THE HIGH COURT

[2021] IEHC 209

[2021 No. 225 SS]

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4.2° OF THE CONSTITUTION OF IRELAND

BETWEEN

SALMAN SHAHZAD

APPLICANT

AND

THE GOVERNOR OF MOUNTJOY PRISON

RESPONDENT

JUDGMENT of Mr. Justice Paul Coffey delivered on the 19th day of March 2021.

Background

1. This case concerns extradition between Ireland and the United Kingdom of Great Britain and Northern Ireland ("the UK") pursuant to Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States [2002] O.J. L190/1 ("the Framework Decision") which was transposed into Irish law by the European Arrest Warrant Act 2003 (as amended) ("the EAW Act of 2003") and the effect thereon, if any, of Article 62.1(b) of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] O.J. C384l/1 ("the Withdrawal Agreement"). The Withdrawal Agreement sets out the arrangements for the withdrawal of the UK from the European Union ("the Union") and from the European Atomic Energy Community ("Euratom"). It came into force on 1 February 2020 and provides for a transition or implementation period which started on the date of entry into force of the Agreement and ended on 31 December 2020. Article 127(1) of the Withdrawal Agreement makes EU law, including therefore the Framework Decision, applicable to and in the UK during the transition period. In order to make provision for cases that were still in the system at the end of the transition period, Article 62.1(b) of the Withdrawal Agreement applies the Framework Decision to the UK in respect of European arrest warrants where the requested person was arrested before the end of the transition period for the purposes of the execution of a European arrest warrant irrespective of whether that person was remanded in custody or released on bail. At issue on this application is whether Article 62.1(b) of the Withdrawal Agreement is binding on and applicable to Ireland.

Introduction

2. The applicant is the subject of a European arrest warrant ("the EAW") dated 20 March 2020 issued by a judicial authority in the UK which seeks the surrender of the respondent to the UK in order to execute a sentence of imprisonment for a term of eight years which was imposed upon him in respect of an offence of conspiracy to defraud, all of which remains to be served. The EAW was endorsed for execution within the State by the High Court pursuant to s.13 of the Act of 2003 on the 18 August 2020 following which the applicant was arrested and brought before the High Court on 9 September 2020. On 8 February 2020 the High Court (Burns J.) made an order for the applicant's surrender to the UK pursuant to s.16(1) of the Act of 2003 and a consequent committal order pursuant to s.16(4)(b) detaining him in prison pending his surrender.

3. It is common case that as the UK had ceased to be a Member State of the EU on 1 February 2020 and had further ceased to be subject to the general application of Union law on 31 December 2020, such power and obligation as the High Court had to surrender and detain the applicant on 8 February, if any, arose under Article 62.1(b) of the Withdrawal Agreement to which ostensible domestic effect was given by S.I. 719/2020 European Arrest Warrant Act 2003 (Designated Member States) (Amendment) Order 2020 ("S.I. No. 719 of 2020") and s.98(1) of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019.

4. Article 62.1(b) of the Withdrawal Agreement provides as follows:

> "(b) Council Framework Decision 2002/584/JHA shall apply in respect of European Arrest Warrants where the requested person was arrested before the end of the transition period for the purposes of the execution of a European arrest warrant, irrespective of the decision of the executing judicial authority as to whether the requested person is to remain in detention or be provisionally released;"

5. S.3 of the EAWAct 2003 provides that the Minister for Foreign Affairs may, by order, designate "a Member State" that has, under its national law, given effect to the Framework Decision. "Member State" is defined by s.2 of the Act of 2003 as "a Member State of the European Communities". Section 98(1) of the Withdrawal of the United Kingdom from the European Union (Consequential) Provisions Act 2019 ("the Act of 2019") anticipates a withdrawal agreement and provides that: -

> "(1) Where, immediately before the coming into operation of this part, a reference in an enactment to a Member State included a reference to the United Kingdom by virtue of that State being a Member State of the European Communities (emphasis added)…then, on the coming into operation of this Part, the reference to the enactment shall, insofar as is necessary to give effect to the terms of a withdrawal agreement, (emphasis added), continue to include a reference to the United Kingdom."

6. The European Arrest Warrant Act 2003 (Designated Member States) Order 2004 (S.I. No. 4 of 2004) designated the UK for the purposes of s.3 of the EAW Act of 2003. Article 3 of S.I. No. 719 of 2020 amended the previous Order of 2004 by the insertion of the following provisions: -

> "2A(1) The United Kingdom of Great Britain and Northern Ireland is, in respect of a European Arrest Warrant that satisfies the condition specified in paragraph (2), designated for the purposes of the European arrest warrant Act 2003 (No. 45 of 2000).
>
> (2) In relation to a European arrest warrant, the conditions referred to in paragraph (1) are –

(a) that the European arrest warrant has been issued by a judicial authority in the United Kingdom of Great Britain and Northern Ireland, and

(b) that the person in respect of whom the European arrest warrant is issued is arrested before 11:00pm on the 31st day of December 2020 for the purposes of the execution of the European arrest warrant."

7. On 16 February 2021 this Court directed an inquiry pursuant to Article 40.4.2° of the Constitution into the legality of the applicant's detention upon the grounds set out in the affidavit of complaint sworn by the applicant's solicitor on 15 February 2021. The applicant's case is that the High Court did not have power to surrender or detain the applicant pending his surrender to the UK because its ostensible power to do so under national law ultimately derived such legal force as it had from the provisions of Article 62.1(b) of the Withdrawal Agreement which the applicant contends is a measure in the area of freedom, security and justice which is subject to Article 2 of Protocol No. 21 ("the Protocol") annexed to the Treaty on European Union ("TEU") and the Treaty on the Functioning of the European Union ("TFEU") whereunder, it is argued, such measures are not binding on or applicable in Ireland unless the State has opted into the relevant measure, which it has not done.

8. Protocol No. 21 to the TEU and TFEU provides as follows: -

"Article 1

Subject to Article 3, the United Kingdom and Ireland shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union…

Article 2

In consequence of Article 1 and subject to Articles 3, 4 and 6, none of the provisions of Title V of Part Three of the Treaty on the Functioning of the European Union, no measure adopted pursuant to that Title no provision of any international agreement concluded by the Union pursuant to that Title and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland; and no such provision, measure or decision shall in any way affect the competences, rights and obligations of those States; and no such provision, measure or decision shall in any way affect the Community or Union acquis nor form part of Union law as they apply to the United Kingdom or Ireland.

Article 3

1. The United Kingdom or Ireland may notify the President of the Council in writing, within three months after a proposal or initiative has been presented to the Council pursuant to Title V of Part Three of the Treaty on the functioning of the European Union, that it wishes to take part in the adoption in application of any such proposed measure, whereupon that State shall be entitled to do so…

Article 4

The United Kingdom or Ireland may at any time after the adoption of the measure by the Council pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union notify its intention to the Council and to the Commission that it wishes to accept the measure. In that case the procedure provided for in Article 33.1(1) of the Treaty on the Functioning of the European Union shall apply mutatis mutandis.

Article 8

Ireland may notify the Council in writing that it no longer wishes to be covered by the terms of this protocol. In that case, the normal Treaty provisions will apply to Ireland."

9. The State cannot exercise the options or discretions under the Protocol as a matter of executive fiat but can only do so with prior parliamentary approval by virtue of Article 29.4.7° of the Constitution which provides:

"The State may exercise the options or discretions –

(iii) under Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice so and next including the option that the said Protocol No. 21 shall, in whole or in part, cease to apply to the State,
that any such exercise shall be subject to the prior approval of both Houses of the Oireachtas."

10. The application for release is opposed by the respondent on two grounds. First, the respondent contends that the application is an impermissible collateral attack on the order of surrender by reason of the fact that the applicant could have but failed to raise the point upon which he now seeks to rely in the s.16 proceedings. Secondly, the respondent contends that the Protocol is of no application to the Withdrawal Agreement by reason of the fact that the Withdrawal Agreement is on its face an agreement that was concluded pursuant to Article 50 of the Treaty of the European Union whereunder, it is argued, the Union has an exceptional and exclusive competence to negotiate and conclude an agreement with the departing Member State which covers all issues relating to the separation including issues that would otherwise lie outside the exclusive competencies of the Union.

11. Accordingly, two issues arise for determination by this Court:

(1) whether the remedy of Article 40.4.2° of the Constitution is available to the applicant; and, if so,

(2) whether the matters provided for by Article 62.1(b) of the Withdrawal Agreement fall within the exclusive competence of the European Union under Article 50 TEU such that its provisions are binding on and applicable to Ireland.

The pre-emptive challenge

12. It is apparent from the agreed chronology of events which is set out in the respondent's written submissions that the s.16 application was heard on four separate occasions by Burns J. in the High Court before he made the order for surrender which is now impugned in these proceedings. It would further appear that a total of eleven points of objection were raised and pursued by the applicant's former solicitor and barrister before the making of the final order, including at least two Brexit related objections. It is common case that at no point in the proceedings did the applicant intimate or seek to advance the point of objection upon which he now relies.

13. It would further appear that the applicant's current solicitor was first contacted two days before the applicant's case was listed for judgment following which he was retained by the applicant on the morning that judgment was delivered. The affidavit avers that the point that is now being raised was not identified until after the applicant's solicitor had considered the judgment of Burns J. and had discussed the matter with counsel. On 16 February 2021 senior counsel for the applicant mentioned the matter to Burns J. apparently with the intention of making an application to have the s.16 proceedings reopened but it is unclear as to whether such an application was in fact made. It is not in dispute, however, that although Burns J. had determined that the Act of 2003 applied to the UK and had in so doing relied on S.I. No. 719 of 2020 and Article 62.1(b) of the Withdrawal Agreement in so finding, no application was made to the High Court for a certificate to appeal the order of surrender pursuant to s.16(11) of the EAW Act of 2003 whereunder an appeal may be brought only if the High Court certifies that the order or decision involves "a point of law of exceptional public importance" and that it is "desirable in the public interest that an appeal should be taken".

14. It is agreed that the committal order that was produced to this Court is good on its face and that there was no want of procedural fairness in the proceedings which led to its making. This is of potential significance having regard to the dictum of Denham C.J. *in FX v. Clinical Director of the Central Mental Hospital* [2014] 1 I.R. 280 where she stated as follows: -

> "An order of the High Court which is good on its face should not be subject to an inquiry under Article 40.4.2° unless there has been some fundamental denial of justice. In principle the appropriate remedy is an appeal to an appellate court, with, if necessary, an application for priority. Thus, the remedy under Article 40.4.2° may arise where there is a fundamental denial of justice, or a fundamental flaw, such as arose in the *State (O) v. O'Brien* [1973] 1 I.R. 50, where a juvenile was sentenced to a term of imprisonment which was not open to the Central Criminal Court."

15. The applicant contends that the general rule stated by the former Chief Justice does not apply to this case because the infirmity contended for is in the nature of "a fundamental

flaw". It is further argued that the Act of 2003 itself envisages Article 40.4.2° as continuing to function as a concurrent means of review inasmuch as s.16(4)(a) expressly requires the High Court when making an order of surrender to inform the person to whom the order relates of his or her right to make a complaint under Article 40.4.2° of the Constitution "at any time" before his or her surrender whilst s.16(6)(v) further provides that where a person makes a complaint under Article 40.4.2° of the Constitution, he or she shall not be surrendered to the issuing state while proceedings relating to the complaint are pending.

16. The example used by Denham C.J. in FX to illustrate what she meant by "fundamental flaw" strongly suggests that she had in mind a flaw that is not only fundamental but, more importantly, manifest and incontrovertible and therefore a flaw of a type that is very different to the warmly contested issue that arises in this case. Absent clarification from the Supreme Court on this issue, however, I can only apply the words used by the former Chief Justice in their literal sense. In doing so I am satisfied that the infirmity complained of by the applicant in this case is not merely fundamental but also systemic relating as it does to all extradition between Ireland and the UK pursuant to Article 62.1(b) of the Withdrawal Agreement. For this reason, I am satisfied that the challenge is permitted by way of exception to the general rule stated by Denham C.J. in FX, a *fortiori*, as the right of appeal given by s.16 of the Act of 2003 is discretionary and not as of right.

17. The respondent further relies on the rule in *Henderson v. Henderson* (1843) 3 *Hare 100* whereunder the court has an inherent discretion to prevent a party to litigation from raising an issue including a matter of defence which could have been raised in previous connected proceedings (see *Fuller v. Minister for Agriculture, Food and Forestry* [2013] IESC 52). Reliance is also placed on *Lanigan v. Governor of Cloverhill Prison* [2015] IEHC 574 where Barrett J. applied the rule in *Henderson v. Henderson* to proceedings under Article 40.4.2° where the applicant sought to challenge the lawfulness of an order of the High Court remanding him in custody pending his surrender to the United Kingdom pursuant s.16 of the Act of 2003. The applicant in that case contended that as the scheme provided for under the Framework Decision and the Act of 2003 established an inquisitorial procedure, it was a violation of fair procedures and that in any event the High Court should refer the case to the CJEU on various questions. Whilst holding that the application was for the most part an impermissible attempt to relitigate points of objection which had already been rejected in the s.16 proceedings, Barrett J. further held that "insofar as matters complained of were not raised", the attempt to do so appeared to him to be a "fairly blatant contravention of the venerated rule in *Henderson v. Henderson".*

18. Whilst the point could have been taken in the s.16 proceedings by the applicant's previous lawyers, and indeed ought to have been the subject of an application for a certificate of appeal to Burns J. having regard to the inquisitorial nature of the proceedings which lead to the making of the order, I am nonetheless loath to apply the rule in *Henderson v. Henderson* in the special circumstances of this exceptional case which involves a point of law of no little complexity, where there is no evidence to

suggest that the applicant's previous lawyers considered the point and where the issue raised is systemic and therefore of a nature that it is inevitably going to have to be decided by the High Court at some time. If so, the applicant ought not be deprived of the benefit of the point that he has raised before his surrender. I will therefore exercise my discretion to reject the respondent's preliminary point of objection.

The applicant's case

19. The point of law relied upon by the applicant is multi-layered and unusually intricate. It is a point that emerges from the following series of interdependent propositions: -

    (1) the entitlement of the High Court to make the impugned order of surrender and the consequent order detaining the applicant depends on the validity of S.I. No. 719 of 2020 made by the Minister for Foreign Affairs under s.3 of the EAW Act of 2003;

    (2) the validity of S.I. No. 719 of 2020 depends upon the application of interpretation provisions of s.98(1) of the Act of 2019 to the construction of s.2 and s.3 of the EAW Act of 2003;

    (3) s.98(1) of the Act of 2019 applies only insofar as it is "necessary" to give effect to "a withdrawal agreement" and therefore only applies if Article 62.1(b) of the Withdrawal Agreement is binding on and applicable in Ireland;

    (4) this is contingent on Article 62.1(b) having its legal basis (as it currently has) in Article 50 TEU; however,

    (5) the applicant contends that the European Council made an error in adopting the entirety of the Withdrawal Agreement, including Article 62.1(b), on behalf of the Union under Article 50 TEU. Instead, it is argued that Article 62.1(b) ought to have been proposed and adopted pursuant to Article 82 TFEU; and therefore

    (6) if Article 62.1(b) of the Withdrawal Agreement can only have its legal basis in Article 82 TFEU, then the Protocol applies. Accordingly, as Ireland has not opted into the measure pursuant to Article 3 of the Protocol, it is argued that Article 62.1(b) is not binding on or applicable to Ireland by virtue of Article 2 of the Protocol.

20. In summary, the applicant's case is that the impugned order of surrender is of no legal effect because it relies on the designation of the UK for the purposes of the EAW Act of 2003 by S.I. No. 719 of 2020 which, it is argued, is *ultra vires* the powers conferred on the Minister for Foreign Affairs under s.3 of the EAW Act of 2003 because, ultimately, the European Council made an error in adopting Article 62.1(b) of the Withdrawal Agreement under Article 50 TEU and in not adopting the measure pursuant to Article 82 TFEU to which the Protocol applies.

Was an error made by the European Council?

21. This Court has no jurisdiction to determine that the European Council acted ultra vires and must submit a preliminary reference to the CJEU under Article 267 TFEU unless it is

acte claire that the Protocol is of no application to Article 62.1(b) of the Withdrawal Agreement.

22. Article 1 of the Protocol prohibits Ireland and the United Kingdom from taking part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the TFEU in the area of freedom, security and justice "in consequence" of which Article 2 provides that no measure or provision of any international agreement adopted or concluded by the Union "pursuant to that Title" shall be binding upon or applicable in the United Kingdom or Ireland.

23. It is common case that the Withdrawal Agreement was not proposed or concluded pursuant to Title V of Part Three TFEU but was negotiated by the European Commission and adopted with the consent of the European Parliament by the European Council on behalf of the Union pursuant to Article 50 TEU. It is further agreed that Ireland took part in and gave its assent to the adoption by the European Council of the Withdrawal Agreement on that legal basis.

24. It is not in dispute that there has never been any institutional infighting or disagreement between the Member States as to the appropriate substantive legal basis for the negotiation, proposal and adoption of the Withdrawal Agreement which has at all times been agreed by all participants in the process to be Article 50 TEU. The Withdrawal Agreement was made on 17 October 2019 and came into force on 1 February 2020 since which date no proceedings have been taken pursuant to Article 263 TFEU before the CJEU within the two-month time limit therein provided or at all to challenge the legal efficacy of Article 62.1(b) or to annul its provisions.

25. It is against this background that the applicant contends that Article 62.1(b) of the Withdrawal Agreement ought to have been proposed and adopted pursuant to Title V of Part Three TFEU and, in particular, pursuant to Article 82 TFEU whereunder the European Council and Parliament have general regulatory powers in the area of judicial cooperation in criminal matters which are subject to the Protocol. In summary, it is contended that an error was made by the Council in proposing and adopting Article 62.1(b) pursuant to Article 50 TEU because, it is argued, the principle of conferral enshrined in Article 5(2) TEU does not allow the European Union to adopt, even within the framework of a withdrawal agreement under Article 50 TEU, a measure which exceeds the limits of the powers that the Member States have conferred on it in the Treaties.

26. It is not in dispute that in accordance with well established principles, the Protocol is not capable of having any affect whatsoever on the question of the correct legal basis for the adoption of the Withdrawal Agreement or any provision that is contained within it. It is further well settled that where the correctness of the stated legal basis of a measure is contested, the applicable legal principles by which the correct legal basis for the decision is to be identified are set out in *European Parliament v. European Council* (Case C-130/10) ECLI:EU:C:2012:472 where the CJEU stated:

"42. According to settled case-law, the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review, which includes the aim and content of that measure (see, in particular, *Parliament v. Council* paragraph 34 and case law cited).

43. If examination of a measure reveals that it pursues two aims or that it has two components and if one of those aims or components are identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant aim or component (see, in particular, *Parliament v. Council* paragraph 35 and case law cited).

44. With regard to a measure that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one being incidental to the other, the Court has held that, where various provisions of the Treaty are therefore applicable, such a measure will have to be founded, exceptionally, on the various corresponding legal basis (see, in particular, *Parliament v. Council*, paragraph 36 in case law cited).

45. Nonetheless, the Court has held also, in particular in paragraph 17 to 21 of case C-300/89 *Commission v. Council* [1991] E.C.R. I-2867 ('Titanium Dioxide'), that recourse to a dual legal basis is not possible where the procedure laid down for each legal basis are incompatible with each other (see, in particular, *Parliament v. Council,* paragraph 37 in case law cited)."

27. It follows from the foregoing that where the stated legal basis for a measure in a legal instrument is contested, recourse to a dual or multiple legal basis is exceptional and will only arise where, first, the relevant measure pursues objectives which are not incidental to a main or predominant objective to which the stated legal basis for the legal instrument corresponds and, secondly, the procedure laid down for each legal basis are compatible with each other.

28. Accordingly, as Article 62.1(b) of the Withdrawal Agreement has manifestly not been proposed or adopted pursuant to Title V Part Three of the TFEU, the choice of Article 50 as the legal basis for the Withdrawal Agreement is unimpeachable unless the applicant can demonstrate, as it contends, that Article 50 TEU is merely procedural (in the sense that it confers no competence at all) or, alternatively, that Article 62.1(b) of the Withdrawal Agreement pursues objectives which are not incidental to the main or predominant objective of the Withdrawal Agreement and that the procedure laid down for Article 50 TEU and Article 82 TFEU are compatible.

Article 50 TEU

29. Article 50 TEU is the stated legal basis for the Withdrawal Agreement and provides both for the entitlement of any Member State to voluntarily withdraw from the Union and for the legal consequences that follow after a Member State has notified the European Council of its intention to withdraw from the Union. It provides as follows: -

(1) Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

(2) A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

(3) The Treaty shall cease to apply to the State in question from the date of entry into force of the Withdrawal Agreement or, failing that, two years after the notification referred to in para. 2, unless the European Council, in agreement with the Member State concerned unanimously decides to extend this period.

(4) For the purposes of paras. 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

(5) If a state which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49."

30. Article 50 thus confers on every Member State the unqualified and unconditional right to unilaterally withdraw from the European Union upon giving notice to the European Council of its intention so to do. The legal consequences which follow from the receipt of such notice are as follows: -

(1) The Union is mandated to negotiate and conclude an agreement with the departing Member State;

(2) the agreement to be negotiated and concluded by the Union must set out the arrangements for the withdrawal of the departing Member State and must further take account of the framework for its future relationship with the Union;

(3) the Union is obliged to negotiate the agreement in accordance with Article 218(3) of the TFEU;

(4) the agreement must be concluded on behalf of the Union by the European Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

31. In *Wightman v. Secretary of State for Exiting the European Union* (Case C-621/18) ECLI:EU:C:2018:999, a case that concerned whether the UK could unilaterally revoke its intention to withdraw from the Union, the CJEU stated that:

> "Article 50 TEU pursues two objectives, namely, first enshrining the sovereign right of a Member State to withdraw from the European Union and, secondly, establishing a procedure to enable such a withdrawal to take place in an orderly fashion."

32. To the extent that it has an obligation to negotiate and conclude such an agreement with the departing Member State, Article 50 necessarily empowers the Union to negotiate and conclude an agreement which settles all such matters as are necessary to provide for the orderly withdrawal of the departing Member State whilst also taking account of the framework for its future relationship with the Union. It follows from this that Article 50 is not merely procedural but also confers on the Union a supranational competence that is commensurate with the mandate that it is required to fulfil. The task of disentanglement is necessarily all encompassing inasmuch as it must direct itself to the disentanglement of all aspects of the antecedent relationship that exists between the Union and the departing Member State. Article 50 must therefore by logical inference be taken to confer on the Union a competence that is equal to the task of concluding an agreement which settles all issues that can arise from all areas of disentanglement together with a competence to do so in such a way that takes account of the framework of the future relationship between the Union and the departing Member State.

33. Article 50 clearly mandates the Union to negotiate and conclude an agreement that is manifestly intended to be unitary in nature without any stated limit as to the areas or issues that can be covered by such an agreement. This is further reflected in the procedure that is provided for under Article 50(2) for the adoption of the agreement which is also manifestly unitary in nature and therefore not subject to the possibility of different procedures, protocols or ratifications. Article 50(2) thus provides that the mandated agreement shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament. In so providing, Article 50(2) envisages the exercise of an exceptional but all-encompassing supranational competence by the Union over which Member States exert control and influence but only to the extent provided for by Article 50(2) and not otherwise.

34. On 22 May 2017, the European Council adopted its Directives for the negotiation of the Withdrawal Agreement in which it described the competence given to the Union under Article 50 in similar terms: -

> "Article 50 of the Treaty on the European Union confers on the Union an exceptional horizontal competence to cover in this Agreement all matters necessary to arrange the withdrawal. This exceptional competence is a one-off nature and strictly for the purpose of arranging the withdrawal from the Union. The exercise by the Union of the specific competence in the Agreement will not affect in any way the distribution

of competences between the Union and the Member States as regards the adoption of any future instrument in the areas concerned."

35. A similar understanding of the competence conferred on the Union by Article 50 TEU was described by Professor Hillion in his article entitled "Withdrawal under Article 50 TEU: An Integration-Friendly Process", (2018) 55 C.M.L. Rev. 29 where he wrote: -

> "All in all, Article 50 TEU is conceived as an all-encompassing competence, allowing the Union to address any matters related to withdrawal. While inherent in the terms of Article 50 TEU, such a broad empowerment has been invigorated by the European Council Guidelines, based on the overall interest of the EU in securing an orderly withdrawal."

The Withdrawal Agreement and Article 62.1(b)

36. It is manifest from a perusal of its recitals that in accordance with Article 50 TEU, the purpose and objective of the Withdrawal Agreement is to set out the arrangements for the withdrawal of the UK from the Union and Euratom, taking account of the framework for their future relationship in order to ensure "an orderly withdrawal".

37. Article 62.1(b) is a "separation provision" contained in Title V (Ongoing Police and Judicial Cooperation in Criminal Matters) in Part Three of the Withdrawal Agreement. The Preamble to the Withdrawal Agreement makes explicit reference to the "separation provisions" in the Withdrawal Agreement and states that the contracting parties are:

> "RESOLVED to ensure an orderly withdrawal through the various separation provisions aiming to prevent disruption and to provide legal certainty to citizens and economic operators as well as to judicial and administrative authorities in the Union and in the United Kingdom, while not excluding the possibility of relevant separation provisions being superseded by the Agreement(s) on the future relationship."

38. Article 62.1(b) provides for the continued application of the Framework Decision to the Union and the UK in respect of European arrest warrants where the requested person was arrested before the end of the transition period for the purpose of the execution of the European arrest warrant. In so doing it applies not merely the obligation to surrender such a person but also the entire EAW regime that is provided for in the Framework Decision including such provisions as are designed to afford protections to persons whose surrender is sought including their rights under the European Convention on Human Rights. Indeed, these were all matters that the Burns J. was obliged to consider and determine before making the order for surrender that is impugned in these proceedings. Accordingly, the provisions of Article 62.1(b) do no more than continue the surrender arrangements that have existed between Ireland and the UK since 2004 save that as and from 1 February 2020, those arrangements have been continued in the specific context of an agreement that is mandated by Article 50 to provide for an orderly withdrawal whilst also taking account of the framework of their future relationship. Article 62.1(b) is not therefore a free-standing new initiative in the area of security, justice and freedom but is

rather a necessary part of a suite of measures that have been included in the Withdrawal Agreement to fulfil the mandate that is given to the Union under Article 50 TEU which is to provide for and ensure an orderly withdrawal.

39. It is clear from an examination of its aims and contents that the Withdrawal Agreement pursues the objective of an orderly withdrawal whilst taking account of the framework of the relationship of the contracting parties and therefore corresponds to its stated legal basis under Article 50 and that Article 62.1(b) serves a purpose that is incidental and subordinate to that objective. I am further satisfied that inasmuch as Article 62.1(b) is a separation arrangement provided for in the Withdrawal Agreement, it is manifestly designed to contribute to an orderly withdrawal as required by Article 50 TEU and that its provisions are proportionate to that objective. Insofar as Article 62.1(b) provides for surrender to a third country, it does so in the specific context of providing for orderly disentanglement of existing arrangements between the Union and the departing Member State where the obligation on the UK to apply the Framework Decision remains unaffected and unqualified. It follows that I do not accept that when examined and assessed within its proper and specific context, namely, within the framework of the Withdrawal Agreement, that Article 62.1(b) has its legal basis in Article 82 TFEU or that its provisions are in consequence subject to Article 2 of Protocol No. 21 as contended for by the applicant.

Acte Claire

40. Insofar as Article 267 TFEU is engaged by the issue raised in this case, I have carefully considered the decision of the Court of Justice in *Srl CILFIT v. Ministry of Health* (Case 283/81) [1982] E.C.R. 3415 and am satisfied that the correct application of Union law is so obvious in the particular circumstances of this application as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be solved so that the matter is Acte Claire.

Conclusion

41. For the foregoing reasons, I am satisfied that Article 62.1(b) of the Withdrawal Agreement has its legal basis in Article 50 TEU to which the Protocol does not apply. As Article 62.1(b) is therefore binding on and applicable to Ireland, it follows that it is "necessary" to apply s.98(1) of the Act of 2019 to the construction of s.2 and s.3 of the Act of 2003 in consequence of which S.I 719 of 2020 has legal efficacy to apply the provisions of the EAW Act of 2003 to the UK in the manner as therein provided so that the surrender and detention orders made by the High Court on the 8th of February are lawful and valid. I therefore find that the applicant's detention is lawful and refuse the relief sought.