AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2022:000019

High Court Record No.: 2016 No. 97 EXT

Charleton J.

O'Malley J.

Baker J.

Hogan J.

Murray J.

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003 (AS AMENDED)

Between/

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

AND

DANAS KAIRYS

Appellant

JUDGMENT of Ms. Justice Baker delivered on the 22nd day of December. 2022

1. The Republic of Lithuania seeks the surrender of the appellant for enforcement of the remaining balance of a combined sentence of three years and seven months, imposed upon him in June 2015, in respect of 13 offences. A European Arrest Warrant ("EAW") was endorsed by the High Court in June 2016 and the appellant was arrested and brought before the court in March 2021. His objections to surrender were unsuccessful, for the reasons set out in the judgment of Paul Burns J. (see *Minister for Justice and Equality v. Kairys* [2022] IEHC 57).

2. The appellant's case is that he should not be surrendered, because the failure of this State to implement Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (hereafter "the 2008 FD") means that, because he is unable to make an application to serve the sentence in question in this jurisdiction, he has been denied his right to dignity and surrender should be refused. He says that since 2016 he has formed a family unit with his partner and two young children in the State, that he wishes to remain here and that his prospects of social rehabilitation would be better served by his imprisonment here.

3. The respondent acknowledges that the State has failed in its obligation to transpose the 2008 FD but contends that such failure is irrelevant to the obligation of the courts to order surrender.

4. Leave to appeal from the decision of the High Court directly to this Court was granted in regard to the question of whether the failure of the State to enact legislation implementing the 2008 FD gives rise to any entitlement to resist the execution of the EAW: [2022] IESCDET 75.

5. Letters exchanged between the appellant's solicitor and Panevezys Regional Court which were presented before the High Court where it was indicated that the request by the

appellant that he be permitted to serve a sentence imposed by the Lithuanian courts in Ireland could not be considered unless made by an authorised authority, namely the Department of Prisons of the Republic of Lithuania, in accordance with the procedure established by law. This means that an application may be made only when the sentence has been activated and the appellant is lodged in prison following surrender.

6. Article 26 of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) (hereafter "the EAW FD") provides that entitlement for credit to be afforded for time served in another jurisdiction is manifestly a manner for the issuing state (in this case, Lithuania) following surrender:

> "1. The issuing Member State shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed.
>
> 2. To that end, all information concerning the duration of the detention of the requested person on the basis of the European arrest warrant shall be transmitted by the executing judicial authority or the central authority designated under Article 7 to the issuing judicial authority at the time of the surrender."

7. It is the failure of this State to establish a procedure by which the appellant can request to be permitted to remain in Ireland and serve his sentence here that forms the basis of his appeal

Legal context

8. The EAW FD was introduced through mutual agreement among Member States in 2002. It created a new EU wide system of surrender which was intended to be more efficient

and streamlined than that preciously in operation under bilateral or multilateral extradition treaties.

9. The EAW FD reflects and gives concrete effect to the principles of mutual recognition of, and a high level of confidence in, the legal systems of the other Member States. The scheme for which it provides is for a swift and routine process of surrender upon request from another Member State: In Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* (ECLI:EU:C:2016:198).

10. Article 1 of the EAW FD provides a mandatory obligation on the part of Member States to execute any EAW and to do so "on the basis of mutual recognition" and in accordance with its provisions. The Article defines an EAW as 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."

11. While Article 1.3 provides that the obligation to surrender does not modify "fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union", the fact that surrender is mandatory is stated in unequivocal terms in Article 1.2:

> "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."

12. With these ends in mind the EAW FD sets out in Article 3 express grounds on which Member States are mandated to refuse execution:

> "The judicial authority of the Member State of execution (hereinafter "executing judicial authority") shall refuse to execute the European arrest warrant in the following cases:

1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;
2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;
3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State."

13. Certain optional grounds are provided in Article 4, which gives some discretion to a national executing judicial authority:

"The executing judicial authority may refuse to execute the European arrest warrant:

1. if, in one of the cases referred to in Article 2(4), the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State; however, in relation to taxes or duties, customs and exchange, execution of the European arrest warrant shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State;
2. where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based;

3. where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;
4. where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law;
5. if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country;
6. if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law;
7. where the European arrest warrant relates to offences which:
    a. are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or
    b. have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

14. It is well established in the authorities that these exceptional grounds for refusal to surrender must be interpreted strictly: Case C-579/15 *Popławski* (ECLI:EU:C:2017:503) (hereafter "*Popławski (No. 1)*") and *Arnayosi:* see opinion of Advocate General Hogan in Case C-665/20 PPU *Openbaar Ministerie v. X* (ECLI:EU:C:2021:303) and the authorities mentioned therein.

15. It is intended that the provisions be exclusive, and this has the effect that an executing judicial authority may refuse to execute a warrant only on the grounds for non-execution listed in in the EAW FD itself. I return later to the exclusive or "closed" character of the legislative structure.

16. The domestic legislation giving effect to the EAW FD is the European Arrest Warrant Act 2003 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 ("the Act").

17. The mandatory requirement to surrender is reflected in s. 10 of the Act of 2003 as substituted by s. 71 of the Act of 2005 and as amended by s. 6 of the Criminal Justice (Miscellaneous Provisions) Act 2009, and now provides that a person in respect of whom a European Arrest Warrant has issued *shall* be arrested and surrendered to the issuing state in accordance with the provisions of the Act:

> "Where a judicial authority in an issuing state issues a relevant arrest warrant in respect of a person
>
> > (a) against whom that state intends to bring proceedings for an offence to which the relevant arrest warrant relates,
> >
> > (b) who is the subject of proceedings in that state for an offence in that state to which the relevant arrest warrant relates,

(c) who has been convicted of, but not yet sentenced in respect of, an offence in that state to which the relevant arrest warrant relates, or

(d) on whom a sentence of imprisonment or detention has been imposed in that state in respect of an offence to which the relevant arrest warrant relates,

that person shall, subject to and in accordance with the provisions of this Act, be arrested and surrendered to the issuing state."

18. It is wholly exceptional for the High Court to refuse surrender on foot of a valid EAW once the formal proofs are met (see judgment of Charleton J. in *Minister for Justice & Equality v. Campbell* [2022] IESC 21, [2022] 2 I.L.R.M. 28 at para. 5).

Execution of sentence in requested state

19. Article 4(6) of the EAW FD provides that surrender may be refused if, subject to certain preconditions, the requested state had undertaken to execute the sentence in its own domestic system. Refusal on this ground requires compliance with certain conditions as follows:

"6. if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law".

20. Article 4(6) does not create a legal basis for the execution of a sentence in a Member State without an undertaking being expressly given by that state that it will so execute the sentence. Absent an undertaking the part of the executing state to enforce the sentence, it is established that no entitlement on the part of the requested person exists to require provision to be made for the service of a custodial sentence in the executing state: *Popławski (No. 1)* and Case C-554/14 *Ognyanov* (ECLI:EU:C:2016:514).

21. The essential element of the system is to ensure that a person does come to serve the sentence lawfully imposed by another contracting state. The system envisaged requires that the sentence must be executed in an identified place, as otherwise there might be a risk of impunity.

22. At para. 22 of its judgment in *Popławski (No. 1)* the CJEU said

> "…. any refusal to execute an EAW presupposes an actual undertaking on the part of the executing Member State to execute the custodial sentence imposed on the requested person, even though, in any event, the mere fact that that Member State declares itself 'willing' to execute the sentence could not be regarded as justifying such a refusal. This indicates that any refusal to execute an EAW must be preceded by the executing judicial authority's examination of whether it is actually possible to execute the sentence in accordance with its domestic law. In the event that the executing Member State finds that it is in fact impossible to undertake to execute the sentence, it falls to the executing judicial authority to execute the EAW and, therefore, to surrender the requested person to the issuing Member State."

23. In the strict practical sense, Article 4(6) is a method of the substitution of the place where the sentence may be served, and therefore does not give rise to the risk of impunity for a convicted person, one of the risks highlighted in the authorities.

24. In the present case, two of the conditions under which surrender may have been refused and the sentence served in Ireland are met: the request is that the appellant be returned to Lithuania to serve the remainder of a sentence and he is a resident of Ireland, the requested state. But Ireland has not undertaken to permit him to serve his sentence in this jurisdiction. Moreover, even had this State undertaken to permit the appellant to serve his sentence in Ireland, a decision to refuse surrender remained one for the discretion of the executing judicial authority. No right to insist on refusal could be said to arise by reason of the appellant satisfying the conditions in Article 4(6) of EAW FD.

25. Article 5(3) of the EAW FD permits a Member State to provide by law that execution of a warrant may be subject to the condition that the person, after being heard, is to be returned to the executing State in order to serve the sentence imposed by the issuing State in the former:

> "where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State."

Framework Decision 2008/909/JHA

26. The focus of this appeal is the fact that Ireland has not implemented the Framework Decision adopted in 2008, Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. The aim of the 2008 FD is to facilitate the rehabilitation of convicted persons by making it easier for that person to seek to serve a sentence in another state. It provides for the establishment in each Member State of a mechanism to enforce within its territory a prison sentence imposed by another Member State, and provides also for the transfer of convicted prisoners for the purpose of serving a sentence either back to the Member State of which they are nationals or where they normally live, or to another Member State with which they have close ties.

27. The 2008 FD intends to further support and ensure "the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union". The recitals record the desirability of enhancing the possibility of social rehabilitation of the

sentenced person and that an executing state is to take account of such elements as for example the requested person's attachment to the executing state, and the place of family, linguistic, cultural, social, economic or other links to the executing state.

28. The purpose of the instrument is described in Article 3 as "to establish the rules under which a Member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognise a judgment and enforce the sentence." Member States are, in the light of that objective of social rehabilitation, to adopt measures for the enforcement of the sentence of another Member State. Article 4(6) requires a Member State to adopt measures, in particular taking into account the purpose of facilitating social rehabilitation of the sentenced person, constituting the basis on which their competent authorities have to take their decisions regarding the place where a sentence may be served. Article 8 provides that subject to Articles 4 and 5 each Member State shall recognise and take steps to enforce within its own jurisdiction a judgment imposing a custodial sentence forwarded to it in accordance with Article 4, subject only to the grounds of non-recognition contained in Article 9.

29. Significantly, for the purposes of this appeal, Article 4(5) of the EAW FD provides that the sentenced person may request the competent authorities of either the issuing State (the State in which the judgment was delivered) or the executing State (the State that is requested to recognise and enforce the judgment) to initiate the necessary procedures for the transfer of the sentenced person to the executing Member State for the service in that state of the custodial sentence:

> "if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country".

30. A request to be permitted to serve a sentence in a place other than that where it was pronounced does not create an obligation on the executing state to permit or facilitate that to happen.

31. Article 25 makes particular provision for cases in which an EAW has been issued in the following terms:

> "Without prejudice to Framework Decision 2002/584/JHA, provisions of this Framework Decision shall apply, *mutatis mutandis* to the extent they are compatible with provisions under that Framework Decision, to enforcement of sentences in cases where a Member State undertakes to enforce the sentence in cases pursuant to Article 4(6) of that Framework Decision, or where, acting under Article 5(3) of that Framework Decision, it has imposed the condition that the person has to be returned to serve the sentence in the Member State concerned, so as to avoid impunity of the person concerned."

Implementation of 2008 FD

32. Member States were obliged by the provisions of Article 29(1) to take the necessary measures to implement the 2008 FD by 5 December 2011, and to furnish the Council and the Commission with the text of the provisions transposing it not later than 5 December 2012.

33. The obligation imposed on a state by Article 29(1) is one that may be enforced by the Commission. In view of this State's failure to transpose this aspect of the 2008 FD by appropriate legislation, the Commission commenced infringement proceedings against this State in which the Court of Justice delivered judgment on 24 March 2022, Case C-125/21, *European Commission v. Ireland* (ECLI:EU:C:2022:213). The conclusion of the Court of Justice was that by failing to adopt within the prescribed period the laws, regulations and

administrative provisions necessary to comply with the 2008 FD amounted to a failure by Ireland to fulfil its obligations under the 2008 FD.

34. It is this failure of Ireland to meet its transposition obligations that has been the focus of argument in the present appeal. The appellant argues that by reason of that failure of Ireland to put in place a structure by which he could apply here to serve the remainder of his sentence in Ireland, and be close to his partner and small children, that he has been denied a right, at a minimum a right to apply to serve his sentence in Ireland, and that because this right is intrinsic to the entire structure of the mutual recognition and enforcement of sentences, he should not be surrendered to Lithuania.

The High Court

35. In his initial efforts to resist an order for surrender in the High Court, the appellant swore an affidavit in which he averred that he had fled Lithuania in 2014 due to fear that he would be subjected to sexual and physical assault and to other ill-treatment in prison there. He also relied upon Article 8 of the European Convention on Human Rights, arising from the fact that he had by the time the application for surrender came to be heard established a family life within this jurisdiction. His partner swore an affidavit in which she referred to the difficulties that she would have visiting him in Lithuania.

36. There followed a sequence of written submissions from both parties. Those filed on behalf of the appellant included a request to the court to put in place the process for which the 2008 FD provided, by which he could apply to serve the balance of his sentence in Ireland, should his aforementioned submissions not succeed.

37. The appellant's submissions in relation to prison conditions were not accepted by the trial judge and that aspect is not relevant to this appeal. Having regard to the judgment of this Court in *Minister for Justice and Equality v. Vestartas* [2020] IESC 12, Paul Burns J. further

found that the appellant's rights in relation to his personal and family life would not be breached by surrender.

38. The arguments relating to the 2008 FD are dealt with in paras 23 to 28 of the judgment.

39. The High Court judge considered that to refuse surrender on the basis of the failure of the State to opt into a particular Framework Decision would be to introduce a new ground for refusal of surrender which was not provided for in the EAW FD and would be a contravention of same. In this regard, he referred to his own judgment in *Minister for Justice v. Schweissing* [2021] IEHC 461.

40. In *Schweissing*, the issuing judicial authority had acknowledged that the circumstances of the requested person were such as to justify him serving his sentence in Ireland, if there had been a legal mechanism by which that could be arranged. However, Burns J. considered, as had Coffey J. in *Campbell v. Ireland* [2021] IEHC 162, that rights provided for under a Framework Decision were not enforceable by private individuals, in national courts, as against a State that had failed to transpose it. A private person could not bring an action to compel transposition of, and a national court could not give effect to the rights conferred by, a Framework Decision. He referred to the judgment of the CJEU in case C-416/20 PPU, *TR v Generalstaatsanwaltschaft Hamburg* (ECLI:EU:C:2020:1042), in which it had been stated that the provisions of a Directive (in that case, one concerned with the presumption of innocence and the right to be present at a trial) could not be relied upon to prevent the execution of an EAW. To do so would be to permit the circumvention of a system established by the EAW FD, which provided an exhaustive list of grounds for non-execution.

41. Finally, the trial judge rejected the submission that the failure of the State to implement Article 4(6) of the 2008 FD amounted to a failure to respect and protect the appellant's human dignity, holding that there was no authority for such a proposition and that it was unsupported by any plausible argument.

42. As noted above, leave to appeal the decision of the High Court to this Court was granted with respect to the question of whether the failure of Ireland to implement the 2008 Framework Decision gives rise to any entitlement to resist the execution of the EAW. The Determination of the Court noted the error into which the High Court judge appears to have been led, and that it may have prevented a full consideration of the issue, and that his judgment was capable of causing confusion in other cases.

43. The judgment contains certain significant errors, and it must be stated that those errors stem directly from acknowledged misstatements in the submissions made to the High Court on behalf of the respondent, said to have come about in the process of editing the written submissions.

44. First, it is apparent that the trial judge was led to believe that the High Court had, in *Campbell v. Ireland*, already rejected an argument that the State was obliged to implement the 2008 FD.

45. Second, the judgment of Burns J. states, in error, that the CJEU had in *X* (Case C-665/20 PPU) confirmed that Article 4 of the 2008 FD was optional. That case was concerned with Article 4 of the EAW FD and the optional grounds for non-execution of warrants, and did not as such deal with the 2008 FD. Nothing turns on that error for the purpose of the present appeal.

46. The respondent now acknowledges the errors in its High Court submissions which led to errors in the High Court judgment. However, it is submitted that the errors in that judgment as to the status of Ireland's obligation to enact the 2008 FD did not lead the High Court into error in the result, as the High Court correctly stated the legal position in relation to this obligation with reference to the previous judgment in *Minister for Justice v. Schweissing*.

The infringement proceedings against the State

47. As to the first error, Burns J., presumably in reliance on the erroneous submissions of counsel, wrongly concluded that it was clear that the State was under no obligation to give effect to the 2008 FD. Because of that error, it is important at this juncture to set out the finding of the CJEU that Ireland was indeed in breach of its obligations on account of the failure to transpose.

48. Prior to the Treaty of Lisbon, the powers of the Commission and of the Court of Justice did not extend to measures adopted in the field of police and judicial cooperation under the Third Pillar of the Maastricht Treaty. Protocol 36 of the Lisbon Treaty provided that this situation should continue for a five-year transitional period (from 1 December 2009 to 1 December 2014).

49. In December 2014, the Commission requested all Member States to notify to it of all national measures transposing acts of the Union in the field of police and judicial cooperation in criminal matters which had been adopted before the entry into force of the Treaty of Lisbon. Ireland did not respond until a letter of formal notice was received in January 2019. At that point it was stated that transposition measures to give effect to the 2008 FD were being drawn up. In July 2019, the Commission sent a reasoned Opinion, inviting the State to take the necessary measures within two months of the receipt of the notice.

50. At that point Ireland responded that it was making "every available effort" to enact the measures necessary for transposition. It drew the Commission's attention to the fact that it already had in place legislation implementing the Convention on the Transfer of Sentenced Persons – the Transfer of Sentenced Persons Acts, 1995 and 1997. The Commission then commenced the infringement proceedings referred above.

51. In the proceedings before the Court of Justice, Ireland argued that while the Transfer of Sentenced Persons Acts did not include many of the technical provisions required by the 2008

FD, they allowed the "spirit" of that measure to be applied. The Commission responded that the fundamental change brought about by the 2008 FD was the shift to a compulsory system of prisoner transfers in certain situations, while creating much broader possibilities for transfer than before. It further submitted that unlike the Council of Europe Convention of 21 March 1983 on the Transfer of Sentenced Persons, the 2008 FD applies where the actual transfer of the person is not required because he or she is already in the executing State.

52. In a judgment delivered on 24 March, 2022, *Commission v. Ireland* Case C-125/21, the Court held that the State had failed to fulfil its obligations under the 2008 FD. For present purposes it is relevant to note the content of paras. 21 and 22:

> "21. … where a Framework Decision is intended to create rights for individuals, it must be borne in mind that its provisions must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the requirement of legal certainty, under which the persons concerned must be enabled to ascertain the full extent of their rights…
>
> 22. In the present case, while Framework Decision 2008/909 is intended to create rights for sentenced persons, the national provisions adopted on the basis of the Convention on the Transfer of Sentenced Persons do not contain any reference to that Framework Decision".

53. As of the time of the hearing of the appeal, and the delivery of this judgment, the State had yet to enact legislation implementing the 2008 FD (although two other Framework Decisions, dealing with enforcement of probation orders and supervision orders, have been implemented). It may be noted that in *Campbell v. Ireland*, Coffey J recorded that he had been informed that legislation giving effect to the 2008 FD was expected to be enacted by the end of 2021.

54. The appellant argues however that, in the words of the CJEU, the 2008 FD was "intended to create rights" for persons in his circumstances, and that the failure of the Sate to enact legislation to give him an effective remedy to enforce those rights must mean that the State is precluded from executing the EAW, and that the failure of implementation amounts to a basis on which this Court could consider that the circumstances constitute an optional basis for refusal under Article 4(6) EAW FD .

The High Court judgment in *Campbell v. Ireland*

55. In *Campbell v. Ireland* the plaintiff, a person whose surrender was sought for prosecution of offences alleged to have been committed in Lithuania, brought proceedings for a declaration that the State had failed to transpose the 2008 FD, and that this failure amount to an infringement of the plaintiff's rights under Article 6 and Article 7 of the Charter of fundamental rights of the European Union. It was common case in those proceedings that the State was obliged to transpose it, had failed to do so, and that failure had already been the subject of complaint by the European Commission to the Court of Justice of the European Union. As noted above, the High Court judge in the present appeal was incorrectly told that Coffey J had held that Ireland was not obliged to transpose the 2008 FD.

56. That plaintiff was unsuccessful: Coffey J. concluded that the obligation imposed on the State by Article 29(1) of the 2008 FD was not justiciable at the suit of the plaintiff. He further held that the granting of a declaration would be utterly pointless, would serve no useful purpose, and could not itself have amounted to an "encouragement" to the State to conclude the implementation process. Coffey J. relied on the legal nature of Framework Decisions, as *ad hoc* legal instruments of intergovernmental action made under the Third Pillar of the Maastricht Treaty and which were not enforceable before the CJEU until the Lisbon Treaty. The judge held that the 2008 FD could not have direct effect and could not be enforced by a

private individual in a national court. Even if the principle of State liability established in *Francovich* could be extended to cover wrongful failure to implement a Framework Decision, it could not be invoked on a *quia timet* basis in respect of damage that had not occurred and might never occur. The plaintiff might never become a sentenced person.

57. The trial judge was misinformed as to the decision of Coffey J. Transposition is mandatory, and Ireland is in breach of its obligation to implement the 2008 FD.

Effect of non-transposition

58. The core question then on this appeal is the legal effect on the EAW process of the failure of the State to enact legislation implementing the 2008 FD.

59. The appellant argues that the combination of the non-transposition of the 2008 FD, and that Ireland has not given an undertaking pursuant to Article 4(6) of the EAW FD to permit him to serve his sentence here, has the effect of denying his right to the protection of his dignity.

60. The appellant accepts that neither the EAW FD nor the 2008 FD has direct effect. The position regarding Framework Decisions generally is clear from the decision of the CJEU in *Popławski (No. 1)* at para. 26:

> "In that regard, it must be pointed out that Framework Decision 2002/584 does not have direct effect. That is because that Framework Decision was adopted on the basis of the former third pillar of the European Union, in particular, under Article 34(2)(b) EU (in the version prior to the Lisbon Treaty). That provision stated that Framework Decisions are not to entail direct effect (see, by analogy, judgment of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraph 56)."

61. The respondent argues that, while the State is obliged to give effect to the 2008 FD, failure to do so is not a ground for refusal to surrender a person on foot of an EAW. It is not a ground provided for under the European Arrest Warrant Act 2003 or the EAW FD governing

grounds for the refusal of surrender. The respondent argues that the failure to transpose the 2008 FD, which does not have direct effect, does not in its terms give rise to any additional ground for refusing surrender on foot of a valid subsisting EAW. Such a ground does not fall within any of the mandatory grounds for non-surrender in Article 3 of that Framework Decision nor any of the optional grounds to which the State has given effect.

Discussion

62. The system introduced by the EAW FD is based on the principle of mutual recognition and is founded on the mutual confidence between Member States that their respective national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level and particularly in the Charter. This purpose and underlying mutuality of respect and confidence has been acknowledged in a large number of decisions of the CJEU, notably in *Aranyos and Căldăraru* C-404/15 and C-659/15, in *Spetsializirana prokurata* (Letter of Rights) C-649/19, and most recently confirmed in Case C-105/21, *IR* v. *Spetsializirana prokuratura* (ECLI:EU:C:2022:511).

63. The judgment of the Court of Justice in *IR v. Spetsializirana prokurata* also confirmed a proposition already established in the authorities that the EAW FD does not have direct effect under the EU Treaty itself but that its binding character places on national authorities an obligation to interpret national law in conformity with EU law as and from the date of expiry of the mandated period for transposition.

64. A Framework Decision does not have any direct legal effect on domestic legislation and does not and cannot of its nature confer a direct benefit on an individual. Framework Decisions were adopted under the Amsterdam Treaty of 1997, under the "Third Pillar" of inter-governmental cooperation. The legal effect of a Framework Decision derives from Article 34 of the Amsterdam Treaty which provides that the Council shall take measures and promote

cooperation between Member States exhibiting to the pursuit of the objectives of the Union and to that end may *inter alia* adopt Framework Decisions for the purpose of "approximation of the laws and regulations of the Member States. Framework Decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect".

65. After the Lisbon Treaty and the creation of the new European Union on 1 December 2009 the EU competence extended *inter alia* into judicial cooperation in criminal matters. What the competence did not extend to was a power to enact directly effective regulations or directives. Since 1 December 2014 Framework Decisions may be enforced by the Commission against Member States as is provided by Article 10 of Protocol 36 on transitional provisions. A full analysis of the sequence of legal instruments is set out in the judgment of Coffey J. in the High Court in *Campbell v. Ireland*.

66. The relevant feature of a Framework Decision for the current appeal is that the failure of a Member State to implement by domestic measures the provisions of a Framework Decision may result in an action by the Commission, as occurred in regard to the 2008 FD when the Commission brought Ireland's failure to implement before the Court of Justice of the European Communities.

67. The Court of Justice has made the decision quite clear in *Popławski (No. 1)* in the extract quoted above at para. 60.

68. The point was repeated in Case C-573/17, *Popławski* (ECLI:EU:C:2019:530) (hereafter "*Popławski (No. 2)*") (paras. 71-72) which concerned the 2008 FD:

> "71 Since those Framework Decisions do not have direct effect under the EU Treaty itself, it follows from para. 68 above that a court of a Member State is not required, solely on the basis of EU law, to disapply a provision of its national law which is contrary to those Framework Decisions.

> 72 In the third place, it should be recalled that, although the Framework Decisions cannot have direct effect, their binding character nevertheless places on national authorities an obligation to interpret national law in conformity with EU law as from the date of expiry of the period for the transposition of those Framework Decisions (judgment of 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835, paragraphs 58 and 61)."

69. It is accepted by the parties that the 2008 FD is not directly effective. This has a number of consequences which are fatal to the argument that surrender be refused.

70. First, because the 2008 FD is not directly effective it is not justiciable by a person whose surrender is requested. The fact that the 2008 FD was in the words of the Courts of Justice in *Commission v. Ireland* "intended to create rights" does not mean that it either itself did create justiciable rights enforceable by the requested person, or that it is to be treated in any manner as self-executing.

71. Second, if the 2008 FD does not have direct effect it cannot be relied upon to disapply conflicting national law: see paras. 62-63 of *Popławski* (*No. 2)*. The 2008 FD as a Framework Decision does not itself set out the conditions under which a Member State may opt to enforce a sentence within its jurisdiction.

72. Third, the 2008 FD is, as its title suggests, a framework agreement which leaves the details of implementation to domestic law. It is true that Ireland is in breach of this obligation, but no domestic legislative provisions exist which may be triggered by the appellant so as to make a request for the opportunity to serve his sentence in this jurisdiction.

73. Fourth, the structure of mutual recognition and enforcement creates a series of obligatory and discretionary factors which are listed "exhaustively", and in subject to one of the conditions "listed exhaustively therein": C-270/17 PPU *Tupikas* (ECLI:EU:C:2017:628). The system created by the EAW FD is intended to create a number of exclusive grounds on

which surrender could be refused. Those grounds operate in all Member States and reflect the mutual recognition of the criminal justice systems of the other States.

74. Fifth, whilst a number of optional grounds are set out in Article 4 of the EAW FD, these are the only optional grounds which may be available to a Member State to refuse surrender, depending on the manner by which they were implemented in national law.

75. Sixth, the 2008 FD provides that Member States are to establish procedures which may be availed of by a requested person to make application to serve a sentence in a place other than where it was imposed. The obligation on Member State is to create a right to apply. No obligation is thereby created which could compel a Member State to accede to an application to be permitted to serve a sentence in that state. No right is created by the 2008 FD, other than, once it is implemented, the right to apply for the benefit of a scheme envisaged by that Framework Decision and required to be implemented in domestic law. It does not create the right to serve a sentence in the Member State of the prisoner's choosing or where it might be argued optimal rehabilitation can best be achieved, but could, once implementing measures are in place, permit application to be made to serve the sentence in a place that might further the rehabilitation envisaged in the 2008 FD and which can be regarded as having a high value. But permission to substitute the place of execution will still depend on the existence of a scheme to serve the sentence in a state other than that where it is imposed, where the result of a request to be permitted to so do is not preordained but will depend on the assessment and application of discretionary factors by a deciding authority of the requested state.

76. The appellant cannot therefore be said to have a right, protected under the Treaties, or derived from the 2008 FD to serve a sentence imposed by Lithuania in this State where an EAW has been issued for his surrender to Lithuania to serve that sentence.

77. Seventh, and crucially, Ireland could not without compounding the failure already identified in *Commission v. Ireland* now refuse to surrender the appellant. The effect of doing

so would be precisely that undesirable effect which the Court of Justice has highlighted: "that the impunity of the requested person would be incompatible with the objective pursued" by the EAW FD and by Article 3 (2) TEU: *Popławski (No. 2)* at para. 82. The primary and core obligation is to ensure "that the custodial sentence is actually enforced". An obligation to permit a requested person to serve a sentence in the executing state "presupposes an actual undertaking on the part of that state to execute the custodial sentence imposed on the requested person". (*Popławski (No. 2)* para. 88).

78. In the present case this means that the practical effect of the failure of the State to implement by legislation the provisions of the 2008 FD does not change or modify the operation of the mandatory obligations contained in the EAW FD. The principle was explained in the very recent decision of the Court of Justice in Case C-105/21 *IR* v. *Spetsializirana prokurata*:

> "Although Framework Decision 2002/584 does not have direct effect under the EU Treaty itself, its binding character places on national authorities an obligation to interpret national law in conformity with EU law as from the date of expiry of the period for the transposition of that Framework Decision …
>
> Although the principle of conforming interpretation cannot serve as the basis for an interpretation of the domestic law of a Member State *contra legem*, it nevertheless requires that the whole body of that domestic law be taken into consideration and that the interpretative methods recognised by domestic law be applied, with a view to ensuring that the Framework Decision concerned is fully effective and to achieving an outcome consistent with the objective pursued by it." (paras 82-83).

79. For these reasons I would reject the argument of the appellant that surrender be refused on account of the failure of Ireland to comply with its obligations to put in place a scheme

under which a requested person could apply to be permitted to serve a sentence imposed in another Member State, and would dismiss the appeal on that ground.

Denial of Convention and Constitutional Rights, and Right to Dignity

80. The appellant makes a second argument grounded in what he says is a failure to afford respect to his right to dignity under the Convention and the Constitution, as it is his wish to be close to his family and to maintain in a not unduly burdensome way his connection and relation with them during his period in custody. He argues that there has been a failure by the Irish State to facilitate his rehabilitation and to respect his personal and private rights and his dignity. The High Court rejected his argument that to return to Lithuania would be a breach of his Article 8 rights and thus rejected his argument that the Court's discretion under Article 4(6) of the EAW FD should be exercised so as to preclude surrender. He now makes a different argument, based essentially on the same material fact of having formed a family in this jurisdiction. He argues that his personal right to dignity encompasses the right to be afforded optimal prospects of social rehabilitation, so that he might optimally reintegrate into Irish society.

81. In support of this argument, the appellant cites the assurance of the dignity and freedom of the individual found in the Preamble to Bunreacht Na hÉireann, and the right to respect for the dignity of a prisoner as confirmed by the High Court in *Connolly v. Governor of Wheatfield Prison* [2013] IEHC 334 at para. 15:

> "for its part the judicial branch must nevertheless exercise a supervisory function to ensure that the essence of these core constitutional values and rights – the dignity of the individual and the protection of the person – are not compromised: see, e.g., *Creighton v. Ireland* [2010] IESC 50, per Fennelly J."

82. The appellant further cites Article 2 and 6 of the TEU and Article 67(1) of the TFEU in support of the argument that the right to dignity is protected at a European level, and refers to Case C–377/98 *Netherlands v. Parliament and Council* (ECLI:EU:C:2001:523), at para. 70 where it is stated:

> "It is for the Court of Justice, in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed."

83. The respondent notes, and I agree, that the appellant advances no case law in support of this argument that the right of dignity should extend to someone subject to an EAW who wishes to remain in a country for family and rehabilitation purposes."

84. In my view, the appellant's argument is flawed. The 2008 FD cannot operate with direct effect on domestic legislation, it does not impose an obligation on an executing State to permit service by a convicted person of a sentence in that State, and does not mandate a particular result. At best the obligation on a Member State is to put in place a structure where application can be made. The link to a supposed breach of the right to dignity is remote and tenuous.

Legitimate expectation

85. The appellant submits that the non-transposition of the 2008 FD defeats his legitimate expectation to be entitled to benefit from of having an option to make application to serve his prison sentence in the State, so that appellant and his family can build upon their integration into Irish society, an entitlement which is protected by the appellant's right to dignity.

86. The appellant submits that the defeat of his legitimate expectations has failed to satisfy his entitlement to legal certainty, and cites the CJEU in Case C-345/06, *Henrich* (ECLI:EU:C:2009:140) at para. 44 in support of this, where it is stated:

> "In particular, the principle of legal certainly requires that Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly."

87. There was no discussion in the appellant's submissions as to how it is alleged the well-established principles governing legitimate expectation, set out *inter alia* in *Glencar Exploration plc. v. Mayo County Council (No. 2)* [2001] IESC 64, [2002] 1 I.R. 84 are met. That ground was not advanced with any enthusiasm and I do not propose to consider it further. It fails for the same reason as the argument regarding a failure to respect the right to dignity. The expectation would be remote and too tenuously linked to the failure to implement 2008 FD to establish any basis to refuse surrender.

The failure of the State to implement

88. Notwithstanding the conclusion to which I come, it seems to me that the failure of the State to meet its European obligations, and the fact that at the date of the hearing counsel was unable to clarify when and if legislation was likely to be enacted to implement the 2008 FD, should not go unmarked and, still less, uncriticised. This appeal must fail by reason of the fact that the appellant cannot establish a legal basis on which he can resist surrender in the light of the nature of the closed system established by the EAW legal process. Nonetheless, the Court of Justice has already observed that the 2008 FD was intended to create rights and to facilitate the high value of integration into society and the rehabilitation of convicted persons. This appellant has established a family life in Ireland, that family life could have been fostered and supported were the appellant permitted to serve his sentence in this jurisdiction where visits by his partner and children to him in prison could more easily have been facilitated, and would have been less costly and burdensome to them.

89. The failure of the State to transpose the 2008 FD could have a suitable case to give rise to a consideration by a court whether exceptionality does exist for the purpose of resisting surrender on Article 8 ECHR grounds, by reason of the non-availability of the option to serve a sentence in the requesting State sufficient to meet what is undoubtedly the very high bar required to resist surrender having regard to the mandatory nature of the EAW process, and the fact that a defence to surrender based on Article 8 can succeed only on cogent and very strong grounds. Those grounds have not been shown nor sought to be shown in this case, and the appellant has relied entirely on arguments from principle rather than fact. The failure of the State could possibly lead to unintended and extreme consequences in some circumstances not here present, but I note my concern here because it seems to me that the failure of the State to transpose the requirements of Article 4(5) of the 2008 FD has become a matter of some urgency.

90. Although the State's failure to transpose cannot be defended, this cannot for the reasons I have stated, affect the rights of the appellant.

91. I would accordingly dismiss the appeal.