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The European Arrest Warrant in the Prosecution of Extraterritorial Offences: the strange case of the Irish murder, the French victim and the English suspect

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Surprising as it may seem, the European arrest warrant (EAW) can be used by one State to take over a domestic prosecution from another State, even though the crime, the accused, the victim and all the primary evidence were located in the latter State and the competent authorities of that State have already decided that there is no basis for prosecution. Focusing on the remarkable facts of the *Bailey* case, this article critically examines how that bizarre situation is facilitated by the EAW Framework Decision and Ireland's implementing legislation. It finds that that the punitive criminal law enforcement demands of the EU's area of freedom, security and justice are prioritised over the due process norms, human rights standards and internal checks and balances of domestic criminal process. The result is that the EAW can be used by prosecutors to expose the accused to a punitive, hybridised, criminal procedure lacking in normative coherence and democratic legitimacy. The article concludes that there is an urgent need to rethink the mutual responsibilities of Member States in the EAW regime.

Introduction

The European arrest warrant (EAW) was an ambitious and ground-breaking initiative when introduced in 2002. It swept away or reduced many of the conventional restrictions on extradition among EU Member States. At its core is a streamlined judicial process through which the authorities in one Member State can secure the surrender of a person from another Member State for prosecution or punishment in the former.¹ It is also a vital component in the establishment of an EU area of freedom, security and justice (AFSJ) in which national prosecutors can readily harness the criminal process of other Member States to enhance the enforcement of their own criminal law.² The EAW's

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¹ See V. Mitsilegas "The Limits of the Mutual Trust in Europe's Area of Freedom, Security and Justice: from Automatic Inter-State Cooperation to the Slow Emergence of the Individual" (2012) 31 *Yearbook of European Law* 319, 323-330.

² On the conceptual underpinnings of the AFSJ, see J. Monar "The Area of Freedom, Security and Justice" in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law*, Revised 2nd ed (Oxford: Hart, 2009), pp.556-562.

success, from a prosecutorial perspective, is reflected in the exponential increase in the volume and speed of intra-EU surrenders since its introduction.³ Equally, however, the EAW has been the subject of sustained criticism from some quarters for, among other things, its premature assumption of equivalence in national criminal law and procedure,⁴ and for its perceived failure adequately to protect the human rights of surrendered persons.⁵

This article focuses on an unusual aspect of the EAW, namely its potential to be used by one Member State (the issuing or requesting State) to pursue extraterritorial jurisdiction over an offence committed on the territory of another Member State (the executing or requested State). There can, of course, be very sound reasons why one Member State may wish to use it for that purpose. It may be, for example, that much of the evidence and most of the witnesses are located on its own territory, to the extent that it is more convenient for both States and most of those concerned for the offence to be prosecuted there. Another possibility is that the offence may go unpunished if the State on whose territory it was committed has little motivation to prosecute, relative to the motivation of the State seeking to exercise extraterritorial jurisdiction. It is a wholly different matter, however, if those reasons do not exist, the offence is very serious (such as murder), the suspect/accused is resident in the requested State where the offence was actually committed, the victim is or was present in that same State at the time of the offence and most, or all, of the evidence is located there. In such circumstances, it should be unthinkable that the requested State would offload its sovereign responsibility for the prosecution of the offence to the other State. It should also be unthinkable for the requested State to facilitate that event by surrendering one of its own nationals or residents for that

³ See European Commission Com(2011) 175 and C(2017) 6389 final, Annex III.

⁴ See, for example, S. Allegre and M. Leaf "Mutual Recognition in European Judicial Cooperation: a Step too Far too Soon? Case Study - the European Arrest Warrant" (2004) 10 *European Law Journal* 200; E. Smith "Running before we can walk? Mutual recognition at the expense of fair trials in Europe's area of freedom, security and justice" (2013) 1 *New Journal of European Criminal Law* 82.

⁵ See, for example, A. Albi "Erosion of Constitutional Rights in EU Law: A Call for 'Substantive Co-operative Constitutionalism'" (2015) 9 *Vienna Journal of International Constitutional Law* 151 and 291; E. Herlin-Karnell "The integrity of European criminal law cooperation: the nation state, the individual, and the area of freedom, security and justice" in F. Amtenbrink and P. van den Berg (eds), *The Constitutional integrity of the European Union* (The Hague: Asser Press, 2010); European Parliament Civil Liberties Committee "Motion for a European Parliament Resolution: with recommendations to the Commission on the review of the European Arrest Warrant" (28th January 2014) 2013/2109(INL)).

purpose. Such action would expose the person concerned to the risk of severe prejudice in that he will be surrendered to, and tried in, a State with which he may have no familiarity or connection, and he will be deprived of a trial in accordance with the familiar norms and procedures of his own State where the offence was actually committed. Yet, incredibly, it seems the EAW can be used to produce that result.

Focusing on the remarkable *Bailey* case, this article illustrates how, and the extent to which, the EAW can prejudice the due process and fair trial rights of the requested person in the specific context of extraterritorial jurisdiction. More broadly, it argues that by facilitating the extraterritorial prosecution of crime across Member States in the interests of an AFSJ, the EAW severs the centuries old sovereign bond between national territory and the prosecution of crime to the detriment of the rights of the accused.⁶ Domestic constitutional values and internal checks and balances can now be circumvented by national prosecutors engaging in mutually convenient ‘forum-shopping’,⁷ thereby exposing the accused to repetitive coercive criminal process and a punitive hybridised criminal procedure lacking in normative coherence and democratic legitimacy.⁸

The article begins with an outline of some key aspects of the EAW, namely its adoption of the principles of mutual recognition and trust and its capacity to be used by the requesting State to pursue the prosecution of an offence that was actually committed on the territory of the requested State. The unusual facts of the *Bailey* case are rehearsed to reveal how the EAW can expose a requested person to severe prejudice and unfairness when used to pursue such extraterritorial prosecutions. This is followed by a critical analysis of the EAW Framework Decision’s management of the tensions between prosecutorial interests and the rights of the accused in this context, as amplified by Ireland’s peculiar approach to the implementation of the key provisions. The article argues that the Framework

⁶ Providing citizens with internal security, controlling access to the national territory and administering justice have been described by Monar as belonging to the basic justification and legitimacy of the existence of the modern nation-state since its emergence in the seventeenth/eighteenth century; J. Monar, fn.2, p.552.

⁷ This refers broadly to the practice of State bodies cooperating strategically across borders to bring a prosecution in the jurisdiction where it will be easier to secure a conviction due to national differences in law and procedure, even though another jurisdiction may be more appropriate to the location of the alleged offence, residence of accused/victim and primary evidence.

⁸ See B. Schünemann “Alternative Project for a European Criminal Law and Procedure” (2007) *Criminal Law Forum* 243.

Decision has failed to deal coherently or effectively with these tensions. There is an urgent need to rethink the mutual responsibilities of Member States in the EAW regime to ensure that it cannot be used to deprive the requested person of the fundamental rights and due process norms that inform the criminal process of his State of residence where the offence was allegedly committed.

The principles of mutual recognition and trust

A signal feature of the EAW is that it transforms the conventional extradition procedure from an exercise in political and diplomatic cooperation between friendly sovereign States, to a legal process of direct engagement between national judicial authorities across a single EU criminal law enforcement space. Making that a reality means overcoming the obstacles posed by the fact that those authorities have to operate within the constraints of their own national criminal laws, procedures and constitutional norms which differ, sometimes fundamentally, across Member States.⁹ Rather than treading on national sovereignty sensitivities through the adoption of harmonising measures, the EU has responded to this challenge by relying heavily on the principle of mutual recognition;¹⁰ a solution borrowed from its own single market methodology.¹¹

Pursuant to the principle of mutual recognition, a competent judicial authority in one Member State must normally recognise and enforce on its own territory a valid EAW issued by a judicial authority in another Member State. This also entails the former having trust in the due process and human rights standards applicable in the latter.¹² Save in exceptional circumstances, the executing State may not go

⁹ See, for example, A. Albi and S. Bardutsky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law: National Reports* (The Hague: Asser Press, 2019); A. Erbežnik "Mutual Recognition in EU Criminal Law and Fundamental Rights – the Necessity for a Sensitive Approach" in C. Brière and A. Weyembergh (eds), *The Needed Balances in EU Criminal Law: Past, Present and Future* (Oxford: Hart, 2018).

¹⁰ See J.R. Spencer "EU Criminal Law – the Present and the Future?" in A. Arnall et al. (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Oxford: Hart, 2011), pp.351-352; A. Suominen "The Sensitive Relationship Between the Different Means of Legal Integration: Mutual Recognition and Approximation" in C. Brière and A. Weyembergh fn.9, pp.168-169.

¹¹ See S. Lavenex "Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy" (2007) 14 *Journal of European Public Policy* 762.

¹² See K. Nicolaidis "Trusting the Poles? Constructing Europe through Mutual Recognition" (2007) 14 *Journal of European Public Policy* 682 for a broader discussion of different facets of the mutual recognition concept.

behind the face of the warrant to check that it has been issued in accordance with the issuing State's domestic law and procedure and that the due process and human rights of the requested person will be respected.¹³ The executing State must simply trust that these have been, and will be, satisfied in the issuing State.¹⁴

From a prosecutorial perspective, these principles of mutual recognition and trust are undoubtedly playing a pivotal role in the success of the EAW and, in particular, the development of a single EU criminal law enforcement space. Conversely, however, they can impact negatively on the rights and freedoms of the individual.¹⁵ So, for example, they prevent an accused challenging the execution of an EAW on the basis that, once surrendered to the issuing State, he will be denied the protections of higher constitutional and procedural checks and balances that would otherwise be applicable if he was prosecuted for the offence in the executing State.¹⁶ In effect, and without even the pretence of democratic legitimacy,¹⁷ mutual recognition has paved the way for an open-ended spectrum of cross-border combinations in criminal law enforcement to the advantage of the prosecution and the detriment of the defence. As put by the team of eleven, mostly German, criminal law professors in their "Alternative Draft for a European Criminal Law and Procedure", it:

“.. leads to a hybridised prosecution in which the invasive procedures of the different legal systems can all be applied, thereby leading eventually to a radically punitive criminal justice system, which did not exist in that form in any member state.”¹⁸

This dilution of national constitutional standards in “hybridised prosecutions” rests heavily on the premise that all of the Member States subscribe to a common benchmark of criminal justice values and fundamental rights. Indeed, the CJEU consistently links mutual recognition and trust to the fact that all Member States are parties to the ECHR and are bound by the Charter of Fundamental Rights

¹³ *Opinion 2/13 of the CJEU (C-2/13)* ECLI:C:2014:2454, paras.191-192. For critical analysis, see V. Mitsilegas “The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe’s Area of Freedom, Security and Justice” (2015) 6 *New Journal of European Criminal Law* 457, 471-474.

¹⁴ This may not be an absolute obligation where non-compliance with fundamental rights is in issue, see D. Flore “The Issue of Mutual Trust and the Needed Balance Between Diversity and Unity” in C. Brière and A. Weyembergh fn.9, ch.11.

¹⁵ For contrasting effects in criminal law relative to the single market, see V. Mitsilegas “The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU” (2006) 43 *C.M.L.Rev* 1277; S. Lavenex fn.11.

¹⁶ See, for example, *Melloni (C-399/11)* ECLI:EU:C:2013:107; *Radu (C-396/11)* ECLI:EU:C:2013:39.

¹⁷ B. Schünemann fn.8.

¹⁸ B. Schünemann fn.8, p.231.

and the general principles of EU law. Not only is that interpreted as precluding the application of higher national constitutional standards as a restraint on the execution of an EAW, but it assumes that all Member States will consistently satisfy the Convention and Charter standards as a minimum threshold in their treatment of criminal suspects and offenders surrendered to them. The weakness of this argument is reflected in the fact that the EU has had to adopt harmonising measures on some key aspects of criminal procedure.¹⁹ It is equally telling that the CJEU (and the EU legislature)²⁰ has acknowledged that mutual recognition can be overridden in some circumstances by the need to ensure respect for fundamental rights.²¹ It is also the case, of course, that most, if not all, Member States have been found in breach of ECHR standards in criminal law enforcement matters from time to time, and some are persistent offenders.²²

The extraterritorial context

The impact of mutual recognition and trust can be most severe on the requested person where the issuing State is pursuing him for an offence committed on the territory of the *executing* State, which is also his state of residence. Ever since the Treaty of Westphalia in 1648 and the rise of the nation state, it has been a fundamental mark of national sovereignty for a State to assert jurisdiction over crimes committed on its own territory.²³ However, this notion of exclusive sovereign territorial jurisdiction has never been absolute. Individual States have always been willing to exercise jurisdiction over some offences committed on the territory of other States in certain circumstances where their interests or

¹⁹ See, for example, Directive 2010/64/EU (right to interpretation and translation in criminal proceedings); Directive 2012/13/EU (right to information in criminal proceedings); Directive 2016/343/EU (strengthening of certain aspects of the presumption of innocence and the right to be present at the trial of criminal proceedings); Directive 2016/1919/EU (legal aid for suspects and accused persons in criminal proceedings and for requested persons in EAW proceedings).

²⁰ See Directive 2014/41/EU, art.11(1)(f).

²¹ See *Aranyosi and Caldaru* (C-404/15) and (C-659/15) ECLI:EU:C:2016:198; *LM* (C-216/18) ECLI:EU:C:2018:586.

²² The poor standard of prison conditions has proved a serious and persistent problem in several Member States; see European Parliament Civil Liberties Committee Report on prison systems and conditions (2015/2062(INL)).

²³ N. Boister *An Introduction to Transnational Criminal Law* (Oxford: OUP, 2012), p.136; J.G. Starke *Introduction to International Law*, 9th ed. (London: Butterworths, 1984), ch.8.

responsibilities are raised. Moreover, the nexus between sovereign territory and criminal jurisdiction is being loosened as States are increasingly encouraged or required by the EU and other international regimes to embrace extraterritorial jurisdiction; and not just to combat terrorism, organised crime, cybercrime and other such transnational criminal threats.²⁴

There is no absolute prohibition on the EAW being used by one Member State to require the surrender of a person from another Member State in respect of an offence that was allegedly committed on the territory of the latter. Inevitably, the use of the EAW to pursue an extraterritorial prosecution in this manner has the potential to generate jurisdictional tensions between the States concerned. More importantly, it could expose the requested person to repetitive coercive criminal process, ‘forum shopping’ by national prosecution authorities and unfair criminal procedures which are stripped of key national checks and balances. The facts of the *Bailey* case offer an acute illustration of these risks, and the limits of the protections offered by the EAW Framework Decision.

The *Bailey* Case

An Irish murder

The *Bailey* case is surely one of the most unusual EAW cases ever to have arisen in any of the EU Member States. Denham C.J. in the Irish Supreme Court said that it “arises in unique circumstances and raises unprecedented questions of law.”²⁵ The case concerns the brutal murder of French woman, Sophie Toscan du Plantier, outside her holiday home in West Cork, Ireland, at some point in the early morning of the 23rd of December 1996.²⁶ Early in the investigation, the Garda honed in on Ian Bailey as their prime suspect and depicted him as a maniacal killer who would imminently kill again. He is an Englishman who was and, since the murder in 1996, has remained permanently resident in the area. It is immediately clear, therefore, that this is an Irish murder of a French national at her holiday home

²⁴ See N. Thorhauer “Conflicts of Jurisdiction in Cross-Border Criminal Cases in the Area of Freedom, Security and Justice: Risks and Opportunities from an Individual Rights-Oriented Perspective” (2015) 6(1) *New Journal of European Criminal Law* 78.

²⁵ *Minister for Justice, Equality and Law Reform v Bailey* [2012] IESC 16, per Denham C.J., para.1.

²⁶ The death occurred (possibly several hours) before 10.00am.

in Ireland, with the suspect being a United Kingdom national living in Ireland. As might be expected, the murder has been robustly investigated by the Garda Síochána (the Irish police) with a view to securing a prosecution and conviction in the Irish courts, but they have been unable to gather sufficient admissible evidence to warrant prosecution.

Lack of incriminating forensic evidence

Bailey, and his partner Jules Thomas, were arrested and questioned twice, and their dwellings searched, by the Garda. In interviews with gardaí, Bailey consistently denied any involvement in the murder and he voluntarily submitted to being photographed, fingerprinted and having blood and hair samples taken while in Garda custody. Despite the bloodied and frenzied nature of the violent attack in a briar strewn area that left about 50 wounds and briar scratches on the victim's body, no forensic evidence was found linking Ian Bailey to the crime scene. Had Bailey been the killer, it is inconceivable that he would not have left "traces of blood, skin, clothing, fibres or hair at the scene."²⁷ Indeed, the intense Garda focus on him as the likely killer was never supported by cogent incriminating evidence, nor did it generate any such evidence. On two occasions, in January 1999 and March 2000, the independent Director of Public Prosecutions (DPP) in Ireland considered the investigation file submitted by the Garda and, on both occasions, he decided that there was insufficient evidence to warrant charges against Bailey. The DPP reviewed the file on several occasions thereafter with the same result.²⁸ Nevertheless, it will be seen below that a French judicial authority subsequently reached the opposite conclusion on the evidence contained in the same file. It is necessary, therefore, to outline briefly the nature and substance of the evidence against Bailey in the Garda file, as well as some of the methods allegedly deployed by the Garda in gathering that evidence and in seeking to have Bailey charged.

²⁷ DPP "Analysis of the Evidence to Link Ian Bailey to the Sophie Toscan du Plantier Murder" (2001), para.1.

²⁸ In a letter to Bailey's solicitors in July 2010, the DPP confirmed that this remained the position.

Informal Admissions

An admission of guilt usually constitutes strong incriminating evidence against the person making the admission. Much depends, however, on the context in which any such alleged admission is made and how it is interpreted and reported. The Garda file on the investigation includes statements from a number of witnesses apparently claiming that Bailey had made informal admissions to be the murderer in conversations with them. In contrast, he consistently proclaimed his innocence at every platform available to him, on the record and otherwise. Moreover, he explained to the Garda that the so-called “admissions” were sarcastic (or black humour) comments that were not meant to be taken seriously, and that is how the DPP interpreted them.²⁹ Having examined all of the statements closely in their respective contexts, the DPP described them variously as: reeking of “sarcasm not veracity”,³⁰ the “antithesis of an admission”,³¹ “dangerously unreliable”,³² or of negligible weight.³³ They would not provide a credible basis on which to ground a prosecution in Irish law.

The ‘Eye-Witness’ Account

The primary evidence in the Garda file connecting Ian Bailey to the crime is a circumstantial eye-witness identification. Independent eye-witness evidence directly connecting a person to the commission of an offence can be strong evidence of that person’s guilt. Much, of course, depends on the nature of the identification and the circumstances in which it is made. An eye-witness identification is notoriously susceptible to mistake, especially where it is a fleeting identification, or one made at night or in circumstances of low-visibility.³⁴

The alleged eye-witness in Bailey’s case did not see him committing the crime, nor even place him on the victim’s property. Instead, she claims to have seen a man, whom she later identified as Bailey, on

²⁹ DPP, fn.28, paras.18-24.

³⁰ DPP, fn.28, para.23.

³¹ DPP, fn.28, para.19.

³² DPP, fn.28, para.22.

³³ DPP, fn.28, para.21.

³⁴ The (English) *Criminal Law Revision Committee: Evidence (General) 11th Report* (London HMSO, Cmnd.4991, 1972) cited mistaken identification evidence as by far the greatest cause of actual or possible wrong conviction.

the road near the victim's property at 3am on the night/morning of the murder. There were several factors which undermined the reliability and veracity of the alleged identification.³⁵ Bailey has always denied being anywhere other than on the property of his partner on the night/morning of the murder. The identification was made from a moving car at night on a dark country road. The person allegedly seen by the witness had his two hands up to the side of his face. The witness did not know Bailey at the time. She claimed that the man she saw on the road was the same man that she had seen outside her shop in the town a few days earlier, but Bailey did not match that man in height or build. She also claimed that she saw the same man on the road thumbing a life outside the town on the morning (or day) before the murder, but that man turned out not to be Bailey. Another concern is that the witness has always refused to identify the person whom she was with in the car, and initially lied in her statement to the Garda to conceal the fact that she was having an extra-marital affair with him.

As far back as 1997, the combination of these factors, and others, led the DPP to conclude, unsurprisingly, that this key witness' testimony was wholly unreliable.³⁶ The gardaí were so advised, yet they continued to manage and portray her as a credible witness for approximately seven more years until she withdrew her statement. She alleged that it had been extracted from her under pressure by gardaí threatening to expose her extra-marital affair and other matters. In High Court civil proceedings taken by Bailey against the State in 2014/2015, she proved to be a wholly unsatisfactory witness. When pressed on the many contradictions in her evidence, she said that "she was getting confused with fact and fiction" and was "mixed up".³⁷ The trial judge in the civil proceedings also took the most unusual step in the presence of the jury of giving her a warning on the risk of perjuring herself.³⁸ It is also worth noting that in interviews with the independent Garda complaints body, she denied actually recognising the person she saw near the scene of the murder as Ian Bailey. She said that she only made the identification statement to gardaí because they (allegedly) pressurised her into

³⁵ Her statement was formally written down by the Garda seven months after it was originally made by the witness in a concealed identity anonymous phone call to the Garda. Some details in a contemporaneous Garda note of the contents of the call differ from the statement in a manner that further diminishes the evidential value of the latter; see DPP, fn.28, paras.14-15.

³⁶ DPP, fn.28, paras.13-16.

³⁷ *Bailey v Commissioner of An Garda Síochána* [2017] IECA 220, para.97

³⁸ *Bailey v Commissioner of An Garda Síochána* [2017] IECA 220.

doing so after showing her a video depicting Bailey.³⁹ These events confirm the presence of the DPP's assessment of the witness in 1997.

Improper Garda methods

Some of the allegedly incriminating material in the Garda file raises strong suspicions of gardaí resorting to improper, and even unlawful, methods to build a case against Ian Bailey. A recurring theme is what appears to be a sustained attempt to present him as the killer. So, for example, several witness statements are included in the Garda file suggesting that Bailey was in possession of knowledge and material about the murder which only the murderer was likely to have. Having examined these statements carefully, however, the DPP concluded that they simply did not match the independently established facts, and are exposed by those facts as being false, mistaken or unreliable.⁴⁰ The DPP also found that the Garda file omitted witness statements which exposed the evidential weaknesses in certain statements that were included.⁴¹ Equally disturbing is that a substantial body of evidence in Garda possession has gone missing. This includes: a blood-spattered gate recovered from close to where the body of the victim was found, a French wine bottle found in the field next to the murder scene, 139 original witness statements (including from some of the central witnesses), five suspect files (on Bailey, his partner and three other suspects) and several critical pages from the contemporaneous Garda record book of the progress of the investigation (these were deliberately and carefully cut out of the book while it was in Garda possession).⁴² Separately, an independent Commission of Investigation chaired by a Supreme Court judge, found that:

“.. members of An Garda Síochána involved in the investigation, including the officer responsible for preparing the report for the Office of the Director of Public Prosecutions, were

³⁹ GSOC *Information Report from the Garda Síochána Ombudsman Commission at the completion of the investigation into the complaints of Ian Bailey, Catherine "Jules" Thomas and Marie Farrell: Pursuant to s.103 of the Garda Síochána Act 2005* (Dublin: GSOC, 30th July 2018), paras.4.1.3.8-4.1.3.11.

⁴⁰ See DPP, fn.28, paras.36-40.

⁴¹ See DPP, fn.28, paras.9, 15, 17, 27 and 31-32. In respect of one such statement from a journalist that debunked the Garda case on Bailey's premature knowledge of the nationality of the victim, the DPP commented "it is astounding that the Gardaí did not in their original report disclose [the journalist's] statement to this Office"; para.32.

⁴² GSOC, fn.41, para.4.11.

prepared to contemplate altering, modifying or suppressing evidence that did not assist them in furthering their belief that Mr Bailey murdered Madame Toscan du Plantier.”⁴³

There is also evidence that gardaí gave clothes, tobacco and money to a local destitute drug abuser allegedly in an attempt to persuade him to befriend Bailey to see if Bailey would say something incriminating about the murder.⁴⁴

The concern that the Garda may have been straining unduly to build a case against Bailey, despite the paucity of the evidence against him, is further fuelled by their apparent enthusiasm to have him charged speedily. So, for example, they presented Bailey as a ruthless and unrestrained killer who might strike again in the local community,⁴⁵ even though that depiction was not supported with cogent evidence. Moreover, a senior Garda officer close to the investigation is reported to have asked a state solicitor in March 1998 to use his personal acquaintance with the Minister for Justice to apply pressure on the DPP to have Bailey charged.⁴⁶ Not only would this be a grossly improper attempt to seek to apply political pressure on the independent DPP in a criminal prosecution, but it would also be unlawful.⁴⁷

Most unusually, the DPP’s perception of the overall Garda investigation was revealed in Supreme Court proceedings in November 2011. The DPP at the time of the investigation (since deceased) felt compelled to bring his assessment to the attention of the parties as he feared that there could be a serious miscarriage of justice if Bailey was surrendered and subsequently prosecuted for the murder in France:

“ .. on the basis of, *inter alia*, ‘evidence’ and conclusions provided by what I regarded at the time as having been a thoroughly flawed and prejudiced Garda investigation culminating in a grossly improper attempt to achieve or even force a prosecutorial decision which accorded with that prejudice. I felt, accordingly, that as a matter of ordinary justice I was obliged to bring that matter to appropriate attention.”⁴⁸

⁴³ See *Report of the Fennelly Commission: Commission of Investigation (Certain Matters Relevant to An Garda Síochána and Other Persons)* (Dublin: Stationery Office, 2017), Conclusions 12.2. For some of the details, see paras.12.5.6-12.5.45.

⁴⁴ It is alleged that he was also offered drugs for this purpose, although that is denied by the gardaí; see DPP fn.28, paras.16-18 and *Bailey v Commissioner of An Garda Síochána* [2017] IECA 220, para.23. The individual in question has strenuously denied ever making a statement.

⁴⁵ See DPP fn.28, paras.5-7.

⁴⁶ See *Bailey v Commissioner of An Garda Síochána* [2017] IECA 220, para.25.

⁴⁷ Prosecution of Offences Act 1974, s.6.

⁴⁸ See *Minister for Justice, Equality and Law Reform v Bailey* [2012] IESC 16, Murray J.

Critically, the DPP is the appropriate constitutional authority to decide whether the Garda file contained sufficient reliable evidence to warrant charging Ian Bailey with the murder. As such, his decision carries immense weight in the sense that it would only be second-guessed by a court in the most exceptional of circumstances (none of which applies here).⁴⁹ Referring to the DPP's analysis of the material in the Garda file leading to his decision not to prosecute, Murray J. in the Supreme Court said:

“This material is of the highest importance, emanating as it does from one of the law officers of the State. It is also dramatic and shocking in its content.”⁵⁰

The Irish decision not to prosecute

In Ireland the DPP applies a two-pronged test in deciding whether to prosecute in any individual case.⁵¹ First, she considers whether there is sufficient admissible evidence on which a jury properly directed in the law could reasonably return a verdict of guilty. If this test is not satisfied on the evidence, the DPP will direct no prosecution. If it is satisfied, the DPP will then go on to consider whether a prosecution is in the public interest. In the *Bailey* case, the first pre-requisite is clearly not satisfied. There is no credible evidence directly connecting Bailey with the murder. Insofar, as there is indirect evidence linking him with the murder, it is either unreliable or unpersuasive. Some of it is almost certainly inadmissible under Irish law because of the manner in which it was obtained by the Garda.⁵² It is hardly surprising, therefore, that the DPP in 2001 formally issued a 44-page “Analysis of the Evidence” to An Garda Síochána concluding that “a prosecution is not warranted by the evidence.”⁵³

⁴⁹ See DPJ Walsh *Walsh on Criminal Procedure* (Dublin: Round Hall, 2016), paras.13-158-13-164.

⁵⁰ *Minister for Justice, Equality and Law Reform v Bailey* [2012] IESC 16. Murray J. is one of Ireland's most experienced and accomplished judges. Now retired, he served as Ireland's Attorney General in the 1980s, a judge of the European Court of Justice from 1992-1999, a judge of the Irish Supreme Court from 1999-2015 and Ireland's Chief Justice from 2004-2011.

⁵¹ *DPP Guidelines for Prosecutors* 4th edition (DPP: Dublin, 2016), ch.4.

⁵² Irish law applies a relatively strong exclusionary rule for evidence that has been obtained in breach of the accused's constitutional rights; see L. Heffernan and Úna Ní Raifeartaigh *Evidence in Criminal Trials* (Dublin: Bloomsbury, 2014), ch.8.

⁵³ DPP, fn.28, para.44.

Initiation of the French prosecution and issue of the EAW

Sophie Toscan du Plantier's family commenced a civil action for damages on the 17th of January 1997. This had the effect of triggering criminal proceedings in France,⁵⁴ which asserts extraterritorial jurisdiction over the murder of a French citizen anywhere in the world.⁵⁵ Following a request for mutual legal assistance (MLA) in the matter, the Irish Justice Minister submitted the Garda investigation file on the case to the French authorities in December 2008.⁵⁶ This, in itself, was a most surprising move by the Irish government. In effect they were conceding the investigation, and possible prosecution, of an Irish murder to France at a time when the Irish DPP had concluded that a prosecution for the murder was not warranted on the basis of the evidence. They did not even include with the file a copy of the DPP's 44-page Analysis from 2001 explaining why he had decided not to prosecute. In the 2014/2015 High Court civil action by Ian Bailey, former DPP, James Hamilton, testified in relation to sending a copy of the 2001 Analysis to the Office of the Attorney General who was the legal adviser to the Irish government. The decision not to send that Analysis to the French seems incomprehensible. What makes the Irish actions even more incomprehensible is that they were under no obligation at the time to accede to the MLA request. It will be seen later that the consequences of doing so would be serious prejudice to the due process and human rights of Ian Bailey.

In February 2010, more than thirteen years after the murder, an EAW was issued for the arrest and surrender of Bailey to be prosecuted in France. The warrant made no attempt to explain why a French prosecution was appropriate for an Irish murder in respect of which the Irish DPP had determined that there was insufficient evidence to prosecute him, and which was still officially under investigation by

⁵⁴ See, C. Elliott, E. Jeanpierre and C. Vernon *French Legal System* 2nd ed. (Harlow: Pearson, 2006), pp.200-201.

⁵⁵ French Penal Code, Art.113.7.

⁵⁶ It seems that the request was actually submitted in 2006, but not executed until the DPP had decided again that there was insufficient admissible evidence to prosecute; see *Bailey v Commissioner of An Garda Síochána* [2017] IECA 220, para.29F.

the Irish police.⁵⁷ Nevertheless, the Irish High Court proceeded to order Bailey's surrender, as the EAW was in the prescribed form and, in the Court's view, none of the mandatory or optional grounds prohibiting surrender were applicable.⁵⁸ Its decision was subsequently overturned on appeal by a majority decision in the Supreme Court. As will be seen below, the Supreme Court's decision to refuse Bailey's surrender was based (partly)⁵⁹ on a particular interpretation of the Irish legislation implementing the EAW Framework Decision provisions on extraterritoriality.⁶⁰ Nevertheless, France proceeded to try him *in absentia* in May 2019. He was convicted and sentenced to 25 years imprisonment. It is likely that a third EAW will issue for his surrender to France; this time to serve the custodial sentence.

'Mixing and matching' of criminal procedures

The 2010 French EAW (just like the MLA request before it) presented quite an extraordinary situation. In effect, it was asking the competent Irish judicial authority to surrender an Irish resident to France to be prosecuted under French law for an Irish murder on the basis of evidence that was deemed by the Irish DPP to be insufficient to justify prosecution under Irish law. Clearly, if an Irish judicial authority was obliged to execute the EAW in such circumstances, it would raise a serious issue over Irish sovereignty in respect of the prosecution of crime committed on Irish territory. Equally, it would expose Bailey to a very real risk of severe prejudice. Not only would he be subject to lengthy, coercive criminal procedures in the same matter across two jurisdictions, but he would also

⁵⁷ Framework Decision 2009/948/JHA on the prevention and settlement of conflicts of jurisdiction does not seem to have been triggered in the case by either party even though it had come into force in December 2009. It must be said, however, that compulsory compliance with the instrument did not commence until June 2012, more than two years after the EAW had issued. For criticisms of the weaknesses of the instrument, see N. Thorhauer, fn.24, p.79.

⁵⁸ *Minister for Justice, Equality and Law Reform v Bailey* [2011] IEHC 177.

⁵⁹ A second ground for refusal was that a decision had not yet been taken in France to put Bailey on trial; this being a precondition for execution under the Irish EAW legislation.

⁶⁰ A subsequent attempt to secure Bailey's surrender pursuant to a second EAW was rejected by the High Court in *Minister for Justice and Equality v Bailey* [2017] IEHC 482 essentially on the basis that the earlier Supreme Court's decision on the interpretation of the extraterritorial point of law was binding and precluded the re-opening of that interpretation. Significantly, the High Court also held that, given the history of the proceedings and litigation, this second attempt to procure the surrender of Bailey amounted to an abuse of process.

suffer from the effects of a cumulative ‘mixing and matching’ of the different laws and procedures in those two jurisdictions.

In Ireland the criminal investigation is essentially the exclusive preserve of the police who enjoy extensive powers and freedom to gather evidence in a loosely regulated environment.⁶¹ It is not supervised by an independent prosecutor or judicial authority. This invites the risk of a miscarriage of justice ensuing from the police gathering evidence that is false or unreliable and/or suppressing evidence that is favourable to the defence.⁶² Critically, that risk is countered by checks and balances in the later prosecution and trial stages where the material in the police file is filtered through a constitutional exclusionary rule, additional admissibility rules and adversarial procedures.⁶³

In France, by comparison, the police investigation stage in a murder case is conducted under the direct supervision of a public prosecutor and an examining magistrate, both of whom are judicial authorities.⁶⁴ As explained by Hodgson, the prosecutor, exercises a supervisory function over the police investigation.⁶⁵ Her focus is on ensuring the construction of a legally coherent file in which basic evidence has been collected and compliance with procedural safeguards documented.⁶⁶ Her concern is with searching for the truth, as distinct from searching for a ‘culprit’.⁶⁷ While this does not eliminate the risk of police corruption or abuse,⁶⁸ it should limit the inclusion of false or unreliable evidence in the prosecution file (equivalent of the Garda file in Ireland), and the suppression of evidence favourable to the defence. Supervision by the examining magistrate provides a further layer

⁶¹ See DPJ Walsh fn.51, paras.1-01 – 1-04; 2-02 – 2-21

⁶² The *Bailey* case is only one of many high-profile cases in which serious allegations of such practices have featured in Ireland in recent times. See, for example, *Reports of the Morris Tribunal of Inquiry into complaints concerning some gardaí of the Donegal Division* (Dublin Stationery Office 2004-2008); *Report of Commission of Investigation into Certain Matters Relative to the Cavan/ Monaghan Division of the Garda Síochána* (Dublin: Stationery Office, 2016).

⁶³ See DPJ Walsh fn.51, chs.12, 19, 21 and 22.

⁶⁴ J. Hodgson *French Criminal Justice: a Comparative Account of the Investigation and Prosecution of Crime in France* (Oxford: Hart, 2005), p.65.

⁶⁵ J. Hodgson, fn.64, p.75.

⁶⁶ J. Hodgson, fn.64, pp.151-152.

⁶⁷ J. Hodgson, fn.64, pp.152-153 quoting a senior prosecutor who intervened in the police investigation of a series of rapes as the police were pursuing a ‘culprit’ rather than the truth.

⁶⁸ J. Hodgson, fn.64, ch.6 for examples of police abuse.

of direction and control over the conduct of the investigation and the contents of the prosecution file.⁶⁹ The net effect is that unreliable or improperly obtained evidence should be filtered out in the course of the pre-trial phases,⁷⁰ thereby dispensing with the need for the Irish-type admissibility and procedural protections for the accused at the trial stage. It is also worth noting that the French trial is much more accepting of inferences as evidence in the form of presumptions from the defendant's behaviour etc that are considered sufficiently serious, precise and concordant to justify a conviction.⁷¹ Equally, it admits details of the defendant's criminal record, personality, family, social and material situation;⁷² matters which would not normally be admissible for the determination of guilt in an Irish trial.

Mere differences between the Irish and French criminal procedures are not necessarily indicative of inherent unfairness in one relative to the other. It is more a matter that the risk of a fair trial being prejudiced by the potential for the police to gather or suppress evidence in a corrupt or improper manner is managed differently in the two regimes. Each is designed to function as an organic whole with its own internal checks and balances. It can be a very different matter, however, when elements of one are taken out of their natural home-setting and placed in the alien environment of the other to produce what might be described as an unplanned, hybrid, criminal process. Any such arbitrary 'mixing and matching' has the potential seriously to prejudice the overall fairness of the process for the accused. In particular, it threatens the precision, clarity, checks and balances, and priority of fundamental rights that have informed criminal law in Europe from the Enlightenment.⁷³ The hybridised procedure in *Bailey's* case, for example, combined the unsupervised Irish police investigation with a French trial procedure cut off from its inquisitorial pre-trial stages. The net effect is that the accused is denied the Irish constitutional and legal protections designed to sift out unreliable and unfair evidence gathered at the police investigation stage, and denied the benefits of French pre-trial procedures designed to prevent such evidence being included in the first place.

⁶⁹ C. Elliott et al., fn.54, pp.206-208.

⁷⁰ J. Hodgson, fn.64, p.127.

⁷¹ C. Elliott et al., fn.54, p.288.

⁷² C. Elliott et al., fn.54, p.219.

⁷³ See, B. Schünemann fn.8; A. Albi "The European Arrest Warrant, constitutional rights and the changing legal thinking: values once lost in transition to the EU level" in M. Fletcher, E. Herlin-Karnell and C. Matera (eds), *The European Union as an Area of Freedom, Security and Justice* (London: Routledge, 2017), ch.6.

The insidious effects of ‘mixing and matching’ in *Bailey*’s case were evident at the outset in the contrasting decisions by the Irish and French authorities on whether there was sufficient evidence in the Garda file to warrant charging Bailey with the murder. As noted above, the Irish DPP concluded that there was insufficient admissible evidence to justify putting him on trial. By contrast, the French judicial authority who issued the EAW concluded that:

“In the course of the investigation carried out by the Garda, serious and convincing clues were accumulated against a journalist named Ian Bailey, of such a nature as to justify that he be charged.”⁷⁴

Significantly, the 2010 French EAW expressly refers to some of the incriminating evidence in the Garda file, but omits any reference to the material casting severe doubt on the reliability of that evidence. So, for example, it includes the eye-witness statement allegedly placing Bailey near the scene of the murder in suspicious circumstances, and it asserts without qualification that Bailey “by repeated acts of intimidation” tried to get the witness to withdraw her statement. However, the EAW makes no reference to the fact that she subsequently withdrew her statement, claiming that the Garda had extracted it from her under duress.⁷⁵ Nor is there any reference to the fundamental weaknesses in the identification or to the witness’s reliability. It would appear that the French judicial authority treated the Garda file (and its contents) as if it was a police file constructed under the supervision of a prosecutor and examining magistrate for the purposes of a French trial.

Concerns over the capacity of the EAW to expose an accused person to an unfair criminal trial or procedure usually arise in the context of alleged abuses in the issuing State where the trial will be held.⁷⁶ The *Bailey* case is most unusual in that the alleged abuses in the gathering of “evidence” actually occurred in the executing State before an EAW was even issued. In effect, the EAW was being used to transfer a trial from the home State of the crime, the accused and the alleged police abuses, to another State where the manner in which the evidence was gathered would escape the

⁷⁴ See paragraph (e) of the French EAW for Bailey.

⁷⁵ *Minister for Justice, Equality and Law Reform v Bailey* [2012] IESC 16, per Denham CJ, para.78.

⁷⁶ See, for example, Fair Trials International *Beyond Surrender: putting human rights at the heart of the European Arrest Warrant* (June 2018).

scrutiny and legal consequences that would otherwise have applied had the trial been held in the home State. As will be seen below, the Irish Supreme Court's decision to refuse Bailey's surrender does not signal a general protection against that risk. In any event, the negative effects (for the accused) of the resulting hybridised procedure were starkly obvious in Bailey's French trial *in absentia*. It seems to have been conducted, and his conviction secured, essentially on the basis of "evidence" in the Garda file that was patently not sufficient to put him on trial in Ireland. The issue of a miscarriage of justice must arise. In addition, he remains effectively imprisoned within his country of residence, thereby depriving him of his fundamental right to freedom of movement within the EU's AFSJ.

The key question

The key question that must be addressed now is whether the EAW can be used by the issuing Member State to compel the executing Member State to surrender one of its own residents for prosecution or punishment in the issuing Member State where: the offence was actually committed on the territory of the executing State, the primary evidence is located in that State, the offence has been investigated robustly by the police authorities of that State, the independent prosecutor in that State has decided not to prosecute on the grounds that there is insufficient admissible evidence to justify a prosecution under that State's law and the offence is still officially under investigation in that State.

Limits on execution of the EAW for offences committed in the executing State

Mandatory and optional prohibitions

The obligation to execute a valid EAW is strict, unless one of the prescribed mandatory or optional prohibitions applies. Of the three mandatory prohibitions, only that for *ne bis in idem* (double jeopardy) is remotely relevant to the facts in *Bailey*.⁷⁷ Apart from the fact that it offers little protection

⁷⁷ Framework Decision 2002/584/JHA, art.3(2). See *Gözütok and Brügge* (C-187/01) ECLI:EU:C:2003:87; *Van Straten* (C-150/05) ECLI:EU:C:2006:614; *Gasparini* (C-467/04) ECLI:EU:C:2006:610.

against a prosecution being exported to a more punitive regime,⁷⁸ it seems firmly established that it is limited to situations where a final decision has been taken disposing of a criminal charge on its merits.⁷⁹ Arguably,⁸⁰ the DPP's decision not to prosecute in *Bailey*'s case lacks that necessary finality. Critically, some of the optional prohibitions are directly relevant to the facts in *Bailey*. Before examining them more closely, it is necessary to clarify their general status. The Framework Decision expresses each of the options as a discretion for a judicial authority to refuse to execute an EAW where the prescribed circumstance apply. While there is no firm decision on the point, it is arguable that Member States must actually implement the options by leaving their competent judicial authorities discretion not to execute an EAW in any of the prescribed circumstances.⁸¹ In other words, Member States have no discretion to exclude any of the options by failing to implement them. Equally, however, it seems clear that Member States cannot convert the options into absolute prohibitions against execution.⁸² Indeed, the CJEU encourages Member States, when implementing an option, to be restrictive in defining the circumstances in which a judicial authority can exercise discretion not to execute an EAW.⁸³ This reflects a preference for punitive AFSJ objectives over domestic human rights standards.

Options for criminal proceedings in the executing Member State

Several of the non-execution options are linked broadly to distinct phases in the domestic criminal process of the executing State. One of these arises where the requested person is being prosecuted in

⁷⁸ See B. Schünemann, fn.8, pp.242-243.

⁷⁹ *Turansky* (C-491/07) ECLI:EU:C:2008:768; *Miraglia* (C-469/03) ECLI:EU:C:2005:156; *Kretzinger* (C-288/05) ECLI:EU:C:2007:441.

⁸⁰ Note the effects of the decision of the European Court of Human Rights in *Mihalache v Romania* (Application No.54012/10); see <https://blogs.kent.ac.uk/criminaljusticenotes/2019/07/31/double-jeopardy-and-prosecutorial-decisions/>.

⁸¹ In *Joao Pedro Lopes da Silva* (C-42/11) ECLI:EU:C:2012:151, Advocate General Mengozzi (para.31) expressed the view that it is not the implementation of the optional grounds that is optional, but rather the execution of the EAW which is left to the judicial authority in the prescribed circumstances.

⁸² *Poplawski* (C-579/15) ECLI:EU:C:2017:503. See also Advocate General Bot in *Kozłowski* (C-66/08) ECLI:EU:C:2008:253.

⁸³ See *Wolzenburg* (C-123/08) ECLI:EU:C:2009:616; *Joao Pedro Lopes da Silva* (C-42/11) ECLI:EU:C:2012:517; *Kozłowski* (C-66/08) ECLI:EU:C:2008:437.

the executing State for the same act as that on which the EAW is based.⁸⁴ Clearly this envisages that a prosecution has already commenced in the executing State and is ongoing. As such, it can protect the requested person from being surrendered to face parallel proceedings for the same offence in one or more other States. Another option arises where the judicial authorities in the executing Member State have decided not to prosecute for the offence on which the EAW is based.⁸⁵ It will be noted that this option is directly applicable in the *Bailey* situation.

These options afford a requested Member State the opportunity to prioritise its own criminal proceedings and sovereignty where it has jurisdiction to deal with the requested person for the same act that is the subject of the EAW. Inevitably, however, the options also invite the risk of jurisdictional confusion, uncertainty and fragmentation along national lines, not least because criminal process stages are not uniform or parallel across the 28 Member States. Further problems can arise from the manner in which the options are exercised, depending on whether individual Member States choose to leave all, some or no discretion to their judicial authorities. The Irish approach is illustrative of what can happen.

Insofar as Ireland has exercised the domestic process options at all, it has done so by imposing absolute prohibitions on execution which, as explained above, appears to be inconsistent with the clear words of the Framework Decision.⁸⁶ The Irish provisions are further complicated by the fact that they do not align fully with the express options in the Framework Decision. So, for example, they prohibit execution where the public prosecutor is considering, but has not yet decided, whether to bring proceedings against the requested person for an offence (whether or not it is the EAW offence).⁸⁷ There is no exact equivalent to that in the Framework Decision.

A major, and critical, omission in the Irish provisions concerns the situation where the public prosecutor has decided not to bring proceedings. As noted above, this is one of the express options provided in the Framework Decision. Significantly, the Irish implementing legislation originally

⁸⁴ Framework Decision 2002/584/JHA, art.4(2).

⁸⁵ *Ibid.* art.4(3).

⁸⁶ See, for example, European Arrest Act 2003, ss.41 and 42.

⁸⁷ *Ibid.* s.42(a).

imposed an absolute prohibition on execution in that situation.⁸⁸ It prohibited the surrender of a requested person to another Member State for an alleged offence, where the DPP had already decided not to prosecute the person for that offence for reasons other than the fact that an EAW had issued. In other words, where the offence was considered primarily a domestic matter for the Irish authorities, the DPP's decision not to prosecute could not be circumvented by an EAW from another Member State.⁸⁹ This could be interpreted as an assertion of Irish sovereignty over the prosecution of domestic crime, and a vital protection against repetitive coercive criminal procedures across two or more States. Surprisingly, this key Irish provision was repealed only 15 months after it was enacted.⁹⁰ Had it been retained, it would have provided vital protection for Ian Bailey. It would have been sufficient in itself to defeat the EAW in the High Court proceedings at the outset, thereby sparing him the ordeal of what was to come. It would also have averted the strange and unsettling spectacle of the Irish courts being coerced into cooperating with the French authorities to ensure the prosecution in France of an Irish murder where the proper independent Irish authorities had already decided that there were insufficient grounds for a prosecution.

It is not entirely clear why Ireland moved so quickly from one extreme of absolute protection for the decisions of its own prosecutorial authority in a domestic criminal matter, to absolute submission to the jurisdiction of another Member State over the same matter. The complete and sudden U-turn was officially explained by the DPP's concern over the effect of the original provision in cases where he had decided not to prosecute because most of the evidence and/or witnesses were located in the issuing State.⁹¹ It was said that a prohibition on execution of an EAW in such circumstances could result in the accused person evading justice in respect of very serious crimes such as: sex tourism, trafficking in persons, war crimes and other crimes arising under international conventions (all of

⁸⁸ *Ibid.* s.42(c).

⁸⁹ Note that a decision not to prosecute does not preclude a prosecution being initiated at any time in the future in Ireland should sufficient admissible evidence subsequently emerge; see DPJ Walsh fn.51, paras.13-174 – 13-183.

⁹⁰ Criminal Justice (Terrorist Offences) Act 2005, s.83.

⁹¹ *Dail Debates* Vol.598, No.3 (23rd February 2005) Criminal Justice (Terrorist Offences) Bill 2002: From the Seanad (Resumed), Seanad Amendment No.35, per C. Lenihan (Minister of State at the Department of Foreign Affairs).

which have a substantive extraterritorial dimension). The *Bailey* case could not be more different. It concerns a domestic murder where the accused, deceased victim, material evidence and key witnesses were all located in Ireland. Moreover, the government would have been very familiar with the case and the difficult and embarrassing issues it presented for them at so many levels. Yet, they do not appear to have foreseen that the repeal went far beyond what was needed to address their purported concerns over the prosecution of certain extraterritorial offences. They could (and should) at least have retained the option to refuse surrender, as envisaged by the Framework Decision. Surprisingly, no mention was made of that in the parliamentary proceedings on the repeal.

The repeal was rushed through as a last-minute amendment at the end of a long and complex “Anti-Terrorism” Act (as distinct from an EAW Act) that was passed in a state of heightened public concern over the unfolding threat from international terrorism. The opaque style of the amendment itself is also a concern. Instead of expressly stating that the key provision was repealed, the amendment simply reproduced the section in the EAW Act that had originally contained the provision and two other prohibitions on execution. Critically, however, the amended section retained the latter two prohibitions and simply omitted to include the prohibition for cases in which the DPP had decided not to prosecute. The net effect is to conceal the fact that the law was being changed to subordinate decisions of the Irish authorities on the prosecution of Irish offences to the demands of the authorities in other Member States.

The Irish government’s abrupt policy U-turn in this matter was not an isolated development.⁹² The government had already acted to remove another provision that would have precluded the surrender in the peculiar circumstances of the *Bailey* case.

EAW offence committed on the territory of executing Member State

⁹² For other examples of domestic protections being diluted in Ireland to facilitate the adoption of lower EU norms, see DPJ Walsh “The European Arrest Warrant in Ireland: Surrendering our Standards to a European Criminal Law Area” in I. Bacik and L. Heffernan (eds), *Criminal Law and Procedure: Current Issues and Emerging Trends* (Dublin: First Law, 2009), p.5.

The EAW Framework Decision provides an express option for non-execution where the offence was committed on the territory of the executing Member State. That, of course, is precisely the situation in the *Bailey* case. The relevant provision is found in article 4(7)(a) of the Framework Decision. It applies even if there is no intention to commence a domestic prosecution for the EAW offence in the executing State. In substance, it is an expression of the sovereign responsibility of a Member State over criminal offences allegedly committed on its own territory.

Implemented correctly in national law, article 4(7)(a) would leave the executing judicial authority discretion to refuse to execute an EAW in respect of an offence committed on its territory. Despite the fact that it was one of only seven Member States responsible for the inclusion of article 4(7)(a) in the Framework Decision, Ireland has not expressly implemented it in its own EAW legislation.

Intriguingly, when the Minister for Justice introduced the original EAW Bill in the legislature in 2003, it contained a section 36(a) which converted the article 4(7)(a) option into a straight prohibition.

Section 36(b) did much the same for the extraterritorial option in s.4(7)(b), which is dealt with below.

While piloting the Bill through the legislature, however, the Minister dropped paragraph (a), so that section 36 became a single paragraph corresponding with article 4(7)(b) only.⁹³ The substance of article 4(7)(a) was omitted entirely. Not only did this amount to a breath-taking concession of Irish sovereignty over the prosecution of Irish domestic offences, but it also removed a fundamental barrier to the surrender of Ian Bailey. The policy reversal was effected quietly and without explanation or discussion.⁹⁴ The net effect is that, contrary to the intention of the EAW Framework Decision, the Irish High Court (as executing judicial authority) has no discretion to refuse to execute an EAW on the ground that the offence was committed wholly on Irish territory.

⁹³ See now, European Arrest Warrant Act 2003, s.44.

⁹⁴ The Minister introduced the amendment removing the provision without explanation towards the end of a long session in which the Committee stage for the whole Act was completed in one day; see *Select Committee on Justice, Equality, Defence and Women's Rights*, 29th Dail, Vol.1, No.27, European Arrest Warrant Bill 2003: Committee Stage, amendment No.97. The Report and Final stages were taken and completed the very next day in the Dail (Lower House) without reaching the amendment due to the application of a 'guillotine'. Equally, there was no discussion of it in the Seanad (Upper House) where the whole Bill was rushed through in the immediately preceding two days ending with the Christmas recess. See DPJ Walsh "Parliamentary scrutiny of EU criminal law in Ireland" (2006) 31 E.L. Rev 48.

Extraterritorial Jurisdiction

The EAW Framework Decision, in article 4(7)(b), provides a specific option for non-execution where the issuing Member State is exercising extraterritorial jurisdiction over the offence in question. This option affords the executing judicial authority discretion to refuse to execute an EAW where the offence was committed outside the issuing Member State and the law of the executing Member State does not allow prosecution for the same offence when committed outside its own territory. It is not entirely clear whether this option applies only where the offence was committed outside the territorial jurisdictions of both the issuing and executing States, or whether it can also apply when the offence was actually committed on the territory of the executing Member State. This issue has proved pivotal in the *Bailey* case.

The fact that article 4(7) is subdivided into (a) and (b) might suggest that the former (as noted above) is intended to deal exclusively with situations where the offence was committed on the territory of the executing State, while the latter is intended to deal exclusively with the situation where the offence was committed outside both the issuing and executing States. The natural words of article 4(7)(b), however, suggest that it is applicable even where the offence was committed on the territory of the executing State.⁹⁵ In other words there is potential overlap between them. Some commentators suggest that article 4(7)(b) reflects an application of the principle of reciprocity.⁹⁶ In other words, the issue was not whether the offence was actually committed outside the territory of the executing State, but whether it could exercise extraterritorial jurisdiction over the same offence if it was committed outside its territory. That was the approach taken by the Irish Supreme Court, by a majority of four to one, in *Bailey*. Accordingly, the extraterritorial option in article 4(7)(b) was not precluded simply because the offence in question was committed on Irish territory

⁹⁵ See H. van der Wilt "The principle of reciprocity" in R. Blekxtoon and W. Ballegooij (eds), *Handbook on the European Arrest Warrant* (The Hague: Asser Press, 2005), ch.6; R. Farrell and A. Hanrahan *The European Arrest Warrant in Ireland* (Dublin: Clarus Press, 2011), ch.12.

⁹⁶ See, for example, R. Farrell and A. Hanrahan, fn.95, ch.12.

In practice, the relationship between subparagraphs (a) and (b) of article 4(7) is likely to be of more academic than practical interest where the executing State has implemented both. The problem that arose acutely in the *Bailey* case is that Ireland has not implemented subparagraph (a), and has implemented subparagraph (b) in a manner that does not fully replicate the wording of (b). The relevant provision reads:

“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.”⁹⁷ (*Author’s note* - The two references to “State” with the upper case ‘S’ refer to Ireland.)

Clearly, this goes further than the Framework Decision insofar as it converts the non-execution option into a prohibition. Unfortunately, it is less clear whether the provision applies where the offence was actually committed on Irish territory (as was the case in *Bailey*).

A credible argument can be made that the Irish provision is only triggered where the offence was committed outside both the issuing and executing States.⁹⁸ That would also appear to have been the view of the Minister for Justice when he introduced the EAW Bill in the legislature in 2003.⁹⁹

Nevertheless, the majority in the Supreme Court took a different interpretation. Proceeding on the basis that the Irish provision had to be interpreted in conformity with article 4(7)(b), unless it would be *contra legem* to do so,¹⁰⁰ they concluded that it (just like article 4(7)(b)) was an expression of the principle of reciprocity.¹⁰¹ Accordingly, in their view, the Irish judicial authority was prohibited from executing an EAW for an offence extraterritorial to the issuing State where Ireland could not exercise extraterritorial jurisdiction over the same offence if the facts were reversed. It did not matter whether the actual offence was committed in Ireland or outside both Ireland and the issuing State.

⁹⁷ European Arrest Warrant Act 2003, s.44.

⁹⁸ See judgment of O’Donnell J. in the Supreme Court in *Minister for Justice, Equality and Law Reform v Bailey* [2012] IESC 16.

⁹⁹ *Dail Debates* Vol.576, No.4 (5th December 2003), European Arrest Warrant Bill 2003: Second Stage, Minister for Justice, Equality and Law Reform (Mr. McDowell).

¹⁰⁰ See *Pupino* (C-105/03) ECLI:EU:C:2005:386. A *contra legem* interpretation in this context would be one that clearly conflicted with the words of the Irish provision.

¹⁰¹ This was a major point of difference between the majority judges and the minority judge.

In *Bailey*, therefore, the question became whether Ireland could exercise extraterritorial jurisdiction over murder. The answer at the time was yes, but only where the offence was committed abroad by an Irish citizen.¹⁰² Although Ian Bailey was an Irish resident, he was a UK citizen. At the time, it was not an offence under Irish law for a UK national to murder anyone (including an Irish citizen) on the territory of another State. Ireland, therefore, could not have sought the surrender of Ian Bailey (or any other UK national) from France to be prosecuted in Ireland for the murder of an Irish citizen in France. Accordingly, the majority in the Supreme Court concluded that he could not be surrendered to France as the reciprocity requirement was not satisfied.

A bizarre consequence of the decision in *Bailey* is that he was protected from surrender under Irish law essentially because he was not Irish! If he was Irish, he would have been denied that protection. This presents a most strange and unusual example of a State's extradition laws being more protective of foreign nationals than it is of its own nationals. On the other hand, it is submitted that the Supreme Court's decision has delivered substantive justice by affording Ian Bailey some measure of protection against the oppressive effects of a surrender regime which has subordinated national constitutional norms and values to the ideological and structural demands of a single EU area of freedom, security and justice. It should be noted, however, that the Irish government has moved recently to use the implementation of the Istanbul Convention on preventing and combating violence against women and domestic violence as a cover to extend Irish extraterritorial jurisdiction over murder allegedly committed by a non-Irish national ordinarily resident in Ireland.¹⁰³ Accordingly, if the *Bailey* type situation arises again, surrender could not be refused on the extraterritorial ground. Any attempt to apply this change in the law retrospectively in the *Bailey* case itself, however, would surely be blocked as an abuse of process.¹⁰⁴

¹⁰² See Offences against the Person Act 1861 (Section 9) Adaptation Order 1973, art.3. Note that this has been amended recently; see below.

¹⁰³ See Criminal Law (Extraterritorial Jurisdiction) Act 2019, s.3(5).

¹⁰⁴ See, for example, *Minister for Justice v Tobin (No.2)* [2012] 4 IR 147; *Minister for Justice v Bailey* [2017] IEHC 482.

Conclusion

The EAW is instrumental in securing a single criminal law enforcement space in which each Member State can readily harness the criminal procedure and resources of any other Member State to enforce its own criminal law. In doing so, however, it subordinates the protection of the fundamental rights of the individual to a policy of maximising convictions and punishment across the EU. Typically, the effects of this are felt in the context of one State seeking to prosecute or punish an offence that was committed on its own territory, or where the circumstances are such that it is the most appropriate State to do so. The *Bailey* case, however, opens up a different and even more disturbing scenario in which the EAW can be used by a Member State to take over a domestic prosecution from another Member State, even though the crime, the accused, the victim and all the primary evidence were located in the latter State whose competent authorities have already decided that there is no basis for prosecution. If permitted, the prioritisation of enforcing national criminal codes over the protection of fundamental rights across the EU will be taken to a wholly new dimension incorporating elements of the kafkaesque.

The provisions of the EAW Framework Decision fall significantly short of what is required to protect the due process and fair trial rights of the requested person in the *Bailey* type situation. Instead of imposing an absolute prohibition on surrender, they merely provide discrete options which, if implemented appropriately, give the executing judicial authority discretion to refuse to execute the EAW. Even where the executing State has implemented these options fully and correctly (unlike Ireland), the accused is still exposed to the risk of being surrendered to an unfamiliar foreign State for a trial in which he will be deprived of the due process checks and balances otherwise applicable in his home State where the offence was allegedly committed. A further twist is that he will also be deprived of the full checks and balances otherwise applicable in the State of trial, as that State will be able to treat the fruits of the unsupervised investigation in the executing State as if they had been obtained from an investigation conducted in accordance with its own regulatory norms.

The immediate challenges presented by the *Bailey* type situation could be avoided by prioritising the sovereign responsibility of the State over domestic crime committed on its own territory. This could

be achieved by extending the mutual recognition and trust principles to decisions of the competent judicial authorities in the executing State. Currently, they only operate in one direction so that judicial authorities in the executing State must recognise relevant decisions and standards in the issuing State as the equivalent of their own.¹⁰⁵ There seems no inherent reason why the authorities in the issuing State should not be obliged to reciprocate by giving mutual recognition and trust to the decisions and standards of the judicial authorities in the executing State where the offence in question was committed wholly on the territory of the latter State. At least that approach would have the merit of being consistent with the concept of a single EU area of freedom, security and justice.¹⁰⁶ On the facts of the *Bailey* case, this would have meant that the French authorities should have recognised and accepted, as the equivalent of their own, the Irish DPP's decision that there was insufficient evidence to prosecute Bailey for the murder of Sophie Toscan du Plantier.

While reciprocity of mutual recognition and trust might produce some immediate practical benefits, it will not reverse the current downward trend in legislative and judicial protections for the human rights of the individual in criminal law enforcement across the EU. Indeed, the principles of mutual recognition and trust are instrumental in driving this trend. They are relieving (arguably depriving) the State of its sovereign duty to protect the fundamental rights of the individual when faced with a cross-border prosecution. In particular, the traditional role of national courts as guardians of fundamental rights and domestic constitutional values is being severely squeezed in the execution of EAWs.¹⁰⁷ So, for example, the Irish Supreme Court resorted to a technical point of reciprocity in extradition law to save Bailey from surrender, instead of directly confronting the serious human rights issues presented by the surrender request.

There is an urgent need to reverse this trend by prioritising protection of the rights of the individual over the interests of maximum criminal law enforcement across the EU's AFSJ. It is submitted that this should include legislative reform at EU level to prevent the EAW being used as a device to

¹⁰⁵ Council Framework Decision 2002/584/JHA, art.1(2).

¹⁰⁶ See, for example, comments of the CJEU in *Gözütok and Brügge* (C-187/01) ECLI:EU:C:2003:87 at para.33.

¹⁰⁷ See, for example, A. Albi, fn.5, pp.175-176.

transfer the prosecution of an offence from the home State (location of the offence, accused and victim) to another State where the law and procedure will make it easier to secure a conviction. In addition, the obligation to ensure protection of the fundamental rights of the requested person must rest unequivocally with the domestic courts of the executing State. This must be a duty that they are not able, or required, to defer to the courts of the issuing State. Moreover, when discharging that duty, at least in situations where the liberty of the individual is at stake, the courts should apply their own domestic human rights standards unless they are inferior to common European standards or those applicable in the requesting State.¹⁰⁸ Admittedly, what is being proposed here will lead to some fragmentation in the application of the EAW across the EU's AFSJ, but that seems preferable to the imposition of an artificial equivalence in which the legitimacy of a cross-border prosecution is tainted by its failure to satisfy the norms and values of one (or either) of the criminal justice systems concerned. In a Europe of substantial national differences in criminal justice norms and procedures, the higher human rights standards of some should not be diluted to the lower standards of others simply to maximise convictions across the single criminal law enforcement space.

¹⁰⁸ See, for example, B. Schünemann fn.8, p.244.