Approved
No redaction required

THE COURT OF APPEAL

Neutral Citation Number [2021] 165

Record No 2020/108

Donnelly J

Ní Raifeartaigh J

Collins J

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003

(AS AMENDED)

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant/Respondent

AND

PETRONEL PAL

Respondent/Appellant

JUDGMENT of Mr Justice Maurice Collins delivered on 2 June 2021

INTRODUCTION

1. I am also of the opinion that this appeal must be dismissed. In my view, a refusal to surrender the Appellant here would constitute a clear and unwarranted departure from the State's obligations under Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States ("*the Framework Decision*").

2. As Donnelly J explains in her judgment, while there were additional issues canvassed before the High Court, this appeal is confined to the question of whether Mr Pal should be surrendered on the charge of aggravated murder.

3. The circumstances giving rise to the proceedings are comprehensively set in the judgment of McDermott J ([2020] IEHC 143) and are also addressed in detail by Donnelly J. A particular feature of the aggravated murder offence here is that it is alleged to have been committed in Ireland. As set out in the European Arrest Warrant of 4 December 2017, the Appellant is accused of:

> *"Aggravated murder as per Article 189, para. 1 of the Criminal Code of Romania. It is alleged that on 10th April, 2014 at 7 Academy Square, Navan, Co. Meath, Ireland, the respondent along with a number of others broke into an*

apartment at that address and repeatedly used "extreme violence against the victim Busa Virgil who finally died on 13.04.2014 in Dublin, Ireland as a result of the trauma suffered. The suspects stole several of the victim's goods from the apartment: 1 Apple laptop, 1 Apple tablet and 1 Apple mobile phone, as well as 1 rucksack".

In seeking the surrender of the Appellant for the purposes of prosecuting him for this offence, Romania is necessarily asserting an extraterritorial criminal jurisdiction.

Extraterritorial Jurisdiction in Criminal Matters

4. It is common for States to assert extraterritorial criminal jurisdiction. As the Supreme Court explained in *In re Criminal Law (Jurisdiction) Bill 1975* [1977] IR 129:

"It is established in international law by the decision of the Permanent Court of International Justice in the Lotus Case that every sovereign State has power to legislate with extraterritorial effect in the sense that it may enact that acts or omissions done outside its borders are criminal offences which may be successfully prosecuted within its borders—this is sometimes called the jurisdiction to prescribe—provided that the events, acts or persons to which its enactment applies bear upon the peace, order and good government of the legislating State: see O'Connell on International Law (2nd ed., vol. 2, p. 602). The Court has no doubt that the offences described in the schedule to the Bill bear upon the peace, order and good government of the State, particularly

as they are committed within the national territory." (at 149; footnotes omitted)

5. As the authors of Farrell et al, *The European Arrest Warrant in Ireland* (2011) (hereafter "*Farrell"*) explain, extraterritorial jurisdiction may be exercised on a number of alternative bases: see para 12-03. The most common, they suggest, is the "*active personality principle"* whereby States assert an entitlement to legislate for the conduct of their citizens outside their own territory and to punish them for offences wherever committed. Less common, and more controversial, is the "*passive personality principle"* whereby States assert jurisdiction to punish harmful conduct against their citizens by whomsoever and wherever committed. The "*protective principle"* recognises the entitlement of States to give extraterritorial effect to laws criminalising conduct damaging to national security or other State interests. Finally, the "*universality principle"* refers to the right of States to assert jurisdiction over serious international crimes regardless of where the conduct occurs or the nationality of the perpetrator.

6. Ireland asserts an extraterritorial criminal law jurisdiction in many (and ever-expanding) circumstances. There is a useful survey in *Farrell*, at para 12-23 and following. The statute-book includes extraterritorial offences in the area of *(inter alia*) the use of explosive substances (sections 2 and 3 of the Explosive Substances Act 1883), treason (the Treason Act 1939), certain offences relating to sexual offences with minors and trafficking for sex (Sexual Offences (Jurisdiction) Act 1996 (as amended) and section 42 of the Criminal Law (Sexual Offences) Act 2017); terrorism offences (Criminal Justice (Terrorist Offences) Act 2005 (as amended)); genocide, crimes against humanity and war crimes (International Criminal Court Act 2006) and offences

of violence against women and domestic violence (Criminal Law (Extraterritorial Jurisdiction) Act 2019). Certain offences committed in the territory of Northern Ireland are also offences here: the Criminal Law (Jurisdiction) Act 1976. In addition, there are various statutory provisions that make specified conduct on board an Irish ship or in an aircraft registered in the Ireland an offence under Irish law (see, by way of example only, section 3(1) and 3(2) of the Criminal Law (Extraterritorial Jurisdiction) Act 2019).

7. Many of these statutory provisions give effect to international agreements and conventions to which the State is a party. Thus, the Criminal Law (Extraterritorial Jurisdiction) Act 2019 gives effect in Irish law to the Council of Europe Convention on preventing and combating violence against women and domestic violence, commonly referred to as the Istanbul Convention. Some involve a requirement of double criminality, others do not. Some apply only to Irish citizens (and, in some instances, non-nationals ordinarily resident in the State) and Irish registered companies, reflecting the active personality principle to which I have referred. Others have universal application. In some cases, a mixture of jurisdictional bases can be found within a single statute, as is the case with the offences created in Parts 2 and 3 of the Criminal Justice (Terrorist Offences) Act 2005 (which gives effect to various international obligations). Thus, for instance, the terrorist offences created by section 6 of that Act apply extraterritorially where the relevant act is done by an Irish citizen or someone resident in the State (the active personality principle), where the act is directed against the State, the EU or any EU body (the protective principle) or against any Irish citizen (the passive personality principle).

8. Provided that the alleged perpetrator is an Irish citizen, the offences of murder and manslaughter have, since 1861, been offences under Irish law, regardless of the place of commission: section 9 of the Offences Against the Person Act 1861 ("*the 1861 Act"),* as adapted by the Offences Against the Person Act 1861 (Section 9) Adaption Order 1973.[1] Section 9's assertion of jurisdiction in respect of murders committed outside the State by Irish citizens is an instance of extraterritorial jurisdiction founded on the active personality principle. The application of section 9 was extended by section 3(5) of the Criminal Law (Extraterritorial Jurisdiction) Act, 2019 to any person who, while not an Irish citizen, is ordinarily resident in the State. However, it is common case that these proceedings are to be determined without reference to that provision.[2]

9. The Appellant is a Romanian national. So too was his alleged victim, Mr Virgil. However, it is the Appellant's nationality that is relied on by the Romanian authorities as the basis for asserting an entitlement to prosecute him in Romania for an offence allegedly committed in Navan. As the High Court Judge explains in paragraph 15 of his judgment, Article 9(1) of the Romanian Criminal Code confers on the courts of Romanian jurisdiction to try offences committed outside the territory of Romania by a Romanian citizen or by a Romanian legal entity provided that the punishment provided by Romanian law is life detention or imprisonment for more than 10 years. Article 9(2) provides that Romanian criminal law applies to offences committed by Romanian

[1] SI 356 of 1973

[2] Accordingly, this judgment addresses the position without reference to the extension of section 9 effected by the 2019 Act.

citizens outside of Romania in other cases if the deed is criminalised by the criminal law of the country where the deed was committed or if the offence was committed in a place that is not subject to any State jurisdiction. Article 9(1) is the relevant provision here. An authorisation for a criminal prosecution in those circumstances may be issued by a general prosecutor attached to the Romanian Court of Appeal. The necessary authorisation has issued here.

10. Thus, the extraterritorial jurisdiction asserted by Romania here corresponds exactly with the jurisdiction asserted by the State in respect of the offence of murder. If an Irish citizen were to unlawfully and inentionally kill someone in Bucharest, that would constitute the offence of murder under section 9 of the 1861 Act and he or she could be prosecuted for murder in this jurisdiction. In such circumstances, the competent Irish authorities could, as a matter of Irish law, issue an European Arrest Warrant for the surrender of the alleged offender from Romania for the purposes of such a prosecution in accordance with Part 2, Chapter 2 of the European Arrest Warrant Act 2003 (as amended) ("*the 2003 Act*").

11. In these circumstances, the contention that Article 4.7(b) of the Framework Decision – to which section 44 of the 2003 Act seeks to give effect in the State – bars the surrender of the Appellant might appear to be a surprising one. It must, of course, be carefully considered. On examination, however, it appears to me to be without merit.

THE OBJECTION TO SURRENDER HERE

12. A number of grounds of objection were advanced in the High Court. For the purposes of this appeal, one ground of objection only is relevant.

13. The Appellant argues that his surrender on the aggravated murder charge would be a breach of section 44 of the 2003 Act. Section 44 provides as follows:

> *"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."*

14. The 2003 Act seeks to give effect to the Framework Decision and section 44 exercises an option given to Member States by Article 4.7(b) of the Framework Decision. Article 4 identifies a number of grounds for optional non-execution of a European arrest warrant. Article 4.7(b) provides that "*the executing judicial authority*[3] *may refuse to execute a warrant"* where it "*relates to offences which:*

> *(b) have been committed outside the territory of the issuing Member State and*

[3] The "*executing judicial authority*" in the State being the High Court: section 9 of the 2003 Act.

the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory."

15. Here, it is said that the offence of aggravated murder alleged to have been committed by the Appellant was committed "*in a place other than"* Romania. That is not in dispute. Next, it is said that, while this alleged offence was in fact committed in the State, for the purposes of applying section 44 it must be hypothesised as having been committed "*in a place other than the State*". In all other respects – so the argument goes – the alleged offence must be taken precisely as set out in the European Arrest Warrant and for the purpose of the exercise the Court must proceed on the premise that the alleged offender is a Romanian national.

16. On the Appellant's submission, therefore, the Court must ask itself whether Ireland could prosecute the Appellant in respect of a murder allegedly committed by him outside the State. Murder "*does not .. constitute an offence under the law of the State*" when committed outside the State by anyone other than an Irish citizen (and the Appellant is not, of course, an Irish citizen). Thus, the Appellant says, it is demonstrated that the surrender of the Appellant is prohibited by section 44.

DISCUSSION

Preliminary

17. The argument that section 44 bars the surrender of the Appellant was rejected by McDermott J in the High Court. The Judge was satisfied that "*the well-established basis upon which Ireland exercises extraterritorial jurisdiction over a murder committed by an Irish citizen abroad does not lead to a situation in which the Romanian authorities who exercise a similar jurisdiction over their citizens would be precluded from seeking the surrender of one of their citizens from Ireland who had allegedly murdered a person here or indeed in some third country*" (at para 40). In his view, where the amenability of the alleged wrongdoer is defined under the issuing state's criminal law by reference to the location in which the offence was committed and the fact that the alleged offender must be a citizen of the issuing state "*a reciprocity is established which enables surrender"*. Having referred to *Minister for Justice, Equality and Law Reform v Bailey* [2012] IESC 16, [2012] 4 IR 1 ("*Bailey No 1*"), the Judge observed that "*[t]he court's search must be for reciprocity"* in the exercise of the jurisdiction asserted by the issuing State. Such reciprocity did not exist in *Bailey No 1* – the extraterritorial laws of France and Ireland were "*the converse of each other".* However, if the executing state exercises extraterritorial jurisdiction in respect of offences of the same type for which surrender is sought in the same circumstances as those exercised by the issuing state, surrender will not be prohibited (at para 43).

The Certified Questions

18. The Judge gave leave to appeal in respect of the following two questions: ([2020] IEHC 202):

> *"(1) What factual circumstances, if reversed, should the High Court take account of for the purpose of considering whether there is reciprocity for the purpose of section 44 of the European Arrest Warrant Act, 2003?*
>
> *(2) Is the fact that the law of the issuing state asserts extraterritorial jurisdiction on a similar basis to Ireland of relevance for the purpose of section 44?"*

The Proper Framework for Analysis

19. The Appellant's arguments depend almost entirely on a reading of the Supreme Court's decision in *Bailey No 1* or, more correctly, of certain of the judgments given in that appeal, particularly that of Fennelly J. I will refer to *Bailey No 1* further below. However, in my view the correct starting point is not *Bailey No 1* but the Framework Decision and in particular Article 4.7(b) itself.

20. The Framework Decision is based on the principle of mutual recognition, based on the mutual trust between Member States with a view to the Union becoming an area of freedom, security and justice: see, for example, the judgment of the CJEU in Case C-270/17 PPU *Tupikas*, at para 49. Its purpose is to replace the multilateral system of

extradition based on the European Convention on Extradition, 1957 (hereafter "*the 1957 Convention*") "*with a system of surrender between judicial authorities of convicted or suspected persons for the purpose of enforcing judgments or of conducting prosecutions, the system of surrender being based on the principle of mutual recognition".* This system is intended to be *"simplified and more effective":* Case C-416/20 PPU *TR*, at paragraphs 31-32.

21. In *Tupikas,* the CJEU stated:

> *"50 ... Article 1(2) of the Framework Decision lays down the rule that Member States are required to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of that Framework Decision. Except in exceptional circumstances, the executing judicial authorities may therefore refuse to execute such a warrant only in the exhaustively listed cases of non-execution provided for by Framework Decision 2002/584 and the execution of the European Arrest Warrant may be made subject only to one of the conditions listed exhaustively therein. Accordingly, while the execution of the European arrest warrant constitutes the rule, the refusal to execute is intended to be an exception which must be interpreted strictly (see judgment of 29 June 2017, Popławski, C-579/15, EU:C:2017:503, paragraph 19 and the case-law cited)."*

The principle that execution of the European arrest warrant is the norm, and refusal to execute an exception that is to be interpreted strictly, has been repeatedly emphasised

by the CJEU: see, *inter alia*, Case C-416/20 PPU *TR* at paragraphs 33-34.

Article 4.7(b)

22. As Denham CJ explained in *Bailey No 1,* Article 4.7(b) was included in the Framework Decision on the proposal of a number of Member States, including Ireland, based on article 7.2 of the 1957 Convention.[4] The 1957 Convention remains in force but it no longer regulates surrender between EU Member States. Fennelly J also identified the connection between Article 7.2 of the 1957 Convention and Article 4.7(b). The latter, he observed, "*replicates the substance*" of the former[5] and should be interpreted as having the same effect.[6]

23. Article 7.2 of the Convention is in the following terms:

> *"When the offence for which extradition is requested has been committed outside the territory of the requesting Party, extradition may only be refused if the law of the requested Party does not allow prosecution for the same category of offence when committed outside the latter Party's territory or does not allow extradition for the offence concerned."*

[4] Paragraph 33.

[5] Paragraph 388.

[6] Paragraph 445.

24. The Explanatory Report on the 1957 Convention[7] explained that this provision was *"inserted in order to take into account the law of countries which do not allow extradition for an offence committed outside the territory of the requesting Party. This paragraph provides that extradition must be granted if the offence has been committed outside the territory of the requesting Party, unless the laws of the requested Party do not authorise prosecution for an offence of the same kind committed outside its territory, or do not authorise extradition for the offence which is the subject of the request."* The Report went on to note that, under Article 26, a reservation could be made in respect of Article 7.2 "*making it subject to reciprocity."*

25. Article 7.2 thus operates to limit the power of the requested State to *refuse* extradition for an extraterritorial offence. Such extradition may be refused if, *and only if*, the law of the requested State does "*not allow prosecution for the same category of offence when committed outside the latter Party's territory*" (or, as the Explanatory Report put it, if such laws do *"not authorise prosecution for an offence of the same kind committed outside its territory"*) or if the requested State's laws do not allow extradition for the offence concerned. Nothing in Article 7.2 appears to *oblige* the requested State to refuse extradition in the event that its laws do not allow for prosecution for the same category of offence when committed outside its territory. In such circumstances (or so the language of Article 7.2 appears to suggest) the requested State would not be under any obligation to extradite but would not be prohibited from doing so. As a matter of ordinary language "*may only be refused"* cannot readily be construed as meaning *"shall*

[7] Council of Europe, European Treaty Series – No 24 (13 December 1957)

be refused". That impression is confirmed by consideration of the 1957 Convention as a whole, the language of which clearly distinguishes between the mandatory and the permissive.

26. In the absence of any reservation under Article 26, the operation of Article 7.2 does not depend on reciprocity, at least not in the sense of reciprocity of surrender.[8] A requested State may be obliged to extradite a person even where, in corresponding circumstances, surrender would be refused by the requesting State and *vice versa*. That is true also of Article 4.7(b). In the absence from the Framework Decision of any provision equivalent to Article 26 of the 1957 Convention, Article 4.7(b) *cannot* be made subject to reciprocity of surrender, As O' Donnell J observed in his judgment in *Bailey No 1,* neither Article 4.7(b) nor section 44 of the 2003 Act involve any inquiry as to the circumstances in which the requesting/issuing State itself would surrender; rather, "*they ask something about the substantive law of the executing State."* [9]

27. Provisions similar to Article 7.2 of the 1957 Convention and Article 4.7(b) of the Framework Decision are commonly found in extradition treaties and agreements. For instance, Article 1(3) of the Treaty on Extradition between Ireland and Australia (September 1985) provides that:

[8] As, for instance, where State A agrees to surrender its nationals to State B only if State B agrees to surrender its nationals to State A.

[9] At para 516.

"Where the offence has been committed outside the territory of the requesting State, extradition shall be granted where the law of the requested State provides for the punishment of an offence committed outside its territory in similar circumstances. Where the law of the requested State does not so provide, that State may, in its discretion, grant extradition."

28. A further notable example is the Agreement on Extradition between the European Union and the United States of America which was signed almost exactly 12 months after the adoption of the Framework Decision. Article 4(4) of that Agreement provides:

"If the offence has been committed outside the territory of the requesting State, extradition shall be granted, subject to the other applicable requirements for extradition, if the laws of the requested State provide for the punishment of an offence committed outside its territory in similar circumstances. If the laws of the requested State do not provide for the punishment of an offence committed outside its territory in similar circumstances, the executive authority of the requested State, at its discretion, may grant extradition provided that all other applicable requirements for extradition are met." [10]

29. Also noteworthy in this context is the United Nations Model Treaty on Extradition,

[10] Article 4(4) did not in fact impact on the extradition arrangements between Ireland and the USA because Article III of the Treaty on Extradition between the United States of America and Ireland provides that extradition shall not be refused on the ground that the offence for which extradition is requested was committed outside the Requesting State.

Article 4 ("*Optional Grounds for Refusal*") provides that extradition may be refused (*inter alia*):

> *"(e) If the offence for which extradition is requested has been committed outside the territory of either Party and the law of the requested State does not provide for jurisdiction over such an offence committed outside its territory in comparable circumstances."*

30. The application of Article 4.7(b) is not limited to offences committed outside the territory of both the issuing and executing States (as the proceedings here illustrate). The State argued for such a construction in *Bailey No 1* but that argument was rejected. However, for the purposes of applying Article 4.7(b), offences committed outside the territory of the issuing State are to be regarded as having been committed outside the territory of the executing Member State.

31. There is a helpful commentary on Article 4(e) of the Model Treaty in the *Revised Manual on the Model Treaty on Extradition* published by the UN's Office on Drugs and Crime. As to its purpose, the Manual explains:

> *"The purpose of subparagraph (e) is to provide for the ability to refuse extradition where the exercise of jurisdiction by the requesting State is viewed as being overly broad.*

> *86. For example, most States would not wish to extradite for an offence where the other State had asserted a ground of extraterritorial criminal jurisdiction that is clearly excessive under generally accepted standards of international law. However, the tradition of civil law States to assert extraterritorial jurisdiction over their nationals is a base of jurisdiction that most common law States would find acceptable and they would be prepared to exercise their discretion to extradite on that basis."* [11]

The Manual goes on to identify as a possible approach to the application of sub-paragraph (e), the drafting of a provision in a way that bestows discretion on the requested State to grant extradition even in cases in which the basis of jurisdiction relied on by the requesting State is not available under the law of the requested State. That would, it is suggested, provide the "*necessary flexibility"* while still ensuring *"sufficient protection to the requested State to guard against excessive claims of extraterritorial jurisdiction."* That is the drafting technique adopted in Article 1(3) of the Treaty on Extradition between Ireland and Australia and in Article 4(4) of Extradition Agreement between the EU and the USA.

32. In this conception, provisions such as Article 4.7(b) are intended as a defence against requests for surrender based on an assertion of an exorbitant extraterritorial jurisdiction; one that is, from the perspective of the executing/requested State, "*excessive*" or "*overly broad*". That appears to accord precisely with the understanding of Article 4.7(b)

[11] At page 27.

expressed by the CJEU in its very recent decision in Case C-488/19 *JR,* on a reference from the High Court (Donnelly J). There the Court identified the purpose of Article 4.7(b) as being "*intended to ensure that the judicial authority of the executing State is not obliged to grant a European arrest warrant which was issued for the purpose of executing a sentence imposed for an offence prosecuted under an international criminal jurisdiction that is broader than that recognised by the law of that State."* While *JR* was a conviction case, the same rationale clearly applies where surrender is sought for the purposes of prosecution.

33. As Lord Millett observed in a closely related context in *R (Al-Fawwaz) v Governor of Brixton Prison* [2001] UKHL 69, [2002] 1 AC 556, *"views as to what constitutes an exorbitant jurisdiction naturally differ; the test adopted by our law has been to accord other countries the jurisdiction which we claim ourselves but no more."* [12]

34. This analysis perhaps helps to explain why it is said that provisions such as Article 4.7(b) in some sense reflect the principle of reciprocity, even though, as already discussed, they do not involve any issue of reciprocity of surrender. They involve an inward inquiry within the issuing State to ascertain whether, in corresponding or equivalent circumstances, it itself could assert extraterritorial jurisdiction in respect of the offence for which surrender is sought. This is expressed with admirable clarity in *Farrell.* Referring to Article 4.7(b), the authors state:

[12] At para 95. Lord Millett was addressing an issue of double criminality, in the context of extraterritorial offences.

"Provisions of this type can be found in extradition agreements from the later 19th century onwards. Such provisions are based on the principle of reciprocity which held that one State should not be required to extradite for an offence if it could not request extradition for the same offence were the roles to be reversed." (paragraph 12-13; my emphasis)

35. Blekxtoon *et al*, *Handbook on the European Arrest Warrant* (2005) also characterises Article 4.7(b) as "*an application of the traditional reciprocity principle".*[13] A further passage from the same work was cited with approval by Denham CJ and Hardiman J in their respective judgments in *Bailey No 1*, as follows:

"Only one provision in the Framework Decision alludes to the principle of reciprocity. According to Article 4, section 7 sub. (2), the executing judicial authority is allowed to refuse the execution of a European Arrest Warrant, whenever such a warrant envisages offences which have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside the territory of the executing Member State. In the corresponding situation the executing state would simply not be able to issue an arrest warrant due to a lack of jurisdiction. The provision restores the equilibrium by offering this state the possibility to restrict the scope of its performances to its own expectations in

[13] At page 238 (in a part authored by Judge Blekxtoon).

similar circumstances. This section mirrors Article 7, section 2 of the European Convention on Extradition." [14]

36. As Fennelly J noted in his judgment in *Bailey No 1*, Article 7.2 has been understood in the United Kingdom as importing a form of reciprocity, permitting the refusal of a request for extradition if the requested State's law *"does not allow for a prosecution in equivalent circumstances*" or (as it has also been put) in "*corresponding circumstances"*.[15] As Fennelly J also noted, the currently applicable statutory provision in the United Kingdom – section 64(4) of the Extradition Act 2003 – provides that where the relevant conduct occurs outside the territory of a *"category 1 territory"* (the Member States subject to the Framework Decision), what requires to be established is that "*in corresponding circumstances equivalent conduct would constitute an extraterritorial offence under the law of the relevant part of the United Kingdom."*

37. In *Bailey No 1* itself, all of the members of the Court who addressed the extraterritoriality issue (with the exception of O' Donnell J) expressed the view that the principle of reciprocity underlay Article 4.7(b) (and section 44). *Bailey No 1* is, of course, binding on this Court.

38. A clear and consistent thread appears to connect Article 7.2 of the 1957 Convention, Article 4.7(b) of the Framework Decision and the other provisions to which I have

[14] At page 74, in a chapter authored by Harmen van der Wilt.

[15] At paragraphs 438-440

referred. States should not be *required* to surrender a person accused (or convicted) of an offence committed outside the territory of the requesting (issuing) State unless the requesting (executing) State itself exercises a comparable extraterritorial jurisdiction, one exercisable in "*corresponding circumstances*". Surrender may thus be refused where the extraterritorial jurisdiction asserted by the requesting State appears, to the requested State, to be exorbitant - "*clearly excessive under generally accepted standards of international law"* - or, as it was put by the CJEU in *JR*, *"under an international criminal jurisdiction that is broader than that recognised by the law of that State"*.

39. So understood, Article 4.7(b) clearly cannot avail the Appellant here. As regards the offence of murder, the basis on which Romania asserts an entitlement to prosecute the Appellant – his Romanian nationality – cannot be said to be exorbitant or excessive as a matter of principle. As *Farrell* explains, the "*active personality*" principle is well-established in international law. Nor can it be plausibly suggested that the jurisdiction asserted by Romania is *"broader than that recognised by the law of [the] State"*. The jurisdiction asserted by Romania is, as far as the offence of murder is concerned, the precise mirror image of the jurisdiction that the State asserts in the form of section 9 of the 1861 Act. Were "*the roles to be reversed*", and if an Irish citizen committed a murder in Romania, Ireland could assert a jurisdiction to prosecute. Thus Ireland exercises (or at least asserts an entitlement to exercise) extraterritorial jurisdiction in respect of the offence of murder in the same circumstances and on the same basis as Romania, that is to say where the murder is alleged to have been committed by one of its nationals.

40. Article 4.7(b) is, in my view, clearly satisfied where extraterritorial jurisdiction is exercised on the same basis. It may well be the case that some lesser degree of correspondence or equivalence is sufficient. In light of *Bailey No 1*, however, that is a difficult question which, fortunately, it is unnecessary to seek to resolve on the facts here. Where, as here, the circumstances in which issuing and executing States exercise extraterritorial jurisdiction are the same, Article 4.7(b) provides no bar to surrender.

41. Before considering further the Appellant's argument to the contrary, I would observe that there is a further (and related) strand apparently linking Article 7.2 of the 1957 Convention, Article 4.7(b) of the Framework Decision and the other provisions to which I have referred. All appear to contemplate that, though not *required* to do so, the requested State *may*, in its discretion, surrender a person accused (or convicted) of an offence committed outside the territory of the requesting State, even if the requested State does not itself exercise a comparable (or precisely comparable) extraterritorial jurisdiction. Such a discretion is expressed in explicit terms in the Agreement on Extradition between the European Union and the United States of America and in the UN Model Treaty. I have already considered the terms of Article 7.2 of the 1957 Convention. The language of Article 4.7(b) is also, on its face, consistent with an intention that Member States should have such a discretion ("*The executing judicial authority <u>may</u> refuse to execute a warrant…*" (my emphasis)) and that also appears consistent with the understanding of Article 4.7(b) expressed by the Court of Justice in *JR* in the passage set out in paragraph [32] above ("… *the judicial authority of the*

executing State <u>*is not obliged*</u> *to grant a European arrest warrant*….” (again, my emphasis))

42. It must be acknowledged that in *Aamand v Smithwick* [1995] ILRM 61, the Supreme Court expressed a very different view about Article 7.2 of the 1957 Convention and did so in emphatic terms. The Supreme Court (per Finlay CJ) interpreted Article 7.2 as providing a mandatory bar to extradition that could be invoked by the person sought to be extradited. That was so even though Article 7.2 was expressed in negative form. The Court roundly rejected the suggestion that the provision conferred discretion on the courts of the requested State, considering that such an interpretation would lead to arbitrary results and undermine the clear protection against extradition which, in the view of the Court, Article 7.2 was intended to afford.[16]

43. In *Aamand*, Denmark sought the extradition of one of its nationals for drug smuggling offences allegedly committed on a foreign-flagged vessel (registered in Vanuatu) on the high seas between Venezuela and the Bahamas. Such conduct was contrary to Danish law where the person involved was a Danish national. In the High Court, it was argued that Article 7.2 barred Mr Aamand’s return to Denmark in circumstances where Ireland did not assert extraterritorial jurisdiction over its citizens in relation to activities on a foreign-flagged ship. The High Court held that Article 7.2 – which it characterised as *“the test of equivalent assumption of jurisdiction”* – was excluded by the 1965 Act. On appeal, the Supreme Court took a different view.

[16] At page 68.

44. It may be that the decision in *Aamand* informed the drafting of section 44 of the 2003 Act. However, *Aamand* is not binding authority on the interpretation of section 44; less still is it binding authority on the interpretation and effect of Article 4.7(b) of the Framework Directive. The decision appears to involve a fundamental recasting of Article 7.2, giving to it an effect that is very difficult to reconcile with its actual language. As regards Article 4.7(b), in a future case where the issue arises, it may be necessary to consider whether the language of section 44 – specifically the transformation of Article 4.7(b)'s "*may refuse to execute*" into the section 44's *"shall not be surrendered*" – arguably goes beyond what is contemplated by Article 4.7(b). [17] Indeed, section 44 is not the only instance in the 2003 Act where an optional ground for refusal expressed in apparently permissive terms in the Framework Directive has been "*translated*" into an apparently mandatory bar to surrender.[18]

[17] These differences in language as between Article 4.7(b) and section 44 were noted by Hardiman J in *Bailey No 1*, paras 314–315 and again at para 325. Though he did not suggest that section 44 went beyond what Article 4.7(b) contemplated, he did express the view that it would be *contra legem* to construe section 44 "*by ignoring the fact that whereas the art.4 of the Framework Directive gives an option to the executing judicial authority, s.44 of the Irish Act of 2003 is couched as a prohibition against execution of the warrant in certain circumstances."* (para 325). It is also apparent from his judgment that the equivalent French provisions were couched in permissive rather than mandatory terms: para 331.

[18] Including, in section 45, the apparently permissive ground for "*optional non-execution*" now contained in Article 4a of the Framework Decision (trials *in absentia).* In *Minister for Justice & Equality v Zarnescu* [2020] IESC 59, the Supreme Court held that, having regard to the decision of the CJEU in Case C-108/16 PPU *Dworzecki*, section 45 ought not to be interpreted literally and that the Table to that section should not be regarded as an exhaustive statement of the circumstances in which a person convicted *in absentia* could be surrendered.

45. The rationale for providing for a *discretionary* bar to surrender is well explained in the passages from the *Revised Manual on the Model Treaty on Extradition* set out above. There may be circumstances where, even if the requested State does not exercise extraterritorial jurisdiction on the same basis or in the same circumstances as the requested State, the extraterritorial jurisdiction asserted by the requesting State appears reasonable. Thus where such jurisdiction is based on a principle recognised by the requested State (such as active personality) and where the offence concerned was a serious one, it might appear appropriate to direct surrender, even in the absence of the requisite reciprocity capable of satisfying the requirements of Article 4.7(b). The requested State might, for instance, elect to direct surrender in respect of a serious assault alleged to have been committed by a national of the issuing State, even where the requested State did not itself assert extraterritorial jurisdiction in respect of that particular category of offence. I do not consider that it follows from the fact that, in such a scenario, a decision to direct surrender would involve the exercise of a discretion, that such decision must necessarily be characterised as "*arbitrary*."

46. In any event, that issue does not arise here. The Minister does not contend that the Appellant's surrender could or should be directed even if that appeared not to comply with the mandatory terms of section 44. Rather, her argument is the requirements of section 44, construed in accordance with Article 4.7(b), are satisfied here and thus section 44 presents no bar to surrender.

Whether a similar approach should to be taken to section 44 of the 2003 Act (assuming that such an approach is not *contra legem*) is a matter for future discussion and debate.

47. The Appellant did not really engage meaningfully with Article 4.7(b) in his submissions. Those submissions were, as noted above, primarily focussed on the judgments in *Bailey No 1* and, in that context, section 44 of the 2003 Act. That is perhaps unsurprising. Nothing in the wording of Article 4.7(b) provides any support for the Appellant's arguments. Even if it is read (as the majority of the Supreme Court in *Bailey No 1* considered that it should be read) as embodying a requirement of reciprocity in respect of extraterritoriality, such a requirement is clearly satisfied here. Ireland and Romania exercise extraterritorial jurisdiction over murder on a reciprocal basis in the sense that they exercise such jurisdiction on the same basis and in the same circumstances.

48. On the Appellant's argument, however, this seemingly perfect reciprocity is irrelevant. What must be established, he argues, is not that Ireland could prosecute *one of its citizens* for an offence of murder committed in Bucharest or anywhere else outside the State but that it could prosecute *the Appellant* for such an offence if committed outside the State.

49. The alleged murder here was committed in Ireland. However, it may help to illustrate the implications of the Appellant's submission to consider how it would apply in a scenario where the alleged murder took place in a third country. Assume, therefore, that the murder took place in France. Murder by a Romanian national in France is a criminal offence under Romanian law in precisely the same way as it is an offence when committed in Ireland. Pursuant to section 9 of the 1861 Act, a murder committed in

France by an Irish citizen is an offence (the offence of murder) under Irish law. If an Irish citizen committed such an offence and then fled to Romania, Ireland could seek his or her return under the Framework Decision for the purpose of prosecuting that offence here. However, if a Romanian national committed such a murder and then fled to Ireland, he would not (on the Appellant's argument) be liable to surrender unless Ireland could prosecute the Appellant for *that murder* as a matter of Irish law. Unsurprisingly, Ireland does not assert any such jurisdiction. That omission would, on the Appellant's argument, be fatal to surrender in such circumstances.

50. By way of further example, I have already referred to the fact that the Criminal Law (Extraterritorial Jurisdiction) Act 2019 gives effect in Irish law to the provisions of the Istanbul Convention. Article 44(1) of that Convention requires the Parties to it to *"take the necessary legislative or other measures to establish jurisdiction over any offence established in accordance with this Convention, when the offence is committed .. (d) by one of their nationals."* The 2019 Act provides that it is an offence in Irish law to engage in conduct in a Convention State that constitutes an offence in that State and which would, if committed in Ireland, constitute a "*relevant offence".* Rape is one such *"relevant offence*". Romania is also a Party to the Istanbul Convention but if Romania were to seek the surrender of one of its nationals for an offence of rape (or its equivalent) committed in another Convention State (including Ireland), Ireland would, according to the Appellant's arguments, be precluded from surrendering the suspect by Article 4.7(b).

51. It will be evident that such an approach to Article 4.7(b) has no basis in any conception of reciprocity: on the contrary, a refusal to surrender in the circumstances hypothesised above would seem wholly inconsistent with any notion of reciprocity. The Appellant did not dispute that but observed that reciprocity does not have the status of a rule of law. That may well be so. However, the majority's decision in *Bailey No 1* critically depended on their view that Article 4.7(b) reflected the principle of reciprocity. That was the cornerstone of the decision. That decision is, in turn, the foundation on which the Appellant's argument rests. The Appellant never recognised or addressed this fundamental inconsistency at the heart of his argument.

52. Given that reciprocity does not supply the rationale for the approach advocated by the Appellant, what might that rationale be? When that question was raised by the Court at the hearing of the appeal, Counsel for the Appellant suggested that considerations of sovereignty were relevant: the State, he said, could properly take the view that it would not surrender for an extraterritorial offence unless it could also prosecute in Ireland for that specific offence. Reference was made to politically sensitive offences such as euthanasia. With respect to Counsel, that explanation is unpersuasive. In the first place, Ireland is not at large in terms of the sovereignty it can assert in this context. This appeal is concerned with an optional exception in the Framework Decision. That exception falls to be narrowly construed and Ireland cannot expand its parameters unilaterally. Second, the explanation appears to conflate issues of double criminality and extraterritoriality (and the importance of double criminality is much diminished by Article 2.2 of the Framework Decision in any event). Thirdly, were the State to take the view as a matter of policy that there are certain offences (such as euthanasia) that ought

not to be amenable to prosecution on an extraterritorial basis, then that would presumably be reflected in the State's own criminal law and, in the absence of an extraterritorial offence in Irish law, surrender could be refused under Article 4.7(b)/section 44 in the absence of sufficient reciprocity. Alternatively, if the concern of the State was at the prospect of extraterritorial jurisdiction being asserted in respect of "*sensitive*" offences committed in the State, it could exercise the option in Article 4.7(a). It remains unclear to me what considerations (other than caprice) might lead a sovereign State to adopt the approach to surrender for extraterritorial offences urged by the Appellant, which appears not to have any basis in historical practice, international precedent or logic.

53. The effect of that approach would be to significantly restrict the availability of surrender for extraterritorial offences under the Framework Agreement, for no discernible policy reason. Where (as here) an application for surrender is made in respect of such an offence on the basis of the nationality of the alleged offender (which is, it seems, the most common basis for such applications) then, on the Appellant's argument, surrender would, in practice, have to be refused in all or virtually all cases. On this reading of Article 4.7(b), Ireland would have to refuse surrender unless it itself asserted what might be regarded as an extravagant extraterritorial jurisdiction (as for instance, in the hypothetical scenario above, jurisdiction to prosecute a Romanian national for a murder committed in France, with no connection whatever to Ireland).

54. In my opinion, the Appellant's argument derives no support from the language of Article 4.7(b), from its legislative history and provenance or from a consideration of its

purpose. Further, the argument is inconsistent with the requirement that, as an exception to the normal rule, Article 4.7(b) must be construed strictly. All of those factors compel the conclusion that Article 4.7(b) is not a bar to the surrender of the Appellant here.

Section 44

55. The 2003 Act seeks to give effect to the Framework Decision. It follows that it must, as far as possible, be interpreted in the light of the wording and the purpose of the Framework Decision in order to achieve the result sought by it: Case C-579/15 *Poplawski*, at paras 30-31. That principle is not absolute, and does not mandate a construction of the 2003 Act that would be *contra legem*: at paras 32-33. The interpretative obligation is nonetheless a powerful one, as is demonstrated by *Minister for Justice & Equality v Zarnescu* [2020] IESC 59.

56. The need to adopt a conforming interpretation of the 2003 Act generally, and of section 44 specifically, was expressly recognised in *Bailey No 1*. The judgment of Fennelly J (with which Murray J agreed on this issue) deals with the point in greatest detail. Following a lengthy analysis, he concluded that section 44 had to be interpreted in conformity with Article 4.7(b), not merely with the general objectives of the Framework Directive.[19] Hardiman J was of the same view.[20] The purpose of Article 4.7(b) has subsequently been clarified by the CJEU in *JR and* section 44 must be read

[19] Para 425. See also para 451.

[20] Para 325.

in that light.

57. In my opinion, there is nothing in section 44 that requires it to be construed otherwise than in accordance with Article 4.7(b). No such submission was in fact advanced by the Appellant.

58. Section 44 refers to the *"act or omission of which the offence consists".* In *Bailey No 1*, the State contended that, for the purposes of section 44, the relevant act or omission was the actual offence alleged in the European arrest warrant. That argument was rejected by all members of the Court. Those words (according to Fennelly J) "*can only refer to a corresponding but hypothetical offence of murder, committed outside Ireland, in which the question of Irish exercise of extraterritorial jurisdiction falls to be considered."* [21] In my opinion, the "*corresponding but hypothetical offence*" here is the offence of murder committed by an Irish citizen outside the State. As Ireland exercises extraterritorial jurisdiction in respect of such a murder, section 44 presents no obstacle to surrender in the circumstances here.

59. I agree with Donnelly J that the Supreme Court decision in *Minister for Justice, Equality and Law Reform v Szall* [2013] IESC 7, [2013] 1 IR 470, and the authorities referred to in that decision, are helpful in this context. While the issue there was one of correspondence of offence/dual criminality under section 5 of the 2003 Act, the requirement for correspondence/dual criminality is also a manifestation of the concept

[21] At para 455.

of reciprocity. In *Szall*, it was argued by the respondent that he should not be surrendered for an offence of being unlawfully at large allegedly committed by him in Poland because the putative corresponding Irish offence (in section 6(2) of the Criminal Justice Act 1960) applied only where the person concerned had been temporarily released under the 1960 Act. Clearly, the respondent had not been released under the 1960 Act and, he argued, there was no sufficient correspondence for the purposes of section 5 of the 2003 Act.

60. Rejecting that argument, Clarke J (with the other members of the Supreme Court agreed) cited a number of decisions from other jurisdictions including the decision of the House of Lords in *R(Al-Fawwaz) v Governor of Brixton Prison* to which I have already made reference and the subsequent decision of the same court in *Norris v Government of the United States of America* [2008] UKHL 16, [2008] 1 AC 920. In his view, having regard to the purpose of the Framework Directive and the need to interpret the 2003 Act in a manner consistent with it, section 5 of the 2003 Act was capable of being satisfied *"proved that the relevant statutory provision or regime by reference to which the Irish offence is defined is sufficiently similar to an equivalent regime in the requesting state*." That was to be assessed *"as a matter of substance"* rather than form.[22]

61. The argument made by the Appellant here bears some similarity to the argument rejected in *Szall*, albeit that we were here concerned with section 44 rather than section

[22] Paragraphs 39-42.

5 of the 2003 Act. The Appellant says that he would not be liable to be prosecuted under section 9 of the 1861 Act because he is not an Irish citizen and on that basis says that the requirements of section 44 are nor satisfied. Similarly, the respondent in *Szall* said that his acts and omissions did not come within the scope of section 6 of the 1960 Act because he had not been granted temporary release under the Act and therefore the requirements of section 5 had not been satisfied. However, the extradition context simply requires *correspondence* and, for the purposes of section 44, the necessary correspondence will be present if extraterritorial jurisdiction is exercised in corresponding/equivalent circumstances.

62. That assessment necessarily involves a degree of "*translation*", as is apparent from *Al-Fawwaz* and *Norris*. The speech of Lord Millett in *Al-Fawwaz*, which is referred to extensively in *Szall*, is particularly illuminating in this context. According to him, it "*is necessary to effect an appropriate substitution for every circumstance connected with the requesting state on which jurisdiction is founded."* Thus, where the United States sought the extradition of persons on charges of conspiring to murder US citizens (including internationally protected persons), the issue of correspondence/double criminality had to be assessed as if the charges alleged conspiracy to murder British citizens: *Al-Fawwaz* at para 110.

63. Here, the "*circumstance connected with the requesting state on which jurisdiction is founded*" is the nationality of the Appellant. Section 44 (and Article 4.7(b)) therefore requires the substitution of Irish nationality for Romanian nationality in posing the question whether "*the act or omission of which the offence consists*" – murder – would

constitute an offence under the law of the State if committed "*in a place other than the State*." Murder committed by an Irish citizen outside the State is an offence under the law of the State and therefore the requirements of section 44 are satisfied.

Bailey No 1

64. In her judgment in this appeal, Donnelly J closely analyses the various judgments in *Bailey No 1*. I gratefully adopt her analysis and it is therefore unnecessary for me to undertake the same exercise. It is, nonetheless, appropriate to say something more about the decision, given the reliance placed on it by the Appellant. As I shall explain, I am not persuaded that any of the judgments in *Bailey No 1* provides support for the Appellant's arguments in this appeal or calls into question the views expressed above as to the interpretation and effect of Article 4.7(b). and section 44.

65. In *Bailey No 1,* France asserted an entitlement to prosecute Mr Bailey for a murder committed in Ireland on the basis of Ms de Plantier's French nationality. Her nationality was the "*circumstance connected with the requesting state on which jurisdiction [was] founded".* As appears from the discussion earlier, while there are certain offences in Irish law in respect of which Ireland asserts an extraterritorial jurisdiction on the basis that the victim of the offence is Irish, murder is not such an offence. Section 9 of the 1861 Act operates on the basis that the *offender* is an Irish citizen; the nationality of the *victim* is irrelevant for the purposes of the section. It follows that the application for surrender in *Bailey No 1* was grounded on a jurisdictional basis not recognised in Irish law as regards the offence of murder. Thus Ireland did not prosecute for murder

committed outside the State on the same basis as France did and Ireland would not have jurisdiction in respect of a murder committed in France (or elsewhere outside of the State) if the jurisdictional circumstances were reversed and the murder of an Irish citizen was at issue.

66. Mr Bailey was not a French national. It could not therefore be said that, if the situation were reversed – and an Irish citizen had allegedly murdered another Irish citizen in France – Ireland could assert extraterritorial jurisdiction, albeit on a different basis. There was, in fact, no intersection at all between the circumstances presented in *Bailey No 1* and section 9 of the 1861 Act.

67. It is also of critical importance to understand the parameters of the debate in *Bailey No 1*. The argument made by Counsel for Mr Bailey is summarised by Fennelly J as involving a submission that section 44 recognised a principle of reciprocity. On that basis, it was said, the "*executing member state is not required to surrender the person unless it practises extraterritorial jurisdiction in the same circumstances*." [23] Mr Bailey's argument is summarised in similar terms by O' Donnell J: section 44 introduced the concept of reciprocity and "*therefore meant that in effect an executing state would not surrender the person unless, if the situation were reversed, the executing state would exercise extraterritorial jurisdiction on the same basis."* [24] The judgments in *Bailey No 1* must be understood against that backdrop. Mr Bailey's

[23] Para 402.

[24] At para 509.

argument was quite different to the argument made by the Appellant here which is to the effect that section 44 requires that Ireland must have extraterritorial jurisdiction over the actual offence (adjusted only for its location, if it took place in the State) if surrender is to be permitted. As already noted, that argument is inconsistent with the principle of reciprocity. That being so, the suggestion that the Supreme Court in *Bailey No 1* arrived at the interpretation of section 44 contended for by the Appellant appears implausible in the highest degree.

68. In *Bailey No 1*, all of the members of the Court that addressed the extraterritoriality issue (with the exception of O' Donnell J) expressed the view that the principle of reciprocity underlay Article 4.7(b) (and section 44). However, even O' Donnell J considered that Article 4.7(b) required a minimum intersection between the laws of issuing and executing State on the issue of extraterritoriality. He expressed the view that, if Mr Bailey's extradition had been sought for an offence of assault, then the exception in Article 4(7)(b) would apply, on the basis that Ireland does not exercise extraterritorial jurisdiction in respect of the offence of assault. It does, however, exercise extraterritorial jurisdiction in relation to murder. That, in his view, was both necessary *and* sufficient in terms of the requirements of Article 4.7(b).[25] It was, of course, on the latter point that he differed from the other members of the Court.

69. Although O' Donnell J eschewed the language of reciprocity, all of the judgments arguably occupy different points on a single spectrum. At one end of the spectrum, there

[25] At para 522.

is the view of O' Donnell J that it is sufficient if Ireland exercises extraterritorial jurisdiction in respect of the particular category of offence for which surrender is sought, regardless of the basis on which it does so and irrespective of whether, were the circumstances to be reversed, Ireland could actually exercise extraterritorial jurisdiction. At the other end of that spectrum, there is the view of Hardiman J that Article 4.7(b) requires not merely that the State (as executing State) exercises extraterritorial jurisdiction in respect of the offence for which surrender is sought but that it must have power to *"prosecute on the same basis*" as the issuing State [26]. On the Appellant's argument, of course, even that is not sufficient. The views of Denham CJ and Fennelly J (with whose judgments Murray J agreed) fall somewhere in between those two points, though much closer to the views of Hardiman J than those of O' Donnell J.

70. Denham CJ was of the view that section 44 and Article 4.7(b) have *"roots in the system of reciprocity*" that existed under the 1957 Convention.[27] She construed section 44 as allowing for surrender "*in respect of an offence alleged to have been committed outside the territory of the issuing state in circumstances where the Irish State would exercise extraterritorial jurisdiction in reciprocal circumstances*." The reciprocity required "*is a factual reciprocity concerning the circumstances of the offence. Offences that take place outside of the territory of a state require specification of the circumstances when*

[26] At para 360

[27] At para 44.

that state will exercise jurisdiction. The reciprocity in this case requires Ireland to examine its law as if the circumstances of the offence were reversed." [28] It is, I think, clear from this passage, that the reference to the *"circumstances of the offence"* refers back to the "*circumstances when [the issuing state] will exercise jurisdiction."* It was those jurisdictional circumstances that required to be reversed. That is, of course, identical to the approach suggested by Lord Millett in *Al-Fawwaz.* Applying that test, the necessary reciprocity was not established because Ireland *"does not have jurisdiction to seek the surrender of a British citizen from France in respect of a murder of a person of any citizenship and which took place outside of Ireland."*

71. In his judgment, Hardiman J considered it clear that a principle of reciprocity underlined the extradition of suspects accused of committing exterritorial offences.[29] He agreed with Denham CJ that there was no reciprocity because of the *"total difference between the manner in which Ireland and France exercise extraterritorial jurisdiction over a non-national in relation to a murder committed outside their respective territories."*[30] As Irish law did not confer a power to prosecute "*on the same basis as France*", section 44 precluded Mr Bailey's surrender.[31]

[28] Para 45.

[29] Para 350.

[30] Para 354.

[31] Para 360.

72. It was a notable – and revealing – feature of the Appellant's submissions that he sought to distance himself from the judgment of Hardiman J. It was suggested that the other majority judgments – particularly that of Fennelly J – better reflected the consensus of the Court. The Appellant appeared to accept that if Hardiman J's articulation of the section 44 test – requiring that Ireland should have power to prosecute for the same offence "*on the same basis"* – was to be applied here, it would clearly be satisfied. That is undoubtedly so. There is, however, no basis in my view for any suggestion that a materially different test emerges from the other judgments.

73. The final majority judgment was that of Fennelly J. I agree with Donnelly J that the fact that Murray J expressed agreement with both the judgment of Denham CJ and that of Fennelly J indicates that he did not see any substantive difference between them. Given the Appellant's insistence that section 44 is to be applied to the actual offence set out in the European arrest warrant (subject only to shifting the location of the offence outside of the State when it is committed here), it is worth noting Fennelly J's emphatic rejection of a broadly similar submission made by the State in *Bailey No 1*. Article 4.7(b) (and thus section 44) was concerned with offences of the same type as alleged in the warrant, not the actual offence. [32] Article 4.7(b) "*envisages that prosecution of the extraterritorial offences at issue should be subject to similar conditions in each State."*[33] Given that Article 4.7(b) recognised the principle of reciprocity, *"where a*

[32] Para 428. At para 445, Fennelly J states that the reference in Article 4.7(b) to "*same offences*" must be understood as meaning "*same category of offence"*, the expression used in Article 7.2 of the 1957 Convention.

[33] Para 441.

state exercises the option, surrender will be prohibited where the executing state does not exercise extraterritorial jurisdiction in respect of offences of the type specified in the warrant in the same circumstances." [34]

74. O' Donnell J took a different approach to Article 4.7(b) and section 44. In his view, it should not be necessary to ask the precise basis upon which Ireland exercises extraterritorial jurisdiction in cases of murder: it should be enough that it does.[35] An analysis of the close reasoning that led him to that conclusion is beyond the scope of this judgment. For present purposes, what may be noted is that, in the appeal here, the requirements of Article 4.7(b)/section 44 as construed by O' Donnell J are clearly satisfied.

75. Accordingly, in my view, *Bailey No 1* provides no support for the construction of Article 4.7(b)/section 44 contended for by the Appellant here. I would add only that, if I considered that the decision in *Bailey No 1* indicated that the surrender of the Appellant on the charge of aggravated murder should be refused, I would not have been prepared to follow the decision, without first seeking guidance from the CJEU.

[34] Para 450.

[35] At para 521.

76. Reference was also made in argument to the decision of the High Court (Burns J) in *Minister for Justice and Equality v Bailey* [2020] IEHC 528 (*Bailey No 3).*

77. For the purposes of deciding this appeal, it is not necessary to consider whether *Bailey No 3* was correctly decided and, in the absence of any arguments directed to that issue, it would not be appropriate to express any view on it. Having said that, I find it difficult to see how the enactment of section 3(2) of the 2019 Act (which extends the application of section 9 to persons ordinarily resident in the State) would permit the conclusion that Ireland and France exercise extraterritorial jurisdiction in respect of the offence of murder on a comparable basis, or in "*corresponding circumstances*". If France had asserted a jurisdiction to prosecute Mr Bailey on the basis that he was ordinarily resident in France (in other words if ordinary residence in France was the jurisdiction circumstance relied on by France), one could readily see the relevance of section 3(2) but, of course, that was not the position. Section 3(2) might have also have been relevant if Mr Bailey had been a French resident, even if the jurisdictional basis relied on by France continued to be the French nationality of Ms Toscan de Plantier. In such a scenario, an argument might be made that, reversing all of the circumstances (residence of alleged perpetrator, nationality of victim and location of offence), Ireland could assert an extraterritorial jurisdiction, though not on the same basis as the basis asserted by France. Whether that would be enough to satisfy the requirements of Article 4.7(b)/section 44 would no doubt be the subject of considerable debate in light of *Bailey No 1*. Fortunately, that issue does not fall for determination here.

CONCLUSIONS

78. For the reasons set out above, and the further reasons set out in the judgment of Donnelly J, with which I agree, I would dismiss the Appellant's appeal and affirm the order of the High Court directing his surrender to Romania on the charge of aggravated murder.

79. I am also of the view that a reference to the CJEU is not necessary. The jurisprudence of this Court is clearly to the effect that it is not a court "*against whose decisions there is no judicial remedy under national law"* and, accordingly, it is not under an obligation to refer pursuant to Article 267 TFEU: see *Sony Music Entertainment (Ireland) Limited* [2018] 2 IR 623, per Hogan J at paras 95–100, as well as the judgment of the same judge in *Byrne (a minor) v O Conbhui* [2018] IECA 57, paras 35–39. There may well be important unresolved issues concerning the interpretation and effect of Article 4.7(b) of the Framework Directive but those issues do not require resolution for the purposes of determining this appeal. Even taking Article 4.7(b) at its height – as requiring that issuing and executing States must exercise extraterritoriality *on the same basis* – its requirements are satisfied here. If Article 4.7(b) requires something less than that – if, for instance, it is sufficient that the executing State should exercise extraterritorial jurisdiction in respect of the offence for which surrender is sought, even if on a different jurisdictional basis – that would clearly not avail the Appellant. Similarly, any issue as to whether Article 4.7(b) requires Member States to allow the judicial authority a residual discretion to direct surrender even where the requirements of Article 4.7(b) are not satisfied cannot impact on the resolution of this appeal.

80. As regards the questions certified by the Judge, I agree with the answers proposed by Donnelly J.