AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2022:000129

High Court Record No.: 2021 No. 330 EXT

[2024] IESC 47

O'Donnell C.J.

Charleton J.

Woulfe J.

Hogan J.

Murray J.

Collins J.

Donnelly J.

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003

(AS AMENDED)

AND IN THE MATTER OF SEÁN WALSH

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

AND

SEÁN WALSH

Respondent

TO: THE PRESIDENT AND MEMBERS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

REQUEST FOR PRELIMINARY RULING

PURSUANT TO ARTICLE 267 OF THE

TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

The Referring Court

1. This reference is made by the Supreme Court of Ireland (Mr Justice Donal O' Donnell (Chief Justice), Mr Justice Peter Charleton, Mr Justice Seamus Woulfe, Mr Justice Gerard Hogan, Mr Justice Brian Murray, Mr Justice Maurice Collins and Ms Justice Aileen Donnelly)

   Contact: John Mahon, Registrar of the Supreme Court

The Parties and their Representatives

2. The parties to these proceedings are as follows:

   The Minister for Justice and Equality ("*the Minister*"), represented by the Chief State Solicitor

   Sean Walsh *("the Appellant***"),** represented by Mulholland Law Solicitors

Subject Matter of the Dispute in the Main Proceedings

3. The United Kingdom seeks the surrender of the Appellant pursuant to a UK-EU Surrender Warrant dated 26 November 2021 issued under the Trade and Cooperation Agreement between the European Union and the United Kingdom *(*"*the TCA*"). Surrender is sought for the purposes of the Appellant's prosecution for four offences: (1) membership of a proscribed organisation, namely, the Irish Republican Army (which offence is punishable by imprisonment for a term not exceeding 10 years); (2) directing the activities of an organisation concerned in the commission of acts of terrorism (punishable by imprisonment up to life imprisonment); (3) conspiracy to direct the activities of an organisation concerned with the commission of acts of terrorism (also punishable by up to life imprisonment) and (4) preparing to commit acts of terrorism (also punishable by up to life imprisonment).

4. These offences are alleged to have been committed in Northern Ireland and the Surrender Warrant is based on four arrest warrants issued by the District Judge (Magistrates' Courts) Northern Ireland. The offences are alleged to have been committed between 18 and 20 July 2020.

5. The Appellant objected to his surrender. One of the grounds of objection was that his surrender would violate Article 7 of the European Convention on Human Rights "*ECHR*"). That objection was based on changes to the law in Northern Ireland relating to the sentencing of persons convicted of terrorism offences and the regime governing their release on licence. Those changes came into effect on 30 April 2021 but apply to terrorism offences whenever committed. As a result of those changes, the Appellant contended that, in the event of his surrender and conviction for any of the offences alleged against him, a heavier penalty would be imposed on him than was applicable at the time of the alleged offending (July 2020).

6. The relevant provisions of the applicable laws are out in detail later in this Order for Reference.

7. On 24 October 2022, the High Court (Ms Justice Caroline Biggs) made an order for Appellant's surrender: *Minister for |Justice and Equality v Walsh* [2022] IEHC 633. In her view, the penalties applicable to the offences (10 years imprisonment in respect of offence (1) and life imprisonment in respect of offences (2) – (4)) had not changed and while the rules relating to release on licence had changed that did not in her view engage Article 7 ECHR.

8. This Court granted the Appellant leave to appeal. At the hearing of the appeal, the Appellant continued to rely on Article 7 ECHR but also argued that Article 49(1) of the Charter of Fundamental Rights of the European Union ("*the Charter*") precluded his surrender. This Court decided to seek a preliminary ruling from the Court of Justice, asking whether, in light of the specific considerations set out in the Order for Reference, and having regard to Article 267(3) TFEU and Article 52(3) of the Charter, it was entitled to conclude that the Appellant has failed to establish any real risk that his

surrender would be a breach of Article 49(1) of the Charter or whether it was obliged to conduct some further inquiry, and if so, what the nature and scope of that inquiry was: *Minister for Justice and Equality v Walsh* [2024] IESC 9.

9. By order of 22 April 2024, the President of the Court of Justice initiated the expedited preliminary ruling procedure. The hearing took place on 4 June 2024, the Advocate General issued his Opinion on 27 June 2024 and the Court (Grand Chamber) gave its judgment on 29 July 2024 (Case C-202/24) (ECLI:EU:C:2024:649). The judgment was given under the name of *Alchaster*, a fictitious name assigned by the Court in accordance with its now usual practice.

The Court of Justice's Judgment in *Alchaster*

10. The Court made it clear that the executing judicial authority was required to carry out an independent assessment, in the light of the provisions of the Charter (§83). Any finding of a real risk of a breach of Article 49(1) of the Charter had to have a sufficient factual basis (§84) and it followed that the executing judicial authority may refuse to give effect to an arrest warrant only if it has, having regard to the individual situation of the requested person, objective, reliable, specific and properly updated information establishing "*substantial grounds for believing that there is a real risk of a breach of Article 49(1) of the Charter*" (§85). In examining whether there was such a risk, the executing judicial authority must make full use of the instruments provided for in the TCA, including the power to seek further information from the issuing State (§§86-89) and the power to seek additional guarantees where it considered that there were valid reasons to believe that there was a real risk of a breach of Article 49(1) (§§90-91).

11. As regards the scope and effect of Article 49(1) of the Charter, the following sets out the reasoning of the Court:

> *"94. It follows from the case-law of the European Court of Human Rights that, for the purposes of applying Article 7 ECHR, a distinction must be drawn between a measure that constitutes in substance a 'penalty' and a measure that concerns the 'execution' or 'enforcement' of the penalty. Thus, where the nature*

and purpose of a measure relate to the remission of a sentence or a change in the regime for release on licence, this does not form part of the 'penalty' within the meaning of Article 7 (ECtHR, 21 October 2013, Del Río Prada v Spain, CE:ECHR:2013:1021JUD004275009, § 83).

95. Since the distinction between a measure that constitutes a 'penalty' and a measure that concerns the 'execution' of a penalty is not always clear-cut in practice, it is necessary, in order to determine whether a measure taken during the execution of a sentence concerns only the manner of execution of the sentence or, on the contrary, affects its scope, to ascertain in each case what the 'penalty' imposed actually entailed under domestic law in force at the material time or, in other words, what its intrinsic seriousness was (ECtHR, 21 October 2013, Del Río Prada v Spain, CE:ECHR:2013:1021JUD004275009, §§ 85 and 90).

96. In that regard, the European Court of Human Rights has recently confirmed that the fact that the extension of the eligibility threshold for release on licence after a conviction may have led to a hardening of the detention situation concerned the execution of the sentence and not the sentence itself and that, therefore, it cannot be inferred from such a circumstance that the penalty imposed would be more severe than the one imposed by the trial judge (ECtHR, 31 August 2021, Devriendt v Belgium, CE:ECHR:2021:0831DEC003556719, § 29).

97. Therefore, a measure relating to the execution of a sentence will be incompatible with Article 49(1) of the Charter only if it retroactively alters the actual scope of the penalty provided for on the day on which the offence at issue was committed, thus entailing the imposition of a heavier penalty than the one initially provided for. Although that is not, in any event, the case where that measure merely delays the eligibility threshold for release on licence, the position may be different, in particular, if that measure essentially repeals the possibility of release on licence or if it forms part of a series of measures which have the effect of increasing the intrinsic seriousness of the sentence initially provided for.

> *98. In the light of all of the foregoing, the answer to the question referred is that Article 524(2) and Article 604(c) of the TCA, read in conjunction with Article 49(1) of the Charter, must be interpreted as meaning that, where a person who is the subject of an arrest warrant issued on the basis of that agreement invokes a risk of a breach of Article 49(1) in the event of surrender to the United Kingdom, on account of a change, which is unfavourable to that person, in the conditions for release on licence, which occurred after the alleged commission of the offence for which that person is being prosecuted, the executing judicial authority must undertake an independent examination as to the existence of that risk before deciding on the execution of that arrest warrant, in a situation where that judicial authority has already ruled out the risk of a breach of Article 7 ECHR by relying on the guarantees offered generally by the United Kingdom as regards compliance with the ECHR and on the possibility for that person to bring an action before the European Court of Human Rights. Following that examination, that executing judicial authority will have to refuse to execute that arrest warrant only if, after requesting additional information and guarantees from the issuing judicial authority, it has objective, reliable, specific and properly updated information establishing that there is a real risk of a change to the actual scope of the penalty provided for on the day on which the offence at issue was committed, involving the imposition of a heavier penalty than the one that was initially provided for.*

12. The formal *dispositif* reflects the terms of paragraph 98 above.

Request for Information and Further Hearings

13. The appeal was listed before this Court on 31 July 2024. In circumstances where there was sharp disagreement between the parties as to the effect of the Court of Justice's judgment and its implications for the resolution of the Appellant's appeal, this Court directed the parties to file further written submissions addressing that judgment.

14. Following a case management hearing on 27 August 2024, the Chief Justice directed that a request for further information issue in accordance with Article 613(2) TCA. For ease of reference, the request and the response of the 17 September 2024 from the District Judge (Magistrate's Court of Northern Ireland) are set out together (with the response in bold):

> *1(a) Please confirm that as of the date of the alleged offences in issue (18-20 July, 2020) the terms of Article 8 of the Criminal Justice Northern Ireland Order, 2008 applied to any sentence imposed for such offences to the effect that a sentenced person would be entitled to release under licence on the expiry of 50% of the sentence;*
>
> ***At the date of the alleged offences a person sentenced to a determinate custodial sentence under Article 8 of the Criminal Justice (Northern Ireland) Order 2008 would be entitled to release on licence at the expiry of 50% of their sentence.***
>
> *(b) If otherwise, please set out the correct position in law*
>
> ***Not applicable***
>
> *2 (a) Please confirm that if the Respondent is surrendered, and is convicted and sentenced for the alleged offences, the provisions of Article 20A of the 2008 Order as inserted by s30 of the Counter-Terrorism and Sentencing Act 2021 will apply to offences 2, 3 and 4 to the effect that the Respondent would only become entitled to apply for release on licence after the expiry of two thirds of any sentence, and after a decision of the Parole Board.*
>
> ***The position as set out is not complete. Please see 2(b) below.***
>
> *(b) If otherwise, please set out the correct up-to-date position in law*

Should the requested person be surrendered, convicted and sentenced for the offences at 2, 3 and 4 there will be a range of sentences available to the court.

The provisions of Article 20A of the Criminal Justice (Northern Ireland) Order 2008, as inserted by section 30 of the Counter Terrorism and Sentencing Act 2021, apply to fixed term prisoners.

Should the requested person be sentenced to a determinate custodial sentence under Article 8 of the Criminal Justice (Northern Ireland) Order 2008 then the provisions of Article 20A will apply to offences 2, 3, 4 and he will be entitled to apply for release on licence at the expiry of two thirds of the sentence.

Other sentences available to the court include an extended custodial sentence under Article 14, an indeterminate custodial sentence under Article 13 or a life sentence under Article 13.

15. The Court held a further hearing on 24 September 2024 at which the parties made oral arguments addressing the Court of Justice's judgment.

The Relevant Sentencing/Release on Licence Provisions and the Changes made in 2021

The Provisions applicable as of July 2020

16. At the time of the alleged offences (18-20 July 2020) the applicable sentencing and release on licence provisions were contained in the Criminal Justice (Northern Ireland) Order 2008 (2008 No 1216 (NI 1)), as amended *(*"*the 2008 Order*"). As of July 2020, the position under the 2008 Order in relation to the four offences at issue here was as follows:

Offence No 1 (Membership of a proscribed organisation) - Maximum Sentence 10 years imprisonment

17. As of July 2020, a person convicted of this offence was liable to a sentence of imprisonment for a *determinate* term, such term being what in the opinion of the court was commensurate with the seriousness of the offence (Article 7). The court imposing a sentence of imprisonment for a determinate term was required to specify a period ("*the custodial period*") not exceeding **one half** of the term of the sentence at the end of which the offender was to be released on licence (Article 8) and there was a duty on the Secretary of State to release a prisoner who had served the relevant custodial period (Article 17).

Offence No 2 (Directing the activities of an organisation concerned in the commission of acts of terrorism) - Maximum Sentence Life Imprisonment

Offence No 3 (Conspiracy to direct the activities of an organisation concerned with the commission of acts of terrorism) - Maximum Sentence Life Imprisonment

Offence No 4 (Preparing to commit acts of terrorism) - Maximum Sentence Life Imprisonment

18. As of July 2020, these offences were "*specified*" and "*serious*" offences for the purposes of Chapter 3 of the 2008 Order. A person convicted of any of these offences was liable to be sentenced to a determinate custodial sentence. In that event, the court was required to specify a period (the custodial period) not exceeding **one half** of the term of the sentence at the end of which the offender was automatically entitled to be released on licence (Article 8), and there was a duty on the Secretary of State to release a prisoner who had served the requisite custodial period (Article 17).

19. If, however, the court was of the opinion that there was a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences, then, depending on the court's view of the seriousness of the offence, it was required to impose (1) a sentence of life imprisonment (Article 13(1) & (2)); (2) an indeterminate custodial sentence (a sentence of imprisonment for an indeterminate period (Article 13(3) & (4)) or (3) an extended custodial sentence (Article 14).

20. If a life sentence was imposed, the sentencing court was required to fix the minimum term to be served by the offender (often referred to as the "*tariff*"). Similarly, in the event that an indeterminate custodial sentence was imposed, the sentencing court was required to specify the minimum custodial period to be served. Where an extended custodial sentence was imposed, the offender was required to serve one-half of the tem determined by the sentencing court to be the appropriate custodial term. In each case, at the end of the relevant minimum period, the offender was eligible to be considered for release on licence but such release was not automatic and was dependent on the Parole Commissioners' assessment of whether the offender's continued imprisonment was necessary for the protection of the public.

The Provisions applicable now

21. In 2021, significant amendments were made to the 2008 Order by sections 30 and 31 of the (UK) Counter-Terrorism and Sentencing Act 2021 ("*the 2021 Act*"). The UK Supreme Court explained the background to the 2021 Act in *Morgan v Ministry of Justice* [2023] UKSC 14, [2024] AC 130. It involved two serious terrorist incidents which occurred in London in 2019/2020. In each case, the perpetrator had been

convicted of a terrorist offence(s), sentenced to a fixed term of imprisonment and automatically released on licence after serving half of that term (the sentencing rules in England and Wales were substantially similar to the Northern Ireland rules). In 2020, the UK Parliament enacted the Terrorist Offenders (Restriction of Early Release) Act 2020, the effect of which was to alter the sentencing rules in England and Wales, and also in Scotland, in relation to terrorist offences. The Act did not apply to Northern Ireland. The purpose of that Act, as explained by the Secretary of State for Justice to Parliament, was to protect the public by bringing an end to terrorist offenders being released early automatically and providing that the earliest point at which such offenders would be considered for release would be once they had served two thirds of their sentence and such release would be dependent on risk assessment by the Parole Board (*Morgan*, §69). The relevant provisions of the 2021 Act made corresponding alterations to the sentencing rules in Northern Ireland.

Offence No 1

22. This offence is now a "*specified terrorism offence*" for the purposes of the 2008 Order, as well as being an offence within Part 4 of Schedule 2A. As a result, Article 15A of the 2008 Order applies to it. A person convicted of the offence is now liable to a determinate custodial sentence under Article 15A of the Amended 2008 Order for a term equal to the aggregate of the "*appropriate custodial term*" plus a further period of one year for which the offender is to be subject to licence. That aggregate term cannot exceed the maximum term of imprisonment that is applicable (which, for the purposes of this appeal, continues to be 10 years). The "*appropriate custodial term*" is the term that, in the opinion of the court ensures that the sentence is appropriate. After serving **two-thirds** of that term, the offender may be released on licence by direction of the Parole Commissioners, provided that the Commissioners are satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined: Article 20A of the Amended 2008 Order.

23. Article 15A and Article 20A were inserted by 2021 Act and would apply to the Appellant in the event that he is surrendered and convicted of this offence, assuming that a custodial sentence was to be imposed on him following such conviction.

Offence Nos 2 – 4

24. These offences are now designated as "*serious terrorist offences*" for the purposes of the 2008 Order. As was the case as of July 2020, a person convicted of any of these offences may be sentenced to (1) life imprisonment; (2) an indeterminate custodial sentence; (3) an extended custodial sentence or (4) a determinate custodial sentence. Whether the court imposes a sentence of life imprisonment, an indeterminate custodial sentence or an extended custodial sentence is dependent on whether or not the sentencing court assesses the offender as dangerous.

25. An offender sentenced to life imprisonment, an indeterminate custodial sentence, or an extended custodial sentence may be released on licence as before but such release is not automatic and is dependent on the Parole Commissioners' assessment of whether the offender's continued imprisonment is necessary for the protection of the public.

26. In the event that a determinate custodial sentence is imposed, after serving **two-thirds** of the appropriate custodial term the offender may be released on licence by direction of the Parole Commissioners, provided that the Commissioners are satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined: Article 20A.

27. The focus of the Appellant's case was on the changes to the rules relating to release on licence of persons sentenced to a determinate custodial sentence. No complaint was made by him about any changes to the rules relating to the release on licence of persons applicable to persons convicted of terrorist offences who are sentenced to life imprisonment, an indeterminate custodial sentence, or an extended custodial sentence.

28. In the event of the Appellant being surrendered and convicted of one or more the offences alleged against him, it will be a matter for the judge to determine what sentence(s) it is appropriate to impose. In the event that the Appellant is convicted of one or more of offences (2) – (4), the sentencing judge will be required to make an assessment of dangerousness and depending on the outcome of that assessment, a life sentence, indeterminate custodial sentence, or extended custodial sentence could be imposed on him. In *Morgan*, certain of the defendants pleaded guilty to offences of

preparing to commit acts of terrorism contrary to section 5 of the Terrorism Act 2006 (offence 4 here). Two received indeterminate custodial sentences having been assessed to be dangerous, whereas two received determinate custodial sentences on the basis that they were not assessed as dangerous.

29. In the event that the Appellant is surrendered and convicted of offence 1, the only custodial sentence that could be imposed on him is a determinate sentence and there is a real prospect that such a sentence would in fact be imposed on him. While the position regarding offences 2-4 is somewhat more contingent, in that other forms of custodial sentence may arise in relation to those offences, in this Court's view there is nonetheless a real prospect that a determinate sentence(s) would be imposed on the Appellant in the event of his surrender and conviction for those offences.

30. The Appellant emphasised that the effect of the changes to the rules relating to release on licence of persons sentenced to a determinate custodial sentence meant that, in the event that he was surrendered, convicted and sentenced to a determinate sentence, he would as a matter of certainty spend significantly more time in prison than would have been the case under the rules applicable in July 2020.

31. Thus, if sentenced to a determinate sentence of 6 years in July 2020, the Appellant would have been *automatically* entitled to release on licence by virtue of the 2008 Order after serving a *maximum* of 3 years in custody (and the sentencing judge could have a specified a shorter custodial period). If sentenced to 6 years now, the Appellant would have to serve a *minimum* of 4 years in custody before being eligible for release on licence and whether and when he might then be released would depend on (a) how quickly the issue of his release was referred to the Parole Commissioners and how quickly the Commissioners carried out their assessment and (b) whether or not the assessment was positive. As this example illustrates, the effect of the 2021 changes is that persons sentenced to a determinate sentence after those changes take effect will serve a minimum of one-third more time in custody in every case. Ultimately, the Appellant could serve considerably more than 4 years and could in fact have to serve the entirety of his six year sentence in custody.

32. There are certain other features of the Northern Ireland sentencing regime that appear to be relevant. First, in sentencing an offender to a determinate prison sentence under the 2008 Order, the judge must disregard the rules relating to early release (*Morgan*, §108). Second, as a matter of UK law, it is the determinate prison sentence that constitutes the "*penalty*" imposed on an offender (*Morgan*, §112). Third, where a prisoner is released on licence, he or she continues to serve the sentence and is subject to recall in the event that they breach any of the conditions of the licence. Fourth, where a prisoner is recalled to prison, they are lawfully detained pursuant to the original determinate prison sentence (*Morgan*, §35).

Grounds for a Further Reference

33. It is clear from the Court of Justice's judgment in *Alchaster* that, for the purposes of applying Article 49(1) of the Charter, a distinction must be drawn between a measure that constitutes, in substance, a "*penalty*" and a measure that concerns the "*execution*" or "*enforcement*" of the penalty. That distinction is, of course, well-established in the case law of the European Court of Human Rights relating to Article 7 ECHR. However, as the Court of Justice observed, that distinction is not always clear-cut in practice (Judgment, §§95).

34. According to the Minister, the relevant "*penalty*" here comprises the prison sentence(s) to which a person convicted of one or more of the offences alleged to have been committed by the Appellant is liable in the event of conviction. The maximum sentence for those offences has not changed. It remains 10 years in the case of offence (1) and up to life imprisonment in case of the other offences. In the event that the Appellant is convicted and a determinate prison sentence is imposed on him, that sentence – the *penalty* for the purposes of Article 49(1) of the Charter – may not exceed the *penalty* that could have been imposed as of the date of the commission of the alleged offence. The Minister characterises the 2021 amendments to the 2008 Order as a measure relating exclusively to the *execution* of the penalty, being a measure effecting a change in the regime for release on licence of persons convicted of such offences. As such, the Minister says, that measure does not form part of the "*penalty*" within the meaning of Article 7 ECHR or Article 49(1) of the Charter (referring to Judgment, §94). According to the Minister, the 2021 amendments did not increase the "*intrinsic seriousness*" of the

penalty, in circumstances where the available penalty has not changed. The Minister acknowledged that, in the event that one or more determinate custodial sentences is imposed on the Appellant (if surrendered and convicted), he would spend more time in custody than would have been case had the 2021 amendments not been made. However, it was clear from the Article 7 ECHR caselaw – including Application 32001/07 *Devriendt v Belgium*, cited by the Court of Justice in *Alchaster* – that the mere fact that a prisoner had to spend more time in custody as a result of changes to rules relating to parole or release on licence did not engage Article 7. That principle was, the Minister said, reflected in §97 of *Alchaster*, which made it clear that a measure that merely delays the eligibility threshold for release on licence cannot, in any event, be considered to entail the imposition of a heavier penalty than the one initially provided for.

35. Thus, on the Minister's case, the Article 7 caselaw of the European Court of Human Rights, and the judgment of the Court of Justice, all clearly point to the conclusion that it would not be a breach of Article 49(1) of the Charter to surrender the Appellant to Northern Ireland.

36. The Appellant adopted a very different interpretation of the Court of Justice's judgment. It was, he argued, significant that the Court had not endorsed or adopted the conclusion of Advocate General Szpunar. Advocate General Szpunar had concluded that the regime permitting conditional release did not come within the definition of a "*penalty*" in Article 49(1) of the Charter and was not therefore caught by that provision (Opinion, §99). Far from endorsing that view, it was suggested that the Court's analysis pointed to the opposite conclusion. Adopting the language of the Court's judgment (§§ 96-97) the Appellant said that the measures adopted in 2021 went beyond a mere "*hardening of the detention situation*" and instead had the *"effect of increasing the intrinsic seriousness of the sentence initially provided for.*" In that context, the Appellant emphasised that, prior to the 2021 amendments, there was an automatic and unqualified entitlement to release on licence once one-half of the term had been served (and the judge had power to fix release for an earlier date). That entitlement was removed in 2021 and eligibility to even apply for release now arose only when two-thirds of the sentence had been served and release is then dependent on the assessment of the Parole Commissioners. According to the Appellant, these changes essentially repealed the

possibility of release on licence, at least for the period between one-half and two-thirds of the term imposed.

37. According to the Appellant, the automatic and unqualified entitlement to release on licence once one-half of the term had been served distinguished this case from *Devriendt* and the other Article 7 cases relied on by the Minister. In *Devriendt*, the prisoner had had no right to conditional release and that, it was said, was important to the Court of Human Rights' analysis (reference being made to the judgment, §25). Furthermore, the prisoner in *Devriendt* was serving a life sentence which, it was suggested, was in a different category to a determinate sentence for a fixed term. Life sentences were, it was said, in a special category given that they authorised detention for life.

38. Here, it was said, the cumulative effect of the changes made in 2021 was to redefine the penalty and, on the authority of *Del Río Prada v Spain*, the Appellant argued that that involved a breach of Article 7 ECHR and thus a breach of Article 49(1) of the Charter also.

39. In essence, the Minister contended that, in the case of a determinate custodial sentence, the term of the sentence constitutes the "*penalty*" for the purposes of Article 49 of the Charter. Absent a change to that term, Article 49 is not engaged. The Appellant characterises that approach as formalistic. In his submission, where the inevitable and predictable effect of a measure is to significantly increase the actual *custodial element* of the sentence – as he says is the position here – then Article 49(1) is breached.

40. The issue before the Court involves the interpretation of Article 49(1) of the Charter and in particular the meaning of "*penalty*" in that article. As a court against whose decisions there is no judicial remedy under national law, this Court is subject to the obligation explained by the Court of Justice (Grand Chamber) in Case C-561/19, *Consorzio Italian Management v Rete Ferroviaria* (ECLI:EU:C:2021:799). There the Court of Justice emphasised that a court of final resort is in principle obliged to make a reference where a question concerning the interpretation of EU law is raised before it, unless (i) the question is irrelevant; (ii) the provision has already been interpreted by

the Court of Justice or (iii) the correct interpretation of EU law "*is so obvious as to leave no scope for any reasonable doubt*" (*Consorzio Italian Management*, §§32-33). The Court also made it clear that the fact that that the court had already made a reference to the Court of Justice for a preliminary ruling in the same proceedings did not affect that obligation when "*a question concerning the interpretation of EU law the answer to which is necessary for the resolution of the dispute remains after the Court's decision*." (§59).

41. The question arising here as to the interpretation of Article 49(1) of the Charter is central to the resolution of this appeal. This Court does not consider that issue to be clear or obvious. Neither, in the Court's opinion, has that issue been clearly resolved by the Court of Justice's judgment of 29 July 2024. As appears above, both parties rely on different aspects of the Court's reasoning to support their respective arguments for and against surrender here. On the one hand, it is arguable that the nature and purpose of the 2021 amendments to the 2008 Order relate only to a change in the regime for release on licence and thus do not form part of the '*penalty*' (*Alchaster* §94, citing *Del Río Prada*). On the other hand, it is arguable that those measures retroactively alter the actual scope of the penalty because they go beyond merely delaying "*the eligibility threshold for release on licence*" by depriving prisoners of the entitlement to release as a matter of legal right once one-half of their sentence is served and substituting, for that right to release, a delayed and conditional eligibility for release (*Alchaster*, §97).

42. The analysis is further complicated by the fact that none of the Article 7 ECHR cases considered by the European Commission on Human Rights or the European Court of Human Rights (such as *Devriendt*) appear to have involved measure affecting a regime for early release in which prisoners had a legal right to automatic release on licence at a particular point in their sentence.

43. The issue is one which may arise in other EU Member States, in the event that the surrender to the United Kingdom of a person accused (or convicted) of terrorist offences is sought. Article 49(1) cannot have different meanings in different Member States. Only the Court of Justice can provide a definitive ruling as to its meaning. Furthermore, that question must be resolved before a final decision on surrender is made by this Court. While the Appellant will, in the event of surrender, have access to the European

Court of Human Rights to assert his Article 7 ECHR rights, he will not have access to the Court of Justice to assert his rights under Article 49(1) of the Charter.

44. In these circumstances, the Court considers it necessary to make a further reference to the Court of Justice.

Question Referred for a Preliminary Ruling

45. The Court refers the following question.

> *Would the application, to a person convicted of an offence or offences and sentenced to a determinate sentence(s), of amended rules having the effect that he or she will have to serve at least two-thirds of such sentence and then will have only a conditional right to release on licence dependent on an assessment of dangerousness, whereas under the rules applicable at the time of the alleged offences, that person would have been automatically entitled as a matter of law to release on licence once he had served one-half of that sentence, involve the imposition of a "heavier penalty" on the convicted person than the penalty applicable at the time of the alleged offences such as to amount to a breach of Article 49(1) of the Charter?*

Final

46. The appeal is stayed pending the ruling of the CJEU on those questions. In view of the fact that the Appellant is currently in detention, the Court respectfully requests the President to initiate the expedited preliminary ruling procedure.

Dated: 22 October 2024

Signed: