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# High Court of Ireland Decisions

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## Ruling

**Title:** The Minister for Justice, Equality and Law Reform -v- R.O. No.4

**Neutral Citation:** [2018] IEHC 284

**High Court Record Number:** 2016 20 EXT; 2016 72 EXT

**Date of Delivery:** 16/05/2018

**Court:** High Court

**Ruling by:** Donnelly J.

**Status:** Approved

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[2018] IEHC 284

## THE HIGH COURT

**IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003 AS AMENDED**

**Record No. 2016/ 20 EXT.**

**Record No. 2016/ 72 EXT.**

**BETWEEN:**

**THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM**

**APPLICANT**

**AND**

**R.O.**

**RESPONDENT**

**Request of the High Court for Preliminary Ruling Pursuant to Article 267 TFEU dated the 16th day of May, 2018**

The following is the substantive text of the Request for Preliminary Ruling pursuant to

Article 267 TFEU made by the High Court (Donnelly J) on 16th May, 2018:

## **1. Introduction**

1.1 The High Court has decided to refer to the Court of Justice questions concerning the impact, if any, on the operation of the system of European arrest warrants, arising from the fact that the United Kingdom of Great Britain and Northern Ireland ("the United Kingdom") has given notice under Article 50 of the Treaty on European Union ("TEU") of its intention to withdraw from the European Union ("Brexit").

1.2 In essence, the issue which has arisen before the High Court gives rise to a question which has not been considered by the Court of Justice previously by reason of the fact that no Member State has, to date, withdrawn from the Union. It is to be noted that in *the Minister for Justice and Equality v. O'Connor* (Supreme Court [\[2017\] IEHC 518](#)), the Supreme Court of Ireland made a Preliminary Reference to the Court of Justice pursuant to Article 267 of the Treaty on the Functioning of the European Union ("TFEU") on 12th March, 2018, on a similar issue but no expedited hearing has been granted in respect of that matter. In contrast to that case, the respondent in the instant case is in custody and will remain in custody until the determination of this application. Furthermore, in the instant case, the respondent has objected to his surrender on the grounds that he claims that the conditions under which he would be held in Northern Ireland (to which his surrender is sought by the United Kingdom) would constitute inhuman and degrading treatment contrary to Article 3 of the European Convention on Human Rights (and therefore also contrary to Article 4 of the Charter of Fundamental Rights of the European Union ("the Charter")).

1.3 Therefore, notwithstanding the existing preliminary reference from the Supreme Court, the High Court has decided to refer essentially the same questions in this case as in the *O'Connor* case since the resolution of same is necessary to enable the court to deliver a judgment in this case. The questions concern the impact of legal measures adopted within the framework of Union law which have the potential of impacting on the rights and obligations of citizens of the Union beyond the anticipated date of withdrawal of a Member State and, in circumstances where those rights may fall in practice, to be enforced solely within the legal order of the departing Member State.

1.4 The issue which arises concerns whether European law (whether to be found in the Treaties or the Charter) contains a necessary implication that otherwise valid measures mandated by Union law should not be adopted where those measures create a risk of placing a person affected by the measures concerned outside the scope of the effective application of rights and entitlements guaranteed by Union law, and in particular the entitlement to request the Court of Justice to rule definitively on any issues of Union law which may arise concerning such rights and entitlements. In light of the fact that the High Court is unable to deliver a final judgment in the case pending a ruling by the Court of Justice and the fact that the respondent remains in custody pending such determination, the High Court has decided to refer the below questions to the European Court of Justice to facilitate a ruling on the issues identified with the minimum of delay in accordance with the provisions of Article 267 of the TEU and Rule 107 of the Rules of Procedure of the Court of Justice.

## **2. The Facts**

2.1 The surrender of the respondent is sought by the United Kingdom on foot of two European Arrest warrants. The first European Arrest Warrant ("EAW") was issued on 27th January, 2016 and was endorsed by the High Court for execution on 1st February, 2016. The respondent was arrested on foot of this EAW on 3rd February, 2016 and was remanded in custody. He has remained in custody since this date. This EAW sought the surrender of the respondent for the purposes of conducting a criminal prosecution in respect of two offences, murder and arson (alleged to have been committed on 2nd

August, 2015), both of which carry a potential maximum penalty of life imprisonment.

2.2 A second European Arrest warrant was issued by the United Kingdom in respect of the respondent on 4th May, 2016. This EAW was endorsed by the High Court on 10th May, 2016 and the respondent was arrested on foot of this second European Arrest warrant on the same date and was remanded in custody. The European Arrest warrant sought the surrender of the respondent for the purposes of conducting a criminal prosecution in respect of an offence of rape (alleged to have been committed on 30th December, 2003) which carries a potential maximum penalty of life imprisonment.

2.3 Points of objection were filed on behalf of the respondent raising, *inter alia*, issues consequent on the withdrawal of the United Kingdom from the European Union and issues concerning Article 3 specifically related to potential inhuman and degrading treatment which it is alleged would be faced by the respondent were he to be surrendered and imprisoned in Maghaberry Prison in Northern Ireland.

2.4 By reason of the ill health of the respondent, the hearing of the case did not take place until 27th July, 2017. At that hearing, issues were raised, *inter alia*, in relation to the consequences of Brexit on Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States and Council Framework Decision of 26 February 2009 amending, *inter alia*, the Council Framework Decision of 2002 and whether there was a real risk that the respondent would suffer inhuman and degrading treatment if surrendered to the United Kingdom.

2.5 In a judgment delivered on 2nd November, 2017, the High Court considered the respondent's claim that he would be subjected to inhuman and degrading treatment if surrendered to Northern Ireland and expressly left over the Brexit issue for judgment on a later date. The Court noted the similar tests to be applied under Article 3 of the European Convention of Human Rights (set out by the Irish Supreme Court in *Minister for Justice v. Rettinger* [2010] IESC 45 and under Article 4 of the Charter, as decided by the Grand Chamber of the Court of Justice on 5th April, 2016 in joint cases *Aranyosi v Generalstaatsanwaltschaft Bremen* (Case C-404/15) and *Caldararu v Generalstaatsanwaltschaft Bremen* (Case C-659/ 15 PPU). The Court held that there was specific and updated information concerning the conditions of detention in Maghaberry prison that give rise to concern that there is a real risk that this respondent, by virtue of his vulnerabilities, will be subjected to inhuman and degrading treatment. In light of those decisions, and an analysis of the evidence in the case, the High Court sought further information from the United Kingdom as to the conditions in which the respondent will be held should he be surrendered to the United Kingdom.

2.6 On 16th April, 2018, the issuing judicial authority, Presiding Judge Bagnall of Laganside Court in Belfast, provided information as to how the Northern Irish Prison Service will address the risks to the respondent of being subjected to inhuman or degrading treatment in Northern Ireland. The High Court has ruled against the respondent on all points of objection raised, other than the remaining issues of the consequences of Brexit and the issue raised with regard to Article 3 of the European Convention on Human Rights. The High Court cannot now determine these two remaining issues in the absence of an answer to the Reference made herein.

### **3. Relevant Legal Provisions**

3.1 The Law in Ireland is governed by the European Arrest Warrant, 2003 as amended. The relevant legislative provisions of the Act, as amended are included herewith.

3.2 Section 4A of the European Arrest Warrant Act, 2003 as inserted by the Criminal Justice (Terrorist Offences) Act, 2005 states as follows: "It shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the

contrary is shown”.

3.3 The procedure for the surrender of an individual sought on foot of a EAW, other than a situation where that person consents to their surrender, is dealt with under Section 16 of the 2003 Act, as amended by the Criminal Justice (Terrorist Offences) Act, 2005, the Criminal Justice (Miscellaneous Provisions) Act, 2009 and the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act, 2012.

“16.(1) Where a person does not consent to his or her surrender to the issuing state the High Court may, upon such date as is fixed under section 13 or such later date as it considers appropriate, make an order directing that the person be surrendered to such other person as is duly authorised by the issuing state to receive him or her, provided that—

(a) the High Court is satisfied that the person before it is the person in respect of whom the European arrest warrant was issued,

(b) the European arrest warrant, or a true copy thereof, has been endorsed

in accordance with section 13 for execution of the warrant,

(c) the European arrest warrant states, where appropriate, the matters required by section 45 (inserted by section 23 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012),

(d) the High Court is not required, under section 21A, 22, 23 or 24 (inserted by sections 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005), to refuse to surrender the person under this Act, and

(e) the surrender of the person is not prohibited by Part 3”

3.4 Section 37 is contained within Part 3 of the Act, and deals with the circumstances in which there would be a prohibition on surrender, stating as follows:

“37.—(1) A person shall not be surrendered under this Act if—

(a) his or her surrender would be incompatible with the State’s obligations under—

(i) the Convention, or

(ii) the Protocols to the Convention,

(b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38(1)(b) applies),

(c) there are reasonable grounds for believing that—

(i) the European arrest warrant was issued in respect of the person for the purposes of facilitating

his or her prosecution or punishment in the issuing state for reasons connected with his or her sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation, or

(ii) in the prosecution or punishment of the person in the issuing state, he or she will be treated less favourably than a person who—

(I) is not of his or her sex, race, religion, nationality or ethnic origin,

(II) does not hold the same political opinions as him or her,

(III) speaks a different language than he or she does, or

(IV) does not have the same sexual orientation as he or she does,

or

(iii) were the person to be surrendered to the issuing state—

(I) he or she would be sentenced to death, or a death sentence imposed on him or her would be carried out, or

(II) he or she would be tortured or subjected to other inhuman or degrading treatment.”

3.5 The Council Framework Decision 2002/584 on the European Arrest Warrant and the Surrender Procedures between Member States provides at Recital (10):

“The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof”.

3.6 The Framework Decision at Recital (12) provides:

“The Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union [Footnote 1: OJ C364, 18.12.200, p.1.] in particular Chapter VI thereof .  
.....”

3.7 The Framework Decision further provides:

## **“Article 1**

### **Definition of the European arrest warrant and obligation to execute it**

1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.
2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.
3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union”.

#### **4. The Grounds for the Reference**

4.1 In order for the High Court to deliver a judgement in the case, it is necessary to determine what effect, if any, the imminent withdrawal of the United Kingdom from the European Union has for the operation of the European Arrest warrant system and the surrender of persons, such as the respondent, to the United Kingdom. The background to Brexit is clear. On the 29th March 2017, notification was given by means of a letter from the Prime Minister of the United Kingdom to the President of the European Council. The effect of that notification is to cause the United Kingdom to withdraw from the European Union (in accordance with the provisions of Article 50 of the TEU) as of 29th March, 2019.

4.2 It follows that it is highly probable that the United Kingdom will withdraw from the European Union on 29th March 2019. There may be transitional arrangements put in place to govern the situation which is to apply immediately thereafter and there may ultimately be agreed arrangements entered into between the European Union and the United Kingdom governing the future relations between those parties in areas such as those covered by the Framework Decision. However, as of today's date, there is no clarity as to whether such arrangements will be entered into and if so the nature of the relevant measures which will be adopted. In particular, there is no clarity as to whether the entitlement of a European citizen, who is within the jurisdiction of the United Kingdom, to have relevant issues of European law, in the event of dispute, ultimately determined by the Court of Justice, will continue in place after the withdrawal of the United Kingdom.

4.3 If surrendered, it is highly probable that the respondent will remain in prison in the United Kingdom after 29th March, 2019, being the date on which the United Kingdom is scheduled to withdraw from the European Union. If an order for surrender is made, the respondent will be subject to pre-trial detention in Maghaberry Prison, followed by a trial in accordance with the then prevailing law of the United Kingdom and a potential lengthy sentence of imprisonment in the United Kingdom if he is convicted of said offences which will extend long beyond the withdrawal date.

4.4 The minister argues, correctly so far as it goes, that current Irish law, being the European Arrest Warrant Act 2003, requires the respondent's surrender. The minister further argues, again correctly so far as it goes, that the respondent's surrender should only be refused in the event that there is an overriding obligation deriving from European Union law which would require the Irish courts to interpret Irish legislation in a way which would preclude the surrender of the respondent because of the Brexit issue.

4.5 On that issue, the minister argues that the law must be considered as it is today and not as it may become in the future after the withdrawal of the United Kingdom. On the basis of that argument, it is said that the United Kingdom is, today, a member of the European Union and that there is no specific or generally implied measure of Union law,

whether to be found in the Treaties, the Charter or the Framework Decision, which would require that the respondent not be surrendered.

4.6 On the other side, the respondent argues that his surrender will inevitably mean that he will be imprisoned as a result of the implementation of an order made within the framework of Union law, in a state which will no longer be, during the currency of his custody, a member of the Union. In the light of that fact, and in the light of the uncertainty as to the legal measures which will be in place after the withdrawal of the United Kingdom, it is argued that there can be no guarantee that any rights which the respondent may enjoy under European law will, in a practical way, be capable of enforcement as a matter of Union law. It is contended on behalf of the respondent that the safeguards and protections afforded to persons surrendered pursuant to European Arrest Warrant Act, 2003, (which include the fundamental rights and rights relating to matters post-surrender such as the rule of specialty, the prohibition on the surrender of persons to other Member States and the deduction of periods of detention served in Executing Member States) would be set at naught.

4.7 It was contended by the respondent that this Court would not be justified in proceeding on an assumption that the issuing state will continue to consider itself bound by the requirements of Article 6 of the Treaty on European, nor could it assume that any breaches of the provisions of Article 6 will be actionable on the part of the respondent into the future. It was argued that the mutual trust and confidence which underpinned the Framework Decision (see Article 1.2, the tenth recital and the twelfth recital of the Framework decision) has been fatally eroded by virtue of the notice given by the United Kingdom of its intention to withdraw from the European Union on 29th March, 2019.

4.8 Additional information has been provided by the issuing judicial authority concerning the prison conditions in which the respondent will be held should be surrendered to the United Kingdom. The minister relies on the assurances received as to the manner in which the respondent would be detained following his surrender, while the respondent contends that it remains an open question as to what weight can be given to such information given the imminent withdrawal of the United Kingdom from the European Union and the fact that legal remedies attendant on the United Kingdom being a member of the European Union will no longer be available to a prisoner in the United Kingdom after 29th March, 2019. The Minister argues that the law should be relied upon as it applies today, while the respondent contends that the issue of whether there is a real risk that the respondent by virtue of his particular circumstances will be subject to inhuman and degrading treatment in Northern Ireland arising from imprisonment contrary to Article 3 of the European Convention of Human Rights and contrary to Article 4 of the Charter of Fundamental Rights of the European Union must be viewed in the context of the withdrawal of the United Kingdom from the European Union and the legal uncertainty and attendant potential restriction of remedies available to any person surrendered and imprisoned in the United Kingdom.

4.9 It may be that an intermediate position might be correct. The starting point for that consideration stems from the underlying argument made on behalf of the respondent which derives from the fact that, after the withdrawal of the United Kingdom from the European Union, he will almost certainly be incarcerated in a prison in a non-Member State of the European Union in circumstances where there is currently uncertainty as to the legal regime which will apply.

4.10 In that context it is, of course, clear that the respondent would have access to the courts of the United Kingdom for the purpose of assessing the legality of any aspect of his continuing imprisonment. It may well be that the courts of the United Kingdom, even after the departure of the United Kingdom from the European Union and even in the absence of any specific measures of United Kingdom law adopted which confer rights by

reference to Union law, may regard the respondent's rights and entitlements as being governed by Union law by reason of the fact that he would have been surrendered to the United Kingdom under a Union law measure. In addition, the respondent was only able to point to four specific aspects of the regime which would apply to him where Union law might theoretically be engaged. The first is the question of whether, having regard to the proper interpretation of the Framework Decision, he may be entitled to credit for the period spent in custody in accordance with Article 26 of the Framework Agreement. The second is the so-called rule of speciality which is given concrete form in Union law in Article 27 of the Framework Decision. The third relates to Article 28 and the prohibition on the further surrender of the respondent to a third state by the United Kingdom. The fourth relates to his fundamental rights as governed by the Charter of Fundamental Rights of the European Union.

4.11 Undoubtedly, the respondent would have access to the courts of the United Kingdom to obtain any order which might be appropriate in respect of any of those questions should they arise. The respondent's argument, however, is that, in the event of there being a dispute about any such matters, and in the absence of any measures being adopted which would confer a relevant jurisdiction on the Court of Justice, he would be deprived of the opportunity of having those matters of European law definitively determined by the Court of Justice.

4.12 However, it is possible that the question of his surrender might require an assessment of whether either or both of those matters gives rise to a real or significant risk of injustice rather than creating a merely theoretical possibility. In that context, the third possible answer to the so-called Brexit issue may be that surrender should be ordered unless the relevant court in the requested state, having carried out an appropriate analysis, concludes that there is, in the circumstances of the situation of the person concerned, a real or substantial risk that rights and entitlements will actually be interfered with, rather than a merely theoretical risk which would arise by virtue solely of the fact that it is possible that the rights and obligations concerned may fall to be enforced by the national courts of the requesting state in circumstances where it may be the case that the Court of Justice will be deprived of any jurisdiction to rule on such questions.

4.13 The High Court does not consider that the answers to the questions raised by the Brexit issue in these proceedings are clear, not least because the situation which has arisen is unprecedented, with it following that there is no directly relevant jurisprudence of the Court of Justice. The High Court considers that there may well be merit in the argument put forward on behalf of the minister to the effect that the law as it stands today should be enforced with the consequence that the respondent's surrender should be ordered. However, the High Court cannot rule out the possibility that there may be an implied right conferred on the respondent, by the Treaties and by the Charter, deriving from his status as a European citizen, not to be subjected to a measure of European law which will continue in force in circumstances where there may be a doubt as to the effectiveness of any remedy which he might enjoy under European law.

4.14 Likewise, the High Court cannot rule out the possibility that it may be necessary, in order to determine whether Union law would preclude the surrender of the respondent in all the circumstances, to carry out an appropriate analysis of the likelihood or significance of the risk that he may actually suffer prejudice.

## **5 Questions Referred for Preliminary Ruling**

5.1 Against that background, the High Court proposes to refer the following questions to the Court of Justice:-

Having regard to:-



(a) The giving by the United Kingdom of notice under Article 50 of the TEU;

(b) The uncertainty as to the arrangements which will be put in place between the European Union and the United Kingdom to govern relations after the departure of the United Kingdom; and

(c) The consequential uncertainty as to the extent to which the respondent would, in practice, be able to enjoy rights under the Treaties, the Charter or relevant legislation, should he be surrendered to the United Kingdom and remain incarcerated after the departure of the United Kingdom,

(1) Is a requested Member State required by European Union Law to decline to surrender to the United Kingdom a person the subject of a European arrest warrant, whose surrender would otherwise be required under the national law of the Member State,

(i) in all cases?

(ii) In some cases, having regard to the particular circumstances of the case?

(iii) In no cases?

(2) If the answer to Q.1 is that set out at (ii) what are the criteria or considerations which a court in the requested Member State must assess to determine whether surrender is prohibited?

(3) In the context of Question 2 is the court of the requested Member State required to postpone the final decision on the execution of the European arrest warrant to await greater clarity about the relevant legal regime which is to be put in place after the withdrawal of the relevant requesting Member State from the Union

(i) in all cases?

(ii) In some cases, having regard to the particular circumstances of the case?

(iii) In no cases?

(4) If the answer to Question 3 is that set out at (ii) what are the criteria or considerations which a court in the requested Member State must assess to determine whether it is required to postpone the final decision on the execution of the European

arrest warrant?

## **6 Request to Avail of the Urgent Preliminary Ruling Procedure**

6.1 The High Court requests that the Court of Justice consider determining the present case pursuant to the urgent preliminary ruling procedure set out in Article 107 of the Rules of Procedure of the Court of Justice.

6.2 This reference raises questions in an area covered by Title V of Part Three of the Treaty on the Functioning of the European Union (TFEU) i.e. judicial cooperation in criminal matters (Chapter 4).

6.3 The respondent is currently in custody solely on foot of the European Arrest warrants issued by the United Kingdom and a ruling on the question identified above is necessary to enable the High Court to give final judgment in his case. In support of the request to avail of the urgent preliminary ruling procedure, the High Court relies on para 4 of Article 267 TFEU which refers to the obligation to "act with the minimum of delay" in respect of a person in custody who is the subject matter of a preliminary reference.

6.4 Use of the ordinary, or even the expedited, preliminary reference procedure would significantly add to the period that the respondent will spend in custody. Given that the Court of Justice may rule at the conclusion of this preliminary reference that further engagement by the High Court with the United Kingdom authorities is required, the EAW proceedings may not be concluded for some time. It is therefore highly desirable that the urgent procedure would be permitted in this case. Urgency is especially highly desirable where the respondent is in custody solely on these EAWs, which were issued for the purpose of conducting a criminal prosecution and in respect of which he has a presumption of innocence.

6.5 The High Court is desirous of ensuring the uniform application of European Union law both for the benefit of this case and another 8 cases in which persons remain in custody in Ireland solely on foot of European Arrest warrants issued by the United Kingdom and where a Brexit point has been raised as a basis for suggesting that the Court should not order surrender. The High Court also notes that other persons are in custody serving domestic sentences which will expire shortly and who could thereafter be remanded in custody pending surrender to the United Kingdom but whose cases must be adjourned pending the determination of the Brexit point. There are also a number of other persons who have been arrested on foot on European arrest warrants from the United Kingdom but who are on bail pending a determination on surrender and who have also raised this Brexit point. There have been a significant number of European arrest warrants received in Ireland from the United Kingdom which remain to be executed. Further arrests of requested persons are therefore extremely likely. Given that the Supreme Court, and now the High Court, has considered it necessary to refer the questions set out above to the Court of Justice, it may readily be inferred that many, if not most, persons whose surrender is sought to the United Kingdom will raise the Brexit point. Once raised, the High Court will be required to defer a final decision on surrender pending the outcome of this reference.

## **7 Proposed answers to the questions identified above**

7.1 The High Court proposes the following answers to the above questions:-

**(1) Is a requested Member State required by European Union Law to decline to surrender to the United Kingdom a person the subject of a European arrest warrant, whose surrender would otherwise be required under the national law of the Member State,**

**(i) in all cases?**

**(ii) In some cases, having regard to the particular circumstances of the case?**

**(iii) In no cases?**

7.2 A Member State is not required to decline surrender to the United Kingdom under a EAW merely because of Brexit, in any case where all other conditions for surrender are met. Article 34 of the Framework Decision required Member States to take all necessary measures to comply with the provisions of the Framework Decision by 31 December 2003. Article 1 requires Member States to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of the Framework Decision. At the point of surrender, presuming it is before "Brexit day", the United Kingdom and other Members States are bound by the provisions of the Framework Decision. There is no provision in the European Treaties or in the Framework Decision that requires surrender to be declined where a Member State has given notification of its intention to leave.

7.3 The obligations on the United Kingdom with respect to surrenders which take place under the EAW scheme do not cease once the United Kingdom ceases to be a member of the European Union. The United Kingdom has entered into an agreement by virtue of its obligations as a Member State of the EU to abide by the conditions of surrender set out in the Framework Decision. At an international level, extradition agreements are predicated on a form of mutual trust between nation states who enter into them. Extradition Treaties/Agreements have specific provisions which deal with the situation post-extradition; including specialty and restrictions on extradition to third countries. In the absence of substantive evidence that there is a real risk that the United Kingdom will renege on any of commitments to abide by the provisions of the 2002 Framework Decision in respect of a requested person after she has ceased to be a member of the EU, there is no reason to decline surrender in all cases.

**(2) If the answer to Q.1 is that set out at (ii) what are the criteria or considerations which a court in the requested Member State must assess to determine whether surrender is prohibited?**

7.4 If the judicial authority in the executing Member State is required to carry out such assessment, then that judicial authority must determine whether it can be satisfied that rights guaranteed to the requested person under the Framework Decision and the Charter of Fundamental Rights will continue to be guaranteed in the United Kingdom upon surrender and whilst he or she is subject to its criminal justice system after it ceases to be a Member State of the Union.

7.5 In making such an assessment, the Court should take into account matters such as the following:

- The likelihood of the requested person being incarcerated in a prison and/ or otherwise subject to the criminal justice system in a non-Member State of the European Union beyond the date of withdrawal.
- the extent to which rights which may be breached are identified.
- the nature of the rights which are apprehended to be breached.
- the nature of the anticipated breach of those rights.
- the presence of any parallel regime (such as the ECHR) of which the United Kingdom is a state party and the availability of any

effective remedy for any breach of rights; and

- Whether any formal guarantees have been forthcoming from the United Kingdom which can provide guarantees both to the executing Member State and the requested person.
- Whether a guarantee can be given that there will be compliance with obligations undertaken by the United Kingdom, and in the event of a dispute, whether the requested person will have access to the courts of the United Kingdom for the purpose of vindicating those rights.
- Whether in the event of there being a dispute about the requested person's fundamental rights, he or she would have recourse to an international judicial tribunal for the verification of those rights
- Whether those matters give rise to a real and significant risk of injustice

**(3) In the context of Question 2 is the court of the requested Member State required to postpone the final decision on the execution of the European arrest warrant to await greater clarity about the relevant legal regime which is to be put in place after the withdrawal of the relevant requesting Member State from the Union**

**(i) in all cases?**

**(ii) In some cases, having regard to the particular circumstances of the case?**

**(iii) In no cases?**

7.6 In light of the answers to Question 2 above, if the guarantees are given to the satisfaction of the executing judicial authority, there will be no need to await greater clarity. If no guarantees can be given within a reasonable time, then the executing judicial authority should bring proceedings to an end.

**(4) If the answer to Question 3 is that set out at (ii) what are the criteria or considerations which a court in the requested Member State must assess to determine whether it is required to postpone the final decision on the execution of the European arrest warrant?**

7.7 In light of the answers to Questions 2 and 3 above, if the guarantees are given to the satisfaction of the executing judicial authority, there will be no need to await greater clarity. If the guarantees cannot be given within a reasonable time, then the executing judicial authority should bring proceedings to an end. In calculating what is a reasonable time, the executing judicial authority must take into account the stage the negotiations on Brexit have reached, and when, in the view of both the United Kingdom and the executing Member State, those negotiations are likely to conclude in a manner which will provide legal certainty with respect to those persons surrendered under a European arrest warrant.

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