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THE EUROPEAN ARREST WARRANT: THE VIEW FROM THE JUDICIARY

The Honourable Mr Justice Bernard McCloskey
Court of Judicature of Northern Ireland

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I INTRODUCTION

[1] The subject of rights features prominently in The Council Framework Decision of 13th June 2002 ("*the Framework Decision*") and the transposing domestic legislation, The Extradition Act 2003 ("*the 2003 Act*"). Some of the more important rights enshrined in these two instruments are the following:

- A simpler and uncluttered judicial extradition process.
- An expedited process, wherein avoidable delay has enemy status.
- The obligation on the executing judicial authority to provide written reasons for any delay.
- Independent and impartial judicial oversight throughout.
- A series of due process rights – beginning with the prescribed form and content of the European Arrest Warrant ("*the EAW*").
- A right to apply for bail.
- The familiar common law "*audi alteram partem*" right, in a modern and European incarnation.
- The principle of informed consent.
- Protection against double jeopardy.
- Specific protection against the risk of the death penalty, torture or other inhuman or degrading treatment or punishment in the requesting State.
- The importation of the full range of HRA 1998 rights.
- Protection against extradition designed to facilitate prosecution of the requested person on what are now universally recognised proscribed grounds (race, religion, nationality, gender, sexual orientation and political opinion).
- Protection against oppressive extradition based on the passage of time only.

- A specific protection against extradition of a person who could not be convicted in the requesting State on account of his age.

- Special protection in cases where the requesting State is a party to the Hostage Taking Convention.

- The preservation of the "speciality" rule.

- The introduction of a "forum bar".

- A right of appeal.

Thus, the Framework Decision contains a veritable proliferation of rights, many of which are specifically designed for the benefit and protection of the requested person.

II THE EUROPEAN COMMISSION REPORT OF APRIL 2011

[2] The European Commission has just published an interesting report in which it reviews the operation of the Framework Decision since the year 2007 [Com (2011) 175]. One recalls that the Framework Decision is dated 13th June 2002 and it came into operation on 1st January 2004. The Extradition Act 2003 came into operation on the same date. It is uncontroversial that the Framework Decision had a series of overarching aims. Foremost amongst these was the reduction of delay and the introduction of a simpler and more streamlined process. One of the underlying rationales was to ensure that open borders within the EU area are not exploited by those seeking to evade justice. Fundamentally, the EAW operates as an instrument of mutual police and judicial co-operation amongst EC Member States.

[3] The European Commission Report contains some notable facts and figures:

- Between 2005 and 2009, some 55,000 EAWs were issued. Of these, almost 12,000 were executed. Between 51% and 62% of requested persons consented to surrender, on average within 14 to 17 days.

- For those requested persons who contested the EAW, the average surrender time was 48 days (compared with the previous average of one year).

Disproportionate resort to EAWs by certain Member States is identified as one of the concerns. For example, between 2005 and 2009, France issued some 7,300 EAW requests, of which a mere 1,500 (viz. approximately 20%) resulted in surrender. In contrast, the United Kingdom issued 665 EAW requests, resulting in 328 executions (viz. circa 50%). Poland issued a remarkable 17,000 EAW requests, with only 2765 successes (a mere 15%). Ireland issued 180 EAW requests, resulting in 40 executions (just over 20%). Focussing on the average surrender period of 48 days in contested cases: the Irish Department of Justice claims that the average period is 4 months (viz. circa 120 days) in such cases. However, it has been pointed out that in the celebrated Adams case, well over one year has elapsed since execution of the EAW, with no substantive hearing date looming.

[4] There is an increasing emphasis on the procedural rights of the requested person, recently recognised in Council Resolution of 30th November 2009, which identifies six priority measures (the so-called "Roadmap") :

- The right to interpretation and translation.

- The right to information about rights.

- Pre-trial legal advice and legal aid for trial.

- A right to communicate with family members, employers and consular authorities.

- Protection for vulnerable suspects.

- A Green Paper on pre-trial detention.

These measures are advancing presently within the forum of the European Parliament and Council.

[5] The issue of proportionality in this context stimulates much reflection. By Article 2(1) of the Framework Decision:

> "*A* [EAW] *may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least twelve months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months*".

There is general consensus among Member States that a proportionality check in the requesting State is essential, the aim being to discourage the issue of EAW requests in respect of minor offences. The proportionality check will embrace the following factors:

- The seriousness of the offence.

- The length of the available sentence.

- The existence of alternative approaches.

- A cost/benefit analysis in the execution of the EAW.

The Commission Report comments:

> "*There is a disproportionate effect on the liberty and freedom of requested persons when EAWs are issued concerning cases for which (pre-trial) detention would otherwise be felt inappropriate. In addition, an overload of such requests may be costly for the executing Member States.* ***It might also lead to a situation in which the executing judicial authorities ... feel inclined to apply proportionality test, thus introducing a ground for refusal that is not in conformity with the Council Framework Decision or***

> ***with the principle of mutual recognition on which the measure is based on***".

[My emphasis].

One might observe that there are certain contradictions in this discrete passage. In particular, is the Commission missing the point? Would it not be altogether better to consider reform of the Framework Decision? Would this not be preferable to the subjectivity, unevenness and possible idiosyncrasy which a proportionality check might create? What about the availability of bail, in both states? In passing, a strong proportionality exhortation is contained in the so-called "Commission Handbook".

[6] The Report's main conclusion is as follows:

> "*… While the EAW is a very useful took for Member States in the fight against crime, there is room for improvement in the transposition and application of the Council Framework Decision. Protection of fundamental rights in particular must be central to the operation of the EAW system*".

The specific areas of concern then highlighted are transposition; fundamental rights; proportionality; training; implementation of complementary instruments; and the gathering and storage of statistics. The Framework Decision is described as "*an innovative and dynamic instrument*", which nonetheless requires ongoing close scrutiny and monitoring, with the adoption of improvement mechanisms in the aforementioned spheres. I would observe that a serious and comprehensive review of the Framework Decision seems entirely appropriate at this stage of its existence. In particular, by virtue of the entry into force of the Lisbon Treaty and the legally binding nature of the EU Charter of Fundamental Rights, the context in which the EAW currently operates has altered significantly.

III THE REQUESTED PERSON'S RIGHTS IN PRACTICE

[7] Analytically, in contemporary extradition proceedings the requested person enjoys a series of rights at three main stages:

(a) During the initial, pre-trial phase.

(b) Throughout the trial phase.

(c) Post-trial.

One is immediately struck by the consideration that no express rights are conferred on the requested person at the beginning of the extradition process viz. in the issuing state. This apparent gap might be usefully reconsidered. In particular, to fill it may not necessarily compromise any of the overarching aims and purposes of the Framework Decision.

[8] Some recent decisions in Northern Ireland place the spotlight firmly on the subject of the requested person's rights in extradition proceedings. These include the following:

- The propriety of applying to the High Court for judicial review in the midst of extant extradition proceedings in the relevant lower court.
- The availability of the remedy of habeas corpus in the same situation.
- The application of the doctrine of abuse of process to extradition proceedings.
- The propriety of convening preliminary hearings in extradition proceedings.
- How the liberty of the subject is to be evaluated.
- The application of the triangulation of interests principle.
- The form and content of the EAW: Articles 8 and 15, Framework Decision.
- The ensuing rights conferred on the requested person.
- Revocation of the grant of bail, in the context of an undetermined appeal against extradition.

- Article 5/1 ECHR and the Strasbourg principle of legality.

- The rights of the absconding appellant.

The discourse which follows is based on a framework (in Northern Ireland) in which the three layers of judicial decision making are:

(a) At first instance, the Recorder of Belfast, who is the designated statutory extradition judge.

(b) On appeal, the Divisional Court.

(c) On further appeal, the Supreme Court.

Habeas Corpus and Judicial Review

[9] In ***Re Campbell's Application*** [2009] NIQB 82, the Divisional Court in Northern Ireland was seised of an application for a Writ of habeas corpus ad subjiciendum, coupled with an application for leave to apply for judicial review. The Applicant was one of several persons whom the Republic of Lithuania have requested be extradited to that country. European arrest warrants were issued in both the United Kingdom and the Republic of Ireland. The Applicant was arrested in the Republic of Ireland on foot of the arrest warrant and proceedings were commenced in that jurisdiction to extradite him to Lithuania. He was, in the language of the governing legislation the "requested person" and Lithuania was the "requesting State" (or "issuing State"). The evidence established that the requesting Lithuanian authority transmitted a EAW, dated 18 December 2008, framed in identical terms, to the relevant agencies in both the Republic of Ireland and Northern Ireland. According to its terms, the issuing judicial authority was the "Prosecutor General's Office of the Republic of Lithuania" and it was signed by the Deputy Prosecutor General. It recited that the Applicant was suspected of criminal offences attributed to a terrorist group involving the supply of firearms, ammunition, explosive devices and substance. He was one of four Irish suspects. Pursuant to the EAW, extradition proceedings commenced in both Northern Ireland and the Republic of Ireland. The applications to the Northern Ireland Divisional Court for a Writ of habeas corpus and judicial review were made when the proceedings in both jurisdictions were uncompleted, in circumstances where the Recorder had convened a preliminary hearing in which he rejected the requested person's contention that the Northern Ireland extradition proceedings were an abuse of the court's process.

[10] Two particular issues bearing on the Defendant's rights fell to be determined. The first was whether the Recorder had erred in entertaining a preliminary application based on abuse of process. The second was whether

the applications to the Divisional court for habeas corpus and judicial review constituted inappropriate satellite litigation. In its judgment, the Divisional Court highlighted that the distinctions between the two forms of legal challenge (viz. habeas corpus and judicial review) are not merely technical. They include, most importantly, differences in procedure, parties and available remedies. The appropriate option will inevitably depend on the particular context. In cases of genuine doubt, the challenging party may wish to initiate both forms of proceeding, as in the ***Campbell*** case. In ***Gronostajski –v- Governor of Poland*** [2007] EWHC 3314 (Admin), which entailed an application for habeas corpus in the context of EAW proceedings, Richards LJ observed:

> *"[8] I have to say at the outset, although this point has not been taken by the requesting authority, that I have real doubts as to whether habeas corpus is the appropriate procedure in this case. The claimant is detained in prison pursuant to an order of the court that is, on its face, perfectly valid and within the jurisdiction of the court. That is not in dispute. The true target of the challenge is not the prison governor but the district judge, the case being that he erred in declining to order discharge. That seems to me to be a challenge properly brought by way of judicial review against the Magistrates Court, not by way of habeas corpus against the prison governor".*

In ***Owens –v- City of Westminster Magistrates Court*** [2009] EWHC 1343 (Admin), the court duly noted this observation of Richards LJ: see paragraph [12]. The distinction between the two forms of proceeding is neatly encapsulated in ***The Queen –v- Home Secretary, ex parte Cheblak*** [1991] 1 WLR 890, at p. 894:

> *"A Writ of habeas corpus will issue where someone is detained without any authority or the purported authority is beyond the powers of the person authorising the detention and so is unlawful. The remedy of judicial review is available where the decision or action sought to be impugned is within the powers of the person taking it but, due to some procedural error, a misappreciation of the law, a failure to take account of relevant matters, or taking account of irrelevant matters or the fundamental unreasonableness of the decision or action, it should never have been taken".*

[11] The Northern Ireland Divisional Court reasoned that the proper Respondent to the application for habeas corpus was the relevant prison Governor. It considered that to issue a Writ of habeas corpus to the governor would not expose, for determination, the real issue, which was the Recorder's reasons for dismissing the Defendant's abuse of process complaint. The

Governor would, predictably, return the Writ duly endorsed with references to the EAW, the Recorder's ruling and the Recorder's further, independent rejection of the Defendant's application for bail. The court accepted that, challenges to the legality of a person's detention in extradition cases have, conventionally, been brought by applications for the Writ of habeas corpus. This is exemplified in ***The Queen –v- Governor of Brixton Prison, ex parte Mehmet*** [1962] 2 QB 1. In ***The Queen –v- Oldham Justices and Another, ex parte Cawley*** [1997] QB 1, Simon Brown LJ was disposed to accept that in extradition cases, habeas corpus had, traditionally, become "the accepted remedy" (at p. 17), echoing the language of The Law of Habeas Corpus (Sharpe, pp. 62-63). Notably, however, in the passage in this text there is a strong emphasis on the nature of the decision under challenge:

> "*Perhaps the most important factor in any given case is to consider the nature of the decision or proceeding to be reviewed …*
> *Where the decision is one in respect of which there really is no other form of redress, or is one concerning which habeas corpus has become the accepted remedy, the courts will wield whatever powers of review are necessary to give relief where it is thought that something has gone wrong …*
> *The significant matter for consideration is the nature of the decision to be reviewed rather than the nature of the error alleged*".

While this passage suggests that there should be some flexibility in the court's approach, having regard doubtless to the hallowed importance of the liberty of the citizen, it nonetheless supports the view expressed in Halsbury's Laws of England [4th Edition 2001 Re-issue], Volume 1(1), paragraph 210 that the Writ of habeas corpus is a remedy of last resort.

[12] In ***Campbell,*** the Divisional Court concluded that the Application for a Writ of habeas corpus was misconceived:

> *"[29] In the particular circumstances of the present case, we consider that an application for judicial review is more appropriate than an application for the Writ of habeas corpus. The former method of challenge has the merit of identifying the real Respondent and, in accordance with well established practice in this jurisdiction, putting such Respondent on notice of the challenge at the outset. This, in turn, enhances the court's prospects of being fully informed, receiving all material evidence and hearing argument from both parties at the earliest possible stage. The present case illustrates how desirable these advantages are, given the issue that was ventilated about the response of the Lithuanian requesting authority to the Recorder's*

> *enquiry of 27th May 2009 and, in this respect, the precise terms in which the Recorder expressed himself in court two days later (see paragraph [17](d), supra). Self-evidently, the prison governor could not have contributed to the court's understanding of these evidential issues. Nor would the governor have been in a position to supply the court with the additional documentary evidence which was provided, without objection, by Mr. Simpson QC. The final consideration is that this conclusion entails no injustice to the Applicant (bearing in mind that his liberty is in issue), given that, on a precautionary basis, simultaneous applications for a Writ of habeas corpus and leave to apply for judicial review have been mounted*".

The Divisional Court further highlighted an important issue of procedural rights:

> "*[30] In the particular circumstances of the present case, we consider that an application for judicial review is more appropriate than an application for the Writ of habeas corpus. The former method of challenge has the merit of identifying the real Respondent and, in accordance with well established practice in this jurisdiction, putting such Respondent on notice of the challenge at the outset. This, in turn, enhances the court's prospects of being fully informed, receiving all material evidence and hearing argument from both parties at the earliest possible stage. The present case illustrates how desirable these advantages are, given the issue that was ventilated about the response of the Lithuanian requesting authority to the Recorder's enquiry of 27th May 2009 and, in this respect, the precise terms in which the Recorder expressed himself in court two days later (see paragraph [17](d), supra). Self-evidently, the prison governor could not have contributed to the court's understanding of these evidential issues. Nor would the governor have been in a position to supply the court with the additional documentary evidence which was provided, without objection, by Mr. Simpson QC. The final consideration is that this conclusion entails no injustice to the Applicant (bearing in mind that his liberty is in issue), given that, on a precautionary basis, simultaneous applications for a Writ of habeas corpus and leave to apply for judicial review have been mounted*".

[13] The Divisional Court then turned to address the question of whether the requested person's applications for habeas corpus and judicial review were a species of inappropriate satellite litigation. In doing so, it noted the

statement of the English Divisional Court in ***USA –v- Tollman*** [2008] EWHC 184:

> *"[80] The 2003 Act makes express provision for extradition to be refused when the request is motivated by 'extraneous circumstances' that under English law would constitute an abuse of process and for these and human rights issues to be considered as part of the extradition hearing. Where extradition is challenged on grounds, such as abuse of process, which are not dealt with expressly under the Act they should nonetheless normally be considered within the extradition hearing. The 2003 Act lays down special rules in relation to extradition that are designed to ensure that extradition proceedings are concluded with expedition. This objective will be torpedoed if allegations of abuse of process are pursued outside the statutory regime."*

The court concluded:

> *"While there is some merit in Mr. Fitzgerald's submission that the Applicant's abuse of process complaint had the character of a threshold issue which sounded on the propriety of the entire proceedings, nonetheless we consider that it is only in exceptional circumstances that preliminary hearings of this kind should be conducted in extradition applications. The same approach should apply to applications for judicial review during the currency of such proceedings. There is no reason why, exceptional circumstances apart, all issues cannot be considered within the extradition proceedings rather than have piecemeal hearings with consequent delay of the hearing of the main issue and increased costs. While the circumstances giving rise to the abuse of process application were unusual there was nothing so exceptional about them that they could not have been dealt with during the main hearing."*

[14] The final rights issue considered in ***Re Campbell*** concerned the availability of remedies. The argument advanced on behalf of the requesting state was that the only avenue of challenge to the Recorder's ruling dismissing the requested person's abuse of process application was to await the substantive hearing and final order and then to appeal. This argument was based on Sections 26 and 34 of the 2003 Act. The effect of the judgment of Laws LJ in ***R (Birmingham and Others) –v- Director of Serious Fraud Office*** [2007] 2 WLR 635 appears to be that a complaint of abuse of process is to be added, by the device of implication, to the various statutory bars enshrined in Section 11 of the 2003 Act and detailed in the ensuing provisions thereof. Laws LJ explicitly concluded that the judge conducting an extradition hearing

possesses an implied jurisdiction to hold that the prosecutor is abusing the court's process, the underlying rationale being the imperative that the integrity of the regime must not be usurped: see paragraph [97]. How does this impact on Sections 26 and 34 of the 2003 Act? This very question arose in ***Nikonovs –v- Governor of HM Prison Brixton and the Republic of Latvia*** [2006] 1 WLR 1518, where the issue ventilated was whether the Applicant had, in compliance with Section 4(3) of the 2003 Act, been brought before the appropriate judge "as soon as practicable". The District Judge refused to discharge the Applicant and an application for habeas corpus ensued. This required the Divisional Court to determine whether this form of challenge was available, having regard to the appeal provisions of the 2003 Act. The court held that an application for habeas corpus could properly be brought. Having considered the relevant Hansard materials, Scott Baker LJ concluded:

> *"[18] Habeas corpus is directed to the lawfulness of a person's detention. Section 34 is silent as to the right to challenge by habeas corpus the lawfulness of continuing detention resulting from an erroneous decision of a judge under Section 4(5) not to discharge the claimant. True by Section 4(6) a person is to be treated as continuing in legal custody until he is discharged under subsection (5) but I would not regard lawful custody as continuing after a decision is taken not to discharge him when he should have been discharged. Absent a right of appeal, did Parliament really intend habeas corpus should not be available. Did Parliament really intend that a person who ought to have been discharged because he should have been brought before the appropriate judge sooner, but nevertheless remains in custody, should have no remedy? In my view the passages from Hansard that I have cited make the answer clear beyond peradventure. It would in my judgment require the strongest words in a provision such as Section 34 to remove the ancient remedy of habeas corpus."*

In thus concluding, the court also emphasized the historical pedigree and constitutional pre-eminence of the remedy of the Writ of habeas corpus.

[15] In ***Re Campbell***, the Northern Ireland Divisional Court followed the decision in ***Nikolovs***. The court stated:

> *"[35] We agree with the decision in **Nikonovs** and propose to follow it accordingly. We would add that, in our view, the decision of the Recorder in this matter, given under the guise of a preliminary ruling, cannot be properly characterised, in the language of Section 34, a "decision of the judge under this Part". There is nothing in Part 1 of the 2003 Act which makes provision for a preliminary ruling of the kind made in*

the present case. Of course, having regard to the general rule enshrined in ***Tollmann****, paragraph [80], the ruling of the court on any complaint of abuse of process will, in the generality of cases, be incorporated in its substantive decision on the extradition application. That, however, is not this case.*

[36] Furthermore, we are satisfied that, taking into account the close association between the two forms of legal challenge and the uncertainties which may genuinely arise at the interface which separates them, the reasoning in ***Nikonovs*** *applies also to applications for judicial review in the context of extradition cases. We consider that Section 34 does not have the effect of ousting the supervisory jurisdiction of the High Court in this field. The treatise in Administrative Law (Wade and Forsyth, 9th Edition, pp. 712-726) reinforces the correctness of this conclusion. As the authors observe, there is a presumption against any restriction of the supervisory powers of the High Court (p. 712). As the authors further observe, following the leading decision in* ***Anisminic –v- Foreign Compensation Commission*** *[1969] 2 AC 147:*

> *'According to the logic of the House of Lords, 'shall not be questioned' clauses must now be totally ineffective. Every error of law is jurisdictional; and error of fact, if material, is either jurisdictional or unreviewable anyway. So there is no situation in which these clauses can have any effect.'"*

[16] Finally, the Divisional Court confronted the requested person's judicial review challenge. This was based on asserted errors of law and misdirections. The court observed:

> *"[39] The contours of the doctrine of abuse of the court's process have become familiar during recent years, particularly in the context of criminal prosecutions. As noted above, the operation of this doctrine in the specific context of extradition proceedings has been expressly acknowledged: see* ***Bermingham*** *and* ***Tollmann****. As explained by Laws LJ in* ***Bermingham****, this entails the implication of a statutory power designed to prevent the usurpation of the integrity of the statutory regime. We consider that it would be inappropriate to attempt any definition of the scope and boundaries of the court's jurisdiction in this respect. These will be developed gradually, on a case-by-case basis. Moreover, it must be remembered that a substantial proportion of the decided cases belongs to the sphere of criminal prosecutions."*

The court then traced the evolution of the doctrine of abuse of the court's process, from ***DPP –v- Connolly*** [1964] AC 1254 to the more recent decisions, including the celebrated case of ***R –v- Horseferry Road Magistrates Court, ex parte Bennett*** [1994] 1 AC 42, where the House of Lords recognised that the doctrine of abuse of process extends to cases where a prosecution offends the court's sense of justice and propriety (per Lord Lowry, at p. 74g). In the same case, Lord Griffiths spoke of executive conduct which threatens either basic human rights or the rule of law (at p. 62). In the language of Lord Bridge, the abuse of process jurisdiction encompasses executive lawlessness and degradation of the court's process (see pp. 67-68). As the decision in ***Bennett*** makes clear, a misuse of the court's process can potentially occur by virtue of the circumstances in which the Defendant is brought before the court. In ***The Queen –v- Hui Chi-Ming*** [1992] 1 AC 34, Lord Hope opined that the doctrine embraces "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all respects a regular proceeding" (at p. 57b).

[17] As appears particularly from the speeches of their Lordships in ***Bennett***, an established feature of the doctrine of abuse of process of some importance is that it confers on the court a power to be exercised sparingly and selectively. See in particular per Lord Griffiths at p. 63, echoing the warning of Viscount Dilhorne in ***DPP –v- Humphries*** [1977] AC 1 that the court should have resort to this power only "in the most exceptional circumstances" and the formulation of Lord Lane CJ in ***The Queen –v- Oxford City Justices, ex parte Smith*** [1982] 75 CR. App. R 200, at p. 204 ("very strictly confined"). In ***Re DPP's Application*** [1999] NI 106, Carswell LCJ emphasized, at paragraph [33]:

> *"1. The jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons …*
> *2. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct".*

In ***Re Campbell,*** the Divisional Court also drew on the celebrated statement of Lord Steyn in ***Attorney General's Reference No. 3 of 1999*** [2001] 1 All ER 577, at p. 584, has some analogous force where applications to stay extradition proceedings are brought on the ground of abuse of process:

> *"The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It*

> *involves taking into account the position of the accused, the victim and his or her family and the public".*

The court was of the opinion that where an abuse of process complaint is ventilated, a contextualised evaluation, tailored to the specific features and context of the individual case, will invariably be required. This will entail the formation of an evaluative judgment on the part of the court. This judgment must be formed at the stage when the complaint is canvassed. Furthermore, given these considerations, a complaint of this nature will almost invariably not be susceptible to an answer which may be characterised right or wrong. Thus there will be scope for differing opinions, a truism noted in the analogous context of abuse of process rulings based on unfair trial arguments in criminal prosecutions:

> *"Whether a fair trial is possible will depend on the circumstances of the particular case and it is also a question on which even experienced judges might sometimes form different opinions".*

[***Regina –v- JAK*** (1992) CLR 30, at p. 31].

The Divisional Court was of the view that this observation applies with equal force to the present context.

[18] The final issue considered by the Divisional Court in ***Campbell*** was the correctness of taking into account the then current facts and realities, in light of certain developments which had occurred between the date of the impugned ruling of the Recorder and the date of hearing of the combined habeas corpus and judicial review applications. This issue was determined in the following manner:

> *"Moreover, we consider that there is an increasing emphasis in public law on substance, in preference to form and on the desirability of the High Court, in the exercise of its supervisory jurisdiction, taking into account the present facts and realities, which may differ from those prevailing at the time of the impugned decision of the inferior court or tribunal. The present case is a paradigm example, in this respect. We consider that it would be wrong for this court to overlook the fact that, within two weeks of the Recorder's ruling, the Republic of Lithuania withdrew its extradition request in the Dublin High Court. It seems to us that the effect of this development was to extinguish the cornerstone of the abuse of process complaint advanced to the Recorder. Added to this is the unequivocal acknowledgement on behalf of the Applicant that there is no challenge to the validity of the EAW or the Applicant's initial arrest pursuant thereto*

> *or the initiation of the proceedings in the Recorder's Court. Rather, the Applicant's challenge focuses on the perpetuation of such proceedings. Self-evidently, this complaint loses much of its momentum as a result of the discontinuance of the associated proceedings in the Republic of Ireland. This development serves to enhance and reinforce the findings and conclusions of the Recorder."*

The ultimate outcome was (a) an order dismissing the habeas corpus application and (b) an order granting leave to apply for judicial review and dismissing the application substantively. The Divisional Court subsequently declined to certify that its decision involved a point of law of general public importance, with the result that no appeal to the Supreme Court could ensue.

IV THE FORM AND CONTENT OF THE EAW

[19] In ***Kingdom of Spain –v- Arteaga*** [2010] NIQB 23, another important issue bearing on the rights of the requested person arose. In short, the right in play was the right not to be exposed to the risk of extradition on foot of a EAW which, in form and content, did not comply fully with the Framework Decision and the corresponding requirements of the 2003 Act. In accordance with Article 8, the EAW must have a prescribed form and content. Further, it must be translated into the official language of the executing Member State. Article 8 provides:

> *"Content and form of the European arrest warrant*
> *1. The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex:*
> *(a) the identity and nationality of the requested person;*
> *(b) the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority;*
> *(c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2;*
> *(d) the nature and legal classification of the offence, particularly in respect of Article 2;*
> *(e) a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;*
> *(f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;*
> *(g) if possible, other consequences of the offence.*
> *2. The European arrest warrant must be translated into the official language or one of the official languages of the executing Member State. Any Member State may, when this Framework Decision is adopted or at a later date, state in a declaration deposited with the General Secretariat of the Council that it will accept a translation in one or more other official languages of the Institutions of the European Communities.".*

The form contained in the Annex makes provision for the inclusion of information relating to, *inter alia*:

(a) The identity of the requested person.

(b) The decision on which the EAW is based.

(c) The maximum length of the relevant custodial sentence, actual or potential.

(d) The number of offences to which the EAW relates.
(e) A description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person.

(f) The nature and legal classification of the offence and the applicable statutory provision/code.

[20] The central role of the competent executing judicial authority in the EAW process is clear from a series of provisions contained in Chapter 2 of the Framework Decision. These include Article 11 (which is concerned with certain due process rights of the requested person) and Article 12 (whether the judicial authority should remand the requested person in custody or on bail). Any consent to surrender must be made before the judicial authority (per Article 13). Next, Article 14 provides:

> "*Where the arrested person does not consent to his or her surrender as referred to in Article 13, he or she shall be entitled to be heard by the executing judicial authority, in accordance with the law of the executing Member State*".

By Article 15:

> "*1. The executing judicial authority shall decide, within the time limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.*
> *2. If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3, 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in Article 17.*"

This latter provision featured particularly in the matrix of the ***Arteaga*** case. By Article 17(1), every EAW must be processed and executed "*as a matter of urgency*". Where the requested person consents to surrender, the final decision thereon should be taken within ten days of the provision of consent. In other cases, the final decision on execution of the EAW should be taken within a period of sixty days, beginning with arrest. If this cannot be achieved, the executing judicial authority must inform the issuing judicial authority,

providing reasons for the delay, whereupon the time limits may be extended by a further thirty days: see Article 17(4). By virtue of Article 17(6), where the executing judicial authority determines not to execute the EAW, a reasoned decision must be provided.

[21] The Recorder convened an initial hearing for the purpose of considering argument on certain preliminary issues. One of these was the requested person's contention that the EAW did not constitute a warrant within the meaning of and complying with Part 1 of the 2003 Act. The thrust of the argument advanced was that the warrant was defective as it failed to adequately particularise how, when and where the conduct alleged against the requested person had allegedly occurred i.e. the degree of his alleged involvement in the asserted offence, contrary to Section 2(4)(c) of the 2003 Act. [described hereinafter as "*the specificity issue*"]. The Recorder acceded to this argument. On foot thereof, he ordered the discharge of the requested person, thereby triggering the appeal provisions of Section 28 of the 2003 Act. The requesting State appealed. In its judgment, the Divisional Court considered the decisions in ***Office of the King's Prosecutor, Brussels –v- Cando Armas*** [2006] 2 AC 1, ***Dabas –v- High Court of Justice, Madrid*** [2007] UKHL 6, ***Louca –v- A German Judicial Authority*** [2009] UKSC 4, ***Palar –v- Court of First Instance, Brussels*** [2005] EWHC 915 and ***Von Der Pahlen –v- The Government of Austria*** [2006] EWHC 1672 (Admin).

[22] In its judgment, the Northern Ireland Divisional Court formulated the following general propositions:

> (a) There is no requirement that the EAW specify any of the evidence on which the accusation is based.
>
> (b) The merits of the accusation against the requested person do not fall to be considered by the executing judicial authority in the requested Member State.
>
> (c) The EAW should convey to the requested person the essence of the accusation.
>
> (d) This basic requirement confers due process rights on the requested person and subjects the surrender process to a sufficient degree of judicial superintendence. This facilitates, and is linked to, the discharge of the court's duty under Section 10 to decide whether the offence specified is an extradition offence.
>
> (e) Further, compliance with this basic requirement should help to expose whether any of the discretionary or obligatory statutory bars to extradition is in play and to ensure compatibility with the requested

person's Convention rights, in accordance with Section 21 of the 2003 Act.

(f) Any specification of particulars of … the conduct alleged to constitute the offence [the domestic statutory language] or the degree of participation in the offence by the requested person [in the language of the Framework Decision] will inevitably vary from one context to another.

(g) Such specification is bound to vary according to the nature of the offence alleged against the requested person.

(h) The nature of the offence alleged against the requested person must be considered by reference to the domestic law of the requesting state.

(i) In construing and applying Section 2(4)(c) of the 2003 Act in any given case, while the court must bear in mind particularly the overarching legislative aim of avoiding undue technicality and complexity, this is to be balanced with the other dominant principles and values articulated in the Framework Decision, which have been the subject of authoritative exposition in the decisions of the House of Lords in ***Cando Armas*** and ***Dabas*** (see paragraphs [17] and [18], *supra*).

[23] Having formulated these general principles, the Divisional Court expressed its overarching conclusion in the following terms:

> *"[32] The question to be addressed is whether the EAW complies with Section 2(4)(c) of the 2003 Act. We consider the fundamental test to be one of sufficiency of particulars, or information. In every case of this kind, there will be an interface between the particulars of the alleged offence (on the one hand) and supporting evidence of its commission (on the other). We consider that, in the present case, the particulars of the conduct alleged to constitute the offence in question contained in the EAW are couched in unacceptably vague and general terms. They are insufficiently specific and particularised. They require the requested State to engage in a process of interpretation, or conjecture, which neither the Framework Decision nor the 2003 Act permits. Ultimately, the accusation contained in the EAW resolves to an assertion that the requested person was a member of Jarrai and that such organisation engaged in a large number of public order and other offences during a lengthy period. There is a failure to include supporting particulars of conduct, time and place attributed in express and personal terms to the requested person. Even assuming that the EAW, as supplemented, is to be interpreted as alleging that*

> *the requested person indulged in **some** of the criminal activities formulated in general terms, there is no further particularisation specific to him. The emphasis throughout the EAW and the supplementary communications is on the corporate conduct of the organisation Jarrai, rather than the individual conduct of which the requested person is accused. In agreement with the Recorder, we conclude, therefore, that the EAW fails for want of particularity."*

In its judgment, the Divisional Court also gave consideration to the provisions of the relevant Spanish law, enshrined in the *Codigo Pelal*. This gave rise to the following further observation:

> "[33] *We would add the following. The court has no reason to suppose that under the Spanish legal system the offence of membership of an unlawful organisation differs fundamentally from its counterpart in the United Kingdom. This offence connotes adherence to, or affinity with, the outlawed group. In the abstract, it is possible that, in some hypothetical case, a requesting state may accuse the requested person of pure membership, or membership simpliciter, in an exclusively passive sense. Thus, for example, the basis of the case against the requested person might be an alleged confession of membership or a statement or other communication indicative thereof, without any suggestion of active participation of any kind. If such a case were to arise, we consider that it would be necessary for the EAW to spell this out in clear terms, bearing in mind the requirement contained in Section 2(4)(c) of the 2003 Act to specify "particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence …". In such a case, a carefully and clearly formulated statement of the accusation against the requested person in terms of conduct, time and place would be necessary, in order to satisfy the statutory requirements."*

The court added:

> "[34] *Such a hypothetical case is to be contrasted with the instant case, where the clear import of the EAW, duly confirmed by the supplementary communications, is that the conduct alleged to constitute the offence of which the requested person is accused by the Spanish Court partakes in some unspecified way of some of the broad descriptions of the unlawful activities attributed to Jarrai in general terms. The*

> *failure to condescend to the level of particularity required by both the 2003 Act and the Framework Decision is fatal to the EAW in the present case.*"

[24] The final noteworthy feature of the decision in ***Arteaga*** is that relating to the proper conduct of extradition proceedings and the procedural rights conferred on the requested person. The Divisional Court stated:

> "[35] ... *This court has previously sought to discourage the isolation and determination of preliminary issues in extradition proceedings: see* ***Re Campbell's Application*** *[2009] NIQB 82 (where judgment was promulgated following completion of the preliminary hearing in the present case)… In addition to minimising delay, uncertainty and expense, this approach has the further merit that any appeal to this court will be of a composite nature, ventilating all relevant issues at a single hearing and resulting in one judgment only. It is to be expected that this guidance will be duly heeded in future cases.*"

One is reminded that preliminary hearings can appear seductively attractive in many litigation contexts. However, they have invariably been discouraged by appellate courts, with the result that many judges and practitioners are familiar with the "*treacherous shortcuts*" admonition.

V REVOCATION OF BAIL

[25] The third rights issue in the context of extradition proceedings which has occupied the Divisional Court in Northern Ireland recently relates to the revocation of the grant of bail to a requested person. This question arose in ***De Juana –v- Kingdom of Spain*** [2010] NIQB 68, where the issue to be determined emerges from the opening paragraph of the Divisional Court's judgment:

> *"[1] The High Court, constituted as a Divisional Court, is seised of an application by the Respondent to revoke the Appellant's bail, commit him to custody and estreat his recognizance. The issues determined by this judgment are jurisdictional in nature. The main question is whether the High Court is empowered to take the measures requested. If the answer to this question is "no", the ancillary question is whether any court or agency is empowered to take measures to secure the Appellant's detention, in the circumstances prevailing. The answers to these questions are not to be found in the Extradition Act 2003 and it became clear at an initial hearing that the court should endeavour give some guidance."*

The material facts were that the Recorder acceded to the requesting state's application and ordered the extradition of the Appellant to Spain. Simultaneously, exercising his power under Section 21(4) of the 2003 Act, the Recorder remanded the Appellant on bail. The Appellant then exercised his right of appeal to the Divisional Court. The grant of bail to the Appellant contained a series of conditions, including requirements of reporting to the police and curfew limitations. The Appellant failed to comply with these conditions and it was widely supposed that he had absconded from the jurisdiction. This stimulated an application to *the Divisional Court* for an order revoking his bail, committing him to custody and estreating his recognizance. The fundamental question was whether the Divisional Court, being the relevant court of appeal, had jurisdiction to entertain and determine such application.

[26] In determining this issue, the Divisional Court gave consideration to a series of provisions in the 2003 Act: Sections 7, 9, 21, 26, 27, 29, 30, 198 and 200. Having done so, the court observed:

> "[11] *It appears to the court that there are three possible sources of a power to detain the Appellant, in the circumstances currently prevailing. These are, respectively:*
>
> > *(a) The inherent jurisdiction of the High Court.*
> > *(b) An implied statutory power invested in the Recorder, qua appropriate judge.*
> > *(c) Part II of the Criminal Justice (Northern Ireland) Order 2003."*

The court then proceeded to examine each of these possibilities *seriatim*, continuing:

> "[21] *We consider that there are three factors militating against the suggestion that the High Court has an inherent jurisdiction to revoke the Appellant's bail and commit him to custody. The first is that to do so would be contrary to the well established principle and practice whereby powers of this nature are exercised by the court granting bail. It would be unusual and undesirable for jurisdiction to grant bail being exercised by one court, with jurisdiction to revoke being exercised by another…*
>
> [22*] The second contraindicating factor is that statutory intervention in the sphere of bail in extradition proceedings clearly weakens any suggestion that the High Court possesses a residual, inherent jurisdiction: see paragraphs [6] – [10] above. The third factor is Article 5/1 ECHR (one of the protected Convention rights under the regime of the Human Rights Act 1998) …*
>
> *In Convention terms, the question becomes: Does there exist a procedure prescribed by law authorising the detention of the Appellant with a view to giving effect to the Recorder's extradition order?*
>
> [23] *It is well established in Convention jurisprudence, both Strasbourg and domestic, that the stipulation of "in accordance with a procedure prescribed by law" requires the relevant domestic law to be accessible and foreseeable…*
>
> [24] *It is clear that the requirement of accessibility entails the availability of a published text of the law in question: see* ***Silver –v- United Kingdom*** *[1983] 5 EHRR 347, paragraph [87]. In domestic jurisprudence, the most notable recent decision belonging to this sphere is* ***R (Purdy) –v- Director of Public Prosecutions*** *[2009]*

UKHL 45: see in particular the opinion of Lord Hope, paragraphs [40] – [43].

> *'[40] The Convention principle of legality requires the court to address itself to three distinct questions. The first is whether there is a legal basis in domestic law for the restriction. The second is whether the law or rule in question is sufficiently accessible to the individual who is affected by the restriction, and sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law. The third is whether, assuming that these two requirements are satisfied, it is nevertheless open to the criticism that it is being applied in a way that is arbitrary because, for example, it has been resorted to in bad faith or in a way that is not proportionate.'*

Moreover, these Convention values and standards have been applied in the specific sphere of Article 5/1."

The court noted that the central purpose of Article 5 is to protect the citizen from arbitrary state conduct. On this discrete issue, it concluded:

> "[25] *In summary, in Convention terms, in order to qualify as a "law" the relevant rule or instrument must satisfy the fundamental requirements of accessibility and foreseeability. The inherent jurisdiction canvassed on behalf of the Respondent in the present context would be unpublished, undefined and unparticularised. Thus it would be manifestly inaccessible. For the same reasons, it would lack the essential quality of foreseeability. We conclude that, given these characteristics, it would not be "in accordance with a procedure prescribed by law", contrary to Article 5/1."*

[27] Thus Article 5/1 ECHR featured prominently in the court's determination of the issues. The final issue to be addressed was whether the Divisional Court had any implied statutory power to revoke the Appellant's bail and commit him to custody. The court rejected the argument that such a power existed, referring firstly to the decision in the House of Lords in ***B (a minor) –v- DPP*** [2000] 2 AC 428 (per Lord Nicholls at p. 464 especially). The judgment continues:

> "[27] *The suggestion of an implied statutory power of the kind mooted is contra indicated by two further considerations. The first is Article 5/1 ECHR, discussed*

> *above. In short, a power of this kind would lack the essential qualities of accessibility and foreseeability. The second contra indication is the nature of the power. Such a power would entail deprivation of the citizen's liberty. The common law has long recognised liberty as a hallowed right and it possesses a similar ranking in Convention jurisprudence.*"

Ultimately, the question became whether the Appellant could be lawfully detained under the Criminal Justice (NI) Order 2003. Article 5(1) of this measure provides:

> "*If a person who has been released on bail fails without reasonable cause to surrender to custody, he shall be guilty of an offence.*"

Article 6(1) provides:

> "*If a person who has been released on bail* ***and is under a duty to surrender into the custody of a court*** *fails to surrender to custody at the time appointed for him to do so, the court may issue a warrant for his arrest.*"

The judgment continues:

> "[31] *In these circumstances, it is arguable that the Appellant is, prima facie, and subject to the presumption of innocence, guilty of an offence under Article 5, exposing him to arrest through the mechanism outlined in the following paragraphs. The situation might be even clearer if the police, at this stage, were to deliver to the Appellant's solicitors and his last known place of abode a formal notification of arrangements to extradite him to Spain.*"

Next, the court referred to Article 26 of the Police and Criminal Evidence (Northern Ireland) Order 1989, which empowers a constable to arrest without warrant a person whom he has reasonable grounds to suspect of being guilty of the commission of an offence. The judgment continues:

> *"[33] In the circumstances of the present case, Article 26(2) and (3) are potentially applicable. Beyond this the court cannot venture, having regard to the limited evidential framework before it and taking into account that the precise contours and circumstances of the contemplated future event cannot be predicted with certainty. Most courts would be instinctively reluctant to pronounce that the future arrest of any citizen would be lawful. The extent of this judgment is that there may be a basis for lawfully detaining the*

> *Appellant in the circumstances currently prevailing. Provided that the necessary statutory conditions are satisfied and if an arrest is viable, it is foreseeable that the police may exercise their power under Article 26 to arrest the Appellant for his failure to surrender to police custody, in contravention of paragraph 1 and condition No. 1 of the Recorder's order dated 1st March 2010, with a view to prosecuting him for an offence under Article 5 of the 2003 Order. Any such arrest of the Applicant will de facto and de iure operate to extinguish his bail, without any requirement for formal revocation by any court. For the reasons explained above, the court declines to pronounce in advance on the legality of any future detention of the Appellant.*"

[28] Finally, the judgment of the Divisional Court identified a possible *lacuna* in the legislation:

> "[34] *Finally, it should be noted that the operative provisions of the 2003 Order came into operation on 13th June 2003 (per SR 2003 No. 307), while the Extradition Act 2003 received the Royal Assent on 20th November 2003. It is noteworthy that the 2003 Order was first laid in draft before both Houses on 24th March 2003, was considered by the Delegated Legislation Standing Committee on 1st April 2003 and was approved by both Houses on 3rd April 2003. These processes are a reflection of its status as a Northern Ireland Order in Council. This is to be contrasted with the progress through both Houses of Parliament of the Extradition Bill, from its First Reading in the Commons on 14th November 2002 until Royal Assent on 20th November 2003. The 2003 Order, in draft, was not laid before Parliament until the day immediately before the Report stage and Third Reading in the Commons of the Extradition Bill. This suggests that the legislative trawls which would have been conducted to determine the consequential amendments rendered necessary by the Extradition Bill would not have identified the 2003 Order as requiring amendment, as it did not exist at the material time. This would appear to explain the evident lacuna in the 2003 Order, exposed by these proceedings, which should be urgently addressed.*"

The court's conclusions were threefold:

(i) The High Court has no jurisdiction, statutory or inherent, to revoke the Appellant's bail, commit him to custody and estreat his recognizance.

(ii) The Recorder has no implied statutory power to take any of these measures.

(iii) Provided that the relevant statutory provisions are satisfied, and subject to the observations of the court in paragraphs [31] and [33] above, the Appellant may be liable to be detained, and prosecuted, via a combination of Part II of the 2003 Order and Article 26 of PACE.

The Sequel: the Absconding Appellant

[29] In the ***De Juana*** case, the final question with which the Northern Ireland Divisional Court continues to grapple is that of whether the absconding requested person has any right to prosecute his appeal. This question remains undetermined. It stimulates an interesting debate on yet another aspect of the requested person's *rights* in the field of extradition law. Under Section 27(1) of the 2003 Act, the only *express* powers conferred on the court are (a) to allow the appeal or (b) to dismiss the appeal. This, in my opinion, potentially raises for consideration a number of interesting questions, including the following:

(a) Does the Divisional Court have jurisdiction to continue to enter the appeal in circumstances where the Appellant's unknown whereabouts render the extradition order incapable of execution?

(b) Are the court's powers confined to simply allowing the appeal or dismissing it?

(c) Is there any scope for the exercise of the High Court's inherent jurisdiction to dismiss an appeal for want of prosecution?

(d) What is the impact of Article 6 ECHR in this context?

(e) What is the impact of the "no delay" principle? In particular, if the hearing of the appeal is to be adjourned while the Appellant's whereabouts remain unknown, can such adjournment continue indefinitely?

(f) Does the Lisbon Charter add any new or different right to be reckoned in this equation?

VI SOME CONCLUDING REFLECTIONS

[30] This latter question prompts the observation that the EU Charter has not featured in any extradition case in Northern Ireland. Indeed, the writer is personally unaware of the ventilation of the EU Charter in *any* case in this jurisdiction. Thus the accuracy of the prediction that the Charter is likely to have a significant impact on judicial review within the EU legal order remains to be seen. While the Charter is presented as an instrument merely declaratory of the legal status quo, it surely has rich potential to present the courts, in this field and others, with new and challenging issues concerning rights and values more conventionally considered by national constitutional courts. Has the United Kingdom/ Poland Protocol had a chilling effect? Or is the dominant position of the Human Rights Act 1998 in some way explicable of the Charter's failure to blossom and bloom before national courts in the United Kingdom? Is it possible that there is some lack of appreciation and education amongst practitioners? Or is a Lisbon Charter explosion about to occur? I suggest that these and other related questions may be worthy of closer examination.

[31] These questions prompt some final reflections. The first relates to the express inter-relationship between the Lisbon Charter and ECHR (and, hence, HRA 1998). The second concerns the intrinsic limitations of HRA 1998. When set against the full backcloth of international law, HRA 1998 is properly seen as a limited instrument of human rights protection. Finally, within the domestic law landscape, whither the common law? One might be readily forgiven for overlooking the vital role which the common law played in creating the necessary conditions for the introduction of HRA 1998.[1] Legal historians, I apprehend, will lay substantial emphasis on the era during which the doctrine of anxious scrutiny and the principle of legality were developed by the highest courts of the United Kingdom.[2] These are, quintessentially, human rights protection doctrines or principles. At their core, they seek to prevent the misuse of power by public authorities.

[32] The extent to which the common law continues to protect basic rights in illustrated in ***R (Bancoult) –v- Secretary of State for Foreign and Commonwealth Affairs (No. 2).***[3] The legal protections which featured in that decision were the citizen's freedom from exile (originating in Magna Carta) and the recently devised common law principle of legality, which facilitated formulation of the proposition that general or ambiguous words in legislation

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[1] …

[2] ***R –v- Ministry of Defence, ex parte Smith*** [1996] QB 517 (per Sir Thomas Bingham MR especially, at p. 554). ***R –v- Lord Chancellor, ex parte Witham*** [1998] QB 575 (per Laws J, at p. 581). ***R –v- Secretary of State –v- The Home Department, ex parte Simms*** [2000] 2 AC 115 (per Lord Hoffmann, at pp. 131-132).

[3] [2008] UKHL 61 and [2009] 1 AC 453: especially per Lord Hoffmann, paragraphs 42-44; Lord Rodger, paragraph 89; and Lord Carswell, paragraphs 123-124.

would not readily be construed as efficacious to extinguish the subject's freedom from exile, the right of abode.[4] In short, HRA 1998 had no application. Finally, we are reminded that the English Court of Appeal has explicitly stated that the common law doctrine of anxious scrutiny is not confined to the Convention rights protected by HRA 1998.[5] This may be seen as a strong judicial assertion of the continuing relevance and potency of the common law in this sphere. In summary, it is my firm conviction that there is continuing rich potential for the ever organic and dynamic common law to contribute significantly to the development, expansion, enhancement and protection of rights, in this sphere and others.

[4] Per Lord Hoffmann, at paragraph [45].
[5] ***R (Q) –v- Secretary of State for the Home Department*** [2004] QB36, paragraph [115].

APPENDIX 1

THE COUNCIL FRAMEWORK DECISION [13th June 2002]

[1] This is an instrument of EU law, which governs the extradition (in contemporary language "surrender") of individuals from one Member State to the other. Its full title is "Council Framework Decision of 13th June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States" (hereinafter "the Framework Decision"). The essence and objectives of this measure can be ascertained from its fifth recital, which states:

> "*The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional co-operation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice*".

The Framework Decision makes provision for the "European Arrest Warrant" ("the EAW"). This is described in the sixth recital as "the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the 'cornerstone' of judicial co-operation".

[2] According to the ninth recital, the role of the "Central Authority" in each Member State in the execution of a EAW "must be limited to practical and administrative assistance". The need for "sufficient controls" in decisions on the execution of a EAW is identified in the eighth recital as the rationale for requiring that decisions on surrender must be made by a "judicial authority" of the Member State where the requested person has been arrested. The recitals continue:

> "*[10] The mechanism of the European Arrest Warrant is based on a high level of confidence between Member States …*
> *[11] In relations between Member States, the European Arrest Warrant should replace all the previous instruments concerning extradition*".

The importance of respecting fundamental rights, coupled with the need for due process, is highlighted in the twelfth recital. The thirteenth recital provides, specifically:

> "*No person should be removed, expelled or extradited to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment*".

[3] The substantive provisions of the Framework Decision reflect and give effect to the values, standards and objectives expressed in its recitals, summarised above. Article 1(1) defines the 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". By 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*".

The category of criminal conduct falling within the scope of the EAW is detailed in Article 2. This includes, per Article 2(2), offences of terrorism punishable by a custodial sentence of at least three years in the "issuing" Member State. Under Article 3, the executing judicial authority must decline to execute the EAW in certain circumstances, whereas pursuant to Article 4 execution is discretionary in specified cases. Article 6 provides:

> "*1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European Arrest Warrant by virtue of the law of that State.*
> *2. The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European Arrest Warrant by virtue of the law of that State.*
> *3. Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law*".

Furthermore, by Article 7, each Member State may designate a "central authority" for the purpose of assisting the competent judicial authorities.

[4] In accordance with Article 8, the EAW must have a prescribed form and content. Further, it must be translated into the official language of the executing Member State. Chapter 2 of the Framework Decision regulates the procedure for the surrender of the requested person. Article 9(1) provides:

> *"When the location of the requested person is known, the issuing judicial authority may transmit the European Arrest Warrant directly to the executing judicial authority".*

In appropriate cases, the issuing judicial authority may also have recourse to an "alert", which is described as "equivalent to a European Arrest Warrant accompanied by the information set out in Article 8(1)." It is clear from Article 11 that the executing competent judicial authority has a proactive role from the time of the requested person's arrest. In particular, one of the decisions to be made is whether the arrested person should be detained. In this respect, Article 12 provides:

> *"When a person is arrested on the basis of a European Arrest Warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State. The person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding".*

The prominence given in this provision of the Framework Decision to the risk of absconding is noteworthy.

[5] Article 14 of the Framework Decision provides:

> *"Where the arrested person does not consent to his or her surrender as referred to in Article 13, he or she shall be entitled to be heard by the executing judicial authority, in accordance with the law of the executing Member State".*

The importance of expedition is emphasized in Article 17, which provides:

> *"1. A European Arrest Warrant shall be dealt with and executed as a matter of urgency.*
> *2. In cases where the requested person consents to his surrender, the final decision on the execution of the European Arrest Warrant should be taken within a period of ten days after consent has been given.*
> *3. In other cases, the final decision on the execution of the European Arrest Warrant should be taken within a period of sixty days after the arrest of the requested person.*
> *4. Where in specific cases the European Arrest Warrant cannot be executed within the time limits laid down in paragraphs 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof,*

> *giving the reasons for the delay. In such case, the time limits may be extended by a further thirty days …*
> *7. Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it shall inform Eurojust, giving the reasons for the delay.*"

Article 17(5) is also noteworthy:

> "*As long as the executing judicial authority has not taken a final decision on the European Arrest Warrant, it shall ensure that the material conditions necessary for effective surrender of the person remain fulfilled*".

Article 17(6) provides that where the executing judicial authority determines not to execute the EAW, reasons must be provided.

[6] The requirement for expedition on the part of the executing Member State features again in Article 23, which provides:

> "*1. The person requested shall be surrendered as soon as possible on a date agreed between the authorities concerned.*
> *2. He or she shall be surrendered no later than ten days after the final decision on the execution of the European Arrest Warrant.*
> *3. If the surrender of the requested person within the period laid down in paragraph 2 is prevented by circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within ten days of the new date thus agreed.*"

Where the requested person has been detained in custody in the executing Member State, credit for that period in custody must be given in the event of a custodial sentence being imposed ultimately. This is clear from Article 26:

> "*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.*"

This provision reflects United Kingdom domestic law and, presumably, the equivalent domestic laws of certain other Member States.

THE EXTRADITION ACT 2003

[7] The Extradition Act 2003 (the 2003 Act) gave effect in domestic law to the Framework Decision and comprehensively reformed the law relating to extradition. The two measures must be considered in conjunction with each other. The 2003 Act came into operation on 1st January 2004 and governs all extradition requests received on and after this date. The main features of the new extradition procedures which it establishes include a regime whereby each of the United Kingdom's extradition partners belongs to one of two categories designated by order of the Secretary of State; the adoption of the Framework Decision, which is widely acknowledged as creating "fast track" extradition arrangements amongst the EU Member States; a simplification of the procedures for authentication of foreign documents; the abolition of the requirement for prima facie evidence in certain cases; and a simplified single avenue of appeal for all cases.

[8] I would highlight some of the provisions of the 2003 Act. Pursuant to Section 67, the "appropriate judge" (viz. the executing judicial authority) in Northern Ireland is such County Court Judge or District Judge as is thus designated by the Lord Chief Justice. The Recorder of Belfast is the designated County Court Judge and, thus, the "appropriate judge" under Section 67. In accordance with the regime established by Sections 4-6, every arrested person must be brought swiftly before the appropriate judge and the EAW and accompanying certificate must be produced. ***Expedition***, with the rights thereby generated, is one of the central themes of the legislation. This is reflected in Section 4(5) and Section 6(6), whereby any failure to comply with the relevant time limit obliges the judge to discharge the arrested person. Section 8 provides:

> *"(1) If the judge is required to proceed under this Section he must –*
> *(a) fix a date on which the extradition hearing is to begin;*
> *(b) inform the person of the contents of the [EAW];*
> *(c) give the person the required information about consent;*
> *(d) remand the person in custody or on bail.*
> *(2) If the person is remanded in custody, the appropriate judge may later grant bail."*

The remaining provisions of Section 8 highlight the importance of expedition in the new statutory arrangements. Section 9 provides, in material part:

> *"… (3) In Northern Ireland, at the extradition hearing the appropriate judge has the same powers (as nearly as may be) as a Magistrates Court would have if the proceedings were*

> *the hearing and determination of a complaint against the person in respect of the [EAW] was issued.*
> *(4) If the judge adjourns the extradition hearing he must remand the person in custody or on bail.*
> *(5) If the person is remanded in custody, the appropriate judge may later grant bail".*

[9] Sections 8-19B contain an array of provisions arranged under the general heading "Bars to Extradition". Within these provisions a series of important rights is conferred on the requested person. These include matters such as the rule against double jeopardy, so-called "extraneous considerations" and the passage of time. The judge must decide whether the extradition of the requested person is precluded by any of the specified prohibitions. Further, the impact of the Human Rights Act 1998 is reflected in Section 21, which provides:

> *"If the judge is required to proceed under this Section (by virtue of Section 11 or 20) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998.*
> *(2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.*
> *(3) If the judge decides that question in the affirmative he must order the person to be extradited to the Category 1 territory in which the warrant was issued."*

[10] There is a right of appeal against an extradition order, by virtue of Section 26, which provides:

> *"(1) If the appropriate judge orders a person's extradition under this Part, the person may appeal to the High Court against the order …*
> *(3) An appeal under this Section may be brought on a question of law or fact".*

The time limit of seven days for appealing, prescribed by Section 26(4), is another reflection of the recurring theme of expedition. The appeal lies to the High Court, which is empowered to quash the extradition order and order the person's discharge, pursuant to Section 27(5). Section 32 makes provision for the possibility of a further appeal to the House of Lords. Finally, Section 34 provides:

> *"A decision of the judge under this Part may be questioned in legal proceedings only by means of an appeal under this Part".*