



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

S:AP:IE:2021:000073

[2022] IESC 12

**O'Donnell C.J.
Dunne J.
O'Malley J.
Baker J.
Hogan J.**

**IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003 (AS
AMENDED)**

Between/

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

-and-

PETRONEL PAL

APPELLANT

Judgment of Mr. Justice O'Donnell, Chief Justice, delivered on the 28th day of

February, 2022.

Background

1. The facts leading to this appeal are set out in comprehensive detail in the judgments of both the High Court (McDermott J.) and the Court of Appeal (Donnelly and Collins JJ.; Ní Raifeartaigh J. concurring), so only a brief outline is necessary here.
2. On April 10th, 2014, a group of armed men attacked Virgil Busa at his apartment at 7 Academy Square, Navan, Co. Meath. Though Mr. Busa managed to escape the building, he was attacked by the remainder of the group outside and sustained extensive injuries, ultimately dying three days later.
3. It is alleged by Romania that the attackers consisted of a number of Romanian citizens, including the appellant in this case, Petronel Pal. While the other members of the group have been surrendered to Romania, Mr. Pal contested his surrender, which was sought on four charges: membership of a criminal group formed to commit murder; aggravated murder; attempt to commit aggravated murder; and aggravated robbery. The requested surrender on the charge of aggravated murder is the only charge still in dispute in this appeal, for reasons which will be discussed below.
4. A European Arrest Warrant (“EAW”) was issued on December 4th, 2018, which warrant was endorsed by the High Court for execution on April 8th, 2019. The appellant was then arrested by Garda Eoin Kane on May 3rd, 2019.

High Court

5. The case came before McDermott J. in the High Court, who gave judgment on March 9th, 2020, permitting the surrender of the appellant on the charges of aggravated murder and membership of a criminal gang formed to commit murder – which equated to the Irish offence of conspiracy to murder – but not the other two charges ([2020] IEHC 143).

6. Opposing his surrender, the appellant relied on s. 44 of the European Arrest Warrant Act 2003 (“the 2003 Act”), which is based on Article 4.7(b) of 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”), and governs the optional non-execution of EAWs. As the appeal centres on the interpretation of s. 44, it is convenient to set the section out in full here:-

“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.”

7. As discussed by Fennelly J. in *Minister for Justice & Equality v. Bailey* [2012] 4 I.R. 1 (“*Bailey No. 1*”), the principle of conforming interpretation requires that s. 44 must be interpreted in a manner which conforms with the Framework Decision, provided this interpretation is not *contra legem*.

“425. Accordingly, I am satisfied that section 44 must be interpreted in conformity with Article 4.7(b) and not merely with the general objectives of the Framework Decision.

426. Once it is established, as I believe it is, that the principle of conforming interpretation applies, it follows that the first thing to do is to seek out the correct meaning of Article 4.7(b).”

Once the interpretation of Article 4.7(b) was established it then fell to the Court to consider if s. 44 could be interpreted in conformity with Article 4.7(b).

8. For its part, Article 4.7(b) of the Framework Decision provides that States may refuse to execute an EAW where it relates to 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 its territory”.
9. Section 44 and Article 4.7(b) were the subject of detailed consideration by this Court in *Bailey No. 1*. While all judges agreed that s. 44 involves a hypothetical exercise requiring the Court to consider what the position would be in certain circumstances, three different approaches emerged as to what this entailed. Denham C.J. and Fennelly J. (with whom Murray J. agreed), delivered separate judgments holding that what was required was “factual reciprocity”, in which the issuing state (also referred to as the requesting state – in this case, Romania) and executing state (Ireland) are reversed, was necessary. Hardiman J.’s “shared basis jurisdiction” approach required that both the issuing state and Ireland must exercise jurisdiction for the offence on the same basis. Finally, in my judgment, which was in the minority on this issue, I held that the section required “category reciprocity”: if Ireland exercised extra-territorial jurisdiction over the type of offence sought to be prosecuted, the accused’s surrender was not prohibited by s. 44. In the High Court in this case, McDermott J. concluded that Denham C.J.’s approach was the majority decision in *Bailey No. 1*, and thus followed the factual reciprocity approach.
10. Firstly, on the charge of aggravated murder, McDermott J. relied on s. 9 of the Offences Against the Person Act 1861 (“the 1861 Act”), which permits the prosecution of Irish citizens in Ireland for murder committed outside the jurisdiction. Reversing the countries involved, the Court held that the alleged offence could be prosecuted in Ireland if committed outside the jurisdiction by an Irish citizen.

Therefore, McDermott J. concluded, there was sufficient reciprocity to justify the surrender of the appellant on this charge.

11. Similarly, on the charge of membership of a criminal group formed to commit murder, the Court relied on s. 71(s) of the Criminal Justice Act 2006 (“the 2006 Act”), which permitted the prosecution of an Irish citizen in Ireland for the crime of conspiracy to murder committed outside the jurisdiction. Again, this was considered to provide sufficient factual reciprocity to allow the appellant’s extradition on the charge, a finding which the appellant has not challenged.
12. However, McDermott J. found that no provision of Irish law permitted prosecution in Ireland for offences of attempted murder or aggravated burglary alleged to have been committed outside the jurisdiction, and therefore that the appellant could not be surrendered on these charges. These findings were not contested by the Minister and are therefore not part of the present appeal.
13. In addition to his objections raised in relation to s. 44 of the 2003 Act, the appellant had also raised a number of complaints alleging potential violations of his right to freedom from torture, inhuman or degrading treatment under Article 3 of the European Convention on Human Rights (“ECHR”), citing the allegedly poor prison conditions in Romania. Citing a number of cases, including *Minister for Justice & Equality v. Rettinger* [2010] IESC 45, [2010] 3 I.R. 783 and *Attorney General v. Davis* [2018] IESC 27, [2018] 2 I.R. 357, the Court rejected this submission, and this issue forms no part of the appeal in this case.
14. In a subsequent judgment, delivered on April 20th, 2020, McDermott J. certified two questions to the Court of Appeal ([2020] IEHC 202) under s. 16(11) of the 2003 Act. In his judgment, McDermott J. refused to certify two proposed questions concerning the prison conditions in Romania which related to the Article 3 ECHR concerns dealt

with in his principal judgment, but did consider two other proposed questions to be of exceptional public importance and therefore meeting the threshold for certification. These questions were:

- (1) What factual circumstances, if reversed, should the High Court take into account when considering reciprocity under s. 44? And,
- (2) What was the relevance of the fact that Romania exercises extra-territorial jurisdiction on the same basis as Ireland?

Court of Appeal

15. The Court of Appeal considered the certified questions, and, in a judgment delivered on June 2nd, 2021 ([2021] IECA 165, Donnelly and Collins JJ.; Ní Raifeartaigh J. concurring with both), upheld the decision of the High Court. In their view, while the first question could not be answered in the abstract, the High Court should take into account all facts relied on by the issuing State to give it jurisdiction in respect of an offence committed outside that State. On the second question, the Court held that the majority decision in *Bailey No. 1* was the authoritative interpretation of s. 44 and that, on both the factual reciprocity and shared basis jurisdiction approaches, the appellant had to be surrendered.
16. Viewing the different judgments in *Bailey No. 1*, Donnelly J. concluded that it was clear that s. 44 was to be interpreted in the light of Article 4.7(b) of the Framework Decision. Adopting the majority position of Denham C.J. of factual reciprocity – which required the State to examine its own law as if the circumstances of the case were reversed – Donnelly J. held that, in the circumstances of this case, it would be possible to prosecute an Irish citizen for murder alleged to have been committed outside the jurisdiction, and noted that Ireland can only seek surrender where the

State enjoys a jurisdiction to prosecute for the offence. In addition to this, Donnelly J. found that the shared basis jurisdiction approach of Hardiman J. would lead to the surrender of the appellant, as Romania and Ireland both prosecuted extra-territorial murder alleged to have been committed by citizens only.

17. Further, Donnelly J. rejected the appellant's attempt to distinguish the approach to correspondence of offences under s. 5 of the 2003 Act from the approach to s. 44 on the basis of there not being a fixed date contained in s.44 for the assessment of whether or not the section precluded surrender, as the Court would be required to fix a date anyway. Donnelly J. cited *Minister for Justice & Equality v. Szall* [2013] IESC 7, [2013] 1 I.R. 470 ("*Szall*") in this regard, noting at para. 102 that:- "[f]or establishing correspondence, there is an element of 'transposing' the essential facts to the assessment of whether that act or omission is a criminal offence in this jurisdiction".

18. Donnelly J. also rejected a submission that the Oireachtas had decided to limit surrender to circumstances in which the facts (with the same individuals) occurred in different countries. This, she held, would be contrary to Ireland's obligation not to be a safe haven, citing in this regard the judgment of this Court in *Minister for Justice & Equality v. JAT (No.2)* [2016] IESC 17, [2016] 2 I.L.R.M. 262. To limit surrender in this manner would require clear wording from the Oireachtas, she held, and such wording was nowhere to be found in s. 44. In addition, Donnelly J. relied on Case C-488/19 *JR* ("*JR*"), where the CJEU held that the purpose of the Framework Decision was to provide a system of surrender based on the principle of recognition, and that Article 4.7(b) had been enacted to ensure that States were not obliged to extradite for offences grounded on a broader jurisdiction than the executing State enjoyed themselves. As there was no basis to believe that the CJEU

would come to the appellant's position, it was accordingly considered not necessary to make a reference to the CJEU.

- 19.** Concurring, Collins J. delivered a separate judgment, in which he also upheld the decision of the High Court, considering that the failure to surrender the appellant “would constitute an unwarranted departure from the State’s obligations” under the Framework Decision. Collins J. agreed with Donnelly J.’s analysis of the judgments in *Bailey No. 1* but considered that the starting point for the analysis of s. 44 was Article 4.7(b) of the Framework Decision, which was itself based on Article 7 of the European Convention on Extradition 1957. Citing my judgment in *Bailey No. 1*, Collins J. noted that both s. 44 and Article 4.7(b) of the Framework Decision address themselves to the substantive law of the executing State and not the surrounding circumstances, and cited other extradition agreements to which Ireland is a party and which also adopt this approach.
- 20.** Collins J. had regard to the judgment of the CJEU in *JR*, and also considered the English case of *R (Al-Fawwaz) v. Governor of Brixton Prison* [2001] UKHL 69, [2002] 1 A.C. 556 (“*Al-Fawwaz*”), where the House of Lords had considered the question of exorbitant jurisdiction, and had concluded that the UK was obliged to accord to other countries the same jurisdiction exercised by the UK.
- 21.** Collins J. concluded that provisions such as Article 4.7(b) involve an inward inquiry by the executing State as to whether it could, in corresponding circumstances, assert extra-territorial jurisdiction. Accordingly, he considered that the executing State and issuing State must exercise jurisdiction for the offence on a similar basis, noting at para. 40 of his judgment that:-

“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”.

22. When applied to this case, Collins J. found that the requirement of reciprocity had been met here, as Romania and Ireland both exercise jurisdiction for extra-territorial murder by their own citizens, and on the same basis. Commenting that the interpretive approach urged by the appellant “appears not to have any basis in historical practice, international precedent or logic”, Collins J. cited Case C-549/15 *Poplawski* as authority for the proposition that s. 44 must be interpreted in the light of the Framework Decision. Relying on *Al-Fawwaz*, he considered that the circumstance connected with the issuing State on which the jurisdiction was founded was key. As, in the circumstances of this case, the relevant circumstance was the nationality of the alleged perpetrator, which would also be the case in Irish law, Collins J. concluded that the appellant must be surrendered on the charge of aggravated murder.

Issues

23. As might be expected, much of the argument in this case concerns the interpretation of the various judgments in *Bailey No. 1* and their impact on the facts of this case. The appellant argues that the key factor in that case was that Mr. Bailey was not an Irish citizen. This arises from the contention that this was the main issue for Hardiman J. in refusing surrender, and as both Murray and Fennelly JJ. agreed with Hardiman J., the appellant submits that the shared basis jurisdiction requirement forms part of the majority decision in *Bailey No. 1*. As Mr. Pal is similarly not Irish, the appellant submits that his surrender is also precluded on this basis.

24. By way of response, the Minister relies on the judgment of Hardiman J. in *Bailey No. 1* that, applying the shared basis jurisdiction, the appellant in this case should be surrendered. Further, the Minister relies on the judgments of Denham C.J. and Fennelly J. in *Bailey No. 1*. Citing Denham C.J.'s requirement for all relevant circumstances to be reversed, the respondent submits that reversing the circumstances will lead to the appellant's surrender. Then, analysing Fennelly J.'s judgment, and in particular his conclusion that Ireland does not surrender in circumstances where it would not itself exercise extra-territorial jurisdiction, the Minister submits that the effect of the majority judgment is that the same basis requirement is necessary, and is satisfied here. Finally, if the issue is approached on the basis of category reciprocity, the Minister notes that the offence is one of extra-territorial murder, for which Ireland permits prosecution, and therefore on that basis also argues that the appellant should be surrendered.
25. Moving then to s. 44, the appellant contends that the section involves an investigation of the basis on which Ireland exercises extra-territorial jurisdiction, in which investigation the only element which needs to be transposed is the location of the offence. The respondent argues that the appellant's approach leads to an absurdity, and is further contrary to the intention of the Oireachtas in enacting s. 44.
26. Further, the appellant criticises the Court of Appeal's reliance on the judgment of this Court in *Szall*, arguing that it led to a consideration of the basis on which Romania exercises extra-territorial jurisdiction and not the basis on which Ireland does. Similarly, the appellant distinguishes *JR* from this case on the facts.
27. The Minister argues that the reliance on *Szall* was appropriate, as it involved a focus on the facts on which jurisdiction was based, and cites *JR* as authority that the state

is not obliged to surrender an accused where the surrender is sought on a wider basis than the state itself enjoys.

28. Finally, the appellant seeks the reference of two questions to the CJEU. Firstly, where a State exercises its optional opt-out under Article 4.7(b), is the executing judicial authority required to pose a hypothetical question in considering whether the State does not allow prosecution for the same offence committed outside the territory? Secondly, in considering “the same offences when committed outside its territory”, what facts must the executing State take into account? In response, the Minister rejects the suggestion that the case should be referred to the CJEU, arguing that it involves a question of national law only, and notes that the possibility of a reference was not raised earlier in the proceedings.

Discussion

29. In this Court, counsel did not seek to engage in a detailed analysis of the majority judgments in *Bailey No. 1* which had characterised the argument in the Court of Appeal and the written submissions before this Court. Instead, he suggested that the Court was free to consider the matter at a level of principle. He accepted that Donnelly J. in the Court of Appeal had been correct to observe that the argument made on behalf of the applicant amounted to a contention that the relevant hypothetical question to be posed under s.44 was “would Ireland prosecute a Romanian national for the offence in question if committed in Romania?”. Indeed, it is to be observed that it is only if the section can be interpreted and applied to pose this question that the appellant can succeed.
30. The appellant argues that what s.44 is concerned with is the question whether:- “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”. It was said that this called for a straightforward analysis and identified a single feature of the hypothetical circumstances which must be transposed from the facts of the particular case, namely the location. There was no good reason, it was said, to transpose matters such as the nationality of the person sought, or indeed, of the victim where relevant.

- 31.** Counsel sought to support this contention by reference to the decision in *Bailey (No 1)*. It was said that it was central to the resolution in that case, or at least to the judgments of the majority in that case, that the particular person sought in that case was not an Irish citizen and at that time Ireland would only exercise extra-territorial jurisdiction in respect of murders alleged to have been committed by Irish citizens. This was elaborated on in the written submissions:-

“[o]n any view Bailey could not have been surrendered (irrespective of a want or reciprocity) [*sic*]...This is of some significance in the present case as the Appellant is in precisely the same position as Mr Bailey so far as that issue is concerned” (*i.e.*, that Mr. Pal in this case is not a citizen of Ireland).

On this basis, it was argued that the factual scenario in the present appeal was all but indistinguishable from *Bailey (No. 1)*, save for the fact that the issuing state had identified the ground for the exercise of extra-territorial jurisdiction as the fact of the citizenship of the person sought. Section 44, it was argued, required the Court to consider whether Ireland could prosecute in the same circumstances. Those circumstances were necessarily identified by the dictates and requirements of Irish law, and not the law of the issuing state. Thus, it was said:-

“[f]rom the perspective of Irish law the only question is whether or not he is an Irish citizen – not whether he is a citizen of another specific state. Once that question is answered in the negative then that is essentially the end of the issue.

This is because prima facie “*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.*” There is simply no getting away from this” (Emphasis in original).

- 32.** This argument, which was advanced with admirable skill and succinctness, relies heavily on the judgment of Fennelly J. in *Bailey (No 1)*, and, in particular, a passage set out at para. 450 of the report:-

“I believe that a sensible and fair interpretation of Art. 4.7(b) demands the recognition of a principle of reciprocity. Thus, where a state exercises the option, surrender will be prohibited where the executing state does not exercise extra-territorial jurisdiction in respect of offences of the type specified in the warrant in the same circumstances. In the present case the relevant circumstance is that the person whose surrender is sought is not an Irish citizen. Under Irish law, a person cannot be prosecuted outside the territory of the State unless he/she is an Irish citizen”.

- 33.** In support of this argument, it has to be said that s. 44 is at best clumsily expressed and part of an Act which itself, as Fennelly J. observed at para. 366, is an “imperfect embodiment of the Framework Decision”. Even if the correct course is firstly to consider what the Framework Decision means, it must be acknowledged that the 20 words of Art. 4.7(b) – namely, that “the law of the executing member state does not allow prosecution for the same offence when committed outside its territory” – are somewhat less than crystal clear, especially when it is recognised that they deal with some very difficult concepts which have traditionally caused difficulty in the field of extradition and surrender between states. Moreover, there are clear divergences of views contained in the judgments of this Court in *Bailey (No. 1)* which was of

course decided at a time when the Court was precluded from making a reference to the CJEU. It seems apparent, therefore, that there are issues as to the interpretation of the Framework Decision which may require to be clarified and therefore require a reference to the CJEU, and a further question as to whether s. 44 can be interpreted in a manner conforming with any interpretation of Art. 4.7(b) of the Framework Decision. This is an area, therefore, which does not lack debateable issues of law. However, I cannot accept that the interpretation advanced by the applicant is one of them, or that it is reasonably possible to interpret Art. 4.7(b) in any way which could lead to a refusal to surrender the applicant in this case and, therefore, to require any reference to the CJEU.

- 34.** A useful starting point is the decision in *Bailey (No. 1)*. As is well known, the relevant facts are that France sought the surrender of a person in respect of the murder of a French citizen which occurred in Ireland. France exercises extra-territorial jurisdiction for murder based on the citizenship of the victim. Ireland at the time exercised extra-territorial jurisdiction for murder based on the citizenship of the person sought to be prosecuted. This Court was unanimous that the request in that case was a request made not for the purposes of prosecution, but rather for the purposes of further investigation, and accordingly that surrender should be refused in respect of that request. However, that reasoning depended on the particular request made, and the point which the investigation had reached. A further issue of principle required to be decided as to whether, if surrender was properly sought for the purposes of prosecution, s. 44 amounted to a bar on surrender. The different approaches to this issue in the judgments of the Supreme Court were helpfully analysed in the judgment of Donnelly J. in the Court of Appeal, and I will adopt the description she proposed and which has already been touched on above.

35. First, there was “shared basis jurisdiction”. This is the approach set out in the judgment of Hardiman J. On this approach, a member state would only surrender a person if the requesting state and the executing state both exercised extra-territorial jurisdiction on the same legal basis. This involves a consideration merely of the law of the executing state and an appreciation of the legal basis upon which the extra-territorial jurisdiction was sought to be exercised by the issuing state. Since Ireland and France both exercised extra-territorial jurisdiction in respect of murder, but on a different legal basis (France on the basis of the nationality of the victim, Ireland on the basis of the nationality of the alleged perpetrator), this approach led to the refusal of surrender. While this is the narrowest of the approaches advanced in the case, it is at least easy to apply. It involves merely an inquiry as to the basis upon which the requesting state is purporting to exercise extra-territorial jurisdiction and then a consideration of whether the law of the executing state exercises extra-territorial jurisdiction on the same basis.
36. It is accepted that the judgments of Denham C.J., Murray and Fennelly JJ. form the majority judgments and, although there is some difference of emphasis, they can properly be described as adopting an approach of “factual reciprocity”. This, too, requires a hypothetical exercise, but in this case focused upon the facts of the case. The question posed is: if the situation were reversed, would the executing state exercise extra-territorial jurisdiction “in the same circumstances”? Much of the argument in this case is addressed to what exactly is required by the admittedly hypothetical inquiry proposed. In other words, much of the dispute is devoted to a consideration of what is meant by the words “if the situation were reversed” and “in the same circumstances”. The majority were agreed, however, that, on the application of this test, surrender in *Bailey No. 1* should be refused.

37. I delivered a judgment which dissented on this point, and Donnelly J. described the approach taken in that judgment as “category reciprocity”. On this basis, when in receipt of a warrant based upon the exercise of extra-territorial jurisdiction of the issuing state, the executing state should inquire merely whether it exercises its extra-territorial jurisdiction in respect of the offence for which surrender is sought, and in that case murder. The basis of the exercise of extra-territorial jurisdiction by the issuing state was not determinative or indeed relevant. On this basis, surrender would have been ordered. It is clear that this was a minority judgment but, as Donnelly J. observed in the Court of Appeal, it may have some benefit in casting some light on what was decided by the majority.
38. A consideration of the judgments in *Bailey (No. 1)* demonstrates that the appellant in this case would be surrendered if either a shared basis jurisdiction or category reciprocity approach were taken. Romania exercises extra-territorial jurisdiction on the basis of the citizenship of the person alleged to have committed the offence, as does Ireland (shared basis jurisdiction), and Ireland exercises extra-territorial jurisdiction for the offence of murder (category reciprocity). It is only if factual reciprocity involves an entirely different test that the applicant in this case can successfully resist surrender. Indeed, as discussed, it is only if Art. 4.7(b) of the Framework Decision and s. 44 of the 2003 Act are to be interpreted as requiring the transposition of the issuing state (Ireland for Romania) and the location of the alleged offence (Romania for Ireland), but without transposing or altering the nationality either of the alleged perpetrator or the victim (still both Romanian), that the argument can succeed. It is certainly clear that Ireland would not exercise extra-territorial jurisdiction in respect of a murder alleged to have been committed by a Romanian national in Romania. But is this the test?

39. It is argued by the applicant that this is the outcome required because the Court must consider if Ireland would exercise extra-territorial jurisdiction “in the same circumstances”. The argument is that the section does not ask if the executing state (in this case, Ireland) would exercise extra-territorial jurisdiction in respect of the actual offence itself. It follows that a hypothetical question is posed by both Art. 4.7(b) and s. 44. The law plainly requires *some* transposition, and accordingly the consideration of *some* hypothetical circumstance. The executing state (in this case, Ireland) is not the prosecuting state; nevertheless, the test under s. 44 and Art. 4.7(b) invites a consideration of the law of the executing state in respect of prosecution. Again, this must mean a consideration not of the actual offence alleged to have been committed, but of some hypothetical offence. As Fennelly J. observed in *Bailey*, the words of Art. 4.7(b) “the law of the executing member state does not allow prosecution” can properly be read as “would not allow prosecution”. So far, the parties are agreed. However, the appellant here contends that the only transposition contemplated by the section is one of *location* which it is said follows from the use of the words “by virtue of being committed in a place other than the State” in s. 44. Similarly, it is said that this follows from the terms of Art. 4.7(b) “and the law of the executing member state does not allow prosecution for the same offence when committed outside its territory” (emphasis added).

40. Looked at from the broadest perspective, I do not think that the judgments in *Bailey* (*No. 1*) can be read in this way – particularly when the majority judgments are read together with the concurring judgment of Hardiman J. and my judgment dissenting on this point. I think it is correct to look at all the judgments together, since they are addressed to the same set of circumstances, and the application of the law to it, and the manner in which they disagree or diverge is helpful in understanding the majority

judgments. The judgments are best viewed as proceeding from the narrowest basis (shared basis jurisdiction) to the broadest (category reciprocity) with factual reciprocity somewhere between, and perhaps closer to shared basis jurisdiction. It is clear, in my view, that they operate in the same register (or, as Collins J. put it in the Court of Appeal, on the same spectrum) and that factual reciprocity does not involve some separate and distinctive approach or analysis. In mathematical terms, shared basis jurisdiction can be seen as a subset of factual reciprocity, in that all cases of shared basis jurisdiction would satisfy factual reciprocity, but there are some circumstances which would satisfy factual reciprocity but not come within shared basis jurisdiction. All cases which satisfy factual reciprocity would in turn also satisfy category reciprocity although that category, being broader, would cover some circumstances in which factual reciprocity would not permit surrender. In the Venn diagram of this aspect of the law, shared basis jurisdiction is entirely within the somewhat broader category of factual reciprocity, and both are entirely within category reciprocity. If that understanding of the judgments is correct, then it is fatal to the appellant's case, at least as far as Irish law is concerned, since it is clear that this case satisfies the narrowest basis on which surrender could be permitted, *i.e.*, the shared basis jurisdiction approach set out in the judgment of Hardiman J. and must therefore also satisfy factual reciprocity (and indeed category reciprocity). Just as the differing approaches of Hardiman J. and the majority led to the same outcome in *Bailey (No. 1)* – in that case refusal of surrender – both approaches would lead to the same outcome in this case: surrender.

- 41.** The majority judgments' test of factual reciprocity can be understood by comparing that approach with the approach in the concurring judgment of Hardiman J. In every case where shared basis jurisdiction is established, and both the requesting and

executing state exercise extra-territorial jurisdiction on the same basis, then factual reciprocity will also be satisfied. The point of distinction between the two approaches can be illustrated by considering circumstances only slightly different to those which occur here. If, as in *Bailey No. 1*, the two states involved had laws on extra-territoriality which were the converse of each other, so that country A exercised extra-territorial jurisdiction on the basis of the nationality of the victim, and country B exercised extra-territorial jurisdiction on the basis of nationality of the alleged perpetrator, then, in all possible circumstances, there would not be shared basis jurisdiction. In most cases, factual reciprocity would also lead to refusal of surrender, since if the facts are transposed, the executing state would not have jurisdiction. If, however, as in this case, both the alleged perpetrator and the victim are nationals of state A, then, while shared basis jurisdiction would *refuse* surrender, factual reciprocity would *permit* it, because on the facts, if transposed, state B would exercise jurisdiction and prosecute, albeit on a different jurisdictional basis to that of the requesting state, *i.e.*, the nationality of the alleged offender, as opposed to the nationality of the victim. If the facts of *Bailey* are changed so that both the victim and the alleged perpetrator are assumed to be French, then the difference in outcome becomes clear. Shared basis jurisdiction would not exist: France would be asserting jurisdiction on the basis of the nationality of the victim and Irish law does not exercise jurisdiction on that basis. However, factual reciprocity would lead to surrender since both states would exercise extra-territorial jurisdiction, albeit on a different legal basis – France on the basis of the French nationality of the victim and, if the situation were reversed and both victim and alleged perpetrator are assumed to be Irish, Ireland would exercise jurisdiction but on the basis of the nationality of the

alleged perpetrator, and accordingly surrender could be ordered notwithstanding the difference in the legal basis on which such jurisdiction would be exercised.

42. Part of the difficulty in this case comes from terminology such as “transposing” or “reversing”. I do not think it is quite correct, for example, to pose the question whether Ireland would prosecute a Romanian national for the offence in question if committed in Romania. It must be recognised that the facts of both *Bailey No. 1* and this case are somewhat unusual in that the offences in respect of which both the requesting states sought to prosecute and thus exercise extra-territorial jurisdiction occurred on the territory of the executing state, in this case Ireland. But that is not a necessary feature of the matter.
43. Neither the Framework Decision nor the 2003 Act are limited to the exercise of extra-territorial jurisdiction in respect of offences which occur on the territory of the executing state. Article 4.7(b) and s. 44 both apply and are intended to apply in a case where the offence is alleged to occur outside the territory of the requesting state (which need not even be on the territory of another member state), and where the person whose surrender is sought is located in another member state. The provisions are necessarily limited to avoid the exercise of exorbitant jurisdiction but were obviously considered necessary to ensure a broader range of possible cases where surrender would be permitted, and so as not to limit surrender to offences committed within the issuing state, and as Donnelly J. put it, to avoid a member state becoming a safe haven.
44. To take a simple example, if a Romanian national was alleged to have murdered another Romanian national and the offence was alleged to have occurred in Germany but the person sought was located in Ireland, and an EAW was sought to be executed, Art. 4.7(b) and s. 44 would be engaged. In such circumstances, it would not be

necessary to “transpose” or “reverse” the location of the alleged crime; it is sufficient that the location be outside the territory of Romania, and, for the purposes of the hypothetical case, outside Ireland. This, however, undermines a central component of the appellant’s contention that the section mandates a transposing or reversing of the location of the offence alone.

45. It is preferable to consider the issue at a more abstract level and by reference to the position of the requesting state and thereafter to substitute the executing state for the requesting state, and consider if that state would prosecute in the same circumstances. Thus, the facts in *Bailey (No. 1)* could be rendered as: state X wishes to prosecute a person (not a citizen of state X) for the murder occurring outside the territory of state X, of a person who was a citizen of state X. When Ireland is substituted for X, it is apparent that in those factual circumstances, Ireland would not prosecute, and therefore would not surrender and this indeed is the outcome upon which all the judges in the majority were agreed. Ireland did not seek to exercise jurisdiction to prosecute a person (not a citizen of Ireland) for the murder outside Ireland of a citizen of Ireland. Thus, I consider it is an error to suggest that it was critical to that case that Mr. Bailey was not Irish; rather, it was critical that he was not French. When Ireland is substituted for France, the fact that the person alleged to have committed the offence is not Irish, as on the facts Mr. Bailey was not French, means that Ireland would not exercise extra-territorial jurisdiction to prosecute for an offence of murder occurring outside Ireland, and accordingly could not execute the warrant issued.
46. I think that this is how para. 450 of the judgment of Fennelly J. in the Irish Reports version of the judgment of *Bailey (No. 1)* is to be understood. The relevant fact was that Mr. Bailey was not French. In the equivalent or corresponding circumstances,

the person sought is not Irish. Ireland does not exercise extra-territorial jurisdiction unless the person sought is Irish, and accordingly a surrender was refused.

47. Counsel sought to argue that even if the decision in *Bailey (No. 1)* could not be read in the way suggested, it was nevertheless possible to read Art. 4.7(b) and s. 44 in this way, and that if such an interpretation was possible, the Court was obliged to make a reference to the CJEU pursuant to Art. 267 of the TFEU. It was argued that, as set out above, it was only necessary to reverse the location of the offence and ask whether the executing state could exercise jurisdiction in such a case. It was necessary to make the change in the location to ensure that the location of the offence was outside the jurisdiction of the executing state, in this case Ireland. It is fair to say the argument was advanced on the basis that this was at least a possible interpretation which could not be excluded, and therefore, required a reference under Art. 267. It was argued, moreover, that this was not an implausible reading of the section and article. In cases where the location of the offence was not within the executing state, then the authority in the executing state would consider whether it could itself exercise jurisdiction in respect of the particular offence and, if so, it could surrender. If the location of the offence was the executing state itself (as in this case and in *Bailey*), it was necessary to hypothesise a third country and make the same inquiry. On this reading, it was suggested that the circumstances in which the executing state would be obliged to surrender a person sought by another member state which was itself exercising extra-territorial jurisdiction were limited to those cases where the executing state could itself exercise extra-territorial jurisdiction in fact. Taking the example of Romania seeking the surrender by Ireland of a Romanian national for prosecution for the murder of a German person in, say, Spain, Ireland could not surrender because it would have no jurisdiction to prosecute in that case.

While it was acknowledged that this would lead to a very narrow set of circumstances in which surrender for the exercise of extra-territorial jurisdiction could occur, and only where the two countries had a different basis for extra-territorial jurisdiction, it was nevertheless an approach which was consistent, and based on a principle, and, therefore, both plausible and possible.

- 48.** I am unable to accept this interpretation, or to agree that it is sufficiently plausible that a reference to the CJEU could be required.
- 49.** First, if this was indeed the interpretation intended, it could have been articulated more clearly and simply. Second, it is reasonable to observe that the Framework Decision applies to nearly all of the member states of the European Union and the decision itself is 20 years old. Counsel was not, however, able to point to any decision in another member state, or even any academic analysis, supporting the interpretation which he maintained was intended, or at least possible. Third, the underlying principle which it is suggested explains the admittedly narrow interpretation of the Article does not hold true consistently, and breaks down on analysis. Even though it is suggested that some consideration of sovereignty operates so as to require a rule that an executing state would only surrender in cases which it would, or at least could, itself exercise extra-territorial jurisdiction, it leads to a refusal to surrender even though the law of the executing state would permit the exercise of jurisdiction in respect of these offences, albeit on a territorial rather than extra-territorial basis. Nevertheless, if the touchstone underlying the interpretation is that Ireland, or any other executing state adopting Art. 4.7(b) will only surrender for offences it itself will try, it is difficult to understand why this then becomes the basis of a refusal to surrender where Ireland or any other executing state has undoubted jurisdiction to try. Furthermore, if there is some further and more

elaborate justification for this outcome, it cannot be deduced from the simple words of Art. 4.7(b) or s. 44. Fourth, the underlying principle asserted is itself inconsistent with the objectives of the Framework Decision or the 2003 Act themselves, which were introduced to facilitate the surrender of individuals for prosecution in circumstances where, it is to be assumed, the executing state would not itself have jurisdiction to try the person for the offence.

50. Fifth, the operation of the interpretation would lead to surprising – and indeed perverse – results. As Collins J. pointed out in the course of a comprehensive and insightful survey of the law and the relevant background, the most common form of extra-territorial jurisdiction exercised is known as “the active personality principle”, whereby states assert an entitlement allegedly for the conduct of their citizens outside their territory and to pursue them for offences, wherever committed. But if both the requesting state and the executing state adhere to that principle, the result, on the appellant’s argument, would be that there could not be surrender between them as the nationality of the person sought which establishes the extra-territorial jurisdiction of the requesting state would, *ipso facto*, preclude the possibility of the exercise of criminal jurisdiction on an extra-territorial basis by the executing state and therefore compel refusal of surrender. Similarly, if both member states exercise extra-territorial jurisdiction on the basis of so-called “passive personality”, *i.e.*, on the basis of the nationality of the victim, or the “protective principle”, insofar as it affects the national security or state interests of the individual state, then the principle argued by the applicant would equally preclude surrender. Not only would this be a very substantial restriction on surrender under a European Arrest Warrant regime, it would also run directly contrary to the generally understood basis upon which states have traditionally surrendered persons where exorbitant jurisdiction was being

exercised by the requesting state. This was explained by Lord Millett in the United Kingdom House of Lords decision in *Al-Fawwaz*:-

“Views as to what constitutes an exorbitant jurisdiction naturally differ; the test adopted by our own law has been to accord to other countries the jurisdiction which we claim ourselves but no more”.

The interpretation contended for by the appellant would therefore, it appears, prevent surrender in cases of shared basis jurisdiction hitherto understood as the narrowest, most conservative and most well-established basis of surrender between friendly states. This, if anything, reinforces the point that it would be surprising if such a dramatic change, or even arguable interpretation, would have, it appears, gone unnoticed. Finally, I agree with both Donnelly and Collins JJ. that the decision of the CJEU in Case C-488/19 *JR* is of some relevance. It was said in that case that the purpose of Art. 4.7(b) was:-

“to ensure that the judicial authority of the executing state is not obliged to grant a European Arrest Warrant which was issued for the purposes 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”.

51. As Collins J. pointed out, while that was a conviction case, the same rationale clearly applies where surrender is sought for the purposes of prosecution. For the reasons set out above, I do not consider therefore that the interpretation advanced by the appellant is correct, nor indeed sufficiently plausible that a reference to the CJEU is required or necessary for the effective resolution of the case. I am conscious of the fact that this Court is a court of last resort for the purposes of Art. 267(3) TFEU and I have regard to the comments of the Court of Justice in Case C-561/19 *Consortio*

Italiana Management, Catania Multiservizi SpA v. Rete Ferroviaria Italiano SpA EU:C:2021:799 (para. 51 of the judgment) regarding the nature of the obligation to refer which is imposed on courts of last resort. It is appropriate to record that I do not think it necessary to make any reference of any question of the interpretation of EU law to that court. I take this view essentially for the reasons already set out above. However, in the light of the obligation on courts of last resort, it may be appropriate to have regard to further consideration not directly argued in this case, but clearly discernible in the background to it. It seems useful to consider the wider background against which the Framework Decision was adopted, much of which is surveyed in the judgment of Collins J. in the Court of Appeal. The provisions of Art. 4.7(b) of the Framework Decision, and s.44 of the 2003 Act, do not stand in isolation. Rather, they address an important area of international law, namely the exercise of extra-territorial jurisdiction by states and, more particularly, the circumstances in which one state will recognise and give effect to the exercise of such jurisdiction by another or treat it as exorbitant and refuse to recognise and give effect to it.

52. As the Court of Justice observed in Case C-182/15 *Petruhhin* EU:C:2016:630, at para. 39 of the judgment:-

“extradition is a procedure whose aim is to combat the impunity of a person who is present in a territory other than that in which he has allegedly committed an offence...although, in the light of the maxim ‘*aut dedere, aut judicare*’ (either extradite or prosecute), the non-extradition of its own nationals is generally counterbalanced by the possibility for the requested Member State to prosecute such nationals for serious offences committed outside its territory, *that Member State as a general rule has no jurisdiction to try cases concerning such acts when neither the perpetrator nor the victim of*

the alleged offence is a national of that Member State. Extradition thus allows offences committed in the territory of a State by persons who have fled that territory not to remain unpunished” (emphasis added).

53. These comments were made in the context of an application of a national rule precluding the extradition of nationals to third country states (and the extent to which that national rule was required to be extended for EU nationals residing in a member state in question); however, this passage nevertheless reflects general principles of public international law regarding the exercise of extra-territorial jurisdiction and, in particular, recognises the “general rule” which, put positively, recognises that states may have jurisdiction recognised by other states and by the general principles of international law to try a person for offences committed outside its territory where either the perpetrator, or perhaps the victim, is a national of that member state.
54. The starting point of jurisdiction in public international law is that a sovereign state may, in general, exercise extra-territorial jurisdiction in respect of offences committed abroad by persons who are its own nationals by virtue of its sovereignty in respect of its own citizens. The famous *Lotus* case (*France v. Turkey* [1927] 4 I.L.R. 5) in the Permanent Court of International Justice indeed recognised that there were some circumstances in which a state may exercise jurisdiction in offences committed abroad by persons *not* its own national. In general terms, however, absent specific international treaties conferring universal jurisdiction in respect of certain crimes (e.g., piracy), such further extra-territorial jurisdiction is generally confined to particular circumstances where the events, acts and persons bear up on what has been traditionally described as the peace, order and good governance of the state in question. In any event, public international law generally requires the existence of a genuine link between the state exercising extra-territorial jurisdiction and the person

in respect of whom the jurisdiction is exercised. In this regard, the following statement of international law practice contained in the separate opinion of President Guillaume in *Arrest Warrant Case (Democratic Republic of Congo v. Belgium* [2002] ICJ Rep. 3) is apposite:-

“States primarily exercise their criminal jurisdiction in their own territory. In classic international law, they normally have jurisdiction in respect of an offence committed abroad only if the offender, or at least the victim, is of their nationality, or if the crime threatens their internal or external security. Additionally, they may exercise jurisdiction in cases of piracy and in the situations of subsidiary universal jurisdiction provided for by various conventions if the offender is present on their territory. But apart from these cases, international law does not accept universal jurisdiction.”

55. Article 4.7(b) of the Framework Decision has plainly been enacted with these sorts of concerns in mind. It clearly enables member states to refuse to give effect to surrender requests from other member states which are based on the exercise of an exorbitant extra-territorial jurisdiction in criminal law which is either contrary to the general principles of public international law, or at least, is a form of extra-territorial jurisdiction which the member state in question does not recognise. To that extent, therefore, Article 4.7(b) can be understood as a form of *renvoi* back to the national legal systems.

56. So far as Ireland is concerned, Art. 29.8 of the Constitution provides that the State may exercise “extra-territorial jurisdiction in accordance with the generally recognised principles of international law”. Article 29.3 provides that Ireland accepts those generally recognised principles as its rule of conduct in its relationship with

other states. Section 44 of the 2003 Act must, therefore, be understood against this background.

- 57.** All of this means that the object of s. 44 is, in turn, to enable this State to refuse in the manner contemplated by Article 4.7(b) of the Framework Decision to effect a surrender where this would represent the exercise of an extra-territorial jurisdiction which would either be contrary to general principles of public international law, or at least, would amount to a form of extra-territorial jurisdiction which we either do not recognise or would regard as exorbitant.
- 58.** Viewed in this way, it is plain that s.44 of the 2003 Act cannot be read to preclude surrender in this case. Here, it is alleged that a Romanian national committed murder in a state other than Romania and Romania seeks surrender to that state to answer this charge. This is a classic case of a jurisdiction which is compatible with the generally recognised principles of international law and, moreover, one exercised by Ireland itself. If, however, the interpretation advanced by the appellant is correct, s. 44 or Art. 4.7(b) would not only result in the refusal of surrender in a case regarded as a permissible, indeed classic, exercise of extra-territorial jurisdiction (*i.e.*, where the alleged offender is a national of the requesting state) but would, moreover, have this outcome precisely because Ireland in this case exercises extra-territorial jurisdiction on that very basis, namely the nationality of the alleged offender. It is impossible to discern any logical basis for such an extraordinary outcome, particularly in the context of surrender between member states of the European Union, and no support for such an approach can be found in the Framework Decision, the *travaux préparatoires*, or the pre-existing law. These broader considerations support the conclusion to which I would have come in any event: that it is not necessary to refer any question of the CJEU to determine this case.

59. I would dismiss the appeal in this case.