Research Brief

Ireland

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Introduction

The STREAM Periodic Country Report for Ireland has already examined in detail the procedures for issuing and execution of European Arrest Warrants (EAW) in Ireland. The focus of this STREAM Research Brief is directed to an examination of the role of how fundamental rights and rule of law guarantees required by both EU law and Irish Constitutional law are taken into account by judicial authorities, namely the extent to which they are a limit to the principle of mutual recognition in surrender cooperation between Ireland and the other EU Member States. This analysis draws on the findings presented in the Country Report for Ireland, and highlights in particular two cases that provide clear examples of how the courts have dealt with arguments opposing surrender on fundamental rights and rule of law grounds.

Section I explains how effective judicial protection is achieved in the issuing stage in Ireland. Documents relating to the issuing of EAWs are not however made publicly available: the only available judgment has already been examined in the Country Report and will be briefly referred to here, as well as the law that applies to the issuing of EAWs in Ireland.

Section II examines the judicial protection of fundamental rights and breaches of the rule of law at the executing stage, drawing in particular on two cases where fundamental rights and rule of law concerns have been raised, the Court *Celmer* case and the *Orlwoski & Lyszkiewicz* case.[2] These cases, each relating to surrender requests from Poland for the purpose of prosecution, have been selected to demonstrate that Irish authorities in general show deference to the principle of mutual trust and cooperation. However, as Section III shows, Ireland is not enslaved to the principle of mutual recognition and engages very widely in horizontal cooperation seeking further information from the issuing authorities in other Member States. Equally, Ireland does not engage in mutual cooperation blindly: it will very readily seek clarification from the Court of Justice of the European Union (the Court of Justice) through the preliminary reference procedure.

2 *MJE v Celmer* 2019 [IESC] 80; Order of the Court of Justice of 12 July 2022, *WO, JL,* Case C-480/21 ECLI:EU:C:2022:592. *Wojciech Orlowski, Jakub Lyszkiewicz v MJE* [2022] IESC 37.

Section I – Fundamental rights: primarily a matter for the issuing state?

Judicial protection in the issuing phase

When acting as the issuing State, effective judicial protection is achieved in Ireland on several levels. The decision to effect an arrest will be taken first by the Garda Siochana, the Irish police force. To that end, the Garda must apply to a judge of the District Court to issue an arrest warrant, and in doing so, must furnish the judge with information on oath and in writing that the person is suspected of committing a criminal offence. Typically, this information will consist of a sworn statement of the member's belief that a specified indictable offence has been committed by an identified person.[3] The District Court judge has a discretion as to whether to issue the warrant, as opposed to the less coercive method of a summons to appear before the court, and therefore cannot simply act on the request of the Garda for the warrant.[4] The judge, based on questioning of the Garda, must be satisfied of the necessity for the warrant, and in that sense, conduct a proportionality test of sorts. There must be a domestic warrant in existence before an application to issue an EAW can be made. Where a person is suspected of a number of offences, separate arrest warrants must be sought in respect of each of them, in order to provide a valid domestic warrant for the purposes of obtaining an EAW. The warrant must include the identity of the person to be taken into custody and it must specify the offence charged.

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, the Garda must apply to the District Court for issue of a bench warrant for the arrest of that person. That warrant will be the domestic warrant for the purposes of the application for an EAW.

The application to issue an EAW must be made to the High Court on behalf of the Director of Public Prosecution (DPP), who is fully independent of the executive. The DPP, who is entrusted with the decision to initiate all prosecutions in Ireland, must be satisfied that the evidence in the case is sufficiently strong to justify a prosecution, and it is proportional and in the public interest to do so. While the European Arrest Warrant Act 2003 places no duty on the DPP to assess proportionality, she will do so as a matter of course to assess if a prosecution is warranted. The judicial authority tasked with issuing (and executing) EAWs is the High Court. An assessment of proportionality must be conducted by the High Court in deciding whether to issue an EAW. The Court must assess whether the issue of an EAW is a justified measure in all the circumstances, including in the balance the public interest in the prosecution of crime especially, where a cross-border element is involved. The High Court has held that '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

3 *Walsh on Criminal Procedure* Dublin: Thomson Round Hall Second edition 2016.

4 *Larkin v O'Dea* [1994] 2 I.L.R.M. 448.

facts'.[5] The Court must include in its assessment consideration of the interests of the victim of an offence. The dual level of protection called for by the Court of Justice of the European Union (Court of Justice)[6] would therefore appear to be satisfied in the issuing of warrants by the Irish courts.

As regards access to effective judicial remedies pre-surrender, Irish law does not provide any remedy to challenge the issuing of the warrant before the surrender of the person is executed. However, as soon as the person has been returned to Ireland, they may challenge the lawfulness of their deprivation of liberty through a *Habeas Corpus* application to the High Court. A successful application results in the person being released immediately and unconditionally from custody. In addition, as soon as requested persons are returned to Ireland, they benefit from all the rights accorded to arrested persons in Ireland. They have a constitutional right of immediate access to a lawyer, a constitutional right to silence, a right of access to the 'materials of the case' as provided under the right to information-Directive and a right to interpretation and to translation of all documents. The remedy for any failure to respect these rights lies in the discretion of the trial judge to exclude any evidence from the trial that has been obtained in breach of these rights – if there is no other evidence on which a jury could rely upon to reach their verdict, the trial judge would be required to direct the jury to acquit the accused. Such a remedy however would not be available until the trial is held.

Unlike those arrested in ordinary domestic proceedings, persons surrendered under an EAW cannot be questioned by the Gardaí and must instead be brought directly to the High Court where the decision of remand in custody or release on bail will be decided. At that point they will be presented with the Book of Evidence, containing all the evidence to date which has been obtained by the DPP, so that they may prepare their defence. Beyond the *habeus corpus* procedure, no further judicial remedies are available, other than the possibility to make renewed applications to be released on bail where a person has been remanded in custody. A surrendered person is not treated any differently to a person in ordinary domestic proceedings, and it is not uncommon for such persons to be held in pre-trial detention for at least a year before the trial will commence. This is a clear shortcoming, since the surrendered person may have family ties outside of the jurisdiction of Ireland, and do not therefore have the benefit of family visits like domestic remand prisoners would enjoy. Surrendered persons who are released on bail face an even greater delay before their trial will commence: anywhere between two and four years appears to be the norm.

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

6 Most recently in the Judgments of the Court of Justice of 10 March 2021, PI, C-648/20 PPU, EU:C:2021:187; and of 28 January 2021, C-649/19, IR, ECLI:EU:C:2021:75.

Section II - Protecting fundamental rights in the executing state?

Section 37 of the 2003 Act contains a fundamental rights clause and it is frequently relied upon to resist surrender. It arises most frequently in relation to family rights to rule of law concerns in the requesting state and in relation to detention conditions.[7] It is more often than not, unsuccessful.

II.1. Family rights

Where an argument is raised based on interference with family rights, the court will generally take the view that the interference is no more than one would reasonably expect where a person is convicted in domestic proceedings and given the 'constant and weighty interest in surrender' are therefore not sufficient to refuse to execute the EAW.[8] In all these cases, the courts have repeatedly emphasized the centrality of the duty to surrender and reiterated that the case must be truly exceptional for the s. 37 ground to succeed.[9] While these cases indicate a deferential approach to the principle of mutual trust and co-operation, the courts in a number of instances, while rejecting the argument based on interference with Constitutional and Convention rights under s. 37, have proceeded to consider objections to surrender on the ground of a common law doctrine, abuse of process. This has arisen where there has been a substantial delay in issuing the EAW. The approach of the court has been to consider all aspects of the case cumulatively, including the family situation of the requested person. While the courts have accepted that abuse of process is not a ground for refusing surrender, and despite their emphasis on the duty to surrender, they have nonetheless refused to execute the EAW in a number of these cases.

II.2. Independence of the judiciary and the two-step test

The judicial authorities have had to grapple with the 'two step test' in the context of rule of law concerns in two cases to date. The *LM* case originated from a preliminary reference by the High Court in Ireland[10] and therefore Ireland was the first Member State that had to apply the test established by the Court of Justice in *LM.*

In its preliminary reference to the Court of Justice in *Celmer*, the principal concern of the Irish court was whether the two-stage test laid down in *Aranyosi* was appropriate in a case where a Member State had been found to be in breach of the rule of law, or whether the first stage of the test, i.e., identifying whether in fact systemic deficiencies existed in the requesting Member State, was sufficient ground for refusing the surrender. The response of the Court of Justice in *LM* was effectively a repetition of the test laid down in *Aranyosi*:[11] it requires Member States

7 The theme of detention conditions is expanded in Section III below.

8 *MJE v W.O.* 2021 IEHC 109 para 92.

9 Most recently in *MJE v D.E.* 2021 [IECA] 188; see also *MJE v J.A.T. No. 2* [2016] IESC 17; *MJE v Vestartas* [2020] IESC 12; *Ostrowski*; *MJELR v Ostrowski* [2013] IESC 24; *MJE v Orlowski* [2021] IEHC 109.

10 *MJE v Celmer (No.3)* [2018] IEHC 153.

11 Judgment of the Court of Justice of 5 April 2016, Joined Cases *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198.

to apply a two-stage test, first identifying whether there are in fact generalised deficiencies as to judicial independence and secondly, whether those deficiencies will affect the individual concerned.[12] The *LM* judgment also requires the executing judicial authority to request from the issuing judicial authority 'any supplementary information that it considers necessary for assessing whether there is such a risk'.[13]

The High Court had little difficulty in applying the first stage of the test: relying on the Commission's Reasoned Proposal,[14] the High Court was satisfied that the position regarding the independence of the judiciary in Poland was unchanged and accordingly, 'there existed a real risk, connected with a lack of independence of the courts of Poland on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached'.[15] The Court had more difficulty in resolving the second stage of the test. It considered that there were two separate matters requiring assessment based on the answer received from the Court of Justice. Firstly the court must consider whether the deficiencies identified in the first step 'are liable to have an impact at the level of the State's courts with jurisdiction over the proceedings to which the requested person will be subject'. Only following resolution of that question does the court then go on to assess 'whether there are substantial grounds for believing that he will run a real risk having regard to his personal situation as well as the nature of the offence and the factual context that form the basis of the EAW, to which the material available to it attests'.[16]

In support of his contention that he would run a real risk of a breach of his fundamental right to a fair trial, the evidence relied upon by Mr Celmer was a report by Polish lawyers and public statements made by the Deputy Minister for Justice in Poland that described Mr Celmer as 'a dangerous criminal from a drug mafia'.[17] Following responses to a request for further information from the judicial authorities in Poland, the High Court considered that the evidence relied on by Mr Celmer, despite the adverse comments on his presumption of innocence, did no more than reiterate the general deficiencies in the independence of the judiciary and did not meet the threshold required to show that he would personally be exposed to a breach of his fundamental right to a fair trial. Moreover, the High Court concluded that it is for the Polish courts to decide, whether at trial or on appeal against conviction, the issue of breach of the right to a fair trial. The surrender was ordered and upheld on appeal by the Supreme Court.[18]

Subsequently in the case of *Orlowski*, in objecting to surrender on the same ground as that put forward in *Celmer*, it was conceded by counsel for Mr Orlowski that he could offer no evidence going beyond that which would reiterate the generalised deficiencies in the independence of the judiciary in Poland, given that he could only rely upon new expert reports from lawyers in

12 Judgment of 25 July 2018, *LM,* C-216/18 PPU, ECLI:EU:C:2018:586.

13 Para 76 of the *LM* judgment.

14 COM (2017) 835.

15 *MJE v Celmer (no 4)* [2018] IEHC 484.

16 *MJE v Celmer (no 4*) [2018] IEHC 484 para 26; This is based on paras 74-75 of the Grand Chamber judgment in *LM.*

17 *MJE v Celmer* (no 4) [2018] IEHC 484 para 31.

18 *MJE v Celmer no 5* [2018] IEHC 639; *MJE v Celmer* 2019 [IESC] 80.

Poland which could go no further than those proffered in *Celmer*. The High Court dismissed that objection, but did go on to consider a new ground, which, it was argued, had not been directly addressed in *Celmer* or in the preliminary references to the Court of Justice in *LM,* and *L and P.* It was argued that those cases related to the independence of the judiciary and the right to trial before an independent and impartial tribunal. Here, the case being made was that an accused person is entitled to trial before a properly constituted court, established by law; given the new laws relating to the appointment of judges, and to the legal impossibility of challenging the validity of a judge's appointment, it could not be said that a trial following surrender would be a trial by a court established in accordance with law. The High Court rejected the argument that the Court of Justice's judgments in *LM* and *L and P* had not encompassed the issues of the appointment of judges and the right to a trial before a tribunal established by law.[19] The Court also accepted that Mr Orlowski could provide no evidence beyond that which would establish a possibility that if put on trial, it would be before a court not established by law. The Court concluded that a 'mere possibility that this might occur is not sufficient to refuse an application for surrender'.[20]

On appeal to the Supreme Court,[21] it was argued by the appellants that a consideration of whether a court is established in accordance with law precedes any consideration of independence, and that question had not been resolved by the Court of Justice in *LM* and *L and P*. On that basis, it was argued that there is no requirement by the court hearing the application for surrender to consider the precise situation of the person sought as per *LM* and *L and P*, 'as such matters are external to the primary question of establishment'.[22] The Supreme Court found that the situation in Poland had deteriorated further since the judgment in *LM*, it noted the impossibility for an applicant to identify which judge would be assigned to their case as judges are randomly allocated and noted that even if an applicant could do so, there is an absence of any effective judicial remedy should they wish to challenge the composition of the court due to the new laws in Poland. The Supreme Court considered that the 'troubling' situation in Poland required clarification 'as to 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'.[23] It decided to refer the case to the Court of Justice.[24] The initial communication from the Court of Justice was that the questions asked by the Irish court had already been addressed by it in *X and Y v Openbaar.*[25] Accordingly the Court of Justice asked whether the Supreme Court wished to maintain its reference. In response, the Supreme Court agreed to withdraw two of the three

19 *Orlowski* 2021 [IEHC] 109 para. 120.

20 Ibid, para.127.

21 On appeal to the Supreme Court, Mr. Orlowski was joined in the appeal by another appellant also resisting surrender to Poland, Mr. Lyszkiewicz.

22 *MJE v Orlowski* & Lyszkiewicz 2021 [IESC] 46 para. 21.

23 Ibid, para. 59.

24 Irish SC preliminary ref *MJE v WO and JL,* Case C 480/21.

25 Judgment of the Court of Justice of 22 February 2022, Joined Cases *X and Y v Openbaar Ministerie,* C-562/21 PPU and C-563/21 PPU ECLI:EU:C2022:100.

questions asked, but maintained its third question.[26] The response of the Court of Justice was to proceed by way of a reasoned order,[27] in which it maintained its position as set out in the *LM* and the joined *X* and *Y* cases, [28] leaving the Irish Supreme Court, despite its concerns, 'with no alternative' but to direct the surrender of the appellants.[29]

Section III Protecting fundamental rights through horizontal and vertical cooperation?

Dialogue between issuing and executing authorities post-*Aranyosi* and difficulties encountered.

III. 1. Horizontal Cooperation

Article 15 of the EAW Framework Decision (EAW FD)[30] has been frequently relied on by the Irish executing judicial authority in cases relating to refusal of surrender under s.21A of the 2003 Act, in cases relating to detention conditions in the requesting state, and in cases raising rule of law concerns. It has been used most frequently in cases relating to s.21A of the 2003 Act, the requirement that surrender must be refused if there is no decision to charge and to try. It is not uncommon in s.21A cases for multiple requests for further information, because the response from the issuing judicial authority has not been of sufficient clarity to enable the Irish judge to decide the application.[31]

The courts have had to apply the *Aranyosi* two step test in a number of cases relating to detention conditions, and given that the court must assess whether the requested person will be specifically affected by the detention conditions, the court has in all these cases sent requests for additional information.[32] In *Gheorge,* due to the failure of the requesting state to address the questions posed by the High Court in multiple requests for information – namely whether detention conditions had improved subsequent to a finding of breach of Article 3 ECHR by the ECtHR relating to the specific prison to which Mr Gheorge would be detained, the court refused surrender.[33] In other cases where the detention conditions have arisen, the Court has accepted the responses of the issuing authorities and ordered surrender.[34]

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26 Irish Supreme Court preliminary reference, *MJE v WO and JL,* Case C 480/21.

27 This is permitted by Art. 99 of the Court's Rules of Procedure, 'in particular where the reply to a question referred for a preliminary ruling may be clearly deduced from existing case law or where it admits of no reasonable doubt'.

28 WO & JL v MJE ECLI:EU:C:2022:592.

29 *Wojciech Orlowski, Jakub Lyszkiewicz v MJE* [2022] IESC 37.

30 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ L 190, 18.7.2002, p. 1.* Transposed by Ireland under s 20.2003 Act: 'the High Court shall, 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'.

31 For examples see *MJELR v Bailey* [2012] IESC 16; and *MJELR v. McArdle* [2014] IEHC 132.

32 The Irish courts follow the jurisprudence of the Court of Justice, for example the Judgment of 5 April 2016, Joined Cases *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198.

33 *MJELR v Gheorghe* [2009] IESC 76.

34 *MJE v Jarokovas* 2021 [IEHC] 270; *MEJ v Raduta* 2021 [IEHC] 374; *MJE v Anton* 2022 [IEHC]293.

In *Celmer*, in order to try to provide evidence that would satisfy the second step of the two step test, the Appellant provided an expert report by Polish lawyers which pointed to a risk to the fairness of the Appellant's trials and highlighted further damaging legislative changes, including the new power of the Minister for Justice to directly-discipline judges in the Ordinary Court. The High Court sought assurances from the issuing judicial authorities in respect of the comments of the Deputy Minister, which infringed the Appellant's presumption of innocence,[35] and in respect of the contents of the Appellant's expert report. On the basis of the evidence proffered by Mr Celmer, the High Court was of the view that it raised significant concerns that he was at 'specific risk of not having his case heard before an independent tribunal in Poland'.[36]

The judge of the Warsaw Regional Court, Judge Gaciarek, to whom the Irish Central Authority had written as the person nominated on the EAW as the Representative of the Warsaw Regional Court, confirmed that he fully accepted the contents of the appellant's report. He highlighted that judges had been subjected to disciplinary proceedings for acquitting persons in politically-sensitive trials, and for referring further questions to the Court of Justice in light of the *LM* judgment.

However, the President of Warsaw Regional Court, Judge Bitner, later wrote to the trial judge saying that the response that had been sent by Judge Gaciarek did not represent the views of the issuing judicial authority and they were his personal views only. Judge Bitner had recently been appointed by the Minister for Justice, without prior consultation with the Judges of the Warsaw Regional Court.[37]

Based on the responses and the Appellant's report, the Court held that the threshold was not reached on the evidence before it, and ordered the surrender.

III. 2. Vertical cooperation

The Irish courts have been very active in sending preliminary references to the Court of Justice, having sent 14 references to it in the area of judicial cooperation in criminal matters, mainly connected with the EAW. The courts always cite the relevant Court of Justice jurisprudence in their decisions, and generally follow them to the letter. An exception is *MJE v Bednarczyk*[38] where the High Court chose to interpret *Vilkas*[39] as not applicable to the delays experienced by requested person in that instance. In addition, the *Orlowski* case shows that the Irish court will not slavishly follow the Court of Justice's jurisprudence where it recognises that it sets too high a bar for a requested person to overcome, at least not without further clarification.

35 See Section II. 2. above.

36 *MJE v Celmer (no 4)* [2018] IEHC 484 para 41.

37 Supreme Court Application for Leave and Notice of Appeal, Office of the Supreme Court 20/12/2018 p 5.

38 [2021] IEHC 316.

39 Judgment of the Court of Justice of 25 January 2017, *Vilkas,* Case C-640/15, ECLI:EU:C:2017:39.

Conclusion

In general, the Irish Court shows deference to the principle of mutual trust and cooperation. The fundamental rights of the requested person are always explored whenever an objection is raised, but they have for the most part not represented a limit to the principle of mutual recognition in surrender. Some cases have resulted in refusal, although not based on the fundamental rights objection under s.37, but on an abuse of process ground. Using this common law doctrine, which it should be noted is not contained in the Irish Constitution and which does not appear as a ground to permit refusal under the EAW scheme, the Irish courts have managed to sidestep the principle of mutual trust and cooperation.

In relation to rule of law guarantees and the extent to which they represent a limit to the principle of mutual recognition in surrender cooperation, it is clear from the two cases examined relating to the rule of law that it is impossible for the requested person, who bears the burden of proof, to produce the evidence that they will be specifically put at risk. The Irish Supreme Court has been clearly concerned with the protection of the fundamental rights of the requested person, indicated by its most recent reference to the Court of Justice seeking further clarification of the *LM* two-step test. While this reference could have provided the Court of Justice with the opportunity to review the *LM/Aranyosi* tests, which appears to be clearly unworkable on the requested person's side, its response has shown no willingness to depart from its earlier rulings.

REFERENCES

National Judgments

Larkin v O'Dea [1994] 2 I.L.R.M. 448.

MJELR v Gheorghe [2009] IESC 76

MJELR v Bailey [2012] IESC 16

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MJE v Celmer [2019] IESC 80

MJE v Vestartas [2020] IESC 12

MJE v D.E. [2021] IECA 188

MJE v Bednarczyk [2021] IEHC 316

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MJE v Orlowski [2021] IEHC 109

MJE v Orlowski [2021] IESC

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Order of 12 July 2022, *WO, JL,* Case C-480/21, ECLI:EU:C:2022:592.

Other sources

Walsh on Criminal Procedure Dublin : Thomson Round Hall Second edition 2016

Availability of EAW-related jurisprudence

For the execution of warrants, all judgments where a surrender is opposed by the requested person are published; no documents are published where the requested person consents to the surrender.

Judgments/documents are not published at the issuing stage of EAWs in Ireland.

The lack of available documents relating to the issuing phase makes it difficult to research the area. The lack of any available documents relating to the execution of orders for surrender where the requested person consents make it difficult to discern how many EAWs are opposed; where any statistics are available, they may relate to a number of EAWs in connection with the same person, so they are not easy to follow.

All judgments are published on the Irish Courts Service website: https://www.courts.ie/