Reports of Cases

OPINION OF ADVOCATE GENERAL
SPIELMANN
delivered on 13 February 2025 [1]

Case C-743/24 [Alchaster II] [i]

Minister for Justice and Equality
v
MA

(Request for a preliminary ruling from the Supreme Court (Ireland))

(Reference for a preliminary ruling – Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part – Judicial cooperation in criminal matters – Arrest warrant – Surrender – Adverse amendment to the parole system in the issuing State – Risk of a breach of a fundamental right – Article 49(1) of the Charter of Fundamental Rights of the European Union – Principle of legality of criminal offences and penalties)

I. Introduction

1. The present request for a preliminary ruling from the Supreme Court (Ireland) constitutes the first case in which the Court of Justice is to examine the scope of the non-retroactivity of a penalty under Article 49 of the Charter of Fundamental Rights of the European Union ('the Charter'), which is why I shall turn directly to the leading case of the European Court of Human Rights ('the ECtHR' or 'the Strasbourg Court'), that is, *Del Río Prada v. Spain*. [2] The key passage of that judgment reads as follows:

'… measures taken by the legislature, the administrative authorities or the courts after the final sentence has been imposed or while the sentence is being served may result in the redefinition or modification of the scope of the "penalty" imposed by the trial court. When that happens, the Court considers that the measures concerned should fall within the scope of the prohibition of the retroactive application of penalties enshrined in [Article 7(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), signed in Rome on 4 November 1950]. Otherwise, States would be free – by amending the law or reinterpreting the established regulations, for example – to adopt measures which retroactively redefined the scope of the penalty imposed, to the convicted person's detriment, when the latter could not have

[1] Original language: English.

[i] The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

[2] See judgment of the ECtHR of 21 October 2013, *Del Río Prada v. Spain* (CE:ECHR:2013:1021JUD004275009, § 89; 'the judgment in *Del Río Prada v. Spain*').

imagined such a development at the time when the offence was committed or the sentence was imposed. In such conditions [Article 7(1) ECHR] would be deprived of any useful effect for convicted persons, the scope of whose sentences was changed *ex post facto* to their disadvantage. The Court points out that such changes must be distinguished from changes made to the manner of execution of the sentence, which do not fall within the scope of [Article 7(1) ECHR].'[3]

2. This quote clearly and concisely demonstrates that it can be difficult to distinguish the imposition of a sentence from its execution. This is particularly so where a new set of rules has been adopted, purportedly relating to the execution of a sentence which, essentially, consists in depriving an individual of his or her liberty for longer than would have been the case under the previous rules.

3. The present request for a preliminary ruling from the Supreme Court further exposes these difficulties of delimitation. It provides yet more testimony to the fact that, whilst Article 7 ECHR is 'a rule of simple fairness, a rule which any child would understand',[4] as so aptly described by the late Lord Bingham, it is trickier to apply such a rule to a specific set of circumstances.

4. I shall argue in the present Opinion that it is not easy to determine the delimitation between the imposition and the execution of a penalty, and is one that calls for scrutiny of the national legislation concerned on a case-by-case basis.

II. Legal framework

A. The ECHR

5. Article 7 ECHR is headed 'No punishment without law'. Its first paragraph is worded as follows:

'No one shall be held guilty of 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 the criminal offence was committed.'

B. European Union law

6. The Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part ('the TCA')[5] is an association agreement based on Article 217 TFEU[6] and Article 101 of the Treaty establishing the European Atomic Energy Community.[7]

3 See the judgment in *Del Río Prada v. Spain*, § 89.

4 See Bingham, T., *The Rule of Law*, Penguin Books, London, 2011, p. 79.

5 OJ 2021 L 149, p. 10.

6 Council Decision (EU) 2021/689 of 29 April 2021 on the conclusion, on behalf of the Union, of the [TCA], and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information (OJ 2021 L 149, p. 2).

7 Council Decision (Euratom) 2020/2253 of 29 December 2020 approving the conclusion, by the European Commission, of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the European Atomic Energy Community for Cooperation on the Safe and Peaceful Uses of Nuclear Energy and the conclusion, by the European Commission, on behalf of the European Atomic Energy Community, of the [TCA] (OJ 2020 L 444, p. 11).

After an initial provisional application from 1 January 2021,[8] it entered into force on 1 May 2021, further to its ratification by the European Union and the United Kingdom.[9] The TCA is composed of seven parts.[10]

7. Article 5 of the TCA, entitled 'Private rights', is contained in Part One,[11] Title II,[12] of the TCA and reads as follows:

'1. Without prejudice to Article SSC.67 of the Protocol on Social Security Coordination and with the exception, with regard to the Union, of Part Three of this Agreement, nothing in this Agreement or any supplementing agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement or any supplementing agreement to be directly invoked in the domestic legal systems of the Parties.

2. A Party shall not provide for a right of action under its law against the other Party on the ground that the other Party has acted in breach of this Agreement or any supplementing agreement.'

8. Part Three concerns law enforcement and judicial cooperation in criminal matters.

9. Article 524 of the TCA, in Part Three, Title I,[13] is headed 'Protection of human rights and fundamental freedoms' and is worded as follows:

'1. The cooperation provided for in this Part is based on the Parties' and Member States' long-standing respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the European Convention on Human Rights, and on the importance of giving effect to the rights and freedoms in that Convention domestically.

2. Nothing in this Part modifies the obligation to respect fundamental rights and legal principles as reflected, in particular, in the European Convention on Human Rights and, in the case of the Union and its Member States, in the [Charter].'

10. Title VII of Part Three (Articles 596 to 632), headed 'Surrender', establishes a surrender regime between the Member States and the United Kingdom. Those provisions are complemented by Annex 43, which sets out the information to be contained in an arrest warrant.[14]

8 See Article 783(2) of the TCA.

9 See Article 783(1) of the TCA and Notice concerning the entry into force of the TCA, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information (OJ 2021 L 149, p. 2560).

10 On common and institutional provisions (Part One), on trade, transport, fisheries and other arrangements (Part Two), on law enforcement and judicial cooperation in criminal matters (Part Three), on thematic cooperation (Part Four), on participation in EU programmes, sound financial management and financial provisions (Part Five), on dispute settlement and horizontal provisions (Part Six) and on final provisions (Part Seven).

11 Common and institutional provisions.

12 Principles of interpretation and definitions.

13 General provisions.

14 Pursuant to Article 778(2)(r) of the TCA, Annex 43 forms an integral part of Title VII of Part Three. See also Article 606 of the TCA, on the content and form of the arrest warrant.

11. Paragraph 3 of Article 599 of the TCA, headed 'Scope', reads:

'Subject to Article 600, points (b) to (h) of Article 601(1), and Articles 602, 603 and 604, a State shall not refuse to execute an arrest warrant issued in relation to the following behaviour where such behaviour is punishable by deprivation of liberty or a detention order of a maximum period of at least 12 months:

(a) the behaviour of any person who contributes to the commission by a group of persons acting with a common purpose of one or more offences in the field of terrorism referred to in Articles 1 and 2 of the European Convention on the Suppression of Terrorism, done at Strasbourg on 27 January 1977, or in relation to illicit trafficking in narcotic drugs and psychotropic substances, or murder, grievous bodily injury, kidnapping, illegal restraint, hostage-taking or rape, even where that person does not take part in the actual execution of the offence or offences concerned; such contribution must be intentional and made with the knowledge that the participation will contribute to the achievement of the group's criminal activities; or

(b) terrorism as defined in Annex 45.'

12. Article 604(c) of the TCA [15] provides that 'if there are substantial grounds for believing that there is a real risk to the protection of the fundamental rights of the requested person, the executing judicial authority may require, as appropriate, additional guarantees as to the treatment of the requested person after the person's surrender before it decides whether to execute the arrest warrant'.

13. Article 613(2) of the TCA specifies that 'if the executing judicial authority finds the information communicated by the issuing State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to … Article 604 …, be furnished as a matter of urgency and may fix a time limit for the receipt thereof …'.

III. The main proceedings and the question referred

14. Four warrants for the arrest of MA were issued by the District Judge of the Magistrates' Courts of Northern Ireland (United Kingdom) on 26 November 2021 in respect of four offences involving terrorism, [16] alleged to have been committed between 18 and 20 July 2020. The first of these offences is punishable by up to 10 years' imprisonment, while the other three offences could receive life sentences.

15. By judgment of 24 October 2022 and orders of 24 October and 7 November 2022, the High Court (Ireland) ordered MA's surrender to the United Kingdom, refusing him leave to appeal to the Court of Appeal (Ireland).

16. By decision of 17 January 2023, the Supreme Court granted MA leave to appeal against that judgment and those orders of the High Court.

15 Article 604 of the TCA is headed 'Guarantees to be given by the issuing State in particular cases'.

16 The four offences are (1) membership of a proscribed organisation, (2) directing the activities of an organisation concerned with the commission of acts of terrorism, (3) conspiracy to direct the activities of an organisation concerned with the commission of acts of terrorism, and (4) preparing to commit acts of terrorism.

17. MA submits that his surrender to the United Kingdom is incompatible with the principle of legality of criminal offences and penalties.

18. The referring court states that, were MA to be surrendered to the United Kingdom and sentenced to a term of imprisonment, his right to conditional release would be governed by United Kingdom legislation adopted after the alleged commission of the offences in respect of which he is subject to criminal proceedings.

19. As the referring court was uncertain as to the need to examine whether there was a risk of infringement of Article 49(1) of the Charter and, if so, how that review should be carried out by the executing judicial authority under the TCA and the Charter, it decided to stay the proceedings and to refer a question to the Court of Justice.

20. In its judgment in *Alchaster*,[17] the Court held that Article 524(2) and Article 604(c) of the TCA, read in conjunction with Article 49(1) of the Charter, must be interpreted as meaning that, where a person who is the subject of an arrest warrant issued on the basis of that agreement invokes a risk of a breach of Article 49(1) of the Charter in the event of surrender to the United Kingdom, on account of a change, which is unfavourable to that person, in the conditions for release on licence, which occurred after the alleged commission of the offence for which that person is being prosecuted, the executing judicial authority must undertake an independent examination as to the existence of that risk before deciding on the execution of that arrest warrant, in a situation where that judicial authority has already ruled out the risk of a breach of Article 7 ECHR by relying on the guarantees offered generally by the United Kingdom as regards compliance with the ECHR and on the possibility for that person to bring an action before the ECtHR. Following that examination, that executing judicial authority may refuse to execute that arrest warrant only if, after requesting additional information and guarantees from the issuing judicial authority, it has objective, reliable, specific and properly updated information establishing that there is a real risk of a change in the actual scope of the penalty provided for on the day on which the offence at issue was committed, involving the imposition of a heavier penalty than the one that was initially provided for.

21. In the light of that judgment, the referring court, pursuant to Article 613(2) of the TCA, requested the United Kingdom authorities to provide further information on the United Kingdom legislation which would be applicable to MA if he were convicted of one or more of the offences for which he is being pursued. The District Judge of the Magistrates' Courts of Northern Ireland responded to that request on 17 September 2024.

22. Further to that reply, the referring court confirms that, at the time of the commission of the offences at issue in the main proceedings, where a sentence of imprisonment for a fixed term was imposed, the court imposing that sentence was required to fix a 'custodial period', which could not exceed half of the sentence imposed, at the end of which the offender was required to be released on parole. In the case of a life sentence, an indeterminate custodial sentence or an extended custodial sentence, conditional release could only take place, at the end of a specified period, if the Parole Commissioners for Northern Ireland (United Kingdom) considered that the continued detention of the convicted person was not necessary for the protection of the public.

[17] See judgment of 29 July 2024 (C-202/24, EU:C:2024:649, paragraph 98 and the operative part).

23. Under the Northern Ireland parole regime applicable from 30 April 2021 onwards, including offences committed before that date, a determinate custodial sentence for a specified terrorist offence is composed of an 'appropriate custodial term' as determined by the judge, with an additional period of one year during which the convicted person will be released on parole, the aggregate of which may not exceed the maximum term of imprisonment. The person may also be released on parole after serving two thirds of the 'appropriate custodial term', provided that the Parole Commissioners are satisfied that his or her continued detention is not necessary for the protection of the public.

24. The rules relating to the conditional release of a person sentenced to life imprisonment, an indeterminate custodial sentence or an extended custodial sentence are not relevant to the present case, as the referring court has stated that MA's complaints relate solely to the amendment of the rules relating to determinate custodial sentences.

25. The referring court considers that there is a real possibility that MA will be sentenced to a fixed term of imprisonment if he is returned to the United Kingdom and that the amendment at issue will lead to persons sentenced to such imprisonment remaining in detention for a longer period. It seeks to ascertain whether the amendment, which has the effect of abolishing a regime under which conditional release was automatic, can still be regarded as relating solely to the enforcement of sentences or whether it must be considered as retroactively altering the very scope of the sentence.

26. It is in those circumstances that, by order of 22 October 2024, received at the Registry of the Court of Justice on 24 October 2024, the Supreme Court decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Would the application, to a person convicted of an offence or offences and sentenced to a determinate sentence(s), of amended rules having the effect that he or she will have to serve at least [two thirds] of such sentence and then will have only a conditional right to release on licence dependent on an assessment of dangerousness, whereas under the rules applicable at the time of the alleged offences, that person would have been automatically entitled as a matter of law to release on licence once he [or she] had served [one half] of that sentence, involve the imposition of a "heavier penalty" on the convicted person than the penalty applicable at the time of the alleged offences such as to amount to a breach of Article 49(1) of the Charter?'

IV. Procedure before the Court

27. The Supreme Court requested that the present case be determined pursuant to the expedited procedure provided for in Article 105(1) of the Rules of Procedure of the Court of Justice.

28. Article 105(1) of the Rules of Procedure provides that, at the request of the referring court or tribunal or, exceptionally, of his own motion, the President of the Court may, after hearing the Judge-Rapporteur and the Advocate General, decide that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure where the nature of the case requires that it be dealt with within a short time. [18]

[18] Moreover, where a case raises serious uncertainties that affect fundamental issues of national constitutional law and EU law, it may be necessary, having regard to the particular circumstances of such a case, to deal with it within a short time. See order of the President of the Court of 19 October 2018, *Wightman and Others* (C-621/18, EU:C:2018:851, paragraph 10 and the case-law cited).

29. On 26 November 2024, the President of the Court decided, after hearing the Judge-Rapporteur and the Advocate General, to grant the referring court's request that the present request for a preliminary ruling be determined pursuant to an expedited procedure in accordance with Article 105(1) of the Rules of Procedure.[19] The President of the Court based his decision on the fact that the question referred for a preliminary ruling by the referring court has been raised in a case with regard to a person in custody, within the meaning of the fourth paragraph of Article 267 TFEU. Furthermore, the answer to that question is liable, in the light of the nature of the question and the circumstances in which it is raised, to have an effect on the continued detention of the person concerned.[20]

30. The President of the Court set the time limit for the submission of written observations at 10 December 2024. In accordance with Article 105(2) of the Rules of Procedure, the date of the hearing was set at 21 January 2025.

31. Written observations were submitted by the parties to the main proceedings, by the European Commission and by the United Kingdom Government.[21] All the parties attended the aforementioned hearing.

V. Assessment

32. This is the second time within half a year that the referring court has made a reference to the Court in connection with the same case at national level: the Irish authorities are unsure as to whether a person alleged to have committed a series of offences can be surrendered to the United Kingdom under the relevant provisions of the TCA.

33. In its judgment of 29 July 2024, the Court held that Article 524(2) and Article 604(c) of the TCA must be interpreted as meaning that, where a person who is the subject of an arrest warrant invokes a risk of a breach of Article 49(1) of the Charter in the event of surrender to the United Kingdom, on account of a change, which is unfavourable to that person, in the conditions for release on licence, which occurred after the alleged commission of the offence for which that person is being prosecuted, the executing judicial authority must undertake an independent examination as to the existence of that risk before deciding on the execution of that arrest warrant.[22] Following that examination, that executing judicial authority will have to refuse to execute that arrest warrant only if, after requesting additional information and guarantees from the issuing judicial authority, it has objective, reliable, specific and properly updated information establishing that there is a real risk of a change in the actual scope of the penalty provided for on the day on which the offence at issue was committed, involving the imposition of a heavier penalty than the one that was initially provided for.[23]

19 See order of the President of the Court of 26 November 2024, *MA* (C-743/24, EU:C:2024:983).

20 See order of the President of the Court of 26 November 2024, *MA* (C-743/24, EU:C:2024:983, paragraph 8).

21 Just as in the case leading to the judgment of 29 July 2024, *Alchaster* (C-202/24, EU:C:2024:649), the United Kingdom has a right to intervene in the present case. For more details, see Opinion of Advocate General Szpunar in *Alchaster* (C-202/24, EU:C:2024:559, point 30 and footnote 19).

22 This includes a situation where that judicial authority has already ruled out the risk of an infringement of Article 7 ECHR by relying on the guarantees offered generally by the United Kingdom as regards compliance with the ECHR and on the possibility for that person to bring an action before the ECtHR. See judgment of 29 July 2024, *Alchaster* (C-202/24, EU:C:2024:649, paragraph 98).

23 See judgment of 29 July 2024, *Alchaster* (C-202/24, EU:C:2024:649, paragraph 98).

34. As regards, more specifically, the scope of Article 49(1) of the Charter, the Court referred to: (1) its consistent case-law to the effect that that article contains, at the very least, the same guarantees as those provided for in Article 7 ECHR, which must be taken into account by virtue of Article 52(3) of the Charter as a minimum threshold of protection;[24] and (2) the ECtHR's consistent case-law to the effect that, for the purposes of applying Article 7 ECHR, a distinction must be drawn between a measure that constitutes in substance a 'penalty' and a measure that concerns the 'execution' or 'enforcement' of the penalty. Thus, where the nature and purpose of a measure relate to the remission of a sentence or a change in the regime for release on licence, this does not form part of the 'penalty' within the meaning of Article 7 ECHR.[25]

35. The Court went on to conclude that a measure relating to the execution of a sentence will be incompatible with Article 49(1) of the Charter only if it retroactively alters the actual scope of the penalty provided for on the day on which the offence at issue was committed, thus entailing the imposition of a heavier penalty than the one initially provided for. Although that is not, in any event, the case where that measure merely delays the eligibility threshold for release on licence, the position may be different, in particular, if that measure essentially repeals the possibility of release on licence 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.[26]

36. By its question, the referring court seeks, in essence, to ascertain whether the second sentence of Article 49(1) of the Charter must be interpreted as meaning that the concept of a 'heavier penalty' contained in that provision covers a situation where the legal provisions governing a parole regime have been amended to provide that a right to automatic entitlement to release on licence, once the first half of an imposed sentence has been served, has been replaced by a right to release once at least two thirds of an imposed sentence have been served. That release is dependent on an assessment conducted by Parole Commissioners.

A. The imposition and the execution of a sentence

37. At the outset, it should be stressed that, apart from the surrender mechanism established by the TCA,[27] there is no EU harmonisation of the concepts on which I am about to elaborate. Those concepts are all, in one form or another, found in any national law of the EU Member States. However, because of a lack of harmonisation, concepts and details inevitably differ from Member State to Member State. The discussion below is therefore an attempt to summarise and explain concepts which are common to any criminal law system.

38. The present case revolves around the difference between the imposition and the execution[28] of a penalty.

24 Ibid., paragraph 92 and the case-law cited.

25 Ibid., paragraph 94 and the ECtHR case-law cited.

26 Ibid., paragraph 97.

27 The TCA is very much inspired by Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24). See also Opinion of Advocate General Szpunar in *Alchaster* (C-202/24, EU:C:2024:559, point 63 et seq.).

28 In the present Opinion, I shall employ the terms 'execution' and 'enforcement' synonymously.

39. Criminal laws provide for an array of penalties, the most draconian of which is the deprivation of liberty in the form of a prison sentence. Such a sentence is imposed by a court [29] at the end of a public trial and expresses public disapproval of the act, thereby contributing to compliance with the law. It entails a significant curtailment of the offender's rights and must, therefore, be commensurate with the severity of the offence and guilt. [30] The purpose of this penalty is manifold and typically falls within several categories, such as punishment, [31] deterrence [32] and rehabilitation. [33]

40. By contrast, the execution of a sentence refers to the process of carrying out or enforcing a court-imposed term of imprisonment. Execution regimes vary considerably from one legal order to another. [34] Sentence execution can include admission to prison, details concerning incarceration and sentence management.

41. While traditionally the execution of a penalty has been vested with the executive, [35] legal orders differ on the specific question of who takes the *decision* regarding release from prison: in some, the decision must, compulsorily, be taken by a judge, [36] while in others this is ensured by the executive. [37] In some Member States, there is a hybrid system, in which, concerning some offences, the executive decides, with the agreement of a part of the judiciary. [38]

42. While the distinction between imposition and execution is fairly straightforward in theory, the devil is in the detail, and it is sometimes difficult to draw a line between imposition and execution, [39] as I shall try to illustrate with three concise examples: a suspended sentence, a reduced sentence and early release from prison.

29 This is often laid down in the constitution of a State. See, by way of example, Paragraph 92 of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany) as well as judgment of the Bundesverfassungsgericht (Federal Constitutional Court, Germany) of 6 June 1967, 2 BvR 375/60, 53/60 and 18/65.

30 See, to that effect, Jescheck, H.-H. and Weigend, T., *Lehrbuch des Strafrechts, Allgemeiner Teil*, 5th edition, Duncker & Humblot, Berlin, 1996, p. 13.

31 Thus it serves as retribution for the crime committed, ensuring that the offender faces consequences.

32 Thus it discourages both the individual offender (specific deterrence) from committing further offences and the general public (general deterrence) from committing offences at all.

33 Thus it aims to assist offenders so that they can reintegrate into society, in a life free from crime.

34 See Höffler, K. and Padfield, N., 'The implementation of sentences', in Ambos, K., Duff, A., Heinze, A., Roberts, J. and Weigend, T., *Core Concepts in Criminal Law and Criminal Justice, Volume II*, Cambridge University Press, 2022, pp. 349-391, at p. 379.

35 See Tulkens, F. and van de Kerchove, M., *Introduction au droit penal. Aspects juridiques et criminologiques*, 8th edition, Wolters, Waterloo, 2007, p. 595. See also Spielmann, A., 'L'exécution des peines – un éternel problème', in *Diagonales à travers le droit luxembourgeois, Livre jubilaire de la Conférence Saint-Yves 1946-1986*, Imprimérie Saint-Paul, Luxembourg, 1986, pp. 831-846, at p. 839, republished in Spielmann, D. (editor), *Au diapason des Droits de l'Homme. Ecrits choisis (1975-2003)*, Bruylant, Brussels, 2006, pp. 151-167, at p. 159.

36 Consider, for instance, Belgium (Title V, Chapter II, of the Loi relative au statut juridique externe des personnes condamnées à une peine privative de liberté et aux droits reconnus à la victime dans le cadre des modalités d'exécution de la peine of 17 May 2006: Tribunal de l'application des peines) or Germany (Paragraph 462a of the Strafprozeßordnung (Code of Criminal Procedure): Strafvollstreckungskammer (criminal chamber responsible for the enforcement of sentences)).

37 This is the case in the United Kingdom, as will be seen in more detail below. For a comprehensive comparative overview, see van Kalmthout, A.M. and Tak, P.J.P., *Sanctions-Systems in the Member-States of the Council of Europe. Deprivation of liberty, community service and other substitutes. Part I* (1988) and *Part II* (1992), Kluwer Law International, Deventer. See also Pradel, J., *Droit pénal comparé*, 4th edition, Dalloz, 2016, § 558.

38 See, for example, Luxembourg (Article 669 et seq. of the Code de procedure pénale (Code of Criminal Procedure), where the prosecutor general or, as the case may be, the prosecutor general on the advice of a committee, comprising, in addition to the prosecutor general, two magistrates from the public prosecutor's office, may take the decision.

39 See also Kadelbach, S., 'Kapitel 15: Keine Strafe ohne Gesetz', in Dörr, O., Grote, R., and Marauhn, T. (editors), *EMRK/GG Konkordanzkommentar*, 3rd edition, Mohr Siebeck, Tübingen, 2022, point 37.

43. First, a court can, at the time of sentencing, decide to suspend a sentence, allowing the convicted person to avoid serving time in prison, subject to certain conditions being met. This is notably and typically the case for sentences with a short penalty spectrum, where there is no significant prior record or significant risk of reoffending, or in cases of positive social prognosis.

44. Secondly, the length of a sentence can officially be shortened after the sentence has been imposed. This is known as a reduction (or remission) of the sentence. Typically, this can be the result of an appeal, a pardon, an amnesty or, quite simply, a change in legislation or even case-law. If granted, the new, shorter sentence becomes the official duration.

45. A third category concerns regimes of early release from prison. Here, the (original) sentence, in particular its length, is not changed. Instead, the prisoner is allowed to serve the remainder of the sentence outside prison, under certain conditions. It constitutes a transitory phase between a prison regime (with the deprivation of liberty) and complete freedom. [40] Such early release can be automatic or subject to good behaviour or rehabilitation progress.

46. Generally speaking, there is a consensus that suspension (first example) refers to the imposition of a sentence, while early release from custody (third example) pertains to the execution of a sentence. Reduction of a sentence (second example) is generally considered as referring to the imposition of a sentence, given that the length of the sentence is officially shortened. That said, in some legal orders it is construed as pertaining to the execution of a sentence, because the shortening of the sentence occurs after the conviction. The judgment in *Del Río Prada v. Spain*, to which I shall turn below, pertains to this last category.

B. The principle of non-retroactivity (Article 7(1) ECHR and Article 49 of the Charter)

1. General considerations

47. A State under the rule of law should protect the individual not only through criminal law, but also from criminal law. [41] Thus, every legal system must, on the one hand, provide suitable methods and means of crime prevention whilst, on the other hand, also impose restrictions as to the use of criminal power so that citizens are not left defenceless against arbitrary or excessive action by the State. One of the principles to ensure the latter is the principle of legality. It serves to prevent arbitrary, incalculable punishment without law or on the basis of an indefinite or retroactive law.

48. The principle of legality can be divided into four further subprinciples: [42] the prohibition of analogy, [43] the prohibition of customary law as constituting or increasing a penalty, [44] the principle of non-retroactivity [45] and the prohibition of criminal laws which are not specific. [46]

40 See Spielmann, D. and Spielmann, A., *Droit pénal général luxembourgeois*, 2nd edition, Bruylant, Brussels, 2004, p. 576.

41 See Roxin, C., *Strafrecht Allgemeiner Teil, Band I*, 4th edition, C.H. Beck, Munich, 2006, § 5 A, point 1.

42 See, on this distinction, Roxin, C., *Strafrecht Allgemeiner Teil, Band I*, 4th edition, C.H. Beck, Munich, 2006, § 5 B, point 7 et seq.

43 *Nullum crimen, nulla poena sine lege stricta.*

44 *Nullum crimen, nulla poena sine lege scripta.*

45 *Nullum crimen, nulla poena sine lege praevia.*

46 *Nullum crimen, nulla poena sine lege certa.*

49. The principle of legality is contained in Article 49(1) of the Charter, pursuant to which no one is to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time it was committed.

50. Similarly, no heavier penalty is to be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty is applicable.

51. These rights are, as fundamental rights, legally enforceable. [47]

52. Article 49(1) of the Charter is primarily modelled on the partially identically worded [48] Article 7 ECHR. [49] It must be interpreted as containing, at the very least, the same requirements as those stemming from Article 7 ECHR. [50] This is confirmed by the (non-binding) explanations relating to the Charter. [51]

53. Article 7 ECHR is a cardinal provision within the convention [52] and is an indispensable element of the rule of law. No derogation from it is permissible under Article 15 ECHR. [53]

54. This brings me to the case-law of the ECtHR, which is relied upon for the purpose of interpreting Article 49(1) of the Charter. There is, indeed, a solid body of case-law by that court concerning non-retroactivity, [54] that is to say, the second sentence of Article 7(1) ECHR under which no heavier *penalty* can be imposed than the one that was applicable at the time the criminal offence was committed.

55. According to the traditional and consistent case-law of the Strasbourg Court, while the penalty falls within the scope of Article 7(1) ECHR, that is not the case for the execution of that penalty. [55]

47 See Lemke, S., in von der Groeben, H., Schwarze, J. and Hatje, A. (eds), *Europäisches Unionsrecht (Kommentar), Band 1*, 7th edition, Nomos, Baden-Baden, 2015, Art. 49 GRC, point 2.

48 The wording of the first two sentences of Article 49(1) of the Charter is essentially identical to that of Article 7(1) ECHR.

49 It is also modelled on Article 15 of the International Covenant on Civil and Political Rights; see Explanation on Article 49 – Principles of legality and proportionality of criminal offences and penalties, contained in Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17). In accordance with the third subparagraph of Article 6(1) TEU and Article 52(3) of the Charter, the explanations were drawn up in order to provide guidance on the interpretation of the Charter and must be duly taken into consideration both by the Courts of the European Union and by the courts of the Member States.

50 See judgment of 29 July 2024, *Alchaster* (C-202/24, EU:C:2024:649, paragraph 92 and the case-law cited).

51 See Explanation on Article 52 – Scope and interpretation of rights and principles, contained in Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17).

52 See also, to that effect, Scalia, D., 'L'application du principe de légalité des peines aux crimes (les plus) graves : l'orthodoxie retrouvée', in *Revue trimestrielle des droits de l'homme*, Vol. 25, No 99, Brussels, 2014, pp. 689-715, at p. 714.

53 See also, in that connection, judgments of the ECtHR of 22 November 1995, *C.R. v. the United Kingdom* (CE:ECHR:1995:1122JUD002019092, § 32); of 22 November 1995, *S.W. v. the United Kingdom* (CE:ECHR:1995:1122JUD002016692, § 34); and of 12 February 2008, *Kafkaris v. Cyprus* (CE:ECHR:2008:0212JUD002190604, § 137).

54 It is nevertheless interesting to note that, in their applications before the ECtHR, it is far more frequent for individuals to base their arguments on alleged infringements of Article 7 ECHR, as opposed to Articles 5 (Right to liberty and security), 6 (Right to a fair trial) or 8 (Right to respect for private and family life) ECHR. See, on that matter, Sanz-Caballero, S., 'The principle of *nulla poena sine lege* revisited: The retrospective application of criminal law in the eyes of the European Court of Human Rights', in *European Journal of International Law*, Vol. 28, No 3, 2017, pp. 787-817, at p. 789. Sanz-Caballero also points out that the few cases in which the Strasbourg Court found an infringement of Article 7 ECHR 'have often been notorious and have generated social alarm'.

55 See decisions of the European Commission of Human Rights of 3 March 1986, *Hogben v. the United Kingdom* (CE:ECHR:1986:0303DEC001165385), and of 28 February 1996, *Hosein v. the United Kingdom* (CE:ECHR:1996:0228DEC002629395). See also decision of the ECtHR of 29 November 2005, *Uttley v. the United Kingdom* (CE:ECHR:2005:1129DEC003694603), and judgment of the ECtHR of 12 February 2008, *Kafkaris v. Cyprus* (CE:ECHR:2008:0212JUD002190604, § 142).

56. Incidentally, that same approach has been adopted by the United Nations Human Rights Committee, which is the monitoring body of the International Covenant on Civil and Political Rights, [56] whilst, in national legal orders as well, the principle of non-retroactivity typically applies to penalties only and not to their execution. [57]

2. The regime in question

57. This brings us to the present case and to the question whether the measures at issue concern the penalty itself or the execution of a penalty. In order to determine this, it is essential to recall the features of those measures.

58. It is obviously ultimately up to the referring court to determine whether, in the present case, there is a risk of an infringement of Article 49(1) of the Charter if MA were to be surrendered to the United Kingdom. [58] Moreover, we are dealing with a considerable amount of uncertainties, given that there is no conviction yet and that surrender of MA is being sought with respect to the commission of alleged offences. It is necessarily unknown at present whether, in the event of a conviction, a term of imprisonment or life imprisonment will be imposed as a penalty. All of this is, nevertheless, in the end irrelevant, since the question of the referring court refers explicitly to a determinate sentence. As a consequence, it will be for the Court to examine the amended legislation with respect to determinate sentences (only).

59. That said, based on the information available and given the fact that the referring court visibly needs guidance on this matter, as is attested by the fact that it has (re-)submitted its question to the Court, I do see myself as being in a position to guide the referring court at this stage.

(a) The content of the new rules

60. At the time of the commission of the offences at issue in the main proceedings, where a sentence of imprisonment for a fixed term was imposed, the court imposing that sentence was required to fix a 'custodial period', which could not exceed half the sentence imposed, at the end of which the offender was – automatically – required to be released on licence. [59] It was a duty of the Secretary of State for Northern Ireland to release a prisoner who had served the relevant custodial period. [60]

56 Article 15 of the International Covenant on Civil and Political rights contains a prohibition of retroactive application of criminal law. Here, the Human Rights Committee has clarified that the retroactive introduction of parole with mandatory supervision was not deemed a penalty within the meaning of the aforementioned Article 15, but rather a measure of social assistance intended to provide for the rehabilitation of the offender. See *A. R. S.* v. *Canada*, Communication No 91/1981, U.N. Doc. CCPR/C/OP/1 at 29 (1984), at point 5.3, available at: https://juris.ohchr.org/casedetails/438/en-US. Consequently, the Human Rights Committee declared the communication to be inadmissible. For a critical discussion, see Schabas, W.A., *U.N. International Covenant on Civil and Political Rights. Nowak's CCPR Commentary*, 3rd edition, N.P. Engel Verlag, Kehl, 2019, Art. 15 CCPR, point 13.

57 See, for example, Merle, R. and Vitu, A., *Traité de droit criminel, Tome I*, 7th edition, Éditions Cujas, Paris, 1997, paragraph 282, and Kuty, F., *Principes généraux du droit pénal belge*, Éditions Larcier, Brussels, 2007, paragraphs 482 and 506.

58 See, to that effect, Opinion of Advocate General Szpunar in *Alchaster* (C-202/24, EU:C:2024:559, point 81).

59 See Article 8 of the Criminal Justice (Northern Ireland) Order 2008, as reproduced by the referring court in paragraphs 17 and 18 of the request for a preliminary ruling. In the case of a life sentence, an indeterminate custodial sentence or an extended custodial sentence, conditional release could only take place, at the end of a specified period, if the Parole Commissioners (United Kingdom) considered that the continued detention of the convicted person was not necessary for the protection of the public.

60 See Article 17 of the Criminal Justice (Northern Ireland) Order 2008, as reproduced by the referring court in paragraphs 17 and 18 of the request for a preliminary ruling.

61. Under the new rules, a person convicted is now liable to a determinate custodial sentence for a term equal to the aggregate of the 'appropriate custodial term', with an additional period of one year for which the offender is to be subject to a licence. That aggregate term cannot exceed the maximum term of imprisonment applicable (for the purposes of the present case: 10 years).[61] The 'appropriate custodial term' is the term that, in the opinion of the court, ensures that the sentence is appropriate. After serving two thirds of that term, the offender may be released on licence by direction of the Parole Commissioners, provided that those commissioners are satisfied that it is no longer necessary for the protection of the public that the prisoner be confined.[62]

62. There are, therefore, two distinct changes that have been introduced by the new rules: first, the possibility of conditional release has been postponed from half of the term of the sentence to at least two thirds of that term, it being understood that there must always be at least one, final year where the person concerned is released, subject to licence. Secondly, a system of automatic release has been superseded by a conditional one, in which the intervention of Parole Commissioners is necessary.

63. It should be added that, as outlined by the referring court,[63] with reference to a relevant judgment of the Supreme Court of the United Kingdom,[64] the stated purpose of the amendment to that act is to protect the public by bringing an end to terrorist offenders being released early, automatically, and delaying the earliest point at which such offenders could be considered for release.

(b) Arguments of the parties

64. MA argues, in essence, that the concept of 'repeal' of the possibility of early release referred to in the Court's judgment in *Alchaster*[65] must be understood as referring to the elimination of not only any possibility of conditional release at any stage of the enforcement of a prison sentence, but also of an automatic release initially provided for at a given stage of that enforcement. Moreover, according to MA, the amendments at issue in the main proceedings have the effect of increasing the intrinsic seriousness of the sentence incurred. He claims that those amendments add a punitive element.

65. Ireland, the United Kingdom and the Commission take the opposite view. They stress that the penalties occurred have remained unchanged, that is to say, imprisonment for a maximum of 10 years. The modification of the conditions for early release are, in their submission, a typical example of a measure relating to the enforcement of a sentence. Moreover, Parole Commissioners do not have the power to extend or reduce the sentence imposed.

61 See paragraph 22 of the request for a preliminary ruling.

62 See paragraph 22 of the request for a preliminary ruling.

63 See paragraph 21 of the request for a preliminary ruling.

64 See judgment of the Supreme Court of the United Kingdom of 19 April 2023, *Morgan and Others* v *Ministry of Justice*, [2023] UKSC 14, [2024] AC 130, paragraph 69, available at https://www.supremecourt.uk/cases/uksc-2022-0056.

65 See judgment of 29 July 2024, *Alchaster* (C-202/24, EU:C:2024:649, paragraph 97).

(c) Analysis

66. I do admit that we are in the presence of a borderline case in which the correct answer is not readily apparent. I must closely scrutinise the relevant case-law of the ECtHR [66] before being in a position to provide the Court with a proposed answer.

(1) ECtHR case-law

67. The starting point of the long-standing case-law of the Strasbourg Court is that the concept of 'penalty' is autonomous in scope. [67] Next, the ECtHR consistently draws a distinction in its case-law between a measure that constitutes a penalty per se and a measure that concerns the execution or enforcement of the penalty.

(i) Cases prior to the judgment in Del Río Prada v. Spain

68. In the decision in *Hogben*, a case of life imprisonment as a mandatory sentence for murder, the rules were such that the person concerned, when no longer considered dangerous, could be transferred from a closed prison to an open prison with the reasonable expectation of being released within a period of two years pursuant to that transfer. Mr Hogben was transferred to an open prison after serving 13 years of his sentence. During that time, the rules for release on parole were altered. The competent minister [68] announced a new parole policy to a conference of his political party. The stated aim was to exclude release on parole before 20 years in custody for 'murderers of police or prison officers, terrorist murders, sexual or sadistic murderers of children and murders by firearm in the course of robbery'. This led to Mr Hogben not being eligible for release before having served 20 years in custody. The European Commission of Human Rights held that the 'penalty' for the purposes of Article 7(1) ECHR was that of life imprisonment. The fact that the parole regime had been amended related to the execution of the sentence and not to the 'penalty' in question. [69] Accordingly, the application was declared inadmissible.

69. In the decision in *Hosein*, the applicant was sentenced to life imprisonment. As a result of his becoming ill during detention and needing to be detained in hospital for treatment, he was refused the parole hearing which could have resulted in his release. The European Commission of Human Rights held that 'expectations with regard to release on parole do not affect [the] "penalty" imposed for the purposes of Article 7 [ECHR]'. [70]

70. In the judgment in *Grava*, the applicant was sentenced to six years' imprisonment, which the competent court of appeal later reduced to four years. Subsequently, he sought sentence reductions, which allowed for remission of sentences under specific conditions. After it being initially denied, a remission was granted. By that time, the applicant had already been released. However, the time spent in prison had exceeded the duration he would have served had the

66 Also relevant is the case-law of the former European Commission of Human Rights, which operated, in the first instance, prior to the entry into force on 1 November 1998 of Protocol No. 11 to the [ECHR], restructuring the control machinery established thereby.

67 See, to that effect, judgments of the ECtHR of 9 February 1995, *Welch v. the United Kingdom* (CE:ECHR:1995:0209JUD001744090, § 28); of 8 June 1995, *Jamil v. France* (CE:ECHR:1995:0608JUD001591789, § 31); and of 12 February 2008, *Kafkaris v. Cyprus* (CE:ECHR:2008:0212JUD002190604, § 142).

68 That is to say, the Secretary of State for the Home Department (United Kingdom).

69 See decision of the European Commission of Human Rights of 3 March 1986, *Hogben v. the United Kingdom* (CE:ECHR:1986:0303DEC001165385, § 4).

70 See decision of the European Commission of Human Rights of 28 February 1996, *Hosein v. the United Kingdom* (CE:ECHR:1996:0228DEC002629395, § 1).

remission been applied in a timely manner. The applicant accordingly argued that the delayed remission application led to a heavier penalty than the law prescribed at the time of his offence. The Strasbourg Court disagreed, stating that the 'penalty' refers to the four-year imprisonment sentence. The issue of remission pertains to sentence execution, not to the penalty itself. Therefore, there was no infringement of Article 7(1) ECHR.[71]

71. In the decision in *Uttley*, a person sentenced to a 12-year prison sentence would have been eligible for early release after serving two thirds of his sentence, provided he had been of good behaviour.[72] While he was in prison, the rules were changed to provide that early release after completion of two thirds of a sentence was subject to a licence. The applicant argued that this licence requirement amounted to a heavier penalty than the one initially imposed. The Strasbourg Court dismissed the application as inadmissible, reiterating that the measure in question did not form part of the penalty, but was part of the regime by which prisoners could be released before serving the full term of the sentence imposed.[73]

72. We can therefore summarise that it transpires from all of the abovementioned cases that, where the nature and purpose of a measure relate to the remission of a sentence or a change in a regime for early release, this does not form part of the 'penalty' within the meaning of Article 7 ECHR.

(ii) The judgment in Del Río Prada v. Spain

73. This brings me to the question regarding the extent to which the rather formalistic approach of the ECtHR, as outlined above, has been modified by the judgment in *Del Río Prada v. Spain*.

74. At the time of Ms Del Río Prada's offence, the Spanish Criminal Code of 1973 limited the maximum term of imprisonment to 30 years in the event of multiple sentences. That criminal code further entitled the detainee to a remission of one day for every two days of work. Subsequently, that is to say, not only after the commission of the offences but also after the sentences were imposed, the Tribunal Supremo (Supreme Court, Spain) applied the so-called Parot doctrine, which changed the calculation of sentence remissions. Instead of applying these to the 30-year maximum term, they were applied to each individual sentence. The result was that it was de facto impossible for Ms Del Río Prada to benefit from *any sentence remission at all*. The possibility of a sentence remission was, in other words, reduced to zero.

75. It was in those circumstances that the ECtHR, sitting in the formation of the Grand Chamber,[74] held that the application of the Parot doctrine to Ms Del Río Prada's situation deprived of any useful effect the remissions of sentence for work done in detention to which she was entitled by law and in accordance with final decisions by the judges responsible for the

71 See judgment of the ECtHR of 10 July 2003, *Grava v. Italy* (CE:ECHR:2003:0710JUD004352298, § 51).

72 Release on licence would have been possible after expiry of one third of the sentence.

73 See decision of the ECtHR of 29 November 2005, *Uttley v. the United Kingdom* (CE:ECHR:2005:1129DEC003694603). At national level, the Court of Appeal (England & Wales) held the imposition of licence to be an integral part of the sentence as a whole, not merely one form of administering it. It was 'fiction' to argue that the sentence had not become more onerous, which is why that court found an infringement of Article 7 ECHR. See [2003] EWCA Civ 1130, points 14 and 15; available at: http://www2.bailii.org/ew/cases/EWCA/Civ/2003/1130.html. However, the House of Lords reversed the Court of Appeal (England & Wales)'s decision ([2004] UKHL 38, available at: https://publications.parliament.uk/pa/ld200304/ldjudgmt/jd040722/uttley-1.htm). See, in detail, Douglas, H., 'Article 7: no punishment without law', in Simor, J. and Emmerson, B., *Human Rights Practice*, Sweet & Maxwell, London, 2024.

74 *In casu*, the case was referred to the Grand Chamber, at the request of the Spanish Government, under Article 43 ECHR, meaning that this is an exceptional case, 'rais[ing] a serious question affecting the interpretation or application of the [ECHR], or a serious issue of general importance' (see Article 43(2) ECHR).

execution of sentences.[75] The ECtHR went on to state that the way in which the provisions were applied 'went beyond mere prison policy'[76] and that 'as a result of the "Parot doctrine", the maximum term of [30] years' imprisonment ceased to be an independent sentence to which remissions of sentence for work done in detention were applied, and instead became a [30]-year sentence to which no such remissions would effectively be applied.'[77]

76. This last element appears crucial to me for the purposes of the present case: in the judgment in *Del Río Prada v. Spain*, under the new legal situation there was no longer a possibility at all for the sentence imposed to be shortened. Such an extraordinary circumstance amounted to a redefinition of the scope of the penalty originally imposed.

77. It is my contention that the judgment in *Del Río Prada v. Spain* in essence confirms the previous case-law, whereby the distinction between the imposition and the execution of a sentence is maintained. The facts of that case, however, were such that through the elimination of any possibility of reducing the sentence, the scope of the initial penalty was affected.

(iii) Cases after the judgment in Del Río Prada v. Spain

78. The ECtHR has gone on to apply this ruling in a number of inadmissibility decisions.

79. In the decision in *Abedin*, the applicant was initially entitled to automatic and unconditional release after three quarters of the sentence had been served. Under the new rules, which were adopted and came into force after his conviction, a parole board had to approve any release. Moreover, licence conditions remained in force until the expiry of the sentence.

80. In other words, just as in the present case, a system leading to automatic release was replaced by a system requiring the intervention and approval of a parole board.

81. The Strasbourg Court first recalled its case-law, notably in the decision in *Uttley* and the judgment in *Del Río Prada v. Spain*. With specific reference to the latter, that court recalled that the critical element in determining the applicability of Article 7 ECHR to such a case was whether the changes introduced had the effect of modifying or redefining the penalty *itself*.[78] It explained that in the judgment in *Del Río Prada v. Spain* 'the Article 7 [ECHR] issue arose because instead of applying remissions earned to the applicant's [30]-year sentence, as had previously been the judicial practice, the authorities applied the remissions earned by the applicant to the individual sentences in line with a recent change in the case-law. The Court considered that the overall effect of the change to the practice in Spain was, essentially, to modify or redefine the penalty imposed on the applicant from one of [30] years less any remissions earned to one of [30] years with no entitlement to remissions'.[79]

82. The Strasbourg Court then held that the same considerations did not apply to Mr Abedin's case, whose penalty of 20 years' imprisonment had not been changed, and that it was to that penalty that the early release provisions applied.[80] The court went on to state that there had been

75 The judgment in *Del Río Prada v. Spain*, § 107.

76 See the judgment in *Del Río Prada v. Spain*, § 108.

77 See the judgment in *Del Río Prada v. Spain*, § 109.

78 See decision of the ECtHR of 12 November 2019, *Abedin v. the United Kingdom* (CE:ECHR:2019:1112DEC005402616, § 33).

79 Ibid., § 35.

80 Ibid., § 36.

no conceivable redefinition, or modification, of the 'penalty' imposed on Mr Abedin.[81] That led the court to conclude that Mr Abedin's case related to the manner of execution of his sentence and did not fall within the scope of Article 7(1) ECHR.[82] It consequently held the application to be inadmissible.[83]

83. In the decision in *Devriendt*, the applicant was sentenced to life imprisonment. At the time of the conviction, he could apply for conditional release after 10 years' imprisonment. Subsequently, that threshold was raised to 15 years and applied retroactively to cases such as his.

84. The Strasbourg Court held that the change in legislation related to the execution of the sentence. Just like in the decision in *Abedin*, it recalled that the penalty in question had not been changed since the day the offence was committed.[84] The Strasbourg Court went on to observe that, under Belgian law, conditional release was a method of enforcing a custodial sentence whereby the convicted person served his or her sentence outside prison, subject to compliance with the conditions imposed during a specified probationary period. In that connection, the Strasbourg Court expressly stated that that case differed in that respect from the situation in the judgment in *Del Río Prada v. Spain*, in which the issue was a reduction in the sentence to be served and not a mere reduction or adjustment of the conditions of enforcement.[85]

85. The court went on to distinguish the situation of Mr Devriendt from that of Ms Del Río Prada. It accepted that the effect of the 2013 legislative amendment was to increase the time threshold for eligibility for conditional release, which undoubtedly resulted in a harsher situation for the applicant's detention, but it noted that, contrary to the situation in the judgment in *Del Río Prada v. Spain*, the effect of that harsher treatment was not to make it impossible to grant conditional release.[86]

86. It then recalled that it had previously been held that the fact that a post-conviction increase in the parole eligibility threshold could lead to a harsher situation in detention concerned the enforcement of the sentence and not the sentence itself and that, consequently, it could not be inferred from such a circumstance that the sentence imposed would be harsher than that imposed by the trial judge.[87]

87. The ECtHR went on to conclude that Mr Devriendt's case concerned only the manner in which the sentence was served and had no impact on the scope of the sentence, which remained unchanged.[88] It consequently held the application to be inadmissible.[89]

88. The judgment in *Del Río Prada v. Spain* is a Grand Chamber judgment, carrying with it the natural authority associated with the most solemn formation of the ECtHR. The decisions in *Abedin* and *Devriendt* are committee[90] inadmissibility decisions. This difference in formation is,

81 Ibid.

82 Ibid.

83 Ibid., § 37: the complaint was incompatible *ratione materiae* with the ECHR within the meaning of Article 35(3)(a) ECHR and had to be rejected in accordance with Article 35(4) ECHR.

84 See decision of the ECtHR of 31 August 2021, *Devriendt v. Belgium* (CE:ECHR:2021:0831DEC003556719, § 24).

85 Ibid., § 26.

86 Ibid., § 28.

87 Ibid., § 29.

88 Ibid., § 30.

89 Ibid., § 34: the complaint was held to be incompatible *ratione materiae* with the ECHR within the meaning of Article 35(3)(a) ECHR and was rejected in accordance with Article 35(4) ECHR.

90 Committees are composed inter alia of three judges, see Article 26(1) ECHR and Rule 27 of the ECtHR's Rules of Court.

nevertheless, immaterial in the present context, since both formations formally engage the ECtHR in the same manner. If anything, it is to be seen as an indication that, for the Strasbourg Court, the matter was so clear-cut in the decisions in *Abedin* and *Devriendt* that it decided to entrust them to a committee. [91]

(2) Application to the present case

(i) Delay of eligibility threshold for release on licence

89. The delay of the eligibility threshold for release on licence, on its own, does not, according to the Court's findings in *Alchaster*, appear to fall within the scope of Article 49(1) of the Charter. [92] We can rely on the judgment in *Del Río Prada v. Spain* and the decision in *Devriendt* here in that the Strasbourg Court is very clear in asserting that a delay in the eligibility threshold for release on licence forms part of the execution of a sentence and, therefore, does not fall within the remit of Article 7(1) ECHR.

(ii) Release conditional on assessment of Parole Commissioners

90. The Court stated, in essence, in *Alchaster* that the scope of Article 49(1) of the Charter potentially covers a situation where the measure in question essentially repeals the possibility of release on licence or forms part of a series of measures which have the effect of increasing the intrinsic seriousness of the sentence initially provided for. [93]

91. The complete repeal of the possibility of release on license can be ruled out in the present case because, as confirmed by the United Kingdom at the hearing, during the last year of serving the sentence, the person in question is *always* released, subject to a licence. It is for this reason that I consider that the situation in the present case is not comparable to that in the judgment in *Del Río Prada v. Spain.*

92. The question whether we are facing a *series* of measures which have the effect of increasing the intrinsic seriousness of the sentence initially provided for is, in my view, trickier and hence difficult to answer.

93. As outlined by the referring court, [94] with reference to a relevant judgment of the Supreme Court of the United Kingdom, [95] the stated purpose of the amendment is to protect the public by bringing to an end the early and automatic release of terrorist offenders and delaying the earliest point at which such offenders can be considered for release.

94. I am well aware that this is the purported intention of the legislature. In particular, the fact that the amendment in question is specifically geared towards terrorist offenders by introducing a specific parole regime for specified terrorism offences could be construed as an indication that,

91 Such inadmissibility decisions have been described as 'negative case-law', the significance of which is that 'it is pointless to take further comparable complaints to Strasbourg, at least for the foreseeable future', see Myjer, E. and Kempees, P., 'Thoughts on the positive impact of negative case-law', in *El Tribunal Europeo de Derechos Humano. Una visión desde dentro. En homenaje al juez Josep Casadevall*, Tirant Lo Blanch, Valencia, 2015, pp. 343-356, at p. 352.

92 See judgment of 29 July 2024, *Alchaster* (C-202/24, EU:C:2024:649, paragraph 97).

93 See judgment of 29 July 2024, *Alchaster* (C-202/24, EU:C:2024:649, paragraph 97).

94 See paragraph 21 of the request for a preliminary ruling.

95 See judgment of the Supreme Court of the United Kingdom of 19 April 2023, *Morgan and Others* v *Ministry of Justice*, [2023] UKSC 14, [2024] AC 130, paragraph 69, available at https://www.supremecourt.uk/cases/uksc-2022-0056.

in reality, the intention was to raise the penalty for such offences. One may also wonder whether, in general, the decision to deprive certain categories of offenders of early release really refers to the technical question of execution rather than re-defines the penalty itself. Or, to put it differently, as the Court of Appeal in the decision in *Uttley* put it – admittedly overruled by the House of Lords – it is 'fiction' to argue that the sentence had not become more onerous. [96]

95. Nevertheless, I do not see how this legislative intention, if any, could call into question, with respect to the present case, the fundamental tenet that the penalty as such has not been altered. It should be added that, already in the decision in *Hogben*, the stated aim of the measure had been to target certain categories of offences. [97] Yet, the Strasbourg Commission did not appear to have an issue with that consideration. [98]

96. Moreover, the introduction of an assessment of the potential danger of an individual to the public appears to me to form part of prison policy. Put illustratively, the key question is whether, having served a substantial part of a sentence in prison, an individual is fit to leave prison at a given moment in time. If Parole Commissioners come to the conclusion that the individual does pose a danger to the public *at that moment* and must serve a longer portion of a sentence inside prison, I do not see how that would affect the intrinsic seriousness of the sentence initially provided for. The sentence as such is not changed; it is up to the individual *at the moment* to act accordingly and show to the Parole Commissioners that he or she is fit to leave. This, in my view, is completely decoupled from the sentence imposed. It is almost traditional prison policy. The fact that the deprivation of liberty of the person persists is a consequence of this.

97. I should like to stress in this connection that the considerations made in the previous point presuppose absolutely that the jurisdiction of the Parole Commissioners is confined to the question whether the person concerned poses a threat to the public at a given time, that the assessment is conducted thoroughly in accordance with a fixed protocol and that it is properly documented. Beyond this, the Parole Commissioners must not be able to avail themselves of any further discretion.

98. If those conditions are met, I consider the amended measures to refer to the execution of a sentence. They do not affect the intrinsic nature of the sentence initially provided for and, therefore, based on the case-law of the ECtHR analysed above, fall outside the scope of Article 7(1) ECHR.

99. This leaves us with the question whether, in a situation such as that of the present case, Article 49(1) of the Charter provides or should provide more extensive protection than Article 7(1) ECHR.

(iii) On Article 52(3) of the Charter

100. Pursuant to Article 52(3) of the Charter, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights are the same as those laid down by the ECHR. It must be stressed that Article 52(3) of the Charter contains a guarantee and not a simple option for the European Union to ensure that the meaning

96 See footnote 70, above.

97 *In casu*, murderers of police or prison officers, terrorist murders, sexual or sadistic murderers of children and murders by firearm in the course of robbery; see decision of the European Commission of Human Rights of 3 March 1986, *Hogben v. the United Kingdom* (CE:ECHR:1986:0303DEC001165385, § 4).

98 Ibid.

and scope of the corresponding rights under the ECHR are not undermined.[99] At the same time, that provision specifies that this does not prevent EU law from providing more extensive protection.

101. I see, however, no reason for considering that this should be the case. The Court of Justice has held that Article 49 of the Charter contains, at the very least, the same guarantees as those provided for in Article 7 ECHR, which must be taken into account by virtue of Article 52(3) of the Charter as a minimum threshold of protection.[100] However, that statement, on its own, merely affirms the wording of Article 52(3) of the Charter.[101]

102. As observed by the Commission, there is no discernible constitutional tradition common to the Member States under which the scope of Article 49(1) of the Charter is or should be broader than that of Article 7(1) ECHR.

103. Nor do I see any aspects specific to the EU legal order which would warrant more far-reaching protection. There may be areas of law where there are good reasons for the European Union to provide for greater protection than under the corresponding ECHR right. That is not the case here, however. We should remember the intrinsic and natural tension between the potential invoking of Article 49 of the Charter and the high level of trust (albeit not mutual trust)[102] which continues to persist between the European Union and the United Kingdom as regards respect for fundamental rights.[103] In such a situation, the careful balance between those two principles is best struck by a level of fundamental rights protection which is aligned to the level of the ECHR. Here I can concur, once more, with the late Lord Bingham, when he stated that 'the meaning of the [ECHR] should be uniform throughout the [States] party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.'[104] The same should apply for the Court in the present case.

(3) Final remarks

104. I should like to end this Opinion with two final remarks, in the spirit of which the referring court must carry out its assessment.

105. First, the present case is confined to the guarantees provided for in Article 7(1) ECHR and Article 49 of the Charter. As has been demonstrated in this Opinion, measures governing the execution of a sentence may not, in principle, be scrutinised under Article 7(1) ECHR. Nevertheless, we should not lose sight of the fact that prisoners continue to benefit from a whole

99 See Callewaert, J., 'L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme : une réponse logique à l'optionalité de la Convention européenne des droits de l'homme en droit de l'Union européenne', in *Revue trimestrielle des Droits de l'Homme*, Vol. 36, No 141, 2025, pp. 9-29, at p. 12.

100 See judgment of 29 July 2024, *Alchaster* (C-202/24, EU:C:2024:649, paragraph 92 and the case-law cited).

101 Article 52(3) of the Charter does not prevent EU law from providing more extensive protection that the ECHR.

102 I understand the Court to resort to the principle of *mutual* trust to refer to the relationship between EU Member States only; see judgment of 29 July 2024, *Alchaster* (C-202/24, EU:C:2024:649, paragraph 92 and the case-law cited). By contrast, I consider the level of trust between the European Union and the United Kingdom to be considerably higher than that with most other non-Member States.

103 See, to that effect, Opinion of Advocate General Szpunar in *Alchaster* (C-202/24, EU:C:2024:559).

104 See *Regina* v. *Special Adjudicator (Respondent) ex parte Ullah (FC)* (Appellant), [2004] UKHL 26, point 20, available at: https://publications.parliament.uk/pa/ld200304/ldjudgmt/jd040617/ullah-1.htm.

range of other fundamental rights, such as the right to vote under Article 3 of the (first) Protocol to the [ECHR] or certain rights contained in the guarantee for respect for private and family life, home and correspondence under Article 8 ECHR,[105] to mention just two examples.

106. Secondly and lastly, I should like to stress once more that it is for the referring court to apply the interpretation proposed to the case before it and that it must, in the course of that exercise, do its utmost to examine whether the measures in question, which have been labelled as 'prison policy' by the United Kingdom, do in fact amount to a policy governing merely the execution of a sentence.

VI. Conclusion

107. In the light of the foregoing considerations, I propose that the Court answer the question referred by the Supreme Court (Ireland) as follows:

The second sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union

must be interpreted as meaning that the concept of 'heavier penalty' contained in that provision does not, in principle, cover a situation where the legal provisions governing a parole regime have been amended to provide that a right to automatic entitlement to release on licence, once the first half of an imposed sentence has been served, has been replaced by a right to release once at least two thirds of an imposed sentence have been served, where that release is dependent on an assessment conducted by Parole Commissioners.

[105] See, in detail, Padfield, N., 'Article 8 and the rehabilitation of offenders: a view from Cambridge, England', in Casadevall, J. and Raimondi, G. et al., *Liber amicorum Dean Spielmann*, Wolf Legal Publishers, Oisterwijk, 2015, pp. 457-464.