Neutral Citation No. [2012] NIQB 117 | *Ref:* **HIG8544**

Judgment: approved by the Court for handing down | *Delivered:* **29/06/2012**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Between:

RUAIRI McGOWAN

Appellant;

-and-

THE REPUBLIC OF IRELAND

Respondent.

AND IN THE MATTER OF THE EXTRADITION ACT 2003

BEFORE A DIVISIONAL COURT

Before: Morgan LJ, Sir Anthony Campbell and Higgins LJ

HIGGINS LJ

[1] This is an appeal under section 26(1) of the Extradition Act 2003 ("the Act") against a decision of the His Honour Judge Miller QC, whereby he ordered that the appellant be extradited to the Republic of Ireland on foot of a European Arrest Warrant ("EAW") issued by the Republic of Ireland, the Requesting State. At the conclusion of the hearing we dismissed the appeal and stated that we would give our reasons later which we now do.

[2] The EAW relates to nine charges under the Republic of Ireland's Misuse of Drugs Act 1977. They are

> "1. Possession of a Controlled Drug (Cannabis Resin) contrary to Section[s] 3 and 27 of the Misuse of Drugs Act 1977 on 23rd April 2004;

2. Possession of a Controlled Drug (Cannabis Resin) for the purpose of selling or otherwise supplying it to another contrary to Section 15 and Section 27 of the Misuse of Drugs Act 1977 on 23rd April 2004;

3. Possession of a Controlled Drug (Amphetamine) contrary to Section[s] 3 and 27 of the Misuse of Drugs Act 1977 on 23rd April 2004;

4. Possession of a Controlled Drug (Amphetamine) for the purpose of selling or otherwise supplying to another contrary to Section 15 and Section 27 of the Misuse of Drugs Act 1977 on 23rd April 2004;

5. Possession of a Controlled Drug (Cocaine) contrary to Section[s] 3 and 27 of the Misuse of Drugs Act 1977 on 23rd April 2004;

6. Possession of a Controlled Drug (Cocaine)for the purposes of selling or otherwise supplying it contrary to Section 15 and Section 27 of the Misuse of Drugs Act 1977 on 23rd April 2004;

7. Possession of a Controlled Drug (Amphetamine) with a market value of € 13,000 or more for the purpose of selling or supplying it to another contrary to Section 15A and Section 27 of the Misuse of Drugs Act 1977;

8. Possession of a Controlled Drug (MDMA) contrary to Section[s] 3 and 27 of the Misuse of Drugs Act 1977 on 1st May 2003;

9. Possession of a Controlled Drug (MDMA) for the purpose of selling or supplying it to another contrary to Section[s] 15 and 27 of the Misuse of Drugs Act 1977 on 1st May 2003;"

[3] The maximum sentence in respect of charges 1, 3, 5 and 8 (possession of a controlled drug) is 7 years imprisonment and the maximum sentence in respect of charges 2, 4, 6, 7 and 9 (possession for the purpose of selling or supplying) is life imprisonment. Section 27 of the Misuse of Drugs Act 1977 permits a Court to impose a life sentence in respect of a conviction for an offence contrary to Section 15 or 15A. Section 33 of the Criminal Justice Act 2007 amended Section 27 of the Misuse of Drugs Act 1977 so that where a sentence shorter than life imprisonment is imposed for an offence contrary to Section 15 or 15A the Court is obliged (exceptional circumstances apart) to specify a sentence of a minimum period of 10 years

imprisonment. Charges 8 and 9 are alleged to have occurred on 1 May 2003 and the remainder on 23 April 2004. It was not suggested that the amendment made by Section 33 is retrospective.

[4] No issue is raised with respect to the procedural requirements relating to the EAW. The appellant accepts that the charges set out in the EAW are extradition offences and does not seek to rely on any of the statutory bars to extradition set out in Section 11 of the Act. Rather the appellant seeks to rely on Section 21 of the Act and asserts that his extradition to the Republic of Ireland would be incompatible with his rights under Article 5 of the European Convention on Human Rights ("ECHR"). Section 21 provides –

> "21. (1) If the judge is required to proceed under this section (by virtue of section 11 or 20) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c. 42).
>
> (2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.
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> (3) If the judge decides that question in the affirmative he must order the person to be extradited to the category 1 territory in which the warrant was issued.
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> (4) If the judge makes an order under subsection (3) he must remand the person in custody or on bail to wait for his extradition to the category 1 territory.
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> (5) If the judge remands the person in custody he may later grant bail."

Under Section 26 of the Act a person may appeal to the High Court against an extradition order on any question of law or fact. Section 27 provides that the High Court may allow or dismiss the appeal but may only allow an appeal if the conditions in Section 27(3) have been satisfied. Section 27(3) provides -

> "(3) The conditions are that—
>
> (a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;

(b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge."

[5] The Grounds of Appeal are -

"(a) That the Appeal is brought in accordance with Section 26 of the Extradition Act 2003 and Order 61A of the Rules of the Supreme Court of Judicature (NI) 1980.

(b) That the appropriate judge ought to have decided a question or questions before him differently in the extradition hearing and in particular that:

(i) The appropriate judge ought to have decided that the extradition of the Appellant to the Republic of Ireland would not be compatible with the Appellant's Convention Rights, particularly those rights under Article 5(1) & 5(4) of the European Convention as set out in Schedule 1 of the Human Rights Act 1998 (hereinafter the relevant rights);

(ii) The appropriate judge ought to have decided that there were substantial grounds shown by the Appellant to justify the belief that his relevant rights would be violated and/or that he had established evidence capable of proving that there were substantial grounds for believing that there is a real risk that his relevant rights would be violated in the event of extradition;

(iii) The appropriate judge ought to have decided that the Respondent State had not dispelled any doubts arising from the evidence as referred to in paragraph (b)(ii) above.

(c) And that had the appropriate judge so decided the question or questions referred to in (b) above in the way in which he ought to have done he would have been required to order the Appellant's discharge.

> (d) That the appropriate judge erred in making an order under Section 21(3) of the Extradition Act 2003 ordering that the Appellant be extradited to the Republic of Ireland."

The appellant submits that His Honour Judge Miller QC ought to have decided the issue raised under Section 21 of the Act differently and in accordance with Section 27(3) should have ordered his discharge. The appellant relies in this court on the same argument raised before, and rejected by, His Honour Judge Miller QC.

[6] In a comprehensive and well-structured judgment the learned trial judge referred to the determination of the European Council to remove cumbersome extradition procedures through the application of the Council Framework Decision of 13 June 2002, central to which was the emergence of the EAW. The Act was the UK response to that Framework Decision. The judge then referred to Irena Rozaitiene v The Republic of Lithuania [2009] NIQB 3 in which this Court examined the history and intentions behind the EAW. Then at paragraph 21 he referred to the speech of Lord Bingham in R (Ullah) v Special Adjudicator [2004] 2 AC 323 in which he stated that successful reliance on Article 5 of the ECHR (and Articles 3 and 6) would require a strong case before the stringent test imposed would be met. At paragraph 23 of his judgment, and relying on paragraph 32 of Rozaitiene and the judgment in Miklis v Deputy Prosecutor General of Lithuania [2006] EWHC 1032, the learned trial judge stated correctly, that the onus lay on the Requested Person to show substantial grounds for believing that a breach of his Convention rights might occur should he be extradited.

[7] At paragraph 24 the judge said that the argument raised by the appellant "came down to an assertion that he should not be extradited to the Republic of Ireland because in the event that he was convicted of any of the charges carrying the theoretical maxima of a discretionary life sentence, he could receive such a sentence". At paragraph 25 he noted that the Republic of Ireland was a Category I Territory within the meaning of the Act and a signatory to the European Convention on Human Rights and that he was entitled to consider that the appellant's rights under that Convention would be protected. He then referred to Section 2 of the Criminal Justice Act 1990 and the decision of the Supreme Court of the Republic of Ireland in Whelan & Lynch v Minister for Justice, Equality and Law Reform [2010] IESC 34 and Mr Hutton's argument that this decision did not address the issues raised by the appellant and commented "although this argument may be superficially seductive I reject it". In paragraphs 29-31 of his judgment he stated his conclusions in these terms –

> "29. What the decision of the Irish Supreme Court in Whelan does clearly establish, however, is the Court's willingness to consider the procedures and measures applied in the Republic in the light of the European

> Convention and to test their compatibility with the provisions of the Convention. No evidence has been placed before this court that establishes that the relevant sentencing procedures in the Republic of Ireland are not compliant with the ECHR or that the Supreme Court has disregarded or refused to comply with any relevant decision of the ECtHR, This Court is left with no doubt that the Courts in the Republic of Ireland would assiduously protect the human rights of the RP or any defendant and that if extradited to that jurisdiction he would have the right to challenge any decision as to sentence through the courts there and would retain the right to ultimately take the matter to the European Court in Strasbourg.
>
> 30. In light of the foregoing analysis I have concluded that the RP has failed to establish "evidence capable of proving that there are substantial grounds for believing there is a real risk that his Convention rights would be violated" if he were to be returned to the Republic of Ireland. I make it clear that even if I had concluded that he had raised such evidence in this case I am satisfied that the RS has dispelled any such doubts to the required criminal standard.
>
> 31. In consideration of Section 21(1) of the 2003 Act I am satisfied having regard to the RP's rights under Article 5 of the European Convention on Human Rights, that his extradition on this application is compatible with those rights within the meaning of the Human Rights Act 1998."

It is that decision, based on those findings, that the appellant submits should have been decided differently. It is submitted that the process of temporary release, which involves the Executive and not a Court of law, is contrary to Article 5 of the ECHR, the relevant parts of which provide –

> "Article 5 (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> a) The lawful detention of a person after conviction by a competent court;

> (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

[8] In his impressive skeleton argument Mr Hutton has traced the development of the respective life sentence regimes in England and Wales, Northern Ireland and the Republic of Ireland. His argument may be summarised as follows. Some of the charges which the appellant faces carry a maximum sentence of life imprisonment. In the Republic of Ireland 'life' does not mean for the rest of his natural life. The prisoner will usually be released, probably on licence, at some stage in the future. The decision as to release is made, not by a Court of Law, but by a Government Minister, the Minister for Justice, Equality and Law Reform, who has to consider and take account of various statutory criteria, in respect of which the Minister receives and considers administrative advice from his departmental officials. It is the Executive in the person of the Minister and not a Court of law that decides his release, any recall and any future release. In addition if the appellant is sentenced to a determinate period of imprisonment a similar regime would apply. Mr Hutton submitted that the learned trial judge relied on the decision in Whelan & Lynch and on the fact that in the Republic of Ireland no formal tariff or minimum term is set. He submitted that this is irrelevant. What is significant is that it is the Minister who makes the decision as to the length of time the prisoner remains in detention. It is not an answer to suggest that in the Republic of Ireland a life sentence is wholly punitive. The same approach was adopted in the United Kingdom until the European court and the House of Lords analysed what occurred in practice and concluded that the practice did not match the theory. It was submitted that in relying on Whelan & Lynch and not the House of Lords in Anderson v Home Secretary, the trial judge erred. It was further submitted by Mr Hutton that the willingness of the Courts in the Republic of Ireland to consider issues in light of the European Convention, as found by the judge at paragraph 29 of his judgment, provides no answer because those Courts will follow the precedent established in Whelan & Lynch and thereby arrive at the wrong conclusion. While the judge may have been correct when he stated that no evidence had been provided which suggested that the sentencing procedures in the Republic of Ireland were not ECHR compliant (paragraph 29) that was not the point. It was the manner in which those sentences were administered thereafter which the appellant challenged. The judge was wrong to state that there was no evidence that the Supreme Court of the Republic of Ireland had disregarded or refused to comply with any relevant decision of the European Court of Human Rights. In Whelan & Lynch the Supreme Court had not applied properly the approach laid down in Stafford v UK. His conclusion that the courts in the Republic of Ireland would protect the appellant's Convention rights was equally erroneous. As the system for release is not Convention compliant it is difficult to see how the courts in the Republic of Ireland could provide compliance with Article 5(4) and the necessary protection.

Central to the appellant's case in this Court is the system implemented under Section 2 of the Criminal Justice Act 1990 and the decision of the Supreme Court of the Republic of Ireland in Whelan & Lynch v Minister for Justice, Equality and Law Reform.

[9] In England and Wales and in Northern Ireland a process has evolved, particularly since the abolition of the death penalty, whereby life sentence prisoners, whether mandatory or discretionary, served a period of imprisonment in respect of retribution and deterrence, following which they could be considered for release provided they no longer posed a threat to society. If they still posed such a threat then their detention was continued. It was this period of detention, sometime referred to as preventative detention, which was found to be incompatible with Article 5 of the ECHR by reason of the fact that release was determined by the Executive and not a Court or similar judicial body with powers of release, before which the prisoner could appear and thereby challenge the ground on which he continued to be detained. In R (On the Application of Giles) v Parole Board [2003] 4 AER 429 2003 UKHL 42 Lord Hope in several passages in his speech summarised the approach of the European Court of Human Rights to Article 5 of the Convention.

> "[25] The general rule is that detention in accordance with a determinate sentence imposed by a court is justified under art 5(1)(a), without the need for further reviews of detention under art 5(4) (see David Feldman Civil Liberties and Human Rights in England and Wales (2nd edn, 2002) p 446). Article 5(1)(a) is concerned with the question whether the detention is permissible. Its object and purpose is to ensure that no one should be dispossessed of his liberty in an arbitrary fashion, and its provisions call for a narrow interpretation (see Winterwerp v Netherlands (1979) 2 EHRR 387 at 402 (para 37)). The conviction does not have to be lawful in order to satisfy this requirement, but the detention must be. This means (i) that it must be lawful under domestic law, (ii) that it must conform to the general requirements of the convention as to the quality of the law in question—its accessibility and the precision with which it is formulated and (iii) that it must not be arbitrary because, for example, it was resorted to in bad faith or was not proportionate (see R v Governor of Brockhill Prison, ex p Evans (No 2) [2000] 4 All ER 15 at 29–30, [2001] 2 AC 19 at 38; McLeod v UK [1999] 1 FCR 193 at 105 (para 41)). Detention in accordance with a lawful sentence of imprisonment imposed by a judge on the prisoner

for an offence of which he has been convicted satisfied these requirements.

[26] Article 5(4), on the other hand, is concerned with the need for the detention to be reviewed in order that it may be determined whether it is lawful both in terms of domestic law and in terms of the convention. Its purpose is to ensure that a system is in place for the lawfulness of the detention to be decided speedily by a court and for release of the detainee to be ordered if it is not lawful. The general rule, as I have said, is that detention in accordance with a determinate sentence imposed by a court is regarded as justified under art 5(1)(a) without the need for any further reviews of the detention to be carried out under art 5(4)…

[40] The important point which emerges from these two decisions for present purposes is that a distinction is drawn between detention for a period whose length is embodied in the sentence of the court on the one hand and the transfer of decisions about the prisoner's release or redetention to the executive. The first requirement that must be satisfied is that according to art 5(1) the detention must be 'lawful'. That is to say, it must be in accordance with domestic law and not arbitrary. The review under art 5(4) must then be wide enough to bear on the conditions which are essential for a determination of this issue. Where the decision about the length of the period of detention is made by a court at the close of judicial proceedings, the requirements of art 5(1) are satisfied and the supervision required by art 5(4) is incorporated in the decision itself. That is the principle which was established in De Wilde v Belgium (No 1) (1971) 1 EHRR 373. But where the responsibility for decisions about the length of the period of detention is passed by the court to the Executive, the lawfulness of the detention requires a process which enables the basis for it to be reviewed judicially at reasonable intervals. This is because there is a risk that the link between continued detention and the original justification for it will be lost as conditions change with the passage of time. If this happens there is a risk that decisions which are taken by the Executive

will be arbitrary. That risk is absent where the length of the period of detention is fixed as part of its original decision by the court.

[41] Elias J ([2002] 1 WLR 654 at [19], [28]) understood the effect of the Strasbourg jurisprudence to be that the detention was lawful only if it continues to achieve the object for which it was imposed, and that no distinction was to be drawn in this respect between sentences which were determinate and indeterminate. In my opinion however that is not the decisive factor. The critical distinction is that which the European Court of Human Rights has made between cases where the length of the detention is fixed by the court and those where decisions about its length are left to the Executive. It is in the latter case only that new issues of lawfulness may arise in the course of the detention which were not incorporated in the original decision by the court.

[51] It is plain from this summary that the basic rule which the court laid down in De Wilde's case continues to apply. Where the prisoner has been lawfully detained within the meaning of art 5(1)(a) following the imposition of a determinate sentence after his conviction by a competent court, the review which art 5(4) requires is incorporated in the original sentence passed by the sentencing court. Once the appeal process has been exhausted there is no right to have the lawfulness of the detention under that sentence reviewed by another court. The principle which underlies these propositions is that detention in accordance with a lawful sentence passed after conviction by a competent court cannot be described as arbitrary. The cases where the basic rule has been departed from are cases where decisions as to the length of the detention have passed from the court to the Executive and there is a risk that the factors which informed the original decision will change with the passage of time. In those cases the review which art 5(4) requires cannot be said to be incorporated in the original decision by the court. A further review in judicial proceedings is needed at reasonable intervals if the detention is not to be at risk of becoming arbitrary."

Lord Bingham agreed with Lord Hope and approved a passage from the decision of May LJ in the Court of Appeal.

> "[9] I need not repeat the detailed account which my noble and learned friend Lord Hope of Craighead has given of the Strasbourg jurisprudence to which the House was referred. I agree with his analysis and I fully share his conclusions. As May LJ pithily put it in his judgment in the Court of Appeal ([2002] EWCA Civ 951 at [18], [2002] 3 All ER 1123 at [18], [2003] 2 WLR 196):
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> > 'All the European authorities to which Kennedy LJ has referred, which conclude that art 5(4) of the (convention) requires an appropriate procedure allowing a court to determine the continued lawfulness of detention, concern sentences which were indeterminate and where otherwise the decision whether to release the prisoner lay with the executive. Neither applies to sentences under section 2(2)(b) of the 1991 Act.'
>
> Mr Fitzgerald accepted the accuracy of that summary. To conclude that the Strasbourg decisions have only applied art 5(4) to cases having features different from the present does not, however, conclude the issue which the appellant raises unless those differences are such as should lead to a different result.
>
> [10] That brings one back to consideration of the core rights which art 5(4), read with art 5(1), is framed to protect. Its primary target is deprivation of liberty which is arbitrary, or directed or controlled by the Executive. In the present case there was nothing arbitrary about the sentence, which was announced and explained in open court and upheld by the Court of Appeal when refusing leave to appeal against sentence. Since the first offence involved what the sentencing judge described as 'a savage attack'

> and the appellant had threatened further violence against his first victim, the term imposed does not appear in any way excessive. The sentence left nothing to the executive, since the Parole Board, whose duty it is to consider release at the half-way stage of the sentence, is accepted to be a judicial body. Again, May LJ put the point succinctly ([2002] 3 All ER 1123 at [18], [2003] 2 WLR 196 at [19]):
>
> > 'Although the sentence is longer than it otherwise would have been because the sentencing judge is of the opinion that it is necessary to protect the public from serious harm from the offender, (i) the length of the sentence is, and is intended to be, determined by the judge at the time of sentence; (ii) it is not intended to be reviewed, other than on appeal;
>
> and (iii) in particular, it is not intended to confer on the executive the responsibility for determining when the public interest permits the prisoner's release …'

[10] Thus the purpose for which the detention existed was crucial. If it was for purposes of retribution and deterrence and imposed by a court it was within Article 5. If it was for public safety, but determined by the Executive, it was incompatible with Article 5. In response to the Convention jurisprudence both jurisdictions, England and Wales and Northern Ireland introduced regimes whereby if a life sentence was imposed the Court would set a minimum term to reflect the element of retribution and deterrence, at the expiration of which the offender would be released provided no risk to the public existed. The determination of whether such risk endured is taken by a body (in Northern Ireland now the Parole Commissioners) with powers to release and before whom the offender can appear and make representations. It was submitted on behalf of the appellant that no such system existed in the Republic of Ireland and that all decisions about release and recall of life sentence prisoners are taken by the Minister on behalf of the Executive, thus offending Article 5, as interpreted by the European Court. It is this involvement of the Executive and the absence of an independent judicial body which are seen as the weakness in the approach of the Republic of Ireland to the release of life sentence prisoners. In his skeleton argument Mr Hutton has helpfully set out the corresponding regime in the Republic of Ireland based on an affidavit by a Dublin practitioner and a critical report on the regime by two academics.

[11] According to the appellant the release of life sentence prisoners is governed by Section 2 of the Criminal Justice Act 1960 as amended by the Criminal Justice

(Temporary Release of Prisoners) Act 2003. This Section confers on the Minister the discretionary power to grant temporary release, which in many cases means full release, always subject to recall. The relevant provisions of Section 2 as amended provide –

> "2.—(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,
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> (b) where there exist circumstances that, in the opinion of the Minister, justify his temporary release on—
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> (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 S.1 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,

(b) where the release of that person from prison is prohibited by or under any enactment, whether passed before or after the passing of this Act, or

(c) where the person has been charged with, or convicted of, an offence and is in custody pursuant to an order of a court remanding him to appear at a future sitting of a court."

[12] It can be seen that Section 2 makes provision for a regime of temporary release for the purposes set out in Section 2(1)(a) or where any of the circumstances mentioned in Section 2(1)(b) exist. Before giving a direction for temporary release the Minister shall have regard to the various matters set out in Section 2(2). These include the nature and gravity of the offence [(2)(a)], the threat to the safety of the public should the person be released [(2)(f)], the risk that the person may fail to return to prison upon the expiration of any period of temporary release [(2)(g)], various reports [(2)(h), the risk of further offence [(2)(i)] and the risk of failure to comply with any release conditions [(2)(j)]. Subsection 3 sets out certain

circumstances in which the Minister should not order temporary release. It was submitted by Mr Hutton that it is apparent from the provisions of Section 2 that the effective decision maker in this process is the Minister and that the factors that he is obliged to take into account include the culpability of the offender and factors which are designed to prevent further offending. This process is supplemented by advice from the Parole Board of Ireland in cases involving sentences of more than seven years, which the Minister can accept or reject. Unlike the regime in Northern Ireland and in England Wales there is no provision for legal representation at reviews conducted by the Parole Board of Ireland. Thus it was submitted that the process for the review of life sentence prisoners in the Republic of Ireland did not satisfy the requirements of Article 5(4) of the ECHR and thereby the extradition of the appellant to the Republic of Ireland would be incompatible with the appellant's rights under the Convention to a Convention compliant review of his sentence should be sentenced to life imprisonment or to a sentence of more than seven years.

[13] The issue whether the regime currently employed in the Republic of Ireland is compatible with the ECHR was considered by the Supreme Court in the Republic of Ireland on appeal from the High Court in the case of Whelan & Lynch v Minister for Justice, Equality and Law Reform 2008 IR 142, 2010 IESC 34. It was submitted by Mr Hutton that this case was incorrectly decided and that this Court should follow the decisions of the Supreme Court of the United Kingdom in regard to what constitutes compliance with Article 5(4) ECHR. In the course of giving the lead judgment Murray CJ of the Supreme Court set out the argument put forward by the appellant in relation to the role of the Minister in life sentence cases.

> "As indicated earlier in this judgment it is contended on behalf of the appellants that the law as explained in the *Deaton* case has no application to the mandatory life sentence for murder because the sentence imposed is not in substance a determinate one. Since a person sentenced to life imprisonment is invariably released during his or her lifetime the length of the sentence and therefore the punishment is in substance decided by the Minister when he decides to bring to an end the period of imprisonment and release the prisoner under the temporary release provisions. Moreover, it is argued, the fact that the Minister, when deciding whether to grant temporary release, can take into account any risk which the prisoner may be thought to pose to public safety if released means that such a prisoner may be kept in prison as a preventative measure and his imprisonment ceases to be punitive. In that sense, it is claimed, there is in substance a period of punitive imprisonment and a subsequent period of

> preventative detention. Thus the length of sentence served by a prisoner will vary according to the circumstances in which the Minister exercises the power of temporary release in individual cases. Thus, when a person convicted of murder is sentenced to life imprisonment he does not know how long he will serve. Since the principles of the *Deaton* case do not apply s. 2 must be considered incompatible with the Constitution because it deprives the trial Court of the power to impose the sentence which is proportionate to the circumstances of the case. Alternatively s. 2 should be interpreted as permitting the trial judge to make a recommendation as to the length of time which the convicted person should serve which was proportionate to the circumstances of the case. Such a recommendation could be made so as to leave intact the Minister's executive discretion to release in that he would not be bound by the recommendation and would retain his discretion to release on a date earlier or later than that recommended."

[14] The view of the Chief Justice on the nature of a life sentence was emphatic -

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

Later in his judgment he considered the compatibility of the regime in the Republic of Ireland with Article 5 of the ECHR in these terms.

> "The essence of the appellant's claim is that s. 2 of the Act is incompatible with Article 5 of the European Convention in that the length of time actually served in prison by the appellant is left to be determined by the executive. In particular the appellants rely on their assertions that the mandatory life sentence is an indeterminate sentence since it is ultimately left to the Minister to weigh up the range of prison terms possible and select the appropriate length of time to be served. In other words the Ministers carry out a judicial

> function and determines the limits of the sentence imposed by the Court since the sentence is not in substance a fixed penalty and confers on the executive the power to determine the actual length of imprisonment. Moreover the manner in which the length of the sentence which the appellants undergo is determined in an arbitrary fashion by a Minister many years after sentencing in a social and political context that may be entirely different from what it was at the time of the sentencing. The effect of s. 2 of the Act of 1990 is to submit the appellants to such a sentencing regime and constitute a breach of Articles 5(1) and 5(4) of the European Convention on Human Rights.
>
> …….
>
> The Court reiterates that it is important to take account of the fundamental distinction between the sentence imposed by a court pursuant to s.2 of the Act of 1990 and any subsequent decision by the Minister to grant temporary release pursuant to the Act of 1960. The appellants were quite correct in submitting, as they did in relation to the constitutional issue, that the Court should not look simply at the formal provisions of the law but at the substance and effect of the law in practice concerning the sentence imposed on a convicted person. In this context the appellants attached significant importance to a number of decisions of the European Court of Human Rights which concerned the sentencing regime in England particularly as applied in the case of life sentences, including mandatory life sentences. The Court will make reference to those cases later in the judgment but for present purposes it is sufficient to state that the relevant sentencing regime in England and Wales at least means that a life sentence comprises of a punitive period ('the tariff') and, when the "tariff" or punitive period has expired a subsequent period of preventative detention. That is not and could not be the position in law in this country as has already been explained in the part of the judgment addressing the constitutional issues."

[15] Murray CJ then went on to consider and approve the statement of Carney J in The People (DPP) v Bambrick 1996 1 IR in which he said that case-law

prevented a sentence comprising any element of preventative detention even for a dangerous prisoner. He continued:

> "The power of the executive, in this case the Minister, to release a prisoner "whether exercising what might be called conventional grounds of compassionate or of a humanitarian nature" as Keane C.J. put it in *O'Neill v. Governor of Castlerea Prison* (cited above) is a distinct executive function and does not constitute a determination of what punishment a person should undergo as a consequence of his crime. It is in the form of an exercise of clemency or commutation and although it may bring to an end the period of incarceration, subject to conditions in the case of temporary release. As already pointed out the life sentence imposed by the Court continues to exist notwithstanding any conditional release and he may be required to continue serving it if there are found to be good and sufficient reasons in accordance with law to withdraw the privilege of temporary release, or the period of release simply expires."

[16] The Chief Justice then referred to the decision of the ECtHR in Kafkaris v Cyprus (2008) in which the distinction between the functions of the Courts and the Executive were recognised and commented "In Irish law any person detained following the imposition of a life sentence may only be detained for the purpose of giving effect to that punitive sentence". This again underlined the nature of a life sentence in the Republic of Ireland, that it is purely punitive and contains no element of preventative detention related to the danger an offender may pose to public safety. Later the Chief Justice turned to the arguments that the sentencing regime in the Republic of Ireland was incompatible with Article 5 on the basis that it duration was determined by the Executive and which was based on Weeks v United Kingdom 1987 10 EHRR, Thynne, Gunnell & Others v United Kingdom [1991] 13 EHRR 66, Thynne v United Kingdom [1995] 19 EHRR 33 and Stafford v United Kingdom [2002] 35 EHRR 1121. He recognised that the ECtHR had found that the regime then in operation in the United Kingdom was incompatible with Article 5 as the sentence was arbitrary and its duration determined by the Executive. On the application of that argument to the regime in the Republic of Ireland he stated -

> "However, as the learned High Court judge has pointed out, and as adverted to above in this judgment, the sentencing regime in the United Kingdom which was under scrutiny in the relevant judgments relied upon by the appellants is radically

different to the sentencing regime in this country. Counsel for the State pointed out, as is evident from the relevant case-law, that a common thread running through these cases was the dual element of punishment and preventative detention although the manner in which the sentencing system functioned evolved over the years.

The sentencing regime in the United Kingdom which was found incompatible with the provisions of the Convention consisted of a life sentence composed of a punitive element identified as "the tariff" period and the subsequent detention of a preventative nature, being for public safety reasons. Thus the nexus between the crime and its punishment was broken or terminated and the prisoner's detention continued for reasons which were unrelated to the punishment of the crime. Because decisions on the further detention of a prisoner were not related to a sentence of punishment for the offence as imposed by a court, the European Court of Human Rights concluded that the procedures for deciding on a prisoner's further or continued detention offended against the provisions of Article 5 of the Convention. These considerations placed the particular sentencing regime in a special category unlike the case of a person sentenced to life imprisonment because of the gravity of the offence committed. (See *Weeks v. United Kingdom paragraph 58).* At page 73 in the *Thynne* case the Court of Human Rights having considered the law and in particular judicial dicta in cases that came before the courts of England and Wales stated: "… It seems clear that the principles underlying such sentences, unlike mandatory life sentences, have developed in the sense that they are composed of a punitive element and subsequently of the security element designed to confer on the Secretary of State the responsibility for determining when the public interest permits the prisoner's release. This view is confirmed by the judicial description of the "tariff" as denoting the period of detention considered necessary to meet the requirements of retribution and deterrents …." The Court added "…the objectives of the discretionary life sentence as seen above are distinct from the

punitive purposes of the mandatory life sentence and have been so described by the courts in the relevant cases … ."

In the *Stafford* case the Court analysed the evolution and changes in the sentencing regime in the United Kingdom and observed at paragraph 40 of the judgment in the case that "…The English courts have recognised that the mandatory sentence is like the discretionary sentence, composed of a punitive period ("the tariff") and a security period. As regards the latter, detention is linked to the assessment of the prisoner's risk to the public following the expiry of the tariff …" and in this respect the Court cited a number of English judicial decisions.

At paragraph 80 of its conclusions in that case the Court noted: 'Once the punishment element of the sentence (as reflected in the tariff) has been satisfied, the grounds for the continued detention, as in discretionary life and juvenile murder cases, must be considerations of risk and dangerousness.' Here the Court is referring to the mandatory life sentence for adults. The Court then went on to state in the same paragraph: 'As Lord Justice Simon Brown commented in *Anderson v. Taylor* …, it is not apparent how public confidence in the system of criminal justice could legitimately require the continued incarceration of a prisoner who has served the term required for punishment for the offence and is no longer a risk to the public.'

In the Stafford case the prisoner had been recalled after release, even though he 'must be regarded as having exhausted the punishment element for his offence of murder'. Since the specified 'tariff' or punishment element of the offence had been exhausted before he was recalled to prison the detention of the prisoner after recall could not be justified as "punishment for the original murder". It was on that basis that the Court concluded that the applicant's detention on foot of the original mandatory life sentence (the one in which the punishment element had already been exhausted) was in violation of Article 5.1 of the Convention.

> That is in stark contrast to the longstanding position in Irish law as explained earlier in this judgment."

[17] It is clear that the Supreme Court has considered the nature of the regime operated in the Republic of Ireland and whether or not it is compatible with the ECHR and has done so in the knowledge of the regime adopted in the United Kingdom and in the light of various decisions of the ECtHR about the compatibility of those regimes. It has identified the dissimilarity between the various regimes and is unequivocal in its view as to the nature of the life sentence which is imposed in that jurisdiction. It has no constituent comprising preventative detention. In those circumstances it is ECHR compliant. It is significant that Lord Hope, at paragraph 40 of his speech in Giles v Parole Board, quoted above, recognised the distinction between a sentence whose length is embodied in the sentence of the court and the transfer of decisions about the prisoner's release or re-detention to the Executive. It is correct that later in that paragraph Lord Hope went on to say that where responsibility for decisions about the length of the period of detention is passed to the Executive, the lawfulness of that detention requires a process that can be reviewed judicially. But that only arises where the punitive element of the sentence has been served; in the United Kingdom that part of the sentence fixed to represent retribution and deterrence. Mr Hutton on behalf of the appellant submits that the approach by the Supreme Court of the Republic of Ireland to the theoretical nature of a life sentence is not an answer to the issue. It is what happens in practice which is important. Prisoners are assessed according to, inter alia, risk and released subject to recall for various reasons, without recourse to judicial supervision. Mr Hutton argues that in reality it is the same process as that adopted in England and Wales and in Northern Ireland. The Supreme Court of the Republic of Ireland takes a different view. There is a fundamental distinction underlying the two regimes. In England and Wales and in Northern Ireland the regime recognises that a prisoner should serve a period of imprisonment to reflect retribution and deterrence (the punitive element) depending on the nature of the offence. Thereafter the detention is preventative, to secure public safety. In the Republic of Ireland the sentence is entirely punitive and the law does not recognise preventative detention. The role of the Executive is to grant temporary release. While the Minister will consider criteria some of which are similar to criteria which the Parole Board or Parole Commissioner would consider in relation to whether an offender remains a risk to the public, the fundamental distinction in the two regimes remains and has been recognised as such by the highest court in the Republic of Ireland. In all these circumstances Mr Hutton submits that the appellant has demonstrated a real risk that his rights under ECHR would be violated should he be extradited to the Republic of Ireland.

[18] It was submitted by Mr McAllister who appears on behalf of the respondent, the Requesting State, that Article 1 of the Framework Decision envisages that "member states shall execute any EAW on the basis of the principle of mutual recognition". Both the United Kingdom and the Republic of Ireland are member states and each should, in the first instance, recognise and respect the others

membership of the European Union and their legal system and the fact that they are signatories to the European Convention on Human Rights. He submitted that His Honour Judge Miller QC correctly identified the applicable principles and the test to be applied in an application for Extradition under the 2003 Act and that his decision was correct. Whether Whelan & Lynch is correctly decided or otherwise, the rights of the appellant under ECHR can properly be left to the courts in the Republic of Ireland to safeguard. In fact he submitted the appropriate place to determine whether any sentence imposed on the appellant does violate any of the appellant's Convention right is in the courts of the Republic of Ireland and not in this jurisdiction.

[19] The learned trial judge identified the test to be applied when considering the application of Section 21 of the Act to be that set out in the speech of Lord Bingham in R (Ullah) v Special Adjudicator 2004 2 AC 322 where he said –

> "24 While the Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to article 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment: *Soering*, para 91; *Cruz Varas*, para 69; *Vilvarajah*, para 103. In *Dehwari*, para 61 (see para 15 above) the Commission doubted whether a real risk was enough to resist removal under article 2, suggesting that the loss of life must be shown to be a "near-certainty". Where reliance is placed on article 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state: *Soering*, para 113 (see para 10 above); *Drodz*, para 110; *Einhorn*, para 32; *Razaghi v Sweden*; *Tomic v United Kingdom*. Successful reliance on article 5 would have to meet no less exacting a test. The lack of success of applicants relying on articles 2, 5 and 6 before the Strasbourg court highlights the difficulty of meeting the stringent test which that court imposes. "

He also referred to the judgment of this Court in Rozaitiene v Lithuania (2009) NIQB 3 where at paragraph 32 we endorsed this approach to the statutory defences to extradition provided by the Act.

> "[32] In an extradition hearing in which the requested person alleges, under section 14 of the Act, that it would be unjust or oppressive to extradite him, the onus is on the requested person to show on

> a balance of probabilities why it would be unjust or oppressive so to do. Where he alleges under section 21 that his extradition would not be compatible with his Convention rights within the meaning of the Human Rights Act 1998, the onus is on him to show substantial grounds for believing that his rights under Article 3 or 6 would be violated. Should he establish evidence capable of proving that there are substantial grounds for believing there is a real risk that his Convention rights would violated, then the requesting state must dispel any doubts arising from that evidence."

[20] The first issue for this Court to consider when a requested person seeks to rely on Section 21 of the Act, is whether or not he has established evidence capable of proving that there are substantial grounds for believing that if he is extradited, Convention rights under Article 5 would be violated. So far as this Court understands the position the appellant has yet to be tried, never mind sentenced. If he is convicted or pleads guilty and is sentenced to a term of imprisonment, of whatever length, he will be deprived of his liberty after conviction by a competent court in accordance with a procedure prescribed by law. Therefore there would be no violation of his rights under Article 5(1) of ECHR. Article 5(4) provides that anyone deprived of his liberty by reason of detention shall be entitled to take proceedings in a court to challenge the lawfulness of his detention. There is no evidence that the appellant if sentenced would not be entitled to take proceedings to challenge the lawfulness of his detention, as Whelan & Lynch were able to do. If detained it would be on foot of a sentence passed by a competent court. Nothing has been suggested to the contrary. What is inherent in the submission of Mr Hutton on behalf of the appellant is that if the sentence is life imprisonment (or a sufficiently long determinate sentence) at some stage consideration would be given to his release. The decision whether or not to release him would be taken by the Minister in consultation with officials and the Parole Board of Ireland. The appellant complains that the Minister acting with his officials and the Parole Board of Ireland do not constitute a court at which the appellant could appear and challenge the lawfulness of his (continued) detention. He compares that process with the Parole Commissioners in Northern Ireland and the Parole Board in England and Wales where such representation is permitted. It is here that the distinction between the respective regimes is critical. In England and Wales and in Northern Ireland, once the period of imprisonment fixed to represent retribution and deterrence has passed the only basis for continued detention is whether the prisoner remains a risk to public safety. That period of detention based on risk has not been determined by the court which imposed the sentence. Therefore the lawfulness of his continued detention may be questioned, though the court will have imposed a life sentence. In the regime in the Republic of Ireland there is no period to reflect retribution and deterrence and the lawfulness of the sentence passed by a competent court remains the basis for detention and it is not suggested that the original sentence is open to

question. Article 5(4) does not require a special court only that there exists a court at which a prisoner can challenge the lawfulness of his detention. The case of Whelan & Lynch demonstrates that courts are available.

[21] The Extradition scheme in the form of the EAW is based on mutual trust between countries that are members of the European Union as well as signatories of the European Convention on Human Rights. That mutual trust raises a presumption that countries that are signatories of the European Convention (and members of the EU as well) will fulfil their obligations under the Convention and that they are able to do so. Thus the starting point in any case in which a requested person relies on a breach of a Convention right in accordance with Section 21 of the Act must be a presumption that their rights will be respected and protected. The burden of proving otherwise lies on the requested person and that burden is by is its nature a heavy one. It would require very clear and cogent evidence to displace it. The Republic of Ireland is a country whose legal system is rooted in the common law and where the rule of law is respected, if not sancrosanct. The evidence adduced by the appellant in this case falls well short of proof that there are substantial grounds for believing that if extradited the appellant's rights under Article 5 of the Convention would be violated. There is no reason in the circumstances of this case to suppose that the Republic of Ireland will not apply the rule of law or that it will not protect the Convention rights of the appellant There is no basis for the submission that His Honour Judge Miller QC should have decided this application differently. We agree with his analysis and reasoning which are beyond criticism. For all these reasons the appeal is dismissed.