Stream

Strengthening Trust in the European Criminal Justice Area through Mutual Recognition and the Streamlined Application of the European Arrest Warrant

First Periodic Country Report: Ireland

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Introduction

The Framework Decision on the European Arrest Warrant (FDEAW) was transposed by Ireland through the European Arrest Warrant Act 2003 (the 2003 Act). Under the 2003 Act, the central authority is the Minister for Justice, the High Court is the executing judicial authority, and in relation to the issuing of EAWs, once the domestic arrest warrant has been issued by a judge of the District or Circuit court, a European arrest warrant can be issued by those courts upon application by the Director of Public Prosecutions (the DPP).

In the application of the FDEAW, the Irish system draws its sources from the Common Law[1], the Irish Constitution, EU law and Irish legislation, and in the broader arena, the European Convention on Human Rights and the case law of the CJEU. As such, it adheres to the common law doctrine of precedent, whereby decisions of higher courts are binding on courts of lower tiers, and in general, the courts follow previous decisions of other courts on the same level. The court that is charged with the execution of European Arrest Warrants is the High Court; an appeal may be made by either side to the Court of Appeal, or to the Supreme Court where the High Court certifies that the case involves a point of law of exceptional public importance.

Section I of this Report will examine the procedures for issuing EAWs in Ireland. This part will address issues of the status and independence of the issuing authorities in Ireland, how the assessment of proportionality and case readiness is made, and the rights of the defence in the issuing phase.

Section II turns to an examination of the execution of EAWs where requests for surrender are received by Ireland. This section will first address challenges to surrender that have arisen relating to the status of the issuing authority in the requesting state, before turning to an examination of the scope for consideration by the executing judicial authority of the issue of proportionality in the issuing of the warrant.

As guardians of the Constitution, the Irish judiciary must protect the fundamental rights of those that appear before them, and to this end, must make enquiry where an objection to surrender is raised that their fundamental rights will be encroached. While the EAW system is meant to proceed from a basis of mutual

[1] Since the departure of the UK from the EU, Ireland is now the only jurisdiction in the EU that follows the common law tradition.

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trust, the Irish judiciary appears unwilling to simply proceed in an exercise of blind faith. Many EAW judgments reveal a tendency by the judges to engage with other systems, through the mechanism of seeking additional information provided for in the FD,[2] so as to enable them to make informed decisions. They also reveal to the judges a very different legal culture to that which pertains in Ireland. [3]

The Courts have dealt with different aspects of fundamental rights involved in an EAW surrender and these cases will be discussed in Section II: poor detention conditions have been repeatedly raised in opposition to surrender, in some cases successfully, in others not ; fair trial rights have been raised to a lesser extent, but it should be noted that in relation to the EU procedural rights *acquis,* Ireland by virtue of protocol 21 of the Lisbon Treaty has opted in to only two of those measures: the right to information directive and the translation directive.[4] Ireland has been faced also with a number of cases where surrender to other Member States has been opposed on the basis of fair trial rights being breached due to the absence of an independent and impartial tribunal, and has sent a number of preliminary references to the CJEU in this regard. These have specifically related to Poland due to concerns about the breakdown of the rule of law. The courts have been faced with opposition to surrender based on arguments that the surrender would violate Constitutional rights of the family, and Art 8 of the ECHR. Here, the courts follow for the most part the jurisprudence of the CJEU and ECtHR and set a high bar to be overcome for a decision of refusal to surrender to be reached on the basis of interference with family rights.

Finally, the impact on execution of EAW's due to three specific aspects of Irish justice system will be discussed. These aspects have resulted in refusals to surrender, despite not being listed as a ground for refusal in the FD. The first to be examined is the requirement by the Irish transposing legislation that a surrender must be refused where no decision to charge and to try the requested person exists at the time of issuing the warrant. The second specific aspect is the principle of reciprocity which has been considered by the Supreme Court to apply to the EAW process, and has been successfully relied upon as a ground for refusal. The third aspect is the Doctrine of Abuse of Process.

Section III will attempt a synthesis of the issues raised in sections I and II, highlighting the challenges that they have presented for the principle of mutual recognition and the tensions arising in respecting that principle on the one hand, and fundamental rights on the other.

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[2] Art 15 FD, and under s. 20(1) of the Act of 2003: In proceedings to which requires the High Court "if of the opinion that the documentation or information provided to it is not sufficient to enable it to perform its functions under this Act, require the issuing judicial authority or the issuing state, as may be appropriate, to provide it with such additional documentation or information as it may specify, within such period as it may specify'.

[3] *McArdle* [2014] IEHC 132 (Netherlands law, an interesting demonstration of mutual exasperation*!); Bailey* [2012] IESC 16 *(*French law*); Gheorghe* [2009] IESC 76 (Romanian law and meaning of 'retrial'*); Herman* [2014] IEHC 251 *(*Czech law and meaning of 'final judgment'*).*

[4] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/; Directive of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1; Ireland did not opt in to the access to lawyer directive Directive 2013/48 of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, [2013] OJ L 294/1; Ireland also did not opt in to the Directive on the presumption of innocence, Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence.[2016] OJ L65/1. There is no case law to indicate whether this has constituted an issue with regard to EAWs issued by Ireland.

Section I – Issuing of EAWs: rule of law and fundamental rights considerations

In Ireland, the Garda Siochana (the Irish police force) are entrusted with the investigation of all offences and are fully independent in their decision to initiate investigations – they are not subject to instructions or supervision from the Director of Public Prosecutions (the DPP) or the judiciary in this regard. The Gardaí then prepare a file on the investigation for the DPP who will give directions as to whether the prosecution should be initiated. While the Gardaí may arrest without a warrant for a broad spectrum of offences,[5] if they are seeking to obtain an EAW, they must apply to the District Court to issue a domestic arrest warrant. Because of the rule of specialty, a separate warrant needs to be obtained for each charge that is to be brought against a suspect. On the basis of the domestic warrant the Gardai then apply to the DPP who in turn makes an application to the High Court, to issue the EAW[6].

Trials *in absentia* are extremely rare in Ireland, so as far as conviction/detention EAWs are concerned, these will generally arise where a person has absconded having already been charged before an Irish court and released on bail, or has breached conditions of a suspended sentence or temporary release from prison. In these situations the Gardaí must apply to the court for issue of a bench warrant for the arrest of that person;[7] that warrant will be the domestic warrant for the purposes of the DPP's application for an EAW. Where the High Court agrees to making the order to issue the EAW, the EAW is then transmitted to the requested state via the Central Authority.

I.1. Status of issuing authorities in Ireland and their independence

On completing their investigation, the Gardaí will send the investigation file to the DPP. In Irish law, the decision to proceed with a prosecution in all indictable offences[8] is solely entrusted to the Office of the DPP.[9] The Office of the DPP is fully independent, subject to no instruction from the executive. The decision to prosecute will be taken where the DPP, following rigorous examination of the investigative file, is satisfied that the evidence in the case is sufficiently strong to justify a prosecution, and it is proportional and in the public interest to commence a prosecution. There should be a *prima facie* case against the suspect: "By this is meant that there is admissible, relevant, credible and reliable evidence which is sufficient to establish that a criminal offence known to the law has been committed by the suspect. The evidence must be such that a jury, properly

[5] Gardaí may make an arrest without a warrant where they have reasonable cause to believe that an 'arrestable offence' (one which carries a penalty of five years or more) has been committed. CJA 1997; in addition, numerous statutes bestow arrest powers to the Gardaí for driving offences, public order offences etc that have a penalty under five years. For further detail on arrest in Ireland see Ryan, A. *Towards a system of European Criminal Justice: the problem of admissibility of evidence* Routledge (2014).

[6] S.33 2003 Act; The 2003 Act permits a District, Circuit or High Court to issue the EAW, but they are always sought in the High court.

[7] S.I. No. 596 of 2014.

[8] Indictable offences are those where there is a right to trial by jury.

[9] Prosecution of Offences Act 1974; The overall direction of serious cases after the decision to prosecute rests with the DPP while the Solicitor's Division is responsible for the general preparation of the case. See further: Guidelines for Prosecutors (5th edition) 2019, Office of the Director of Public Prosecutions 2019; Ryan A. in Ligeti … Walsh; O'Malley

instructed on the relevant law, could conclude beyond a reasonable doubt that the accused was guilty of the offence charged."[10]

The Irish Constitution provides: 'All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and to the law."[11] The domestic warrant forming the basis of the EAW application is issued by a District Court judge. The Gardaí must show that they have reasonable suspicion that the person has committed the offence and the information is given to the judge under oath.[12] The application to issue an EAW must be brought on behalf of the DPP to the High Court[13].

There are therefore effectively three layers of independent review feeding into the issuing of an EAW: the investigation by the Gardaí will be thoroughly reviewed by the DPP in order to reach a decision to conduct a criminal prosecution; the decision by the Gardaí to launch an investigation and arrest a suspect will also be reviewed by the District Court judge in deciding whether or not to issue a domestic arrest warrant; finally, the High Court will consider all the circumstances of the case in making its own decision to issue the EAW. The independence of the judicial authority responsible for issuing EAWs in Ireland has to date not been challenged, and it can be said that Ireland is in line with the standards developed by the CJEU on effective judicial protection in the EAWs' issuing phase.[14]

I.2. Proportionality and case readiness assessment in the issuing phase

In principle, proportionality has to be assessed and assured in the issuing phase by the competent authority in the issuing country. In Ireland, in keeping with the FD, the High Court may issue the EAW where it is satisfied that a domestic warrant has been issued but not executed, that a term of imprisonment of not less than 4 months has been imposed or the person would be liable to imprisonment of twelve months or more.[15] As decisions are made on an *ex parte* basis and therefore not published, there is just one judgment by the High Court which produced a guideline on the assessment of proportionality in a EAW application by the DPP.

The Court noted: "the DPP plays no role in ensuring that there is no disproportionate overuse of the EAW; her only role is to decide on the initiation or continuation of prosecutions. It must be acknowledged that a by-product of the DPP's approach may well be that few, if any, disproportionate applications will be made, as the

[10] Guidelines for Prosecutors (5th edition) 2019, p 12. See generally chapter 4 of the Guidelines for the detailed consideration undertaken by the DPP to reach the decision whether or not to proceed with the prosecution.

[11] Article 35.2. Constitution of Ireland.

[12] District Court Rules 1997, Order 16. (S.I. No. 93 of 1997); S.I. no 260 of 2010:District Court (Criminal Justice (Miscellaneous Provisions) Act 2009) Rules 2010.

[13] Rules of the Superior Courts Order 98. [Rule VI. Application for issue of European arrest warrant 9(1): Subject to sub-rule 2, an application under section 33(1) of the 2003 Act by or on behalf of the Director of Public Prosecutions to the Court to issue a European arrest warrant in respect of a person shall be made ex parte grounded on an affidavit of a person duly authorised on behalf of the applicant.]

The application is usually conducted by members of the Garda Extradition Unit on the DPP's behalf.

[14] *Bob-Dogi*, C-241/15, EU:C:2016:385; *Kovalkovas*, C-477/16 PPU, EU:C:2016:861; Joined Cases OG,PI, C-508/18 and C-82/19 PPU.

[15] S.33 2003 Act.

end result of the DPP's prosecutorial decision making may be to weed out cases where an EAW would clearly be disproportionate to the end to be achieved in any proposed prosecution."[16]

The court confirmed that there is no duty conferred by s 33 of the 2003 Act on the DPP to assess proportionality, above and beyond that which is required in the DPP's decision to prosecute. That duty is placed on the High Court alone.[17]

"The purpose of the proportionality test is … to assess whether the issue of an EAW is a justified measure in all the circumstances. There is a public interest in the prosecution of crime, even, and sometimes especially, when that requires cross-border co-operation. The use of international arrest warrants may not be justified where their effects on the requested person (and the requested state) are disproportionate to the end to be achieved. That disproportion may arise where, inter alia, due to the lack of gravity of the offence and other factors, the requested person is unlikely to face a custodial penalty. Each case must be decided on its own facts." [18] It should be noted that the Irish criminal justice system contains no principle of mandatory prosecution. Trivial offences would not find their way to the High Court for an application for a EAW; applications would only relate to offences punishable by the minimum permissible sanctions provided for by the Act and the FDEAW. Indeed, the issuance of a domestic arrest warrant by the District Court will be for an arrestable offence, and these are all punishable by a minimum of five years. It would therefore seem reasonable for the High Court in deciding whether the issuing of the EAW is proportional, to rely on the District Court's prior consideration when issuing the domestic warrant, which must be in existence when the application is made for the issue of the EAW.[19]

The assessment of proportionality must also include consideration of the interests of the victims of an offence: "It is not beyond the bounds of possibility that a case where an accused, due to age, infirmity or antiquity of the offence is unlikely to be given a prison sentence could nonetheless be properly the subject matter of an EAW due to the particular interest of the victim in seeking the vindication of a criminal conviction, which is also an important component of the public interest. These are all matters to be weighed in the balance in each particular case."[20]

While the European Commission's Handbook on the issuing and execution of EAWs urges Member States to give consideration to other less coercive judicial cooperation measures than the issue of an EAW, [21] it should be noted that Ireland have only very recently transposed these measures into Irish law. To date, the courts in

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[16] In the Matter of an Application Pursuant to s.33(1) of the European Arrest Warrant Act 2003 [2018]IEHC 586.

[17] The Guidelines for prosecutors does state however:'The extradition of persons required to answer any charge of an offence or to serve a sentence imposed will involve restrictions on the requested person and expense to the State and to the country requested to extradite the person. Where an application for extradition is being considered, the prosecutor should also have regard to these factors in addition to assessing, in accordance with these guidelines, the prosecution case, the impact of any delay and the public interest. In the case of serious offences it will generally be appropriate to proceed with such an application where there are reasonable prospects of conviction, in order to maintain confidence in the administration of the law and to deter offenders fleeing from justice." Guidelines for Prosecutors (5th edition) 2019, p 18.

[18] In the Matter of an Application Pursuant to s.33(1) of the European Arrest Warrant Act 2003 [2018] IEHC 586,

[19] "it would seem that a warrant may not issue on the bare statement of a member of the Garda Síochána that he believes that the offence has been committed. The sworn information must show some evidence on which the judge could be personally satisfied that the offence was committed. Only then will he be in a position to exercise his discretion to issue the warrant." *Walsh on Criminal Procedure (2016)* 4;175.

[20] In the Matter of an Application Pursuant to s.33(1) of the European Arrest Warrant Act 2003 [2018] IEHC 586 para 39.

[21] (Handbook on how to issue and execute a European Arrest Warrant 2017 0J C335/15 [[Commission Notice — Handbook on how to issue and execute a European arrest warrant (2017/C 335/01).

Ireland have not been able to avail of a European Supervision Order to permit a person sought by Ireland on an EAW to await trial in their normal country of residence.[22] In addition, Ireland did not opt in to the European Investigation Order[23] so the courts must instead rely on the slower mutual assistance measures as an alternative to seeking a EAW.[24] The measures relating to the transfer of probation decisions and alternative sanctions also have not been available to the Irish courts until very recently.[25] The measures relating to the transfer of prisoners have not yet been fully transposed into Irish law.[26] Arguably as a result of the absence of these possibilities until now, the Irish courts appear not to give consideration to the possibility of using less coercive measures in their consideration of proportionality.[27]

Case readiness

Because applications for an EAW are made *ex parte* and judgments are not published, this makes it difficult to gain an insight into whether any questions are raised by the court relating to trial-readiness. The 'book of evidence' (the file containing all the evidence gathered during the investigation) must be served on the accused before the District Court may send the accused forward for trial. It is only at that point that a decision is made to put the person on trial, but an intention to put the person on trial will exist once the DPP has decided to conduct a criminal prosecution.[28] Where a person is in pre-trial detention, the trial will be held as soon as possible; defendants who are in custody take precedence. Nonetheless, the accused will generally wait for at least 8 months to 20 months before a trial will commence.[29]

I.3. On the Right of the defence in the issuing phase

The application for issuing a EAW is heard on an *ex parte* basis, therefore no information about the application is released prior to the warrant being executed in the requested state.[30] However, as soon as requested

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[22] Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention [2009] OJ L294/20. Transposed by Ireland by Criminal Justice (Mutual Recognition of Supervision Measures) Act 2020, in force since February 2021.

[23] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [OJ] 1/5/2014 L130 1.

[24] The legal framework for mutual assistance for obtaining evidence in Ireland is the Council of Europe Convention on Mutual Assistance in Criminal Matters 1959 and subsequent protocols of 1978 and 2001, together with the Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ C 197, 12.7.2000, p. 3), and Protocol 2001 (OJ C 326, 21.11.2001, pp. 2-8). These are addressed in the Criminal Justice (Mutual Assistance) Act 2008.

[25] Council Framework Decision on probation and alternative sanctions (2008/947/JHA). Transposed by Ireland in the Criminal Justice (Mutual Recognition of Probation Judgements and Decisions) Act 2019 (in force September 2019).

[26] Council Framework Decision (2008/909/JHA) on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. OJ L327/27 5/12/2008; a Bill has been published but has not yet completed the legislative process : Criminal Justice (Mutual Recognition of Custodial Sentences) Bill 2021.

[27] In the absence of published reports of the *ex parte* applications it is hard to gauge whether this is the case.

[28] See below Section II where it will be seen the Irish courts, when asked to surrender a person, insist that a decision has been made to charge 'and to try'.

[29] Courts Service Annual Report 2020 ; there has been an increase in waiting times due to the backlogs created by the Covid pandemic. In domestic criminal trials, a person may have already waited for 3 to 6 months after arrest before the book of evidence is served. The book of evidence would be served sooner in the case of a person returned to Ireland on foot of an EAW (communication from Extradition Unit to author).

[30] This is in line with *Radu,* Case C-396/11, Judgment of 29 January 2013**.** Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as meaning that the executing judicial

persons are returned to Ireland they benefit from all the rights accorded to arrested persons in Ireland. They will benefit from the Custody Regulations, which govern the treatment of suspects when they are in custody in a garda station.[31] These include providing a suspect with a notice of their rights, and in addition, the garda must provide the suspect with a 'Letter of Rights' under the Right to Information Directive.[32] Translation and interpretation rights also apply.[33] Ireland did not opt in to the access to lawyer Directive.[34] Suspects have a constitutional right of immediate access to a lawyer, in private, and benefit from a constitutional right to silence.[35]

Suspects must be brought before the court as soon as possible. They may be held over until the next sitting of the District Court, but the purpose of the garda arrest when executing the domestic warrant underlying the EAW is to bring the person before the court, not to detain for questioning. When the person appears before the court, the court may remand in custody or release the person on bail.[36] Release on bail may be applied for at subsequent appearances before the District Court and an appeal against refusal may be made to the High Court. A further safeguard for a person in pre-trial detention is to make an application to the High Court for an order of *habeas corpus*.[37] A successful application results in the person being released immediately and unconditionally from custody. A release on *habeas corpus* is not triggered by mere technicalities. A person may not be deprived of liberty except in accordance with law, meaning 'there must be such a default of fundamental requirements that the detention may be said to be wanting in due process of law.'[38]

The suspect will be given access to the 'materials of the case' as required under the right to information Directive through service of the book of evidence, and the prosecution are under a duty of disclosure regarding any subsequent evidence that arises before the trial, including that which the prosecution will not be using, but which may be helpful to the defence.[39]

In terms of challenging the issuing of the EAW, If the application for habeas corpus was unsuccessful, the next opportunity to seek a remedy would not arise until their trial for the offence is held. There is currently no system of pre-trial hearings in Ireland.

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authorities cannot refuse to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard in the issuing Member State before that arrest warrant was issued.

[31] Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987 (SI No 119 /1987) (the Custody Regulations).

[32] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/. There is a considerable overlap between the domestic and Directive notices of rights.

[33] Directive of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1.

[34] Directive 2013/48 of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, [2013] OJ L 294/1.

[35] Ireland also did not opt in to the Directive on the presumption of innocence, Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence.[2016] OJ L65/1.

[36] The law on bail is governed in Ireland by the Bail Act 1997.

[37] This stems from the continuation of the Habeas Corpus Act of 1782 as part of the law in Ireland, and from Art 40 of the Irish Constitution, which has incorporated the wording of the 1782 Act into the constitutional provision. It has only been relied on where Ireland is the executing authority, eg Lanigan -v- Central Authority & ors; Lanigan -v- Governor of Cloverhill Prison & ors [2018] IECA 40.

[38] The State *(McDonagh) v Frawley* [1978] IR 131,136.

[39] *People (DPP) v Tuite* (1983) 2 Frewen 175 (Supreme Court): "The constitutional right to fair procedures demands that the prosecution be conducted fairly; it is the duty of the prosecution, whether adducing such evidence or not, where possible, to make available all relevant evidence in its possession, so that if the prosecution does not adduce such evidence, the defence may, if it wishes, do so."

Section II – The execution of EAWs: national judicial authorities as monitors of trust

For the purposes of this report, cases were selected spanning a period since 2012 to present, given that the last amendment to the 2003 Act was effected in 2012[40]. Earlier difficulties that arose prior to those amendments have since been resolved and therefore do not merit further discussion.[41] Given the doctrine of precedent, where a case has reached the Supreme Court, that decision in the case will be examined, and similarly, those that have reached the Court of Appeal. Where a point has not been appealed, the decisions of the High Court will be relied on.

Cases have been selected that reveal matters of controversy that have arisen in requests for surrender under the FDEAW. These relate to the status of the issuing authority, the scope for consideration by the executing judicial authority of the issue of proportionality in the issuing of the warrant and the approach by the Irish courts to fundamental rights of persons whose surrender is requested. Controversies have also arisen relating to a specific requirement under the 2003 Act relating to the issue of 'case readiness'.

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[40] European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012; more recent amendments have been made to take account of post Brexit, but these will not be relevant for purpose of this report.

[41] In general, the issues giving rise to difficulties were principally related to the manner in which Ireland had transposed the Framework Decision through the European Arrest Warrant Act 2003.

One difficulty resulting from the way the Framework Decision was implemented was that those seeking to resist surrender did so by exploiting differences in wording between the Act and the provisions of the Framework Decision. This issue is most clearly stated in Altaravicius where Murray CJ noted in the context of s10 of the Act:

'where a European arrest warrant has been duly issued in respect of a person "that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision, be arrested and surrendered to the issuing state". The Act of 2003 does not confine itself to including the framework decision in a schedule for reference purposes. There are other provisions of the Act of 2003 which require the Courts to interpret and apply the framework decision directly but it is sufficient for present purposes to note that s.10 means that in deciding on an application for surrender pursuant to the terms of the Act of 2003 the court must apply both the provisions of the Act and the framework decision. It is, to say the least, an idiosyncratic method of legislating and likely to create ambiguity." A further difficulty that cropped up frequently, again related to the way the Framework Decision had been implemented, was the wording of s10, the section that gives effect to the general obligation to surrender contained in the Framework Decision. A sub-section provides where a judicial authority in an issuing state issues a warrant in respect of a person 'on whom a sentence of imprisonment or detention has been imposed … and who has fled from the issuing state' before he or she commenced serving the sentence or completed serving the sentence.

The Supreme Court addressed this issue in Tobin [2012] IESC 37. The warrant sought Mr. Tobin who had caused the death of two small children while driving in Hungary. While his prosecution was pending he left Hungary lawfully, fully complying with procedures set down by the Hungarian authorities and was later convicted and sentenced in his absence. Peart J held that he had not "fled" that jurisdiction within the meaning of s10 of the 2003 Act and refused the order for his surrender. That finding was upheld by the Supreme Court, who noted 'fleeing' necessarily implies escape, haste, evasion, the notion of moving away from a pursuer' and concluded that the Mr. Tobin's departure from Hungary came nowhere near such actions. There is no requirement or indeed mention in the Framework Decision that surrender should be contingent of a person fleeing, Nonetheless, the section has prevented surrender in a number of cases.

Both these provisions have now been amended by legislation. The words 'and the Framework Decision' have been deleted, so now the person shall be subject to the provisions of the Act alone – though it must be interpreted in conformity with the Framework Decision unless a Member State would have to act *contra legem.* The words 'and who has fled' have also been deleted, so the court now simply needs to be satisfied that the person is a person on whom a sentence of imprisonment or detention has been imposed, and not need grapple with the issue of whether their actions of leaving the Member State concerned amounted to flight.

II.1. Status of issuing authorities and their independence.

Ireland has had several cases where the qualification of the issuing authority has been challenged. The Irish courts have held that the burden is on the person resisting surrender to establish that the issuing authority is not competent. The issue was considered by the Supreme Court in *McArdle*[42] where one of the grounds resisting the surrender was on the basis that the Public Prosecutor was not a judicial authority. The Supreme Court noted that it is common across the EU for national public prosecutors to be designated judicial authorities for issuing EAWs. Upholding the decision of the High court to order the surrender, the court concluded:

"If there are cogent grounds established in a particular case which could lead the Court to concluding that the issuing authority was not a judicial authority that would be a different matter. No such grounds have been established in this case."

Most recently, resistance to surrender based on the lack of requisites that are necessary for an authority to effectively qualify as issuing judicial authority for the purpose of the EAW resulted in a preliminary reference by the Supreme Court to the CJEU seeking clarity on the criteria for deciding whether a public prosecutor is a judicial authority.[43] In *PF*,[44] the CJEU clarified that the concept of a issuing judicial authority is capable of including authorities of a Member State which, although not necessarily judges or courts, participate in the administration of criminal justice in that Member State. It further clarified that an authority such as a Public Prosecutor's Office which is competent in criminal proceedings to prosecute a person suspected of having committed a criminal offence must be regarded as participating in the administration of justice of the relevant Member State. The authority must act independently of the Executive in arriving at the decision, and that independence must be underpinned by national rules "capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, *inter alia*, to an instruction in a specific case from the Executive". The High Court made the order for surrender to Lithuania of Mr. Lisauskas but not of Mr. Dunauskis, on the basis that the German public prosecutor was not independent of the Executive.

II.2. Considerations of the concept of 'proportionality' in executing EAWs.

The leading decision on proportionality is the Supreme Court decision in *Ostrowski*.[45] The High Court refused the surrender of Mr. Ostrowski, who had been sought by Poland for an offence of possession of a very small amount of marijuana. The EAW was issued five years after the commission of the offence. The High Court considered that 'it would represent a disproportionate interference with his fundamental rights, and particularly his right to liberty, his right to enjoy physical and mental health, and his right to respect for family

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[42] *McArdle* [2015] IESC 56

[43] In the linked cases of *Dunauskis* and *Lisauskas* [2018] IESC 43. *Dunauskis* related to Germany and *Lisauskas* related to Lithuania. A further preliminary reference was sent with the same questions, this time relating to a warrant issued by Germany by the public prosecutor, who was not fully independent from the Executive ; the reason for a mirroring preliminary reference was that the CJEU had rejected a request to use the PPU procedure for *Dunauskis* and *Lisauskas* but in this case requested person was in custody (see *Cornea* [2019] IEHC 70).

[44] *PF,* case C-509/18, 27th May, 2019.

[45] [2013] IESC 24.

life, to surrender him at this time'.[46] Notwithstanding the refusal, the High Court certified a question for the Supreme Court asking "whether proportionality is a matter solely for consideration by the issuing judicial authority when deciding whether to issue an EAW, or whether the High Court is entitled to consider proportionality when it is considering whether to surrender a respondent on foot of an EAW." The Chief Justice considered that once an offence has been found to correspond to an offence in this jurisdiction and the potential sentence meets the requirements in Art 2 (1) FD for the issue of an offence not listed in Art 2(2) FD, 'the question of whether or not the offence is trivial is not a matter for the High Court.' Furthermore, 'the High Court has no role to look at possible sentences which might be awarded in an issuing State when a person is surrendered and to consider whether such a sentence is proportionate.'[47] The decision in *Ostrowski* therefore confirms that it is not for the High Court to exercise a proportionality test as to whether the EAW should have been issued, nor should the High Court apply a proportionality test to a potential sentence.

II.3. Pre-trial detention

Section 4A. of the 2003 Act provides—'It shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown." On that basis, a person resisting surrender will have to satisfy the court that the issuing state is in fact not complying with its requirement to respect fundamental rights as per Art 1 3. FD EAW. To rebut the presumption, "the burden rests on the respondent to adduce evidence that there were substantial grounds for believing that he would be at real risk of being exposed to a flagrant denial of justice."[48] In *Lyszkiewicz*[49], the surrender was resisted on the basis of Poland's poor record in relation to pre-trial detention. The court ordered the surrender, finding that the reliance on a decision of the ECtHR without anything more specific to show that the situation in Poland had not improved since the ECtHR's finding in *Kauczor v Poland*[50], which had ruled that Poland was in breach of Art 5. 3 due to its excessive length of pre-trial detention, was insufficient to rebut the presumption in s4A.

It should be noted that Ireland has only very recently transposed the Framework decision on the European Supervision Order so to date, the Irish courts have been unable to draw on that instrument as a possible route to mitigate pre-trial detention concerns.[51]

II.4. Safeguarding Fundamental Rights

II.4.1. Detention conditions

A number of cases have resisted surrender on the basis of Section 37, para. 1, let. c), (iii) (II) of the European Arrest Warrant Act 2003, which states that a person shall not be surrendered if there are reasonable grounds

[46] [2012] IEHC 57.

[47] [2013] IESC 24. Judgment of Denham CJ. 37.

[48] MJELR v Rettinger [2010] IESC 45

[49] [2021] IEHC 108

[50] ECtHR 3 feb 2009

[51] Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention [2009] OJ L294/20.

for believing that "he or she would be tortured or subjected to other inhuman or degrading treatment", effectively a restatement of Art. 3 ECHR.

In such a case where objection is based on Art. 3 ECHR, the Irish court has held, based on the case law of the ECtHR and the Court of Justice,[52] that it is "not necessary to establish that there is a probability of ill-treatment, rather a real risk is sufficient."[53] The evidential burden is on the person to establish the risk. In addition to evidence of specific hardship to the person, the Court will generally have regard to expert opinions from practitioners in the relevant jurisdiction, as well as reports from Committee on Prevention of Torture (CPT) and relevant responses, Member State authorities and NGO's.

In *Kinsella*,[54] surrender was resisted on the basis of Art. 3 ECHR. It was argued that the prison conditions in Greece were such as could breach the rights of the person who was sought for a prosecution for the offence of drug trafficking, based on poor prison conditions, inter-prisoner violence in Greece and the specific health issues affecting the person. In refusing surrender, the Court found: "Where conditions are so bad that they violate Article 3, the good intentions and bona fides of the appropriate authorities cannot excuse the breach. If the Court was to hold otherwise, the Court would be violating its duty to protect the fundamental rights of those people who appear before it.55

By contrast, in MJE v. Kacevicius the surrender was resisted on basis of Lithuanian prison conditions and prisoner violence. The court examined reports of the CPT however following receipt of additional information from Lithuanian authorities, the court was happy to make the order for surrender, despite finding that the issue of inter-prisoner violence was a continuing concern, although conditions had improved regarding other aspects of prisons in Lithuania.[56]

Most recently, in *Gheor*ge[57], surrender to Romania was refused on the basis of absence of the required personal space of 3m2 as required by the ECtHR.[58]

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[52] The Irish courts follow the jurisprudence on *Aranyosi*: where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State. *Aranyosi v. Generalstaatsanwaltschaft Bremen* (Case C-404/15, Grand Chamber, 5th April, 2016) and *Caldararu v. Generalstaatsanwaltschaft Bremen* (Case C-659/15 (PPU), Grand Chamber, 5th April, 2016

[53] *MJELR v Rettinger* [2010] IESC 45.

[54] *MJE v Kinsella* [2017] IEHC 519

[55] *MJE v Kinsella* [2017] IEHC 519 P.65

[56] *MJE v Kacevicius* [2019] IEHC 740. Note that where assurances are sought by the executing authority under Art 15 FD EAW, the executing authority 'must rely on that assurance' received from the issuing authority in the absence of evidence to the contrary. This is interlinked with fostering of the principle of mutual trust; see: Case C-220/18 PPU, *ML* para.112.

[57] [2020] IEHC 618.

[58] The court relied on *Mursic v Croatia* (app. 7334/13 20 Oct 2016; see also *Calin v. Romania (app 20049/15)* and *Simulescu v. Romania (app 17090/15),* detailing specific shortcomings in Romanian prison conditions.

It should be noted that Ireland has not yet transposed the FD on prisoner transfer, hence the FD has not featured in any of the cases on poor detention conditions to date.[59]

II.4.2. Fair Trial Rights - procedural rights

The right to access to case file

In *E.P.*[60] the surrender to Poland was resisted through argument that the surrender would be in breach of the right to a fair trial under the Convention. This was on the basis that E.P.'s request to be provided with any evidence that the issuing authority possessed against him had been refused by the relevant authorities in the issuing and executing states. It was argued that this was in breach of the Right to Information Directive.[61] Effectively, he was attempting to obtain whatever evidence the Polish authorities had against him in order to challenge the issuing of the EAW. The High Court dismissed this argument finding it to be "entirely misconceived". The High Court reached this conclusion on the basis that the Information Directive provides for a different approach regarding the material that is required to be provided to a person on arrest and detention in domestic proceedings on the one hand, and to a person arrested under an EAW on the other. In the case of the latter, the Information Directive provides that a person arrested for the purposes of execution of a EAW is entitled simply to information about the content of the warrant, the rights of access to a lawyer, to translation and the right to be heard by a judicial authority.[62] There is no provision under the indicative Letter of Rights for the right to access essential documents needed to challenge the arrest or detention, in contrast with the indicative Letter of Rights for domestic proceedings.

This finding was echoed in the recent ruling by the CJEU[63] on a preliminary reference from Bulgaria. The question referred by the Bulgarian court related to what information should be included in a EAW form relating to rights to information, specifically asking whether the rights of an accused person under Article 4(3) of the Information Directive apply to a person arrested under a EAW. That article relates to the Letter of Rights to be given to accused persons which must contain information about 'any possibility, under national law, of challenging the lawfulness of the arrest; obtaining a review of the detention; or making a request for

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[59] Ireland has only recently transposed the Framework Decisions on probation and alternative sanctions (2008/947/JHA) but has not yet transposed Council Framework Decision (2008/909/JHA) on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. OJ L327/27 5/12/2008

[60] *MJE v E.P.* [2015] IEHC 662.

[61] Directive 2012/13 of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1;

[62] *MJE v E.P.* [2015] IEHC 662; see also *Farrell* [2019] IECA 278 – the argument was made that in order to vindicate their constitutional rights to a fair trial, disclosure of information, which had been obtained under a mutual assistance request was essential, and failure to do so was in breach of arts 6 & 7 of the Directive 2012/13/ EU 2012 on the right to information. It was argued that the case differed from *E.P.* in that the material they sought was present in this state as opposed to the issuing state. The court held that there was no basis for distinction – the Information Directive applies to all arrests under the EAW regardless of whether the information exists in the executing state or the issuing state. Effectively the court found they were seeking access to the information not to provide an evidential basis to support an objection to surrender, but simply in the hope "that something would turn up". There was no duty on respondents to provide the information on grounds of fair procedures in advance of arguments to be advanced in EAW proceedings; the Court of Appeal found the trial judge was correct to apply *E.P.*

[63] Case C-649-19, *IR Spetsializirana prokuratura (Declaration des Droits*) Judgment of 28 January 2021

provisional release'.[64] The Court reasoned that the rights conferred by the Information Directive to persons arrested under a EAW are expressly governed by Art 5 of the Directive (to be provided with a letter of rights) and Art 8(1)(d) & (e) FDEAW:

"Article 8(1)(d) and (e) of the EAW FD provides that the EAW must contain information concerning the nature and legal classification of the offence and a description of the circumstances in which the offence was committed, including the time, place and degree of participation by the requested person." The Court considered "[T]he right to effective judicial protection does not require that the right to challenge the decision to issue an EAW for the purposes of criminal prosecution can be exercised before surrender. Therefore, the mere fact that the requested person is not informed about the remedies available in the issuing Member State and is not given access to the materials of the case until after he or she is surrendered cannot result in any infringement of the right to effective judicial protection."[65]

In *E.P.* the High Court stressed that it is not the job of the High Court when executing a EAW to consider the strength of the evidence against the requested person. That is the task of the issuing state after the person has been surrendered. It is at that point that the person may challenge the basis for issuing the warrant, and it is also at that point that the person can benefit from the right to access essential documents needed to challenge the arrest or detention. This is so because once the person has been surrendered, they then become a person arrested for the purpose of domestic proceedings, and thereby become covered by those articles of the Information Directive that bestow the broader right to information.

The Irish courts have consistently held that the defence rights can be respected and effective judicial protection ensured through any proceedings that will take place in the issuing state following surrender. It is at that point that challenges can be made to the substantive grounds for the issuing of the arrest warrant, and the courts will have far more information by which to resolve the issues than that which would be available to the executing state. Nonetheless a person may not be excluded from raising an issue of fundamental rights before the court.[66] Moreover, it is always open to a person to bring an application of *habeas corpus* to the High Court to challenge the lawfulness of their detention.

The right to an independent and impartial tribunal

A number of cases have opposed surrender based on fair trial concerns due to an absence of an independent and impartial tribunal. These have been in relation to requests sent by Poland in reaction to the breakdown of the rule of law following reforms to the judiciary by the Polish government.

In *Celmer,* the person was requested by Poland and resisted his surrender on the basis of concerns over the independence of the judiciary. The case was the subject of a preliminary reference to the CJEU by the High Court.[67]

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[64] Directive 2012/13 of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1;

[65] Case C-649-19, *IR Spetsializirana prokuratura (Declaration des Droits*) Judgment of 28 January 2021 paras 78 - 80

[66] MJE v Strzelecki [2015] IESC 15; MJELR v. Stapleton [2007] IESC 30.

[67] *MJE v Celmer (No. 3)* [2018] IEHC 153. The question asked in the preliminary reference was:

The response of the CJEU[68] was that the FDEAW "must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the European Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) of Framework Decision 2002/584, as amended, there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State."

The High Court ordered the surrender to Poland following consideration of the response it had received by the CJEU. The High Court found that Mr Celmer had not satisfied the two step test set out by the CJEU in that he had not established he would be subject to a real risk of a flagrant denial of justice.[69] On appeal to the Supreme Court, the court considered the High Court had correctly interpreted *LM* and upheld the order for surrender by the High Court.[70]

More recently, this issue has resulted in a further reference to the CJEU in the case of *Orlowsk*i.[71] There the High Court ordered the surrender to Poland based on the CJEU ruling in *LM* and the subsequent ruling in *L & P* following a referral by the Netherlands.[72] The Supreme Court however considered that the point in issue in this case was not one relating to the independence of the judiciary, but one relating to whether a court is one that is established by law. The point of appeal was that there is 'a real risk that any court before which they will appear will not be established by law' due to the new laws in Poland. The Supreme Court considered that despite the *LM* and *L & P* rulings, it remains unclear **"**whether the systemic deficiencies in the Polish system are such that they, by themselves, amount to a sufficient breach of the essence of the right to a fair trial, requiring the executing authority, in this case, Ireland, to refuse surrender." On that basis, the Court has sent a preliminary reference to the CJEU as follows:

(1) Is it appropriate to apply the test set out in *LM* and affirmed in *L and P* where there is a real risk that the appellants will stand trial before courts which are not established by law?

(1) Notwithstanding the conclusions of the Court of Justice in Aranyosi and Căldăraru, where a national court determines there is cogent evidence that conditions in the issuing Member State are incompatible with the fundamental right to a fair trial because the system of justice itself in the issuing state is no longer operating under the rule of law, is it necessary for the executing judicial authority to make any further assessment, specific and precise, as to the exposure of the individual concerned to the risk of unfair trial where his trial will take place within a system no longer operating within the rule of law?

(2) If the test to be applied requires a specific assessment of the requested person's real risk of a flagrant denial of justice and where the national court has concluded that there is a systemic breach of the rule of law, is the national court as executing judicial authority obliged to revert to the issuing judicial authority for any further necessary information that could enable the national court discount the existence of the risk to an unfair trial and if so, what guarantees as to fair trial would be required?

[68] *LM* Case C-216/18 PPU, 25 July 2018

[69] *Celmer no 5* [2018] IEHC 639

[70] *Celmer* [2019] IESC 80

[71] *Orlowski* [2021] IEHC 109

[72] Joined cases C-354/20 and C-412/20 PPU ; decision of CJEU 17 Dec 2020.

(2) Is it appropriate to apply the test set out in *LM* and affirmed in *L and P* where a person seeking to challenge a request under an EAW cannot by reason of the fact that it is not possible at that point in time to establish the composition of the courts before which they will be tried by reason of the manner in which cases are randomly allocated?
(3) Does the absence of an effective remedy to challenge the validity of the appointment of judges in Poland, in circumstances where it is apparent that the appellants cannot at this point in time establish that the courts before which they will be tried will be composed of judges not validly appointed, amount to a breach of the essence of the right to a fair trial requiring the executing state to refuse the surrender of the appellants?[73]

The response of the CJEU is awaited.

II.4.3. Breach of the essence of guarantees provided under national constitutional law.

The Irish Constitution protects fundamental rights, encompassing an obligation to protect and vindicate inter alia, personal liberty and family rights.

Several oppositions to surrender under the theme of fundamental rights have raised the ground of interference with family rights, based on Art 41 of the Irish Constitution and under Art 8 of the Convention.[74] Often, the argument relating to breach of family rights stems from a delay in the issuing of the EAW.

The courts have been very unwilling to grant relief on this ground and insist on a very high threshold being reached by the applicant, in that they insist on evidence of a 'real risk' of violation of their rights.[75] It is considered that in the normal course of things, the fact of arrest and subsequent conviction will undoubtedly have a detrimental effect on the family of the convicted person in domestic proceedings, and this is no less so for a person who is imprisoned following an EAW surrender. While proportionality does not arise as a consideration by the executing judicial authority relating to the issuing of the European Arrest Warrant, it does arise where the court must consider the fundamental rights of the requested person where surrender is resisted on the basis that it would be incompatible with a Constitutional or Convention right.

In *Ostrowski*,[76] the Supreme Court noted that proportionality is 'central to the assessment' where an argument under s 37 2003 Act is raised, and that Mr. Ostrowski was entitled to make use of the concept of proportionality in any assessment of his Art 8 rights. The test of proportionality should be applied in accordance with Constitutional and ECHR jurisprudence. Matters such as stress, anxiety, separation from family, friends and locality must be taken into account, but not factors such as the cost and "other burdens" involved in executing the EAW and the likely sentence which an affected person, on conviction, might receive.

In *J.A.T.* a case of tax fraud, the person successfully resisted the surrender on Art. 8 grounds, on basis of his medical condition and that he was the sole caregiver to his son who had substantial needs, especially given the delays involved in the case. These delays were attributable to both the issuing State (UK) and the Irish

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[73] *Orlowski* [2021] IESC 46

[74] The Irish Constitution (Art 41) guarantees protection for the family, but only a family based on marriage; for this reason, unmarried families will ground their arguments under the Convention.

[75] As per *Aranyosi*, *Căldăraru*

[76] *MJLR v Ostrowski* [2012] IEHC 57; [2013] IESC 24.

authorities.[77] While the Supreme Court considered that health conditions and family circumstances "would never, in themselves, be remotely a ground for refusing surrender", the avoidable delays and the knowledge on the part of both authorities of the health concerns, made this case "exceptional" although "even then close to the margin".

More recently, in *Vesartas*,78 the Supreme Court dealt with the issue of breach of fundamental rights on grounds of delay. Here, the person was a Lithuanian national who had been released on parole for a conviction of various offences (a total of 43, committed when he was a juvenile under 18), and absconded to Ireland. The High Court had refused his surrender on grounds inter alia of delay, finding that surrender would infringe his rights under Art 8 ECHR. On appeal to the Supreme Court, the Court considered the relationship between private interests and public interests. Overturning the refusal to surrender by the High Court, the Court considered that "Unless truly exceptional or egregious, delay will not alter the public interest" and that the family circumstances must be "well outside the norm" such that would make an order for surrender incompatible with the State's obligations under Art 8 ECHR. Here, the position of the person sought was not so unusual as to make it exceptional.

Similarly, in T.E. where the person was sought by France for money laundering and human trafficking offences, it was argued that if she was returned to France on foot of the warrant, her Art. 8 rights to private and family life would be breached, since her family would be unable to visit her if she was held in pre-trial detention in France. The High Court approached the matter from the accepted principle:

> *"that non-surrender on Article 8 grounds is possible in a European arrest warrant case, but that having regard to the strong public interest in extradition, and the need for this State to live up to its international obligations, the bar to be vaulted by an objector on Article 8 grounds is set at a high level."*

In this case, the court rejected her arguments based on section 37 of the 2003 Act on the ground that there was a "very strong public interest" in her extradition and that the court "has not been persuaded that it would represent a disproportionate measure to extradite her".[79]

II.5. Impact on execution of EAW's due to specific aspects of Irish justice system.

Typically in the Irish legal system, the trial is adversarial in nature and the burden of proof will rest on the prosecution in criminal cases, with the standard of proof being 'beyond a reasonable doubt'. In civil proceedings, the burden lies with the plaintiff, the standard of proof being 'on the balance of probabilities'. In EAW proceedings, the process, unusually in the common law setting, runs more along the 'inquisitorial

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[77] *MJE v J.A.T. No. 2* [2016] IESC 17.

[78] [2020] IESC 12

[79] *T.E.* [2013] IEHC 323; The surrender was however refused based on the S21A, charge and try ground. See also *MJE v Kacevicius [2019] IEHC 740* The offences for which the surrender was sought were "at the lower end", relating to theft of items which did not have any great monetary value – shrubs and mobile phones total value 400 euro. His argument on Art. 8 grounds, having 2 children under the age of three and his wife being pregnant with their third, was rejected.

'method and is regarded as being *sui generis*[80]. Here, the Court must be 'satisfied' where called upon to execute the warrant, 'that the requirements of s. 16 of the Act of 2003 have been met'.[81]

The Act proceeds on the basis of presumptions, which stand 'until the contrary is shown.' The starting point for the Court is the presumption that the issuing state 'will comply with the requirements of the Framework Decision'.[82] As noted by the Court of Appeal, 'the executing judicial authority must be satisfied that the requirements of the Act are fulfilled by the warrant which has been forwarded by the issuing judicial authority, and it does this independently of the parties to the application, albeit with the assistance of submissions made by one or both parties."[83] On that basis, the court will decide on the surrender on the basis of the warrant itself, and any additional information it has received in the s.16 application. Where a person resists surrender, they do not bear any legal burden of proof, but they do bear what is known in common law as an 'evidential burden'. In other words, they must lay before the court cogent evidence to dislodge the presumption contained in s. 4A of the Act of 2003 that the issuing state will comply with the Framework Decision, including respect for fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on the European Union.

In cases where resistance to surrender is based on Art 3 ECHR grounds, 'the burden rests upon a respondent to adduce evidence capable of proving that there are substantial/reasonable grounds for believing that if he or she were returned to the requesting country, he or she will be exposed to a real risk of being subjected to treatment contrary to article 3 ECHR; It is open to a requesting State to dispel any doubts by evidence. 'There is a default presumption that the requesting country will act in good faith and will respect the requested person's fundamental rights. Whilst the presumption can be rebutted, such a conclusion will not be reached lightly;[84] 'in examining whether there is a real risk, the Court should consider all of the material before it and, if necessary, material obtained of its own motion;'[85] this again is an unusual exercise for a common law court. The same applies where the lack of independence of the issuing authority is raised by the person resisting surrender.[86]

The Irish courts have on some occasions refused surrender for reasons that do not feature in the FDEAW as grounds for refusal. The Irish courts have refused surrender based on the requirement in the 2003 Act that a decision has been taken to 'charge and to try' the requested person. That is explained by the Statement by

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[80] MJE v. Palonka [2016] IECA 69; see also Lanigan v Gov Cloverhill Prison, Minister for Justice and Equality, Ireland and the Attorney General [2015] IEHC 574 where the *sui generis* procedure was unsuccessfully challenged as being unconstitutional.

[81] These include that the court is not required to refuse surrender under s21A, 22, 23 or 24, and that surrender is not prohibited by Part 3 of the 2003 Act (breach of constitutional or Convention rights; correspondence and offence punishable by custodial sentence of maximum period not less than 12 months, or order of detention not less than 4 months has been imposed, or for offences under Article 2 of the FDEAW, the offence is punishable by imprisonment of not less than 3 years; Pardon or amnesty; Double jeopardy; Immunity from prosecution and no bar to surrender under the extra-territorial jurisdiction of the State where the offence has been committed outside of the issuing state (s.44).

[82] S 4A 2003 Act

[83] MJE v. Palonka [2016] IECA 69; MJE v. Sliczynski [2008] IESC 73.

[84] MJE v. Pal [2020] IEHC 143

[85] *MJELR v Rettinger* [2010] IESC 45; In MJE v. Lanigan [2015] IEHC 677, it was stated in the context of seeking additional information on its own motion: 'The Court must be satisfied regardless of the urgings of the parties before making a decision to surrender;'

[86] For an Article 8 defence to succeed, it can only be on clear facts based and cogent evidence. 'The evidence must be sufficient to rebut the presumption contained in s. 4A of the Act (see, para. 41 above). The circumstances must be shown to be well outside the norm; that is, truly exceptional': MJE v Karaliunas [2021] IEHC 149

Ireland during the negotiations on the proposal for the FD which states: "Ireland shall, in the implementation into domestic legislation of this Framework Decision, provide that the European Arrest Warrant shall only be executed for the purpose of bringing that person to trial or for the purpose of executing a custodial sentence or a detention order."[87]

Surrender has also been refused by Ireland because of the court's interpretation of Irish law on extraterritorial jurisdiction, and by its reliance on a common law doctrine, abuse of process. These will be examined in turn.

II.5.1. 'Case-readiness'.

In its transposition of the FD into Irish law, the 2003 Act included a mandatory ground for refusal of surrender. Section 21A (1) provides: "Where a European arrest warrant is issued in the issuing state in respect of a person who has not been convicted of an offence specified therein, the High Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing state."

The section also contains a presumption that a decision has been made to charge and try, but that presumption is rebuttable.[88] The section had featured in several decisions where the courts have had to grapple with the question of whether there has in fact been a decision to 'try' the person sought under the warrant. In *McArdle* the Supreme Court noted that some jurisdictions often require a suspect to appear before them as part of the investigation, and warrants "issued for the purpose of such investigations could not be considered as requiring the surrender of a person for the purpose of being tried for an offence." The surrender should only be ordered where "the decision taken by the relevant authority to prosecute and try that person is not contingent on the outcome of further factual investigation."[89] In *Olsson,* the Supreme Court reiterated that the court must only refuse surrender "when it is satisfied that no decision has been made to charge or try that person" and this would be so where "there is no intention to try the requested person on the charges at the time the warrant is issued."[90] The court also clarified that 'the concept of the 'decision' in s. 21A should be understood in the light of the 'intention' referred to in s. 10 of the Act of 2003 and the 'purpose' referred to in art. 1 of the Framework Decision."..[91]

The Supreme Court in *Bailey*[92] overturned an order for surrender to France by the High Court on a number of grounds, *inter alia* the case-readiness ground. Regarding s21A, Fennelly J. noted:

87 Corrigendum to the Outcome of Proceedings" (6/7th December, 2001) Brussels, 11 December 2001 14867/1/01 REV 1 COR 1.

88 S21A. (2) "it shall be presumed that a decision has been made to charge the person with, and try him or her for, that offence in the issuing state, unless the contrary is proved."

89 *MJELR v McArdle* [2005] IESC 76

90 *MJELR -v- Olsson* [2011] IESC 1

91 Ibid, judgment of O'Donnell J. para 32.; S.10 of the 2003 Act, under the heading of 'Obligation to surrender, provides: 'Where a judicial authority in an issuing state issues a European arrest warrant in respect of a person —(a) against whom that state intends to bring proceedings for an offence to which the European arrest warrant relates,…'; Art 1 of the FD provides: 'The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.'

92 *MJELR v Bailey* [2012] IESC 16.

> *"I am, therefore, compelled to agree that the section prohibits the surrender of the appellant. If this section were not in such terms, it could be plausibly argued that, looking at the French criminal procedure in its entirety, and even accepting that it is still only at the stage of instruction, the surrender of the appellant is sought "for the purposes of conducting a criminal prosecution..." A broad, purposive and conforming interpretation could well lead to that result. But the section is quite explicit. It is not open to the Court, by means of conforming interpretation, to circumvent the clear terms of s. 21A."*

The court will generally send a request for additional information to the issuing authority to help it ascertain whether in fact a decision has been taken to charge *and to try* the requested person. Its judgment on whether this is the case will generally rest upon the responses given from the issuing state. So for example, in *E.P.* the person was sought by Poland for the purpose of prosecution. *E.P.* argued that the warrant was one that sought him for investigation and therefore the presumption that it was for the purpose of 'charge and try had been rebutted'. This was on the basis that the warrant described him as a 'suspected person' and the additional information stated that the EAW was issued "in order to conduct the preparatory proceedings against him. In further additional information the Polish authorities explained that under Polish law "the investigations cannot be completed without announcing the decisions to present charges to [E.P.], then questioning him as a suspect by the prosecutor and checking the line of defence provided by the suspect. After completing the proceedings, the prosecutor will make a decision on whether an indictment against [E.P.] should be lodged with the Court or not".[93] The court found that his status as a 'suspect' in itself did not preclude a decision or intention to charge – he was not charged simply because he had fled, and the reference to preparatory proceedings again 'did not establish that no decision had been made to charge him and put him on trial." Furthermore, the court considered that "the necessity for the future laying of the indictment is not confirmation that no decision has been made at present not to try him with the offences. It must be seen as part of the procedural steps that must be undertaken and in particular it must be viewed in light of the reference to checking the line of defence provided by the suspect." The court concluded that following *Olsson*, "the existence of the intention to bring proceedings against him is virtually coterminous with a decision to bring proceedings sufficient for the purposes of section 21A."

Similarly, in *Dunauskis*[94] the warrant was accompanied by an undertaking from the issuing authority that if the appellant was surrendered to Germany he would be placed on trial. The court noted that "while preliminary investigation proceedings may be in the process of being conducted, this does not negative the statement that a decision has been made to try him. Furthermore, the use of the words "strongly suspected" does not undermine the statement in this case that a decision has been made to charge and try him for the offence of murder alleged against him (or the presumption provided for this in s.21A(2) of the Act of 2003)".[95]

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93 Para 50 *E.P.* [2015] IEHC 662

94 [2016] IECA 245.

95 In *Viplentas* [2016] IEHC 46 the High Court ordered the surrender where the decision of the prosecutor in Lithuania 'to engage the first stage of criminal proceedings, namely pre-trial investigation of the case' was sufficient evidence of a decision to charge and try; By contrast, in an earlier case, following a detailed description of the Lithuanian criminal process, the inclusion of the statement in response to additional information that the person was 'sought for the purposes of criminal prosecution' did not satisfy the court that the decision to charge and try had been taken: *Jociene* [2013] IEHC 290. A more recent case found a request from Lithuania was for the purpose of charge and try, despite the authorities furnishing the same information on the Lithuanian trial process as it had done in *Jociene*: See *Ziznevskis* [2020] IEHC 415; also in *Campbell* [2020] IEHC 344,

In *Tamulaitis* [96], the inclusion of an express statement in the warrant that the person was sought "for the purposes of conducting a criminal prosecution" and in *Tache*[97] the inclusion of the words 'for prosecution in proceedings' were sufficient for the court to find that s 21A was satisfied.

However, in *McPhilips and Hatherley*[98], the High Court refused to surrender the applicants to Belgium on the basis that the warrant was issued for the purpose of further investigation of the offence rather than for the purpose of 'charge and try'. The response from the Belgian authorities for additional information stated that "the suspect once surrendered, would have to be questioned before being freed on bail or remanded in custody", and "the decision to charge and try will be taken at a later stage (when the investigation is closed by the investigating judge) by the public prosecutor."[99]

Section 21A will generally arise where there is an objection to surrender. In a case where the requested person consents to surrender, the High Court may order the surrender but first must be satisfied that the consent is voluntary and that the person has been afforded the opportunity to obtain legal advice before consenting to the surrender.[100] The Court must be further satisfied that there is no obligation to refuse the surrender under the terms of the 2003 Act. This will be achieved by scrutiny of the warrant itself and of any additional documents supplied. Where the court orders the surrender, it must also inform the person of their right to make a complaint under Article 40.4.2° of the Constitution at any time before being surrendered to the issuing state.[101]

II.5.2. The Principle of Reciprocity

Section 44 of the Act of 2003 provides:

"A person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State."[102]

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the court found the presumption in s 21A had not been rebutted and ordered the surrender to Lithuania. The order was upheld by the Court of Appeal [2021] IECA 219. See also *Nicola* [2020] IEHC 318 where the court accepted that a decision had been taken to charge and try even though the questioning of the suspect was required before the process could move forward.

[96] [2020] IEHC 433

[97] [2020] IEHC 130

[98] [2020] IEHC 414

[99] In response to the question asked: *"Will the decision to charge and try be taken at a still subsequent stage before a pre-trial chamber judge, at which stage criminal proceedings can be initiated?" para 7.*

[100] S.15 2003 Act; there is no reference in the Act to any obligation to receive legal advice, the opportunity must simply be available.

[101] S.15 2003 Act. For an application to succeed under Art 40 it must be found that has been "a fundamental denial of justice, or a fundamental flaw" that affords him the opportunity of remedy under Article 40'. Lanigan v Gov Cloverhill Prison, Minister for Justice and Equality, Ireland and the Attorney General [2015] IEHC 574.

[102] This section purports to implement Art 4.7(b) of the FD EAW which provides the executing judicial authority may refuse to execute the EAW where the EAW relates to offences that: "are regarded by the law of the executing Member State as having been (b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory."

In *Bailey,* the surrender was sought by France of a UK citizen resident in Ireland, for the murder of a French citizen which had occurred in Ireland. The majority of the Supreme Court considered that the Section 44 is based on the principle of reciprocity. Fennelly J. considered that: "Article 4.7(b) [of the FDEAW] envisages that prosecution of the extra-territorial offences at issue should be subject to similar conditions in each State."[103] He noted that "[i]t is common case that France exercises extra-territorial jurisdiction on condition that the victim is or was a French citizen"[104] whereas under Irish law, "murder committed outside Ireland is not an offence under Irish law, unless the alleged perpetrator is an Irish citizen."[105] He suggested that the laws on extra-territoriality of France and Ireland "are the converse of each other."[106] At the time of the hearing, the relevant law in Ireland provided that Ireland would have jurisdiction to prosecute an Irish citizen who committed murder or manslaughter abroad.[107] However the law did not apply to non-Irish citizens, and here, Mr Bailey was a U.K citizen .[108] For that reason, Fennelly J. concluded that Section 44 prohibited the surrender because "Ireland would not have the power to prosecute on the same basis as France".[109] O'Donnell J. by contrast did not agree with the majority of the Court that Section 44 and Art 4.7(b)of the FDEAW contained any principle of reciprocity and dismissed the appeal on that particular ground. He considered that reciprocity was a principle of the old extradition system that had not carried over to the EAW system.[110]

Following the refusal to surrender on a second EAW in 2017,[111] the French authorities tried Mr. Bailey in absentia and found him guilty of the murder; a third warrant was sent to Ireland – this time a conviction warrant. In the interim, an amendment had been made to Ireland's law on exterritorial jurisdiction so that it would now be possible for Ireland to exercise such jurisdiction in respect of a person resident in Ireland. The High Court considered the issue of reciprocity and concluded that the amendment had not brought about a reciprocal basis as between France and Ireland in respect of the exercise of extraterritorial jurisdiction for the offence of murder in this case. The Court concluded that 'the French basis for extraterritoriality in this case remains the nationality of the victim, whereas the Irish basis for any such extraterritoriality is the nationality or ordinary residence of the alleged perpetrator. On that basis, "the surrender of the respondent remains precluded by virtue of Section 44 of the Act of 2003".[112]

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[103] *Bailey* [2012] IESC 16, Judgment of Fennelly J. para 79.
[104] Ibid para 85
[105] ibid para 97
[106] ibid para 87
[107] Offences Against the Person Act 1861 s.9
[108] Mr. Bailey was an British national, resident in Ireland.
[109] *Bailey* [2012] IESC 16, Judgment of Fennelly J. para 97
[110] *Bailey* [2012] IESC] 16, judgment of O'Donnell J. para 50.
[111] *Bailey no 2* [2017] IEHC 482.
[112] *Bailey no 3* [2020] IEHC 528.

II.5.3. Doctrine of Abuse of Process

Irish law as a common law system encompasses the common law doctrine of abuse of process. Abuse of process has been defined as:"something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respect a regular proceeding".[113]

Under common law in relation to the burden of proof where abuse of process is alleged, "[T]he burden of establishing that the bringing or continuation of criminal proceedings amounts to an abuse of the court's process is on the defendant. The standard of proof is the balance of probabilities"[114]

In J.*A.T. (No. 2)*[115] the surrender was sought by UK for prosecution of fraud offences. There had been an error in the first warrant due to the issuing state's failure to clearly state on the EAW form the offences for which the person was being sought. This should have been corrected at the outset by the Irish Central Authority through seeking clarification from the issuing authority. That was not done. Following the refusal by the High Court of the first surrender request due to the defects in the EAW form, a second attempt was made by the issuing state. There had been a considerable delay - considerable time has passed since the alleged offences and a considerable time has passed since the conclusion of the first surrender application and the arrest of the appellant on the second EAW.[116] This had negative effects on the medical condition of the appellant and his adult son who suffered severe schizophrenia. The High Court had found there had been an abuse of process in seeking surrender on foot of a second warrant. This was largely on the basis that the requesting judicial authority had failed to provide any explanation for the defect found to have existed in the first warrant, and in the circumstances the second attempt to have him surrendered was oppressive. The High Court sought clarification from the Supreme Court as to whether "where such an abuse of process has been found to have occurred is it sufficient or appropriate for the Court to admonish the parties responsible whilst also surrendering [the appellant]?" The Supreme Court,[117]upholding the High Court's refusal to surrender, agreed that there had been "an unjust harassment of the respondent amounting to a de facto abuse of process, arising from the manner in which requests for his surrender had been processed". The Supreme Court considered that the two surrender requests had an 'oppressive effect' on the appellant and on his family. The Supreme Court clarified that this should result in a refusal to surrender rather than simple admonishment of the responsible parties. It further clarified that "the abuse asserted to exist must be of the processes of the High Court here dealing with the application for surrender, and therefore must relate to the application for surrender itself, and not to the prosecution of the offences which the respondent will face if he/she is

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[113] *Hui Chi-Ming v R* [1992] 1 A.C. 34.

[114] *R v Telford Justices ex parte Badhan* [1991] 2 Q.B. 78; *R v Great Yarmouth Magistrates ex parte Thomas* [1992] Crim. L.R. 116." See also: R. v John Anthony Downey 21 /2/ 2014 central criminal court England and Wales Secretary of State for the Home Department v CC and CF para 82. [2012] EWHC 2837 (Admin).

[115] *MJE v. J.A.T. (No. 2*) [2014] IEHC 320

[116] The appellant was alleged to have committed the offences between 1997 and 2005. The first warrant was issued on the 7th March, 2008, the appellant was arrested April 2008; proceedings concluded including appeal to Supreme Court December 2010. The second EAW was issued in June 2011 and endorsed in September 2011. There was a nine month delay between endorsement of the second EAW and the arrest of the appellant and a further six month delay between the arrest and the s.16 surrender hearing.

[117] *MJE v. J.A.T. (No. 2*) [2016] IESC 17

surrendered."[118] The Supreme Court also noted that "delay and lapse of time fall far short, by themselves, of establishing any abuse of process or grounds for refusal of surrender, but here, the cumulative effect of the delays and the very difficult family circumstances of the appellant was such as to warrant refusal.

Surrender was successfully resisted on abuse of process ground in *Bailey (no 3),* following the issuing by France of the third warrant, this time a conviction warrant. The High Court in Bailey (no 2) had been satisfied that an abuse of process jurisdiction can be invoked in the context of EAW proceedings, and accepted the argument that there was an abuse of process, based on the principle of achievement of finality[119]:

"In effect, proceedings were issued for the involuntary surrender of a person entitled to the protection of our laws and Constitution for trial and the possible imposition of a prison term of up to 30 years, ignoring or regarding as irrelevant that fact that the domestic legal process has comprehensively determined that the allegation giving rise to the request cannot be supported to the extent of justifying the preferment of a charge, let alone trial and conviction. I believe that I am entitled to regard this highly unusual state of affairs as a contribution to a finding of abuse of process in this case."120

The High Court in *Bailey (no 3)* considered itself bound to follow the earlier finding of abuse of process by the High Court in *Bailey (no 2).* It should be noted that in each of these cases, an application for a reference to be made to the CJEU was declined by the High court, and neither judgment was appealed by the State.

In *Bednarczyk* the person was sought on foot of 2 EAWs, issued by Poland.[121] The EAWs were issued in 2007 and 2009 respectively for the purpose of prosecution. The offences were in the nature of fraud, though 'not at the most serious level of offending'. It was submitted by the defence that the surrender would amount to an abuse of process. The High Court had ordered his surrender in 2012 but no surrender took place. Following correspondence with the Polish authorities, after it became clear that Poland were unable to complete the surrender on the dates indicated by Ireland, he was released from prison. Nothing more happened until 2019 when the EAW was retransmitted to Ireland. On seeking information from Poland as to why the earlier surrender had not be completed following the 2012 order for surrender by the Irish court, it was apparent that there had been a breakdown in communications between the Polish and Irish authorities. The High Court considered that no blame could be attributed to the respondent. He had lived an open and crime free life in Ireland in the intervening years. He had an adult son who suffered from severe mental illness and was his sole carer. The offences for which the EAWs had issued dated back 24 years prior to the retransmission of the EAW; relying on *Vilkas*[122], it was argued by the State that "member states should persevere with attempts to

[118] See also *Downey* [2019] IECA 182 where the court stressed that the question whether there might be an abuse of process were the respondent put on trial for the offences for which surrender is sought is not a matter for determination in this jurisdiction on an application for surrender".

[119] The principle of finality is a common law principle set out in *Henderson v Henderson* (1843) 67 ER 313 and *Woodhouse v. Consignia plc* [2002]1 W.L.R. 2558). In *Bailey no 2* the High Court considered: "that there should be finality in litigation and that a party should not be vexed twice in the same matter; that it is an abuse to subject a party to unjust harassment; that the appellant must therefore be protected from oppression; that it is important in the public interest, as well as that of the parties, that litigation should not drag on for ever; and that a defendant should not be oppressed by successive suits where one would do." (*Bailey No 2* 2017 para 34).

[120] *Bailey (no 2)* 2017 IEHC 482; *Bailey no 3* [2020] IEHC 528. The murder in this case had been committed outside the territory of France, and wholly in the territory of Ireland, the executing state.

[121] [2021] IEHC 316

[122] Case C-640/15

surrender where the surrender was not effected due to circumstances beyond the control of the State, even where the requested person had been released' and that this was a retransmission as opposed to a fresh warrant'. Relying on the Supreme Court decision in *Vestartas* regarding delay, the Court considered that the delay of seven years in effecting surrender 'could not be justified'; that there had been 'an abject failure on the part of both the issuing and executing authorities to follow up on the Order for surrender with any degree of alacrity or expedition'. The court concluded that the facts in the present case, taken cumulatively, are exceptional and constitute a rare case where surrender should be refused on grounds of abuse of process. The Court also doubted "that *Vilkas* is authority for the proposition that the issuing state and/or the executing state may permit a prolonged and inexcusable delay in effecting surrender to occur so that some 7 years later, the executing judicial authority is obliged in all circumstances to order surrender." The court refused the application for surrender.

In *Siklosi*[123] the Court of Appeal applied the principle enunciated by the CJEU in the *Tupikas* Case that "the execution of the European arrest warrant constitutes the rule, the refusal to execute is intended to be an exception which must be interpreted strictly ."[124] The Court noted the high threshold to be overcome, "particularly so given that abuse of process is not a ground for refusal listed in the Framework Directive. A refusal of surrender on a ground not listed requires "exceptional circumstances." Here the Court of Appeal found no abuse of process arising from the issue of a second EAW where the court had previously refused surrender nor from lapse of time.

In terms of the burden of proof that would normally apply to abuse of process allegations, it is unclear whether the Courts are simply approaching the issue on the basis of the presumption contained in s. 4A of the 2003 Act and consider themselves put on enquiry when the argument is raised. The cases do not reveal judges actively seeking additional information. That said, the judges will draw upon whatever information is made available to them, even if the person alleging abuse of process objects.[125] None of the cases where abuse of process has been raised refer to the issue of the burden of proof, nor do they refer to being 'satisfied' that the presumption under s 4A has been rebutted. Arguably this is an example of a common law doctrine sitting uneasily in the EAW process, indeed where it would appear to have no basis under the EAW scheme for sitting there at all!

[123] [2021] IECA 210.

[124] *Tupikas* Case C-270/17, para 50.

[125] An example is Dubikatlis [2006] IEHC 332.

Section III – Mutual Trust and cooperation through the EAW: key interpretation and implementation challenges, and solutions adopted in Ireland

As has been seen in the first section of this report, few controversies arise where Ireland is the issuing state. The independence of the judicial authority responsible for issuing EAWs in Ireland has to date not been challenged, and it can be said that the structure in place in Ireland is in line with the standards developed by the CJEU on effective judicial protection in the EAWs' issuing phase. In terms of its assessment of the proportionality of issuing the EAW, it is clear from the guideline judgment that the practice of the High Court is to follow the Handbook of the Commission.

Nonetheless, the court has so far been precluded from being able to draw on the other available options to issuing a EAW, as considered by the Commission in the Handbook may be more appropriate than the EAW, "Such measures include, in particular: (a) the European Investigation Order; (b) the transfer of prisoners; (c) the transfer of probation decisions and alternative sanctions; (d) the European Supervision Order". The latter two, as has been seen, have been finally brought into law, (it should be noted, following infringement proceedings having been commenced against Ireland by the Commission). As to how much they will be utilised remains to be seen. The transfer of prisoners is on the cusp, but not yet legislated for.[126] The ease of using an EIO instead of the more cumbersome and slow mutual assistance procedure, is not available to the Irish courts because of the decision by Ireland to not opt in to the EIO Directive.

In terms of defence rights, it has also been seen in this Report that Ireland has again used its opt out under Protocol 21 in relation to the access to a lawyer and the Presumption of innocence Directives. That possibly leaves open to persons sought by Ireland, a fertile ground to resist the surrender by the requested member state, on the basis that Ireland has not implemented the lawyer Directive. Irish law does not give as extensive an access to a lawyer as that bestowed by the Directive: there is currently no statutory or judicial basis for the right to have a lawyer present during questioning by the Gardaí.[127] That said, as has been seen in Section I, where the Gardaí do take custody of the surrendered person, they are not permitted to conduct any questioning. In practical terms therefore, the scope of the right of access to a lawyer that would be provided to a person surrendered to Ireland under an EAW is otherwise as extensive as that provided for under the Directive and under the ECtHR's *Salduz* line of jurisprudence.[128]

As regards the execution of EAWs by Ireland, the key controversies that have been noted in this Report have related to objections to surrender relating to the status of the issuing authority, disputes focusing on the proportionality of issuing an EAW, the objections to surrender based on the requirement of a decision to

[126] Criminal Justice (Mutual Recognition of Custodial Sentences) Bill 2021.

[127] In *DPP -v- Doyle* [2017] IESC 1 the Supreme Court ruled: The constitutional right is one of access to a lawyer, not of the presence of a lawyer during an interview". In *Doyle v Ireland* (Application no. 51979/17) 23/8/2019 ECtHR, Ireland was found not to have breached Article 6 but the court did state that the Irish Supreme Court "failed to recognize that the right of an accused to have access to a lawyer extended to having that lawyer physically present during police interviews." The outline of a Bill has recently been published by the Dept of Justice that would clarify that the constitutional right of access to a lawyer includes the right to have the lawyer present during garda questioning. General Scheme of the Garda Síochána (Powers) Bill 2021

[128] *Salduz v Turkey [GC] no 36391/02 ECHR 2008*

charge and to try at the time of issuing the warrant, and a number of challenges alleging the surrender will result in a breach of fundamental rights. These have to a greater or lesser degree created challenges to the mutual recognition principle.

As regards the issuing authority and proportionality, the Supreme Court has made it very clear that it is not the function of the High court as executing judicial authority to look behind the warrant and query the proportionality of the decision to issue an EAW. In addition, it has underpinned this through its preliminary references on the point to the CJEU. On that basis, it should not continue to provide a viable ground for resisting surrender in future cases. The same applies to objections to the status of the issuing authority, since this again appears to have been resolved, again by the Court's preliminary references to the CJEU.

The same cannot be said about the recurring objections to surrender on the basis that the warrant is for investigation purposes rather than for the purpose of 'charge and try'. This raises perhaps the greatest challenge to the mutual recognition principle. The cases reviewed on the issue above demonstrate that the High Court will always seek clarification from the issuing authority as to the factual position. Indeed, the idea of mutual trust has been described by one member of the judiciary as 'an entirely notional respect and confidence which in practice co-exists with an absolute ignorance of the system involved.'[129] On that basis, the courts consider an enquiry is warranted.

As to whether a person will be surrendered when this objection is raised, quite often it appears to hinge on the phrasing of the question, and the answers received from the issuing authority. Surrender was refused in *Bailey* where the answer from the French authority clearly stated that "If he were handed over to France by the Irish authorities, Ian Bailey would be at the investigation procedure stage of the case."[130] The High Court refused a surrender to Belgium, having asked "Will the decision to charge and try be taken at a still subsequent stage before a pre-trial chamber judge, at which stage criminal proceedings can be initiated?" to which the response was "the decision to charge and try will be taken at a later stage (when the investigation is closed by the investigating judge) by the public prosecutor."[131] It is difficult to reconcile this with the decision in *E.P.* where it was clear that the suspect had to be questioned first before the process could continue.[132] In addition, the manner in which the questions were framed – 'will the decision to charge and try be taken [at a later stage]?; 'has a decision been taken to put the respondents on trial?', appear to be at odds with the ruling in *Ollson* that 'decision' in S21A should be understood in the context of 'intention' and 'purpose'. A different answer might be received if the question were simply put: is there an intention to charge and try the requested person, rather than using the word 'decision'.

It is clear from a number of decisions of the Irish courts that the judges are unhappy with the wording used in S21A.[133] A reform to the 2003 Act so that it would more closely reflect the Statement by Ireland during the negotiations, 'that the European Arrest Warrant shall only be executed for the purpose of bringing that person

[129] *MJELR v Tobin (no2)* [2012] IESC 37 Hardiman J

[130] *Bailey* [2012] IESC Denham CJ

[131] *McPhillips & Hatherley* [2020] IEHC 414.

[132] *MJE v E.P.* [2015] IEHC 662

[133] For example, *Viplentas* [2016] IEHC 46 and *Bailey* [2012] IESC.

to trial' could do much to alleviate the problem.[134] The drafting of the legislation to state 'charge and try' is effectively much narrower than 'for the purpose of bringing that person to trial', the latter being closer to the more widely understood concept of 'for the purpose of conducting a criminal prosecution'. Section 21A is intended to prevent persons being surrendered purely for the purpose of investigation, akin to where a person in Ireland would be arrested by the police on suspicion of committing a criminal offence for the purpose of questioning, after which a person may or may not be charged. It is therefore aimed at protecting the fundamental right to liberty and preventing the holding of a person in lengthy pre-trial detention while investigations are proceeding. Overall, it puts into question mutual trust, and contributes to delays in what is meant to be a speedy process. The concerns associated with pre-trial detention, which also pose a challenge to mutual trust, could be better addressed through more proactive use of the European Supervision Order[135], I have noted elsewhere that there needs to be reform to better synchronise the ESO, the EIO and the EAW.[136]

With regard to mutual recognition and fundamental rights, the Irish courts have clearly set a very high bar if a person is to resist surrender on grounds that fundamental rights will be breached. In the cases where family rights are pleaded, the courts have more often than not ordered the surrender, insisting on a demonstration of 'egregious circumstances', or circumstances that are 'truly outside the norm'. In these cases, the courts also place a high value on the 'duty of compliance'[137] imposed by the FD, the general public interest in surrender inherent in the FD and the fact that the FD 'is predicated on mutual trust'.138

Nonetheless, it is clear that the courts are unwilling to place 'blind faith' in the criminal justice systems of other EU jurisdictions, particularly where fundamental rights such as the right not to be subjected to torture or inhuman or degrading treatment are in issue, relating to prison conditions. In *Rettinger* for example, the Court held that the principle of mutual trust will not have the effect of nullifying evidence which reveals a 'real risk' that an infringement of fundamental rights will take place in the issuing state following surrender.[139] The courts have been rigorous in attempting to determine the actual position regarding prison conditions through scrutiny of CPT reports and those of NGOs, thereby showing willingness to safeguard fundamental rights. On the other hand, there is also evidence of faithful adherence to the mutual recognition principle in those cases that order surrender on the basis of the information received from the issuing state on the current prison conditions.

Safeguarding fundamental rights is evidently a high priority of the Irish courts given its repeated preliminary references to the CJEU regarding the rule of law concerns in Poland. Nonetheless, the courts have continued with surrenders to Poland since the CJEU's ruling in LM on the basis of responses received from the Polish authorities, thereby demonstrating a respect for the mutual recognition principle. The latest reference[140] to

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[134] Corrigendum to the Outcome of Proceedings" (6/7th December 2001) Brussels, 11 December 2001 14867/1/01 REV 1 COR 1.

[135] Ireland has only just implemented the European Supervision Order) under the Criminal Justice (Mutual Recognition of Decisions on Supervision Measures) Act 2020, in effect since 5th February 2021 (SI No 452 of 2020).

[136] Ryan, A. 'The Interplay Between the European Supervision Order and the European Arrest Warrant: An Untapped Potential Waiting to Be Harvested' European Forum (European Papers, Vol. 5, 2020, No 3) 1531.

[137] *Vesartas* [2020] IESC 12 (para 35).

[138] Ibid (para 103).

[139] *Rettinger* [2010] IESC 45; See further Ryan A. & Hamilton C. *The Routledge Handbook of Irish Criminology* (Routledge 2015) 470.

[140] *Orlowski* [2021] IESC 46.

the CJEU arguably shows unease by the Irish courts with the test set down in LM, since it would appear well-nigh impossible for a person resisting surrender to demonstrate that their specific case will not respect their fair trial rights.

A further challenge to the mutual recognition principle is posed by the Irish court's finding that reciprocity forms part of the EAW system. The issue of reciprocity arose in the Supreme Court at a time before the Lisbon Treaty gave the CJEU full competence on the Third Pillar measures, so there was no possibility of sending a reference to the CJEU in *Bailey* at that stage. There was however, clearly a question to be asked, given the judgment dissenting on that issue where it was stated that Art 4.7(b) of the FD:

"does not require analysis of the precise basis upon which Ireland or any other executing state may exercise extraterritorial jurisdiction for that offence. It is more consistent with the Framework Decision, to ask simply, whether in the case of murder (whatever its definition) Ireland exercises extraterritorial jurisdiction. We no longer ask how Ireland or the requesting state define the offence of murder: it is enough that they have such an offence. By the same token, it should not be necessary to ask the precise basis upon which Ireland exercises extraterritorial jurisdiction in cases of murder; it should be enough that it does."[141]

When *Bailey (no.3)* came for hearing, Ireland was by then enabled to make preliminary references to the CJEU. What was again at issue in the case was the interpretation of Art 4(7)(b) and its transposition by the 2003 Act through s.44, the ground for optional refusal of warrants on the basis of the territoriality exception. The High Court applied the earlier interpretation provided by the Supreme Court – that the section engaged the principle of reciprocity, even though it made clear that it preferred the reasoning of the dissenting judgment of the Supreme Court in *Bailey.* Equally, it considered itself bound by the abuse of process finding by the High court in *Bailey (no.2*), though again the Court made clear that it doubted whether the application for the conviction warrant amounted to an abuse of process.[142]

It is regrettable that the State chose not to appeal the High Court's refusal to surrender on the conviction warrant in *Bailey (no 3),* thus missing the opportunity to refer a question to the CJEU on whether there is a place for reciprocity in the EAW system, and if so, what criteria apply?[143] There could also have been a clarification sought on the role of an abuse of process doctrine in the EAW system. The conviction warrant sent by the French authorities in (Bailey No. 3) was a fresh warrant which they were perfectly entitled to send and it is difficult to understand how it could have amounted to an abuse of process. Both the FDEAW and the 2003 Act allow the Irish courts to refuse surrender where surrender would breach a Constitutional right or a Convention right, however abuse of process is a common law construct and is not *per se* a constitutional right. The Irish courts have nonetheless drawn on abuse of process as a ground for refusing surrender where no such mandatory or optional ground is provided by the FDEAW.

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[141] ibid Judgment of O'Donnell J. para 41.

[142] The Court considered itself bound through the doctrine of precedent; The court ultimately did not decide the case on the abuse of process ground because it was able to reach its decision to refuse surrender based on the s 44 ground. It also refused surrender on the basis of issue estoppel – which was in some way linked to abuse of process.

[143] There is no obligation on the State to appeal. Given that no appeal was taken, the Supreme Court ruling on s 44 continues to be the authority and is cited whenever the issue has arisen in subsequent cases. While it could be described as an instance of 'hard cases making bad law' it evolved into a case where bad law could have been made good through an appeal – especially considering the only judge on the Supreme Court bench now remaining is the judge that dissented in the 2012 case.

Overall, the courts do try to engage with the principle of mutual recognition, but their task has not been made easy by the far less active engagement by the State with the EU criminal justice measures in general. It is really only from now on that the judiciary, and persons sought for surrender will have more instruments to draw from, given the State's tardiness in transposing the EU detention package of measures.[144] The three Framework Decisions should have been transposed to domestic law in 2011, however the European Supervision Order and the probation and alternative sanctions FDs have only just become operational and transposition of the transfer of prisoners is still awaited. Better use of these instruments in the EAW process could alleviate much of the challenges examined in this report.

[144] Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention [2009] OJ L294/20. (transposed by Ireland in Criminal Justice (Mutual Recognition of Supervision Measures) Act 2020;

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