



Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

Respect for Rights and Values in a Complex Europe: National and Supranational Perspectives

Delivered by Mr. Justice Donal O'Donnell, Chief Justice, at the Attorney General's Office and Chief State Solicitor's Office Public Law Conference on 2 October 2025

1. This conference is, in my view, a very welcome development and the Attorney General is to be congratulated on this initiative. It is a recognition, without exaggeration, of an enormous expansion of public law litigation in Ireland in recent decades. In my view, a number of factors can be identified that have combined to produce this outcome:

- (1) The well-established jurisprudence in relation to **constitutional litigation** which accelerated in the 1960s, and has been an established part of the legal system ever since;
- (2) **The expansion of judicial review.** There was significant development of judicial review in the United Kingdom in the latter part of the 20th Century, in response to the development of the administrative state and, perhaps, the absence of constitutional review. This inevitably influenced the development of Irish law,

where judicial review had never fallen into disuse as it had in the UK;¹

- (3) The enactment of **the Human Rights Act 1998** in the UK which came into force in 2000, gave rise to a flood of litigation in that jurisdiction. Again, when the Convention was incorporated into Irish law using the same mechanism in the 2003 Act, this meant that Irish litigants and courts had access to substantial jurisprudence developed in the common law tradition, and which analysed provisions of a legal system that was very similar. Again, this had a knock-on effect in Ireland. Recently the then Justice Minister, now Home Secretary, Shabana Mahmood, a barrister, said that it is now generally recognised that the United Kingdom had been maximalist in its approach to the Convention, and inevitably this had some effect in Ireland.²

These latter two developments in Ireland, where there was already a culture of active constitutional litigation, had the effect of adding fuel to the fire. putting some high octane fuel on an already well-established fire.

¹ As Lord Lowry put it in *R v Belfast Recorder ex p. Kelly* [1992] N.I. 217, the revival of the jurisdiction to quash a decision for error on the face of the record in *R v Northumberland Compensation Appeal Tribunal ex p. Shaw* [1952] 1 K.B. 338 “came as a surprise to the bench and Bar in Ireland, both north and south, since the weapon had never become rusty, but in this country continued to be wielded vigorously throughout the period in question.” See *Galway City Council v Kingston Construction Ltd.* [2010] IESC 18.

² Charles Hymas, ‘Britain has extreme interpretation of ECHR says Justice Secretary’ The Telegraph (London 4 September 2025) <<https://www.telegraph.co.uk/news/2025/09/04/britain-extreme-interpretation-echr-justice-secretary>>

(4) Fourth, the incorporation of the Convention had the effect that more claims proceeded to **Strasbourg**;

(5) Finally, but by no means least, the law of the European Union has expanded its scope, and now regularly involves a consideration of rights, whether under the provisions of secondary EU law or, since the entry into force of the Lisbon Treaty in 2009, **the Charter of Fundamental Rights**, which clearly covers the territory already addressed by the Constitution and the Convention. That is not surprising. The rights are, after all, fundamental.

2. Public law litigation may involve all of these steps and, in addition, involves the possibility of multiple decision makers: quite possibly an administrative law decision; the decision of the Irish Courts (which may involve appeals); the Court of Human Rights; and the Court of Justice. Moreover, this decision making is not just dislocated in terms of space, but also time. It is a feature of the relationship between the CJEU and national courts that issues of European law are determined by way of preliminary ruling *in advance* of the decision of the national court. Because of the requirement of the exhaustion of domestic remedies, review in Strasbourg will occur, if at all, between different parties *after* the national Court's decision.

3. In this session we are discussing the last two legs of this procedure, but it is important to understand it in the context of a national court and national law. I completely agree with President O'Leary's analysis of the direction of travel in both European Courts. Because Luxembourg and Strasbourg are still somewhat distant from us, we do not necessarily appreciate the degree to which approaches

within those systems can be in flux. A particular valuable insight she offers is the difference in the direction of travel in each court. The current in the last decade or more of the Strasbourg Court, has been consolidation rather than expansion. It now places particular emphasis on the margin of appreciation, the principle of subsidiarity and the principle of process-based review. Thus, if a national court has properly analysed an issue of compatibility of a provision with the Convention, the Strasbourg Court will not substitute its view for that of the national court. Subsidiarity, an important tolerance of some degree of difference, reduces some of the strains on the system. As Oliver Wendell Holmes said: "*some play must be allowed to the joints if the machine is to work*".³ On the other hand, the direction of travel of the CJEU is driven by different considerations, and has seen the Court enthusiastically expand its interpretation of the Charter, and of the TEU, in particular Articles 2 and 19. But if currents of water or air collide, the result can be turbulence, and at worst at vortex, particularly when there are already currents already at play in the national jurisdiction. The national court is at the centre of that.

4. Inasmuch as there was discussion of the possibility of problems being caused by overlapping jurisdictions at the time of the adoption of the Lisbon Treaty, and the coming into force of the Charter, there were I think three answers given:

- (1) The Charter only guarantees fundamental rights, and that was already part of the law of the European Union;

³ *Tyson & Bro. v Banton*, 273 U.S. 418, 446. (1927).

(2) The rights are in essence those guaranteed by the European Convention of Human Rights, and;

(3) It is not possible to have too many human rights.

5. An important provision of the Charter addressed the interrelationship between the Charter and the Convention. Article 52(3) on the scope and interpretation of the Charter provides:-

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention... the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

6. A lawyer might have said in 2009 that such an approach might be more difficult than it appears, but the meaning and intent was reasonably clear: there should be no disparity between the Convention and the Charter. The Union could, however, adopt a higher standard of rights protection. If we ignore Article 8 of the Charter for a moment, the right to data protection might be an example which illustrates a different standard. The right to private life would be protected in the same way under the Charter and the Convention, but the Union could, by GDPR, adopt a higher standard. However, the CJEU appears to have adopted an interpretation, without the matter really being argued or debated, that the last sentence of Article 52(3) permits *the court by interpretation* of the Charter to adopt a higher standard of rights protection than the Convention as interpreted by the Strasbourg Court.
7. I think this interpretation has obvious problems. It is firstly, a fallacy to conceive of rights having higher levels of protection. It is not like turning the dial on an oven

up. What happens is that a *different* and perhaps more demanding interpretation is adopted and, by definition, a different interpretation cannot be the *same*. Higher is not the same as lower. So this approach is in my view and, with respect, difficult to reconcile with the express terms of Article 52(3). However, I recognise that the interpretation of the Charter is not a matter for the national court: it is a matter ultimately for the CJEU. What I want to focus on, is the practical consequences of this approach. This is a very simplified example drawn from a case recently before our Court.

8. The European Arrest Warrant procedure was created by the Framework Decision of 2002/584 introduced in the aftermath of 9/11. It was designed to facilitate surrender of suspects for trial between Member States of the European Union and with others with whom the Union agreed to operate the procedure. The idea is simple and sensible: we have sufficient confidence and trust in the legal systems of other Member States, we will execute European Arrest Warrants and surrender persons found within our jurisdiction required for trial in another Member State, and other Member States will in turn surrender suspects required for trial here. The idea was to have an expedited and simplified procedure for surrender between Member States and that is given effect to in Irish law by the European Arrest Warrant Act 2003.
9. Under the Trade and Co-operation Agreement (TCA) between the UK and the EU, executed on the 30th December 2020, it was agreed that the procedure would continue to be utilised between the United Kingdom, and the Member States of the European Union, subject to some differences, which, at least in my view, are not relevant for the present purposes. It is logical that the EAW procedure would be

retained in the TCA. Both parties had the same interest. And Brexit did not make the UK any less willing to surrender suspects to other European countries, or EU Member States less willing to surrender to the UK.

10. The Framework Decision only refers to fundamental rights in very general terms.

Article 1(3) provides: *“This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights...”* It is, however, quite clear that an objection based on the Convention could in theory be a ground for refusal to surrender.

11. Until relatively recently the law relating to sentence and execution of sentence was

quite similar in the UK and Ireland. It was for a court to impose a sentence, and the execution of that sentence, including issues of remission, temporary release, parole and remission was a matter for the Executive. However, in 2003 the UK changed its law and provided by statute that a court should impose the sentence it considered appropriate, and that the sentenced person should serve 50% of that sentence in custody, and the remainder of the sentence in the community.

12. In or around 2020 and as a result of some incidents and offences being committed

by persons serving the balance of their sentence in the community, that law was changed in respect of serious terrorist offences and it was provided that in such cases, the offender would serve at least 66% of the sentence in custody, and would serve the balance of the sentence in the community only if a parole board considered that he or she was no longer a danger to the public. That is a very simplified example, but the question then arises as to what happens to a person who is convicted of a relevant offence prior to 2020, but sentenced under the new regime?

13. It is a principle recognised in most if not all legal systems, that a person cannot be found guilty of a criminal offence for an act or omission which did not constitute an offence at the time it was committed. *Nullum crimen sine lege*. This is provided for by Article 15.5 of the Irish Constitution: “*The Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission.*” This principle was also understood at least in some jurisdictions to also prevent a heavier penalty being imposed than the one which was applicable at the time that the offence was committed. And this indeed is set out in express terms in Article 7 of the Convention:-

“*No one shall be held guilty for any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. **Nor shall a heavier penalty be imposed than the one that was applicable at the time of the criminal offence was committed***” [emphasis added].

14. Article 49 of the Charter is, in this respect, identical to Article 7 of the Convention and therefore Article 52(3) would, it seems, apply. A core issue therefore is whether the change in the law of the UK contravened this principle. As it happens, that issue had arisen a number of times under the Convention and there is now a well-established distinction between the imposition of a sentence, which is a matter for the Court, and the execution of the sentence which is generally a matter of the Executive. Changes to the sentence will breach the principle, and changes to the execution of it will not. Although that distinction is easily stated, it is obviously difficult to apply, particularly in borderline cases. In one case, *Del Rio Prada v*

Spain, the Court of Human Rights had held that a change in the law (as interpreted by the Spanish Constitutional Court) contravened Article 7.⁴

15. We do not need to delay to debate this issue, because it could take all day.⁵ It is I think sufficient to note, in the words of Advocate General Spielmann that: “A *borderline case in which the correct answer is not readily apparent.*” So, it is only a slight exaggeration to say that in terms used by lawyers to their clients since time began, this is something of a toss-up.

16. We can skip the question of the application of the EAW, and any domestic standard judicial review point. The first issue then, is does it offend the Constitution? Let’s assume for the moment that Article 15.5 extends to the question of penalty. For a long time, Irish Courts struggled with the question of returning somebody, whether in a child custody dispute, or in extradition, where it was alleged that their Constitution rights would be breached in the requesting jurisdiction. But in two cases, *Minister for Justice v Brennan*⁶ in 2007 and *Minister for Justice v Balmer*⁷ nine years later in 2016, the Supreme Court emphasised what in retrospect was an obvious point: to speak of the legislation of another sovereign State breaching the Irish Constitution or breaching constitutional rights, is legally nonsense, and self-contradictory. The Irish Constitution does not control what happens in another sovereign State. Indeed, it respects the sovereignty of those other States and seeks friendly cooperation with them. What the Irish Constitution does control is the

⁴ *Del Río Prada v Spain*, Application No. 42750/09, (21 October 2013) ECLI:CE:ECHR:2013:1021JUD004275009.

⁵ There is, for example, a comprehensive and insightful discussion of the principle in the light of the UK Supreme Court cases in: Kelly, ‘Retrospective Law and Release from Prison’ (2025) 45(2) *Oxford Journal of Legal Studies* 387.

⁶ [2007] 3 IR 732.

⁷ [2017] 3 IR 562.

decision made in Ireland, and the question of whether surrender of someone who might be affected by the 2020 law would offend the Irish Constitution is subtly different to the question of whether the enactment of a similar act in Ireland would be unconstitutional and its application to someone would be unconstitutional. Otherwise, Ireland could not cooperate with any country which did not have an identical constitutional regime. Instead, the test was whether surrender was so offensive to Irish constitutional values that it could not properly be ordered. That is not a perfect test, and there can be argument with the margins, but it would not normally be offended in borderline cases.

17. The next question is the Convention. Of course, the European Convention on Human Rights *does* apply in the United Kingdom and in every other country to which the EAW regime applies. So, we do not have the *Brennan/Balmer* issue. Again, the Supreme Court has addressed this question. In 2008 in *Minister for Justice and Equality v Stapleton*,⁸ it was held that Ireland was *prima facie* entitled to rely on the fact that the Convention would apply in the requesting country and that a remedy was available in that State and that was the preferable place in which to raise any argument. Notably, the Strasbourg Court upheld this approach, in ruling that a complaint was inadmissible.

18. As it happened there was a wrinkle in this case because the issue had already been raised in the courts of the requesting state in Northern Ireland. In *R. v Morgan*, the Northern Ireland Court of Appeal had held that the relevant provisions of the 2021 Order in Northern Ireland, did breach Article 7 of the Convention and made a

⁸ [2008] 1 IR 669.

declaration of incompatibility.⁹ The coin in this case had landed tails. That was the situation when the matter arose in the Irish High Court, which held that the surrender could be effected because the Convention was being upheld in Northern Ireland. The matter was appealed to the Supreme Court of Ireland, and at that time *Morgan* had been appealed to the UK Supreme Court, and our case was adjourned pending the outcome of that appeal. In due course, in *Morgan v Ministry for Justice*,¹⁰ the UK Supreme Court unanimously reversed the decision of the Northern Ireland Court of Appeal and held that there was no breach of Article 7, as the applicable law applied only to the execution of the sentence, rather than the sentence itself.

19. In the Irish Supreme Court, it was argued that we were nevertheless obliged to make our own assessment of the issue of compatibility and, in effect, prefer the view of the Northern Ireland Court of Appeal to the UKSC. In addition, it was argued that since the purpose of the European Arrest Warrant Act of 2003 was the implementation of the Framework Decision, this was a matter of European law, and it was possible to argue that the surrender would be in breach of Article 49 of the Charter, an issue which was clearly not considered or decided in *Morgan*. This argument involved a re-run of the Convention argument in Article 7, but now invoking Article 49, and obviously the interpretation of Article 52(3) therefore kicked in.

20. In the event, we considered that, having regard to the standard set in the *CILFIT* case, it was necessary to refer a question to the CJEU under Article 267 TFEU.

⁹ [2021] NICA 67.

¹⁰ [2023] UKSC 14.

However, we suggested that it was not necessary to attempt to resolve the question anew. Instead, it ought to be sufficient that the UK was a country in which the Convention applied, and in which there is no reason to doubt that any Convention remedy or decision of the Strasbourg Court would be implemented, fundamental rights were therefore respected in the requesting state. If that was not sufficient then the question of the compatibility of the new provisions with the Charter arose.

21. The next step was the opinion of Advocate General Szpunar. He did not agree that it was possible to take such a structural or process-based approach. He said it was necessary to assess on a case-by-case basis the question of compliance with Article 49.

22. However he said that while the EU-UK Trade Cooperation Agreement ('TCA') could not be considered to be in the same category as the Framework Decision regulating decisions on surrender between Member States or even between Member States and EFTA countries, Article 524 of the TCA, which referred to the respect for protection of fundamental rights, could be considered to be of constitutional significance and a signpost to interpretation. This seemed to suggest that the starting point at least should be a strong presumption of protection, and the Advocate General said clearly that he considered that there was no reason not to execute the arrest warrant in the present case.

23. The next step was the Court of Justice decision, which did not endorse Advocate General Szpunar's clear conclusion as to surrender either directly or indirectly. It said that a measure would only affect the sentence, and offend Article 49, if it retroactively altered the actual scope of the penalty, but said:-

*The position may be different in particular if that measure essentially repeals the possibility of release on license or if it forms part of a series of measures which have the effect of increasing the intrinsic seriousness of the sentence initially provided for.*¹¹

And on the question of mutual trust and confidence with the UK, the Court appeared less positive than the Advocate General emphasising that the UK stood below other member states and the EFTA countries in terms of mutual trust. And importantly it said very clearly that compliance with the Convention or a Convention test was not enough. At paragraph 81, it was said that the fact that the Court could rule out a breach of the Convention on the *Stapleton* basis was not enough. A little earlier at paragraph 78 it was said that surrender could not be effected if, following “*a specific and precise examination of that person’s situation there are valid reasons for believing that that person would run a real risk to the protection of his or her fundamental rights if that person were surrendered to the UK.*”

24. Almost inevitably it was argued that this did not resolve the issue and accordingly we made a further reference in the case.

25. This produced a very detailed and comprehensive opinion by Advocate General Spielmann, who as it happens was the President of the European Court of Human Rights and presided in the Grand Chamber decision of *Del Rio Prada v Spain*.¹² Again, he concluded, that the amended measures refer to the execution of a sentence did not affect the intrinsic nature of the sentence which it provided for,

¹¹ Case C-202/24 *Alchaster* / ECLI:EU:C:2024:649, paragraph 97.

¹² *Del Río Prada v Spain*, Application No. 42750/09, (21 October 2013) ECLI:CE:ECHR:2013:1021JUD004275009.

and that there was no basis in this case for adopting a more expansive interpretation of Article 52(3) of the Charter.

26. However, in an interesting passage he suggested the CJEU should adopt the mirror principle first outlined by Lord Bingham in respect of the UK's approach to Strasbourg case law and as articulated in *R (Ullah) v Special Adjudicator*.¹³ *“The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.”*¹⁴ For a number of reasons, I am not sure that that can be translated to the relationship between the Charter and the Convention,¹⁵ but it is illustrative of an awareness that a genie had been released by the expansive interpretation of Article 52(3). In the event, the CJEU did not endorse this approach.

27. The second last step in the saga was the judgment of the Grand Chamber on the 3rd of April 2025, which concluded:-

*That it does not appear that a change such as that referred to...forms part of a series of measures which have the effect of aggravating the intrinsic nature of the penalty initially provided for.*¹⁶

28. This is the second last step because of course the Strasbourg Court has yet to rule definitively on the provisions of UK law and there remains a theoretical possibility that at least it could come to a different conclusion.

¹³ [2004] UKHL 26.

¹⁴ Case C-743/24 *Alchaster II* ECLI:EU:C:2025:88, paragraph 103.

¹⁵ Discussed at greater length in O'Donnell, 'The ECHR Act 2003: Ireland and the Post War Human Rights Project' (2022) 7(2) *Irish Judicial Studies Journal* 1.

¹⁶ Case C-743/24 *Alchaster II* ECLI:EU:C:2025:230, paragraph 40.

- 29.** Everyone who looked at this case has I think addressed the issue conscientiously with a high degree of legal skill and done so very expeditiously. But it is still an unsettling case and one which does not reflect well on the elaborate construction of rights protection which ought to be the glory of post second world war Europe.
- 30.** We need to remind ourselves that this was just a preliminary and contingent question. Could someone be surrendered to another country in whose criminal justice system we have justifiable trust in confidence and faith, to face a trial on a substantive issue whether they are guilty or not of a serious offence? At that trial they would have the full panoply of rights of defence, legal aid and the guarantees of fair procedures under the Convention, and the possibility of full appeal. The surrender issue was meant to be swift and speedy, but in this case, it took three and a half years for the process to wind its way not to a conclusion, but at least to this point. There are real problems with that. The ultimate issue may indeed be a toss of a coin, but it's troubling that the coin has been tossed now eight times to date, with a possible ninth coin toss in Strasbourg, which could lead to the process being restarted all over again.
- 31.** Furthermore, the outcome of the references to Luxembourg, now make it clear that the Court must engage in separate considerations of any Charter arguments, a close analysis of the facts of each case, and make some refined distinction between surrender to Member States of the EU, to EFTA countries, to the UK, and to other third countries. As I said at the outset, these decisions are made by different people, by different courts at different times in different places and with nobody having overall responsibility for the outcome. Furthermore, it has the extraordinary consequence that the Charter, while not applying to any trial in the

UK or indeed in any Member State on any of the offences, nevertheless indirectly applies because of the fact that the question of surrender is one within the field of application of European law.

32. We are at a very dangerous time in Europe when there is a fundamental challenge from both East and West to the rules-based order upon which modern Europe has been built. There is I think a real obligation on all of us involved to ensure that the system can be shown to work effectively and practicably and that it does not become the caricature which is so often attacked by its opponents, that is a system of stagnating economies and countries hide bound by an impenetrable web of regulation. The best cannot be allowed to become the enemy of the good. One starting point in my view would be to give effect to the plain meaning of Article 52 and seek to align the approaches of the Strasbourg and Luxembourg Courts and for the CJEU to endorse the margin of appreciation, the principle of subsidiarity and process-based review that the Strasbourg court has adopted. The machine must work. And a larger part of making the entire process work, is to have a full understanding of all the moving parts that go into decisions made in the field of public law, and this Conference is a very welcome part of that process.