding that the necessary exceptional circumstances did not exist to warrant an appeal direct to this Court in circumstances where Mr. O’Connor would not have available to him what might be described as the ordinary remedy of an appeal to the Court of Appeal. The relevant European jurisprudence in that regard will be referred to later in this judgment. It follows that leave to appeal should be granted in the event that the general constitutional threshold is met.

2.4 In the vast majority of cases it is, of course, the case that applications for leave to appeal are considered on paper and a written determination is issued. However, when a panel of this Court met to consider the application for leave in these proceedings it was considered beneficial that there be an oral hearing to enable the Court to consider the matter in greater detail. In that context, the point which the parties were asked to address at the oral hearing was described in correspondence sent, at the direction of the Court, by the Registrar to the parties in the following terms:-

“...whether there is an issue of European law as to the existence or otherwise of any obligation under European law which would require Irish legislation to be operated in a manner which would preclude the surrender of a person to the United Kingdom in circumstances where that country has served a notice under Article 50 of the Treaty for the purposes of exiting the European Union.”

2.5 The concern of the Court was to ascertain whether there truly was an issue of European law which arises in these proceedings and whose resolution would be necessary in order for these proceedings to be properly concluded. It follows that it is appropriate to turn to the European dimension.

### **3. The European Dimension**

3.1 The general position of a court of final appeal in European law is clear. Article 267 of the Treaty on the Functioning of the European Union (“TFEU”) provides as follows:-

“The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of

the European Union shall act with the minimum of delay.”

3.2 The Court of Justice considered Article 267 of the TFEU insofar as it relates to courts of final appeal in *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* (Case 283/81) [1982] ECR 3415. In that case, the Court held that para. 3 of Article 267 of the TFEU:-

“...is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.”

3.3 It is necessary to consider how those principles of European law engage with the provisions of the Irish Constitution introduced by the 33rd Amendment. Where a party seeks leave to appeal to this Court under the constitutional architecture introduced by that Amendment, this Court becomes, by definition, a court of final appeal as that term is used in European law, as the refusal of leave gives rise to a situation where there would be no judicial remedy available under Irish law. It follows in turn that this Court may consider it appropriate to grant leave to appeal in certain cases if for no other reason than that it may be considered necessary to make a preliminary reference to the Court of Justice.

3.4 It would certainly be a prudent course of action, having regard to the obligations of this Court as a matter of European law, to grant leave to appeal in a case where it was likely that a reference would be required under the *CILFIT* jurisprudence. In that context, it seems to the Court that any issue of European law which would require a reference under that jurisprudence must necessarily be a matter of general public importance for the purposes of the constitutional threshold. However, that being said, it is also clear that the obligations on this Court to refer a matter to the Court of Justice arise only where the issue concerned can be said properly to arise in the case, is necessary to determine the potential appeal before this Court and further will not arise if the relevant issue of European law is *acte clair*.

3.5 Where, therefore, an issue of European law is asserted on an application for leave to appeal as being the basis or one of the bases for suggesting that the constitutional threshold is met, this Court will be required to consider whether the issue of European law concerned properly arises on the appeal and whether it can be said that the resolution of that issue will be necessary for the resolution of the appeal. For example, the facts as found by the High Court or affirmed or determined by the Court of Appeal may be such that an issue of European law which might otherwise have arisen can no longer be properly said to remain open on any potential appeal. Furthermore, the ordinary procedural rules which apply in this jurisdiction concerning the extent to which points can be raised on appeal having regard to the manner in which the proceedings were pursued in a lower court or lower courts also apply, so that a point sought to be raised on an appeal to this Court may not be admissible by reason of the failure to raise the point, or at least a sufficiently analogous point, in the courts below. Other examples could be given.

3.6 It follows that the mere fact that a party asserts that a point of European law arises which might require to be referred to the Court of Justice does not, of itself, entitle that party to leave to appeal. This Court must assess whether, having regard to considerations such as those just identified, the point truly and properly arises and is

necessary to determine the issues which properly arise on the appeal.

3.7 In the light of the recent experience of this Court in considering notices filed for the purposes of applying for leave to appeal, it is also important to emphasise that there is an obligation on a party seeking leave to appeal to set out in a clear way the issue or issues which it is said would arise on the appeal if leave is granted and which would meet the constitutional threshold. This requirement applies in all cases and not just those which may arguably involve a point of European law. It should be noted that this Court has, to an extent, exercised some latitude in regard to that obligation during the early period after the new regime brought about by the 33rd Amendment came into force. However, it is now more than three years since the new constitutional architecture has been in place. The Court would wish to strongly emphasise that it is not the function of the Court to sift through diffuse and imprecise points or arguments which are placed before the Court in the hope that the Court itself might identify a point which meets the constitutional threshold.

3.8 It has to be said that in at least some cases it has been difficult to avoid the impression that parties seeking leave to appeal may have sought to set out facts, arguments and grounds of potential appeal in such a diffuse way that it was hoped that the Court might grant leave to appeal for fear that there might be an issue lost somewhere in the undergrowth which truly did meet the constitutional threshold. It is important that the Court emphasises that such latitude will not be given in the future. If a party fails to clearly identify the issue or issues which are said to meet the constitutional threshold in such a way as enables the Court properly to assess whether the issues advanced truly warrant leave to appeal then leave may well be refused simply because the applicant has failed to set out in a sufficiently clear way the issues which are said to meet the threshold. The Court would wish to emphasise that it is not suggesting that the application in this case was at the end of the spectrum of clarity (or lack thereof) just identified.

3.9 Be that as it may, there will be cases where the Court may conclude that a point of European law arises which might require to be referred to the Court of Justice on the basis that the point properly arises on the appeal, that its determination might be necessary to the proper resolution of the appeal and that the point is not *acte clair*.

3.10 Indeed, it is possible that there could be cases where the proper course of action for the Court to adopt, in the course of considering whether to grant leave, might be to refer the relevant issue of European law there and then to the Court of Justice so that the judgment of the CJEU could be applied in the context of the decision to grant or refuse leave to appeal.

3.11 In that latter context, it is, of course, the case that there may be other issues which arise on an appeal whose resolution may lead to a European law point falling away. Furthermore, the Court may require further argument to decide whether the relevant European law point truly arises and is necessary for a resolution of the appeal. In such circumstances it may be that the Court will grant leave to appeal but will require a hearing to consider whether the point truly arises and, if it be relevant in the circumstances of the case, whether the point is *acte clair*. However, as an alternative to potentially making a reference during the leave process itself, the Court, where it is satisfied, as a result of the issues raised on the leave application, that the success or otherwise of the potential appeal depends solely on the answer to the question of European law raised, may decide to grant leave to appeal but put the appeal itself in for a very early consideration before the Court for the purposes of determining the nature and terms of the reference which should be made. If, as a result of the consideration of this Court of the leave application, it is clear that the appeal stands or falls on the merit of a potential point of European law which must be referred, then the sooner the

reference is made the better.

#### **4. The Circumstances of this Case**

4.1 It follows that the question which this Court must ask itself at this stage is as to whether a point of European law which is not *acte clair* truly arises in the circumstances of the case and whether a resolution of the point concerned is necessary to determine the proceedings. The mere assertion of a point of European law is clearly insufficient. In the context of these proceedings it is important to emphasise that the only issue advanced as being an issue which meets the constitutional threshold is the so-called Brexit point. It follows that there could be no other basis on which leave to appeal could be granted other than that point. The application for leave to appeal stands or falls therefore, on whether the Brexit point properly arises on this appeal, is not *acte clair*, and is necessary for the resolution of these proceedings.

4.2 There are, potentially, three answers to that question. They are yes; no; or that it is not possible to clearly answer the question within the limited confines of an application for leave to appeal. If the answer is yes, then it would seem to follow that the proper course of action for this Court to adopt would be to grant leave to appeal and conduct an early and short hearing solely directed to affording the parties the opportunity to be heard on the potential question or questions which should be referred to the Court of Justice. If the answer is no, then it follows that there could be no legitimate basis for granting leave to appeal. If the answer is that the Court is concerned, on the basis of the limited consideration which would ordinarily arise on an application for leave to appeal, that there might be an issue of European law whose resolution was necessary to the proper determination of these proceedings, and which point properly would arise on an appeal, but is not clear on that question, then the proper course of action would be to grant leave to appeal but to have a more substantial hearing to determine whether a reference is required. In passing, it is worth repeating that there may be other cases where there are potentially issues beyond those of European law which might require a full hearing of the appeal in any event before a decision could properly be made on whether there should be a reference.

4.3 It follows that it is necessary to analyse the so-called Brexit issue and consider whether the answer to the question of whether it properly arises on any potential appeal in this case and would be necessary to its resolution is either yes, no or that the question requires more detailed consideration requiring a full hearing.

#### **5. The Brexit Issue**

5.1 The principal reason why the Court directed an oral hearing regarding the application for leave to appeal was that the Court felt that it was necessary to attempt to define the so-called Brexit issue which was said properly to arise on the potential appeal with a much greater degree of precision than had been apparent from the notice for leave to appeal filed on behalf of Mr. O'Connor. It has to be said that the oral hearing did not go very far in achieving that end. There was a great deal of assertion that the departure of the United Kingdom from the European Union changed everything about European arrest warrants, but very little clarity about what precise measures of European law (whether to be found in the Treaties, the Charter or in European legislation) were engaged such as might lead to it being properly concluded that, as a matter of European law, a European arrest warrant can no longer be deployed in respect of requests from the United Kingdom either generally or in the circumstances of this case. Indeed, it should be recorded that counsel on behalf of the Minister relied on the fact that he found it difficult to address the case being made in favour of leave on behalf of Mr. O'Connor precisely because, it was argued, the European law issues had not been defined with anything like the necessary precision.

5.2 In that context it should be said that counsel for Mr. O'Connor drew attention to a

series of possible questions which had been addressed to the trial judge in the High Court. These are recorded at para. 27 of the judgment of Donnelly J. in the following terms:-

"1. Whether it was premature to request an Article 267 TFEU reference for a ruling on the respondent's objection to surrender related questions or must any such reference await the conclusions of the cessation procedure or some other event.

2. Is it compatible with the EU treaties, the Charter and the 2002 Framework Decision:

(a) To order the respondent's immediate surrender?

(b) To so order in circumstances where the previous EAW was withdrawn without explanation shortly before the respondent's appeal had been due to be heard against an order that he be surrendered under that European arrest warrant?

(c) To so order where there has not been and, under the requested state's EAW procedural law there cannot be, a determination of the precise merits of an objection to surrender that the respondent raised that was referable to a provision of the 2002 Framework Decision?

(d) To defer ordering the respondent's surrender until such time as the E.U. law rights he presently would enjoy if he had already been surrendered (e.g. Chap. 3 of the 2002 Framework Decision and availability of an Article 267 reference) remain fully effective there until the envisaged duration of his detention or other specified transitional arrangements have been adapted there?

(e) If surrendered, under Article 26 of the 2002 Framework Decision to deduct only periods the respondent was actually detained under the second warrant and to disregard the periods he had been detained under the earlier abandoned warrant?

(f) If surrendered under Article 26 not to deduct the periods during which he was provisionally released from the detention and was under extremely strict bail conditions?"

5.3 As already noted, this Court is strongly of the view that parties who wish to assert that leave to appeal should be given on the basis of the potential necessity for this Court, under the jurisprudence of the CJEU to which reference has been made, to make a reference should specify with some precision the terms of the reference which it is said should be made. It is not sufficient to make a general contention that issues of European law may arise. Rather, it is necessary to say precisely what issues would require to be referred so as to enable this Court to assess whether those issues properly arise on the potential appeal and whether the resolution of those issues would potentially be necessary to determine an appeal should leave be granted.

5.4 That being said, some general contentions were advanced on behalf of Mr. O'Connor.



5.5 It was said, which is clearly correct so far as it goes, that the United Kingdom has given the required notice under Article 50 of the TEU and that it would appear, therefore, that the United Kingdom will withdraw from the European Union on the 29th March, 2019. It is also said, again correctly so far as it goes, that the legal framework which will apply to relations between the European Union and the United Kingdom after Brexit are unclear at this stage and will not be clear until appropriate negotiations have reached a conclusion. Furthermore, it is well known that the possibility of a transitional arrangement has been the subject of some discussion and it is possible that there may be an initial transitional period followed by different arrangements, negotiated during that transitional period, which will govern relations between the European Union and the United Kingdom after the transitional period has finished. What effect any or all of those measures may have on the European arrest warrant regime can be little more than a matter of speculation at this stage. In that context, affidavit evidence was filed in these proceedings from a United Kingdom Queens Counsel deposing to the state of the law of the United Kingdom. However, entirely understandably, the position which might obtain post Brexit could not be expressed with any clarity having regard to the fact that the terms, whether transitional or permanent, on which the United Kingdom may withdraw from the European Union, remain unclear.

5.6 Furthermore, it is also the case that the precise consequences for Mr. O'Connor are equally unclear. What will happen to him if he is surrendered to the United Kingdom, the legal regime which will apply to him in those circumstances and many other matters are not clear at this stage and are unlikely to become clear for some period of time. In particular, it remains uncertain as to whether any aspects of the relations between the European Union and the United Kingdom after March of next year will remain subject to the jurisdiction of the CJEU and if so what aspects might remain subject to CJEU jurisdiction and for how long such an arrangement may last.

5.7 Certain facts are, however, clear. Mr. O'Connor's surrender is sought first so that he might serve a sentence imposed on him in respect of offences of conspiracy to cheat the public revenue. Subsequent to the imposition of those sentences, and while he was on bail, Mr. O'Connor absconded to this jurisdiction.

5.8 The second reason why Mr. O'Connor's surrender is sought therefore is so that he might be prosecuted in respect of an allegation of absconding while on bail. In that context, it seems almost certain that, at a minimum, should Mr. O'Connor be surrendered, he will be required to serve the sentences already imposed and may, if convicted on further charges, be required to serve whatever additional sentence might be imposed in that regard. In substance, it is highly probable that, if surrendered, Mr. O'Connor will continue to be imprisoned in the United Kingdom beyond the 29th March, 2019, when the United Kingdom will withdraw from the European Union. It is also probable that he will be tried on the absconding charge and it is possible that those proceedings may have legal consequences, whether relating to the issues involved or any possible sentence if convicted, which extend beyond the 29th March, 2019.

5.9 In that context, the essential argument made on behalf of Mr. O'Connor is that Ireland is being asked to surrender a citizen of the European Union in circumstances where the legal framework within which that citizen may come to be governed in the United Kingdom is at least at significant risk of being no longer subject to European law but will be dependent on the law of the United Kingdom, subject only to the relevant departure arrangements establishing that the United Kingdom will, to a greater or lesser extent, be bound by European law in this area, either generally or in the particular circumstances of persons already surrendered on foot of the European arrest warrant regime. In particular, it is said that any rights which might accrue to Mr. O'Connor under the Charter will not necessarily be capable of enforcement.

5.10 It seems to the Court that there are three potential answers to this general question. The first is that urged on behalf of the State. The Minister argues that the proper way to approach these issues as a matter of European law is to look at what that law says now. The Minister argues that it has been definitively determined that what might be termed the ordinary operation of the European arrest warrant regime is such that it requires the surrender of Mr. O'Connor to the United Kingdom. The Minister is clearly correct in that assertion. That has already been determined by both the High Court and by this Court in the manner set out in the judgment of Donnelly J. to which reference has already been made.

5.11 The Minister's argument is that the question of the appropriateness or otherwise of Mr. O'Connor's surrender must be determined on the basis of the law as it now is and that, on that basis, no issue of European law arises. As that argument goes, hypothetical questions about what may or may not happen in the context of Brexit are not relevant to the question of whether Mr. O'Connor should be surrendered now because the United Kingdom is today a member of the European Union and is therefore a competent requesting State for the purposes of the European arrest warrant regime.

5.12 At the other end of the spectrum, the counter argument of Mr. O'Connor is that his European law rights cannot be guaranteed should he be imprisoned in the United Kingdom for a period which would go beyond the date of Brexit. It is acknowledged that he may well have rights as a matter of United Kingdom law which may, on one view, become equivalent to the rights which he would enjoy as a matter of European law. In particular, reference is made to the rule of speciality and to an issue which may arise concerning the entitlement of Mr. O'Connor to credit for a period of time spent in custody on foot of an earlier European arrest warrant which was found to be invalid. It should be said that these are the only two specific matters which counsel for Mr. O'Connor was able to identify on which his European Union law rights might be said to be impaired. But it is again a matter of speculation, and can in reality be nothing else, to consider what rights he might have in those or any other area post Brexit because that will depend both on the terms of any Brexit arrangements entered into between the European Union and the United Kingdom and also on the laws of the United Kingdom and decisions of the United Kingdom courts. That must be so unless the arrangements for the withdrawal of the United Kingdom from the Union are such that they confer a relevant jurisdiction on EU institutions and in particular the CJEU.

5.13 That the debate on potential consequences is not entirely theoretical can be seen from the question which was raised concerning the entitlement of Mr. O'Connor to the benefit of a period spent in custody on foot of an earlier European arrest warrant which was found to be invalid for reasons which it is unnecessary to consider for the purposes of the issues arising on this application. There may well be a debate as to whether, as a matter of European Union law, Mr. O'Connor may be entitled to the benefit of that period in the calculation of the amount of time which he should spend in prison. A literal reading of the relevant legislation may suggest that he is not so entitled but it may be argued that a purposive interpretation of the same legislation may lead to a different conclusion. The point made on behalf of Mr. O'Connor stems from the fact that the proper resolution of that question is a matter of European Union law.

5.14 Undoubtedly, it would be possible to argue before the courts of the United Kingdom that a similar regime as would exist under European law ought to be applied to Mr. O'Connor as a matter of United Kingdom law having regard to the fact that he would, in those circumstances, have been surrendered to the United Kingdom on foot of a European Union legal measure. Alternatively, it might successfully be argued before the courts of the United Kingdom that European Union law itself ought to be applied to the circumstances in which Mr. O'Connor should be imprisoned. However, the argument put forward is that should such matters come before the courts of the United Kingdom after

the 29th March, 2019, it may well be that the courts of the United Kingdom would no longer be in a position to make a reference to the Court of Justice. On that basis, it is argued that, even if the United Kingdom courts were persuaded that, as a matter of United Kingdom law, the position in European Union law should be applied, there would undoubtedly be room for a genuine difference of opinion on the proper application of European Union law in circumstances where the United Kingdom courts might be deprived of the opportunity of making a reference to the Court of Justice.

5.15 Before leaving that point it should be noted that both the Framework Decision and the relevant current Irish implementing measure, being the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012, ("the 2012 Act") contemplate the possibility that a non-member state of the European Union may be designated as a country to which the European arrest warrant regime will apply. Under s. 2 of the 2012 Act, the Minister for Foreign Affairs of Ireland may so designate provided that there is a relevant European Union agreement with the state in question. It might be said to follow that the possibility that the European arrest warrant regime might apply to a state which is not a member of the European Union carries with it the possibility that a person who is surrendered to such a state may, after surrender, no longer have the full benefit of European Union law. However, that proposition in turn depends on the legal arrangements which would be entered into between the Union and the relevant non-member state to govern the situation of persons post their surrender to such a state. Such arrangements might well include the possibility of issues concerning the rights and entitlements of such a person being the subject of a reference to the Court of Justice, possibly from the courts of the Member State concerned. So far as this Court understands the matter, there is, currently, no non-member state in respect of which such arrangements have been put in place although there are particular provisions relating to Gibraltar.

5.16 In the same context, it is also worth briefly noting that the position in both Ireland and the United Kingdom was such that the courts of both jurisdictions previously did not have the ability to refer issues in relation to the Framework Decision to the Court of Justice. However, the position now is that the Irish courts have such a possibility and it is the understanding of this Court that the same applies in respect of the United Kingdom. It follows that, while the United Kingdom remains a member of the European Union, any issues concerning the rights of Mr. O'Connor while imprisoned in the United Kingdom where the rights concerned were said to arise under European Union law, would be potentially the subject of a reference for a definitive determination of the legal issues concerned to the Court of Justice.

5.17 In any event, it is argued on behalf of Mr. O'Connor that the legal substratum of the European arrest warrant system is based on an assumption that a requesting State to which a person may be surrendered will remain subject to European law for any relevant period at least in so far as the rights of the individual surrendered under European law may be concerned. On the basis that there can be no clarity at this stage that such will be the case, it is argued that surrender is not now possible to the United Kingdom and either will remain impossible or at least may only become possible when there is sufficient and appropriate clarity about the regime which would apply post Brexit to ensure that all European Union law rights which might be enjoyed by a person such as Mr. O'Connor will continue to be guaranteed in that new regime, including the right to have any questions concerning the scope of those rights determined ultimately by the Court of Justice.

5.18 Indeed, in that latter context it is worth noting that one of the suggestions put forward on behalf of Mr. O'Connor is that a final decision on his surrender should be deferred until such time as the arrangements which are to prevail in respect of the withdrawal of the United Kingdom from the European Union become clear at least to the

extent that it becomes possible to determine the extent to which Mr. O'Connor would be able to enforce in a practical way any Union law rights which he may enjoy, including the entitlement to have the extent of any such rights definitively determined by the Court of Justice. Whether there is a jurisdiction to direct such a postponement is itself a matter which will need to be considered.

5.19 In between those two competing positions it must, of course, also be recognised that it might be possible to suggest that the question of whether surrender is now permissible might depend on an analysis of the particular circumstances of the individual case under consideration having regard to factors such as the extent to which it has been established that there is a real risk that the rights which might be enjoyed by a person who is surrendered may alter post Brexit.

5.20 It may well be the case, as the Minister argues, that the proper analysis is that the requested court must consider the position at the point at which surrender is sought and by reference to the law which then applies. It may also well be the case that the argument advanced on behalf of Mr. O'Connor did not seek to place his position squarely under any particular provision of the Treaties, the Charter or relevant legislation. However, this Court cannot conclude that the question which he raises is unstateable. It could not safely be determined that the Court of Justice might not consider that, as a matter of European Union law, the underlying substratum of the European arrest warrant regime is removed by the giving of notice under Article 50 of the TEU in circumstances where a person whose surrender is sought may be at risk that the full rights which that person might enjoy under the European arrest warrant regime as a matter of European law would not necessarily be guaranteed after the departure of the requesting State from the Union.

5.21 In addition, this Court could not conclude that the CJEU might not itself determine that the question of whether surrender can properly be directed at this stage might be dependent on an analysis of the circumstances of the case by reference to particular features including those identified earlier in this judgment.

5.22 In particular, it follows that if the principal argument advanced on behalf of Mr. O'Connor were to find favour with the Court of Justice it would in turn follow that his appeal would have to be allowed, for that point clearly arises in these proceedings and if correct would lead to the conclusion that he could not presently be surrendered to the United Kingdom at this stage.

5.23 It must be recalled that the threshold identified in the *CILFIT* jurisprudence, which establishes the obligation on a court of final appeal of a member state to refer an issue to the Court of Justice, is a low threshold but one which must be faithfully applied by the courts which are governed by it.

5.24 It follows in turn, therefore, that this Court must conclude that there is an issue of European law which arises in these proceedings which could properly form the basis of an appeal to this Court. The Court must further conclude that the issue concerned is necessary to determine these proceedings. The point is novel and is not the subject of any jurisprudence of the Court of Justice. However, that is hardly surprising since there has never been a case before of a country leaving the European Union. The fact that the point is novel and relies on very general principles of European law does not mean that it is unstateable or fails to meet the *CILFIT* requirement. The point is not, therefore, *acte clair*.

5.25 The Court is, therefore, satisfied that an issue of European law does arise which is necessary to determine these proceedings and that it is, therefore, necessary that this

Court grant leave to appeal in order that it might refer that issue to the Court of Justice.

## **6. Practical Considerations**

6.1 The Court was informed that there are some twenty cases in the High Court which are held up pending the decision of this Court on this application. The Court is also mindful of the fact that the general principle advanced in this case might arguably have some effect in other areas of law and also, once raised, has the potential to affect the relations between other countries and the United Kingdom in a range of areas. In those circumstances, the Court is minded that the reference should be made at the earliest possible date and is further minded to invite the Court of Justice to deal with the matter in the most expeditious manner possible. It is in the interests of all concerned that certainty be brought to this area of the law as quickly as possible. However, that certainty can only be brought about by the Court of Justice.

6.2 In those circumstances, this Court will grant leave to appeal but will set out very specific and highly expedited procedures to determine the questions to be referred to the Court of Justice. The Court will dispense with the ordinary case management process identified in the relevant Rules of Court and the statutory practice direction. The Court will direct that there will be a hearing of this appeal for the sole purpose of determining the questions to be referred to the Court of Justice. With that in mind, the Court will direct that submissions on the text be made by both sides by 7th February next. The Court will then list the matter for hearing not exceeding 30 minutes on Tuesday 13th February, 2018.

6.3 In aid of that process, the Court sets out hereunder one possible version of the text of the questions which might be referred to the Court of Justice. However, the Court would wish to emphasise that it will consider the submissions of the parties before finalising those questions.

## **7. A Possible Question**

Having regard to:-

- (1) (a) The giving by the United Kingdom of notice under Article 50 of the TEU;
- (b) The uncertainty as to the arrangements which will be put in place between the European Union and the United Kingdom to govern relations after the departure of the United Kingdom; and
- (c) The consequential uncertainty as to the extent to which Mr. O'Connor would, in practice, be able to enjoy rights under the Treaties, the Charter or relevant legislation, should he be surrendered to the United Kingdom and remain incarcerated after the departure of the United Kingdom.

Is a requested state required to decline to surrender to the United Kingdom a person the subject of a European arrest warrant, whose surrender would otherwise be permitted, either

- (i) in all cases?
- (ii) having regard to the particular circumstances of the case? or
- (iii) in no cases?

(2) If the answer to Q. 2 is that set out at (ii) what are the criteria or considerations which a court in the requested member state must assess to determine whether surrender is required?

(3) In the context of Q. 2, can the Court of a requested member state postpone the finalisation of a request for surrender to await greater clarity about the relevant legal regime which is to be put in place after the withdrawal of the relevant requesting member state from the Union?

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