

**THE HIGH COURT  
JUDICIAL REVIEW**

[2021] IEHC 240  
**Record No: 2021/90JR**

**BETWEEN:**

**RICHARD GALLAGHER**

**APPLICANT**

**-AND-**

**THE MINISTER FOR FOREIGN AFFAIRS**

**-AND-**

**IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**-AND-**

**THE MINISTER FOR JUSTICE**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice Tony Hunt delivered on 26 March 2021**

1. The background to this matter is an application by the notice party for surrender of Mr Gallagher to the United Kingdom ("the UK") pursuant to a European arrest warrant ("the EAW"). The EAW was issued by District Judge George Conner of the Belfast Magistrates' Court on 10 July 2020. It was endorsed for execution by the High Court (Paul Burns J.) on 22 September 2020. Mr Gallagher was arrested on foot of the EAW and brought before the High Court pursuant to the provisions of s.13 of the European Arrest Warrant Act 2003 (as amended) ("the Act") on 7 December 2020.
2. During the hearing into the matter pursuant to the provisions of s.16 of the Act on 10 February 2021, Mr Gallagher contended that his surrender on foot of the EAW was precluded, *inter alia*, because Statutory Instrument 719 of 2020 (the European Arrest Warrant Act 2003 (Designated Member States) (Amendment) Order 2020), ("the S.I.") was *ultra vires* the first respondent ("the Minister"). (I take it that this is the S.I. under challenge in these proceedings. The papers consistently refer to the European Arrest Warrant (Application to Third Countries) (United Kingdom) Order 2020, which is in fact S.I. No 720 of 2020. The provisions of that Order do not apply to the facts of this case.)
3. I was of the opinion that the legality of such secondary legislation could not be tested within the context of a surrender hearing under the Act, as the Minister who issued the S.I. was not a party to the surrender application. I adjourned that hearing to 26 March 2021, and gave the applicant leave to serve a motion on notice to the respondents seeking leave to apply for judicial review in order to quash the S.I. This motion was returnable for 17 February 2021, when the respondents were represented by counsel at the application for leave. The matter was fully argued and dealt with as a "telescoped" application for judicial review.
4. Patrick McGrath SC (of the Inner Bar) moved the application for judicial review. The relevant parts of the statement required to ground the application sets out that grounds of the application are as follows: -
  - (v) The United Kingdom ceased to be a member of the European Union with effect from 1 February 2020.

- (vi) S.I. 719/2020 came into effect on 31 December 2020 at 23:00 (Midnight Central European Time).
  - (vii) The Applicant's liberty will be an issue if an order for his surrender is made in the EAW proceedings.
  - (viii) At the time that SI 719/2020 came into effect, the United Kingdom was not a "Member State" (within the meaning of s. 2 of the European Arrest Warrant Act 2003).
  - (ix) The power to designate States granted to the Minister for Foreign Affairs pursuant to s. 3 of the European Arrest Warrant Act 2003 is limited to "Member States".
  - (x) Accordingly, the order made by the Minister for Foreign Affairs in regulation 3(a) of S.I. 719/2020 is *ultra vires*.
5. Mr. McGrath argued that the S.I. came into effect when the UK was no longer a member of the European Union ("the EU") and could only be *intra vires* if the UK was a Member State of the European Union on 31 December 2020, which it was not, having departed the EU on 31 January 2020. On behalf of the respondents, Ronan Kennedy SC (of the Inner Bar) submitted that there was no lack of *vires* in relation to the S.I., on the basis that:-
- a) The term "Member State" is defined in a number of places, including s.2 of the European Arrest Warrant Act 2003, and in the provisions of s. 98(1) of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019.
  - b) The 2003 Act, and particularly the provisions relating to designation, must now be read in the light of the 2019 Act.
  - c) During the transition period following the departure of the UK from the EU, between 1 February 2020 and 31 December 2020, EU law continued to apply by virtue of Articles 7 and 62 of the Agreement on the Withdrawal of the UK from the EU of 18 October 2019.
  - d) During this period, the effect of these provisions was that the UK continued as if it was a member of the EU until the expiry of that period.
  - e) The effect of the S.I. and S.I. 720 of 2020 is that two legal regimes operate after the end of the transition period, one relating to cases where there had been an arrest on foot of an EAW before 31 December 2020, and the other relating to cases where an EAW was extant on that date but where there had been no arrest.
6. Mr. McGrath submitted that Mr. Kennedy was incorrect in his interpretation of s. 98. He submitted that s. 98 has a limited purpose, which is to include the United Kingdom only insofar as it was necessary to "*give effect to a withdrawal agreement*". As he put it, the relevant withdrawal agreement ceased on 31 December 2020, so "*there was no*

*withdrawal agreement to give effect to*” after that date, when any reference in any enactment to “Member State” could not include the UK. When the Minister made the S.I., the designating provision could not apply to the UK, as the withdrawal agreement had expired. Accordingly, at that time, there was no power under any statutory enactment to designate the UK as a Member State for the purposes of the Act.

### **Discussion**

7. The general scheme of the EAW legislation is clear. The Act applied to Member States, and (as amended) gives the power to the Minister to designate third countries where the European Union and that third country had entered an agreement implementing the provisions of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (“the Framework Decision”). The UK ceased to be a member of the EU on 31 January 2020, subject to the application of transitional arrangements expiring on 31 December 2020.

8. The legal basis relied upon by the Minister for the S.I. is s. 98 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019 (“the 2019 Act”). That section, which anticipated the withdrawal agreement, reads as follows: -

*“98. (1) Where, immediately before the coming into operation of this Part (Part 15), a reference in an enactment to a Member State included a reference to the United Kingdom by virtue of that state being a Member State of the European Communities or of the European Union, then, on the coming into operation of this Part, the reference in the enactment shall, in so far as is necessary to give effect to the terms of a withdrawal agreement, continue to include a reference to the United Kingdom.*

*(2) A reference to a Member State in an enactment that comes into operation at the same time as, or at any time after, the coming into operation of this Part shall, in so far as is necessary to give effect to the terms of a withdrawal agreement, include a reference to the United Kingdom.*

*(3) Subsection (1) applies whether the enactment concerned came into operation before, on the same day as or after the commencement of the Act of 2005.*

*(4) Subsections (1) and (2) apply notwithstanding section 21(2) of, and Part 2 of the Schedule to, the Act of 2005 in so far as they relate to the meaning thereby assigned to “Member State”.*

*(5) In this section—*

*“Act of 2005” means the Interpretation Act 2005;*

*“enactment” has the same meaning as it has in the Act of 2005;*

*“withdrawal agreement” means an agreement concluded under Article 50 of the Treaty on European Union between the United Kingdom on the one part and the*

*European Union on the other part setting out the arrangements for the withdrawal of the United Kingdom from membership of the European Union.”*

9. The withdrawal agreement to which this Act applies is the EU-UK Withdrawal Agreement 2019, as subsequently agreed on 17 October 2019 (“the withdrawal agreement”). The withdrawal agreement generally continued the application of the law of the EU during the transition period as if the UK was a Member State during that time: see Article 7 thereof. Article 62.1 of the withdrawal agreement specifically provided that: -
- “(b) Council Framework Decision 2002/584/JHA shall apply in respect of European arrest warrants where the requested person was arrested before the end of the transition period for the purposes of the execution of a European arrest warrant, irrespective of the decision of the executing judicial authority as to whether the requested person is to remain in detention or be provisionally released”.*
10. This Article of the withdrawal agreement was implemented in domestic law by Part 15 of the 2019 Act as set out above. The provisions of Part 15 of the 2019 Act were brought into effect at 11pm on 31 January 2020 by S.I. No. 28 of 2020. As noted above, in this case the EAW warrant was issued and endorsed and Mr Gallagher was arrested and brought before the High Court before the end of the transition period created by the withdrawal agreement. His EAW is covered in the first instance by the withdrawal agreement which was in force at the time of issue, endorsement, arrest and appearance before the High Court. On all those dates, by virtue of s. 98 of the 2019 Act, the UK was properly regarded as a Member State of the EU for the purposes of the 2003 Act, in order to give effect to Article 62.1(b) of the withdrawal agreement, whereby the UK committed to compliance with the Framework Decision for persons arrested on EAWs prior to the end of the transition period. That class of persons now includes Mr Gallagher.

### **Conclusion**

11. I am satisfied that such warrants continue to be enforceable on the basis of the arrangement concluded between the EU and the UK in October 2019 to the effect that the Framework Decision would apply to warrants issued under the withdrawal agreement during the transition period. The mutual obligations arising from the withdrawal agreement continued and would have continued after the expiry of the withdrawal agreement, irrespective of whether there had been a further agreement between the EU and the UK at that time. The withdrawal agreement contemplated a range of legally valid actions being executed by the parties for the duration of the transition period, such as the processing of EAWs issued subject to the agreed application of the Framework Decision. Those actions remain legally valid notwithstanding the expiry of the transition period and the withdrawal agreement at 11pm on 31 December 2020.
12. Therefore, I cannot accept Mr McGrath’s argument, which appears to depend on an assertion that the withdrawal agreement can no longer be implemented in any way after it expired on 31 December 2020. As I see it, this argument conflates cessation of the agreement with cessation of the legal validity of acts done pursuant to that agreement during the currency thereof. There was and is a continuing obligation on both sides to

implement the terms of the withdrawal agreement after that time in respect of actions lawfully commenced but not completed at the expiration of the term of withdrawal agreement. In my view, giving effect to the withdrawal agreement includes providing for the final working out and completion of cases arising under that agreement. Consequently, the situation in this case is squarely governed by the requirement to ensure continued implementation of the withdrawal agreement in respect of acts lawfully performed under the aegis of that agreement.

13. I agree with Mr Kennedy that the Minister was fully entitled and empowered by the 2019 Act to address both classes of warrant and factual situations covered by the S.I. and S.I. No. 720 of 2020. The consequences of expiry of the withdrawal agreement (and the coming into effect of a subsequent agreement) on 31 December 2020 was clearly addressed by promulgation of the S.I. and S.I. 720 of 2020. In designating the UK as a Member State for the disposal of extant cases at the expiry of the withdrawal agreement, the Minister was simply giving continuing effect to that agreement, as he was specifically empowered to do by s. 98 of the 2019 Act.
14. Where a warrant has issued during the currency of the withdrawal agreement and is thereby governed by the Framework Decision structures, and where an arrest has taken place on foot of such a warrant prior to 11pm on 31 December 2020, the agreement is now implemented by the process of designation of the UK as a Member State for the purpose of s.3 of the Act. Where there has been no arrest by that date, the agreement and the Framework Decision will be implemented in relation to such warrants by the application of the Act to the UK as a third country, as provided for by Part Three, Title VII of the Trade and Cooperation Agreement between the UK and the EU of 24 December 2020.
15. In summary, there is no substance in the point that the UK actually had to be a Member State of the EU as of the date of the S.I. There remains an obligation to implement that agreement insofar as it applies to ongoing cases arising from warrants issued subject to the provisions of the agreement. In relation to cases regulated in the first instance by the combination of the withdrawal agreement and the Framework Decision, I am satisfied that s. 98 of the 2019 Act provides specific legal power to the Minister to give continued effect to the withdrawal agreement by means of the S.I. Consequently, the Minister was entitled to use his power of designation in relation to the UK for the purposes of the Act to provide legal continuity for cases such as this, notwithstanding cessation of the EU membership of the UK on 31 January 2020. Indeed, he might well have been criticised had he failed to bring clarity to the situation by providing legal bases for unfinished and future business at the expiry of the withdrawal agreement and the commencement of the subsequent agreement.
16. Accordingly, as I am satisfied that the making of the S.I. was *intra vires* the Minister, I will make an order granting Mr Gallagher leave to seek judicial review on the grounds set out above and, having heard both parties on those questions, but will then dismiss that application for judicial review. It follows that the application by the notice party for

surrender of Mr Gallagher to the UK on foot of the EAW remains legally valid, and this process will continue. I will hear the parties on the question of costs.