

UNAPPROVED



THE COURT OF APPEAL

Neutral Citation No. [2021] IECA 165

Record No.: 2020/108

**Donnelly J.
Ní Raifeartaigh J.
Collins J.**

BETWEEN/

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT/RESPONDENT

-and-

PETRONEL PAL

RESPONDENT/APPELLANT

JUDGMENT of Ms. Justice Donnelly dated the 2nd day of June, 2021

INTRODUCTION

1. The appellant, a Romanian citizen, appeals against the order of the High Court (McDermott, J.) made on 20th April 2020 pursuant to s. 16 of the European Arrest Warrant Act, 2003 (as amended), (hereafter “the Act of 2003”). The order was for his surrender to Romania for the purpose of prosecution in respect of two alleged offences: a) an alleged offence of creating an organised criminal group in order to commit murder and b) an alleged offence of aggravated murder. These offences were committed outside the territory of Romania. Romania is therefore asserting an entitlement to exercise extraterritorial jurisdiction in seeking to prosecute him and in seeking his surrender for that purpose.
2. At the outset of the oral hearing, counsel for the appellant informed the Court that the appeal concerned only the offence of aggravated murder. Therefore, regardless of the decision

in this appeal, the appellant must be surrendered to Romania in relation to the offence of creating an organised criminal group in order to commit murder.

3. Section 44 of the Act of 2003 prohibits surrender in respect of offences committed outside the issuing state (in this case Romania) unless certain conditions are met.

4. 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.” (Emphasis added)

The phrase “European arrest warrant” was amended by the European Union (European Arrest Warrant Act 2003) (Amendment) Regulations 2021 (S.I. 150/2021) and now reads “relevant arrest warrant” but this amendment has no relevance to these proceedings.

5. As the emphasis on the word “and” demonstrates, the section requires two conditions to be met before surrender will be refused. It is the second of these conditions that is at issue in this appeal. That condition was at issue in the case of *Minister for Justice, Equality and Law Reform v. Bailey* [2012] 4 I.R. 1 (hereinafter, “*Bailey No. 1*”) and the plurality of judgments in that case are analysed in detail below.

6. The facts in *Bailey No. 1* are well known even beyond those who have a particular interest in extradition law. The case concerned a request by France for the surrender for prosecution of a British citizen, living in Ireland, for the murder in Ireland of a French citizen. Coincidentally, this appeal also concerns a murder committed in Ireland. The fact that both murders were committed *in Ireland* is not *per se* of relevance. It is the fact that the offence was committed *outside the territory of the issuing state* that engages consideration of the provisions of s. 44 of the Act of 2003 concerning surrender for extraterritorial offences.

7. As will be explained further in this judgment, when considering whether s. 44 prohibits surrender, a court must engage in an examination of a hypothetical counter-factual in order to decide whether the act or omission of which the offence consists would be an offence in respect of which Ireland would exercise extraterritorial jurisdiction. The net point on appeal concerns the identification of the extent of that counter-factual. The argument in the present case is whether (as the appellant contends) the hypothetical counterfactual is restricted to reversing the issuing state for Ireland in the description of the factual circumstances of the offence, an interpretation which would lead to the non-surrender of the appellant, or whether (as the Minister contends) the citizenship of the suspect should also be reversed.

8. The appellant's case is premised upon the fact that as Ireland (subject to a recently amended legal provision which is inapplicable to this appeal) would not exercise extraterritorial jurisdiction to prosecute a Romanian national for a murder committed in Romania (or anywhere outside the State) therefore s. 44 prohibits his surrender for the offence of aggravated murder. On the appellant's view, the relevant question to ask in the present case for the counter-factual is: "Would Ireland prosecute a Romanian national for the offence in question if committed in Romania?". As the answer to that question is no, the outcome should be refusal to surrender. However, the Minister's submission is that the relevant counter-factual includes a reversal of the citizenship of the requested person. In circumstances where Ireland would prosecute an Irish citizen for a murder committed outside the State, the Minister submits the appellant is liable for surrender. On the Minister's view, the relevant question to ask for the counter-factual is: "Would Ireland prosecute an Irish national for the offence in question if committed in Romania?". As the answer to that question is yes, the outcome would be to order surrender.

THE CERTIFIED QUESTIONS

9. The High Court certified that its judgment (delivered on the 9th March, 2020) involved

points of law of exceptional public importance and that it was desirable in the public interest that an appeal be taken to the Court of Appeal. The certified points of law are as follows:-

1. What factual circumstances, if reversed, should the High Court take account of the purpose of considering whether there is reciprocity for the purpose of s. 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?

FACTS

10. By European Arrest Warrant (hereinafter, “EAW”) issued on the 4th December, 2017, Romania sought the surrender of the appellant in respect of four offences: (i) creating an organised crime group (in order to commit murder), (ii) aggravated murder, (iii) attempt to commit aggravated murder and (iv) aggravated robbery. The EAW provided basic information in section (a) concerning the identity of the appellant, including the fact that he is a Romanian national.

11. Following the endorsement of the EAW in this jurisdiction pursuant to s. 13 of the Act of 2003, the appellant was arrested on the 3rd May, 2019 and brought before the High Court. He was remanded in custody and the proceedings were adjourned from time to time to permit preparation for the hearing and to obtain of further information.

12. In response to a request for further information made on the 11th July, 2019 enquiring as to the basis upon which Romania was exercising extraterritorial jurisdiction, the Romanian authorities replied on the 17th July, 2019. The relevant part of the response explained that extraterritorial jurisdiction was asserted under Article 9(1) of the Romanian Criminal Code in respect of offences committed by a Romanian citizen for which the punishment provided for by Romanian law is life detention or imprisonment for more than 10 years (which applied to the charge of aggravated murder).

13. As the High Court correctly held in the present case:-

“Under s.9 of the Offences Against the Person Act, 1861, as adapted by the Offences Against the Person Act, 1861 (s. 9) Adaptation Order, 1973, an Irish citizen is liable to be prosecuted in Ireland for any murder or manslaughter committed extraterritorially in another jurisdiction.”

It is appropriate to point out that under s. 3 of the Criminal Law (Extraterritorial Jurisdiction) Act, 2019 (hereinafter, “the Act of 2019”), Ireland now exercises jurisdiction over the offence of murder committed outside the State by a person who is *ordinarily resident in the State*. The appellant was resident in this State for 10 years prior to the offence being carried out in this jurisdiction. If this section were applicable s. 44 would not prohibit this appellant’s surrender even on the appellant’s argument. As the Minister has not however contended that this Act has any applicability to the present request for surrender, this judgment will consider Ireland’s position on extraterritoriality as it applied at the time the EAW was issued.

14. In respect of the three other offences before the High Court, Article 9(2) of the Romanian Criminal Code provided the necessary extraterritorial jurisdiction where the offences were committed outside the territory of Romania by a Romanian citizen “if the deed is provided as a crime also by the criminal law of the country where the deed was committed”.

15. With respect to the act comprising the offence of organising a criminal group in order to commit murder (being a conspiracy to commit murder), Ireland also exercises extraterritorial criminal jurisdiction where the offence is committed inside or outside the State, by an Irish citizen or a person who is ordinarily resident in the State and it constitutes a *serious offence* (defined in s. 70(1) of the Criminal Justice Act, 2006 as an offence for which a person may be sentenced to a period of imprisonment of 4 years or more) under the law of the place where the conspiracy was intended to take place (s. 71 of Criminal Justice Act, 2006). Even if this Court were to accept the appellant’s argument that the only counter-factual circumstance

that is to be reversed is the issuing State and Ireland, the appellant would still be liable to surrender because of the fact that he was ordinarily resident in Ireland. As the appellant cannot succeed on any basis it is correct that he has accepted, albeit belatedly, that he must be surrendered to Romania for prosecution of that offence.

16. The High Court refused to surrender the appellant in relation to the offences of attempt to commit aggravated murder and robbery on the basis that s. 44 prohibited the surrender in circumstances where Ireland did not exercise extraterritorial jurisdiction in relation to the acts or omissions of which those offences consist. The Minister did not seek leave to appeal against those findings.

HIGH COURT JUDGMENT

17. The only part of the High Court judgment relevant to this appeal is how the trial judge dealt with the issue under s. 44 of the Act of 2003 in respect of the offence of aggravated murder.

18. McDermott J. referred to *dicta* of Denham C.J. and Fennelly J. in *Bailey No.1*. In particular, he referred to the finding of the Chief Justice that Ireland could surrender in respect of extraterritorial offences where it would exercise such jurisdiction in reciprocal circumstances. Denham C.J. had gone on to find that the “*reciprocity in this case requires Ireland to examine its law as if the circumstances of the offence were reversed.*” The trial judge held that Fennelly J. found that surrender in that case could not take place because Ireland did not prosecute on the same basis as France.

19. McDermott J. stated at para. 39:-

“In this case, the Romanian authorities seek the extradition of a Romanian citizen who is amenable to prosecution under Romanian law for the murder alleged to have been committed in Ireland outside the territorial jurisdiction of Romania. In those circumstances, I am satisfied that, having examined the situation if

circumstances were reversed, an Irish citizen who is alleged to have murdered an individual outside the territorial jurisdiction of Ireland is amenable to prosecution for murder before the Irish Courts. I am satisfied that s. 44 enables Ireland to surrender the respondent in respect of a murder charge alleged to have been committed outside the territory of Romania in circumstances in which the Irish State would exercise extraterritorial jurisdiction in reciprocal circumstances. That is, it would seek to prosecute an Irish citizen who commits a murder, for example in Romania. I am, therefore, satisfied that there are no grounds upon which to refuse the respondents surrender in respect of the charge of aggravated murder. The Romanian authorities seek the surrender of the respondent, a Romanian citizen, for the murder of a Romanian citizen in Ireland: an Irish citizen who commits a murder abroad would be amenable to prosecution in Ireland for murder.

20. The trial judge went on to state at para. 40:-

“I am 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. If the amenability of the alleged wrong doer 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 under s. 44.”

21. Accordingly, he found that s. 44 did not prohibit surrender in the case of the charge of aggravated murder committed extraterritorially.

ANALYSIS

22. The parties accept that s. 44 represents Ireland's implementation of the optional ground for refusal to surrender set out in Article 4(7)(b) of the Framework Decision which provides:

“The executing judicial authority may refuse to execute the European arrest warrant:

(7) where the European arrest warrant relates to offences which:

- (a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or
- (b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.”

23. Counsel for the appellant submits that his case on appeal is quite straightforward and can be stated relatively succinctly. Counsel submits that the trial judge fell into error in transposing the citizenship of the appellant to that of Irish citizenship for the purpose of the hypothetical exercise mandated in *Bailey No. 1*. He submits that surrender in *Bailey (No. 1)* was refused in circumstances where Mr. Bailey was not an Irish citizen and therefore could not have been prosecuted for murder under the relevant provision of the Offences Against the Person Act, 1861. All four members of the court who formed the majority on this issue appear to have agreed on this. The appellant submits that want of reciprocity was a separate, distinct and additional reason for the refusal of surrender in that case, with at least one member of the Court (Hardiman J.) requiring that the issuing state exercise extraterritoriality on the same basis as Ireland.

24. The appellant's contention is that Ireland could not, assuming a reversal of the relevant circumstances, *prosecute* for the extraterritorial offence in the first place. The appellant submits that while there is undoubted complexity to the issues under consideration, it is vital

to emphasise that the factual scenario that the Court is considering in the present appeal is all but indistinguishable from *Bailey No. 1* save for the fact that the issuing state have identified as one of their grounds for the assertion of extraterritorial jurisdiction the fact of citizenship of the requested person (in *Bailey No. 1* the citizenship assertion was that of the victim). The core question is whether that is of any relevance in circumstances where Ireland does not, in any event, exercise jurisdiction on the appropriate hypothetical counterfactual. In other words, exercising extraterritoriality on the same basis is insufficient where Ireland would not *prosecute* on the same appropriate hypothetical counterfactual (reversal of states only).

25. Counsel submits that s. 44 presents challenges to interpretation which has been recognised expressly by all the members of the Supreme Court in *Bailey No. 1* regardless of their position on its interpretation. The written submissions are quoted at length from each of the 5 judges in *Bailey No. 1*. It was submitted that “the purpose of so doing is to demonstrate that, irrespective of the absence of reciprocity in that case, the majority of the Court was clearly of the view that because Mr. Bailey could not have been prosecuted on the relevant hypothetical counter-factual his surrender must be refused.”

26. In *Bailey No. 1* all members of the Supreme Court were in agreement that s. 44 presented difficulties of interpretation. Naturally, difficulties of interpretation do not prevent a Court from making an authoritative ruling on statutory provisions and the role of this Court is to apply the authoritative ruling of the Supreme Court in so far as it may be ascertained and is relevant to the facts of the present case. The parties have helpfully in their submissions, referred extensively to the various judgments in *Bailey No. 1*. I will consider the contents of the judgment in detail and address the submissions in light of those judgments.

27. It is perhaps helpful at this point to identify in shorthand the three types of approaches identified in the various Supreme Court judgments in *Bailey No. 1*:

a) The approaches (although not identical) of Denham C.J. and Fennelly J. This is a

“factual reciprocity”. This approach requires a hypothetical counter-factual scenario to be considered. The precise nature of the hypothetical counter-factual scenario process, namely whether the counter-factual only relates to the substitution of this State for the requesting State in relation to the offence in the warrant, is at the heart of the present case.

b) The approach of Hardiman J. This is reciprocity on a “shared basis jurisdiction”. Under this approach, both Ireland and the requesting country must exercise extraterritorial jurisdiction on the same basis *e.g.* both countries prosecute their own citizens in respect of murder committed anywhere.

c) The minority approach of O’Donnell J. This approach might be termed “category reciprocity”. Under this approach, so long as Ireland prosecuted the “same type of offence” as that set out in the EAW, the requested person would be liable to surrender.

This approach did not find favour with the majority in *Bailey No. 1*.

The Judgment of Denham C.J.

28. The judgment of Denham C.J. contains a detailed analysis of the origins of Article 4.7(b). At the outset of her judgment, she rejected the interpretation applied to s. 44 by the High Court judge. The High Court, having referred to the wording of s. 44 had held that it did not apply to an offence actually committed in Ireland.

29. In rejecting that interpretation, Denham C.J. referred to the provisions of Article 4.7 (a) and (b) and how they gave a choice of options for non-execution of a warrant. Section 44 was a choice to implement para. (b) of that option. Section 44 imposed two conditions. The first was that the offence was committed in a place other than the issuing state. The offence had occurred outside France so that condition was met. As for the second condition, Denham C.J. held that it was helpful to reorder the phrases so that it read “and the act or omission of which the offence consists does not constitute an offence under the law of the State, by virtue

of having been committed in a place other than the State.” She held these were clear words and are to be applied literally. The section prohibits the surrender of a person where the act of which the offence consists does not constitute an offence in Ireland, by virtue of having been committed (*i.e.* because it was committed) in a place other than Ireland.

30. Denham C.J. repeated that the EAW was based upon the concept of mutual trust and confidence between judicial authorities of the member states but stated that Article 4.7 and s. 44 reflect other principles also. She analysed the *travaux preparatoires* on Article 4.7. She stated that “[t]he concept of reciprocity has long been utilised by States in making extradition treaties.” She referred to Article 7 of the European Convention on Extradition, 1957 (hereinafter, “the 1957 Convention”), para. 2 of which permitted extradition to be refused for offences committed outside the territory of the requesting Party “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.” She referred to Article 26 which allowed for reservations and of which the explanation papers of the Convention stated: “Under the terms of Article 26, a reservation may be made in respect of [paragraph 7(2)], making it subject to reciprocity.” Thus, the 1957 Convention permitted reciprocity.

31. In considering the *travaux preparatoires* of Article 4.7, she noted that Ireland was one of the parties seeking to introduce additional grounds for optional non-execution. A compromise was reached and of relevance was “[a] territoriality clause making it optional to execute an arrest warrant in respect of offences committed in the executing State for acts which took place in a third state but which are not recognised as offences by the executing state.” Denham C.J. said that the roots of Article 4.7(b) are seen in Article 7 of the 1957 Convention and there is a clear line of thought through to Article 4.7(b).

32. Denham C.J. went on to say:-

“Whether one classifies it as an option as to extraterritoriality or reciprocity, art. 4.7(b) of [the Framework Decision], makes provision for an exception to the requirement of surrender which is a fundamental principle of the Framework Decision.”

She then referred to Blextoon and Van Ballegooij, *Handbook on the European Arrest Warrant*, (T.M.C. Asser Press, 2005) in chapter 6, *The Principle of Reciprocity*, by Harman van der Wilt at p. 74 in which the author stated:-

“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 similar circumstances. This section mirrors Article 7, section 2 of the European Convention on Extradition.”

33. Denham C.J. then referred to Irish law and held at paras. 42 and 43:

“Thus, applying the above law, Ireland could request France to surrender to Ireland an Irish citizen for an alleged murder committed in France. However, Ireland could not make a successful request to France to surrender to Ireland a citizen of the United Kingdom for the offence of an alleged murder committed in France. The act of murder in another state is not an offence which may be prosecuted in this State except where it is committed by an Irish citizen. There is no jurisdiction in Ireland to prosecute for an offence of murder committed outside the area of the application of the laws of the State, unless an ingredient in that crime is that the alleged offender was an Irish citizen.

It appears to me that the High Court Judge fell into error in adding the words ‘and other than this State’ to the words of s. 44 of the Act of 2003 in his analysis. The words of s. 44 are clear, are not ambiguous, and do not include the words ‘and other

than this State’.”

34. In her analysis, Denham C.J. was able to demonstrate that s. 44 did not prohibit surrender where the extraterritorial offence had been committed in this State. It should be emphasised that the Supreme Court accepted that s. 44 did not transpose Article 4(a) of the 2002 Framework Decision, which relates to offences committed in the territory of the executing member state. No such argument was made in this case. At para. 44 of her judgment, Denham C.J. discussed the root of s. 44 in the Framework Decision which itself had roots in Article 7 of the 1957 Convention. She held that s. 44 of the Act of 2003 and Article 4.7(b) of the Framework Decision, have roots in the system of reciprocity that existed under the earlier regime and this informs the construction of s. 44 of the Act of 2003.

35. Denham C.J. finally held at para. 45, as follows:

“I construe s. 44 of the Act of 2003 as enabling Ireland to surrender a person 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 extra-territorial jurisdiction in reciprocal circumstances. Ireland would not have jurisdiction to surrender to France a citizen of the United Kingdom for a murder committed in France. Applying s. 44, and the principles upon which it was founded, the appellant has established grounds to succeed on the first legal issue. The reciprocity that is required in construing s. 44 is a factual reciprocity concerning the circumstances of the offences. Offences that take place outside of the territory of a state require specification of the circumstances when 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. Here the circumstances are that a non-citizen of either the issuing or executing State is sought by the issuing State in respect of a murder of one of its citizens which took place outside the issuing State. The Court then must

determine under Irish law if Ireland could request the surrender of a non-citizen of either Ireland or the executing State in respect of a murder of one of its citizens which took place outside Ireland. 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. Thus, I would allow the appeal on this first issue. (Emphasis added).

36. The appellant accepts that the implication from the above *dicta* of Denham C.J. appears to be that the position would have been different if Mr. Bailey had been a French citizen. The appellant nonetheless submits Denham C.J. did not “go that far”. That would appear to be a difficult submission to make in the circumstances of the findings set out above. Moreover, the Chief Justice did not have “to go that far” because that was not the circumstance before her. The importance of her judgment is that she did hold that a factual reciprocity concerning the circumstances of the offences was required in construing section 44. I consider for reasons that will be explained more fully below, that the factual reciprocity in the present case is that the appellant must be considered an Irish citizen in the hypothetical counter-factual.

The Judgment of Murray J.

37. Murray J. expressly said in his judgment, having referred to the analysis carried out by Fennelly J. on the meaning and import of s. 44 that he agreed “*fully with the reasons and conclusions of Fennelly J. in this regard*”. He also stated: “*I also agree with the judgment of the Chief Justice on this point.*” I consider that Murray J. was therefore in agreement with both the Chief Justice and Fennelly J. While his explicit reference to the reasons and conclusions of Fennelly J. may have meant that he preferred the route by which Fennelly J. reached the conclusion, I think the more likely explanation is that he understood that both judges were, in substance, adopting the same interpretation of section 44.

The Judgment of Fennelly J.

38. Fennelly J. in his analysis of s. 44 first concentrated on the applicable approach to its interpretation. Although Article 4.7(b) was an opt out to the general requirement to surrender contained in the Framework Decision, Fennelly J. held that there was no reason in principle why the principle of conforming interpretation of national law in light of the wording and purpose of the Framework Decision should not be applied.

39. I will interrupt the narrative in respect of the judgment of Fennelly J. to make a couple of observations. My first is to note that the CJEU interprets the Articles of the Framework Decision, even those providing for optional grounds of refusal to surrender, “*such as to best ensure the objective pursued by that Framework Decision, which is to facilitate and accelerate judicial cooperation between Member States on the basis of the principles of trust and mutual recognition*” (*Tupikas* (Case C-270/17) at para. 87). The CJEU most recently did this in a preliminary reference from the High Court, *JR* (Case C-488/19), in which the second question concerned the applicability of Article 4.7(b) to a situation where the original sentence was imposed in a third country but recognised in the issuing state pursuant to an agreement on the transfer of sentenced persons. I will refer in more detail to that case later in this judgment.

40. A second observation is that the duty to apply conforming interpretation applies to all courts regardless of any previous domestic decision. For example, in the case of *Ognyanov*, (Case C-554/14), which dealt with the Framework Decision on the transfer of sentenced prisoners, the Grand Chamber of the CJEU stated at para. 70:

“In those circumstances, it is for the referring court to ensure that Framework Decision 2008/909 is given full effect, and if necessary to disapply, on its own authority, the interpretation adopted by the Varhoven kasatsionen sad (Supreme Court of Appeal), since that interpretation is not compatible with EU law (see, to that effect, judgment of 5 July 2016, Ognyanov, C-614/14, EU:C:2016:514, paragraph 36).”

The same principle was stated in *Poplawski* (Case C-579/15), a case concerning the 2002

Framework Decision. On that basis, it can be seen that if the interpretation of Article 4(7)(b) of the Framework Decision adopted in *Bailey No. 1* was not compatible with EU law, this Court would be bound to disapply that interpretation as a matter of law. If there was a doubt as to the correct interpretation of EU law, this Court would be entitled to refer the matter to the CJEU; an option not available to the Supreme Court at the time *Bailey No 1* was decided. Neither party has urged this Court for a preliminary reference, but both have kept, so to speak, that option in reserve. I will deal with that further below.

41. Turning back to *Bailey No 1*, Fennelly J. was satisfied that s. 44 had to be interpreted in conformity with Article 4.7(b) and therefore it was necessary to seek out the correct meaning of Article 4.7(b) of the Framework Decision. Like Denham C.J., Fennelly J. was satisfied that the argument that s. 44 did not apply because the offence was committed in Ireland was to be rejected. That would have been the case if the State had adopted the opt out contained in Article 4.7(a). He held that “*Article 4.7(b) applies where the offence specified in the warrant was committed outside the issuing Member State and, under its law, the executing Member State does not prosecute for the same offences.*” He then went on to consider whether s. 44, properly interpreted in the light of Article 4.7(b) prohibits surrender in this case.

42. In looking at the issue of reciprocity, Fennelly J. could not discern a general principle of reciprocity in terms of the 1957 Convention, identifying, at most, two provisions which recognise the possibility of making some provisions reciprocal. He acknowledged however that s. 8(1) of the Extradition Act, 1965 envisaged that the adoption by the Government by order of an intentional convention in relation to another country would depend on reciprocal facilities being offered by that country (and referred to the decision of Finlay C.J. in *Aamand v Smithwick* [1995] 1 I.L.R.M. 61 at p. 68 to that requirement in the context of basic requirements and guidelines). He noted that the leading textbook in the United Kingdom, Jones, *Jones on Extradition* (1st Ed., Sweet & Maxwell, 1995), indicated a similar

interpretation. The authors stated at p. 131 with reference to Article 7 of the 1957 Convention:-

“If a party requests extradition for an offence committed outside its territory, extradition may be refused only if the requested party’s law does not allow for a prosecution in equivalent circumstances”.

Fennelly J. explained that the UK legislation of 2003 implementing the Framework Decision appears to implement Article 4.7(b) by its definition of an extradition offence by reference to conduct which, *inter alia*, occurs outside the requesting country and *“in corresponding circumstances equivalent conduct would constitute an extraterritorial offence under the law of the relevant part of the United Kingdom...”*. Fennelly J. noted that the UK expression *“corresponding circumstances”* was used in UK extradition since 1967 and that was modified to *“equivalent circumstances”* in *Jones on Extradition*. It was a phrase reflective of the 1957 Convention.

43. Fennelly J. examined the nature of the reciprocity in Article 4.7(b), noting it did not require reciprocity in the sense that each member state must have adopted the opt out. Each member state decides independently whether to avail of the opt out. He concluded that:-

“it is still possible to interpret the provision as implying a reciprocal application of the respective laws of the issuing and executing states. By that I mean that Article 4.7(b) of the Framework Decision envisages that prosecution of the extra-territorial offences at issue should be subject to similar conditions in each State”.

Fennelly J. quoted *in extenso* from Farrell and Hanrahan, *The European Arrest Warrant in Ireland* (Clarus Press, 2011). Of particular note is the passage at para. 12.14 of the text, quoted by Fennelly, J. at [443], which includes the following:

“Provisions of this type can be found in extradition agreements from the late 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 where the roles were reversed.”

44. He notes that the authors considered that s. 44 was concerned with the hypothetical comparison of the legal provisions of the two states regarding extraterritorial offences; a far from straightforward exercise. The authors had queried how far the translation of the different elements of the offence must go. While this involves an assumption that the offence took place outside the State, the authors had posited that it was less clear where the requesting State asserted extraterritorial jurisdiction on a particular basis such as active personality (*i.e.* the respondent is a citizen of the requesting State and as such criminally liable for offences committed abroad). The authors had concluded *“the underlying principle of reciprocity would seem to predicate in favour of the court being restricted to considering whether extraterritorial jurisdiction could be exercised in theory on a similar case as opposed to on some other ground.”*

45. Fennelly J. stated that Article 7 of the 1957 Convention inspired Article 4.7(b) and although expressed in different terms, its effect was the same. If the term “same offences” was used in a literal sense in Article 4.7(b) it might refer to the actual offence but, clearly, in context, Fennelly J. concluded it did not. He said that the 1957 Convention used the expression “same category of offence” and that was how Article 4.7(b) should be interpreted.

46. Fennelly J. identified the nub of the case by reference to Article 4.7(b) as follows: *“[i]s the application of paragraph (b), however, defeated where, as here, the executing state prosecutes for the same type of offence but only on condition that the perpetrator is an Irish citizen?”*

47. He went on to hold:-

“[673] As a matter of Irish law, a person not a citizen of Ireland could not be prosecuted for the crime of murder committed outside Ireland. Adverting to the words of Article 4.7(b), it is not true that Ireland does not exercise extraterritorial jurisdiction

in respect of the crime of murder. Equally, it would not be true to say, without qualification, that Ireland exercises extra-territorial jurisdiction over the crime of murder. The question, ‘does Ireland prosecute for murder committed outside its territory?’ is not susceptible to a yes or no answer.

[674] The extra-territorial laws of Ireland and France are the converse of each other. A too literal interpretation of Article 4.7(b) leads, in my view, to an uneven, capricious and arbitrary result, well illustrated by the present case. The English-law concept of corresponding circumstances tends to a more consistent result. It obviously envisages more than the mere search for correspondence, which is, after all, provided for elsewhere in the Framework Decision.

[675] I believe that a sensible and fair interpretation of Article 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 extraterritorial 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 or she is an Irish citizen. (Emphasis added).

48. Fennelly J. proceeded to interpret s. 44 in the light of Article 4.7(b), noting that this could only be so interpreted as far as possible. The first part of s. 44 replicated the first part of Article 4.7(b) but the second part did not use corresponding language. He noted that two aspects of the second part were replicated. “*In a place other than the State*” corresponded with “*offences...committed outside its territory*” and the offence “*does not...constitute an offence under the law of the State.*”

49. Fennelly J. viewed the most problematic aspect of s. 44 to be found in the words “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”. Fennelly J. concluded at para. 455 onwards:-

“[455] My view is that, in the light of art 4.7(b) these words 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. The section relates to a hypothetical offence of murder. Thus, without doing any significant violence to the language of the section, the term, ‘does not,’ is necessarily a reference to what Irish law provides for in such a situation. Looking at it as a grammatical problem, the use of the indicative form, ‘does not,’ is equivalent to the conditional, ‘would not’ and could, if necessary, be so read. However, that may not be necessary. Once the question is recognised as being hypothetical, the issue is whether, the crime of murder generally, when committed outside Ireland ‘constitute[s] an offence under the law of the State’ (s. 44 of the Act of 2003).

[456] In such a hypothetical situation, the question is whether the offence ‘does not’, ‘by virtue of having been committed in a place other than the State constitute an offence under the law of the State’.

[457] The final lines of s. 44 of the Act of 2003 are: ‘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’. If the words were inverted to read as follows, they would be: ‘the act or omission of which the offence consists does not ... constitute an offence under the law of the State, by virtue of having been committed in a place other than the State’.

[458] *In this way, s. 44 of the Act of 2003 can be made compatible with art. 4.7(b) of the Framework Decision without doing violence to the words, but merely by placing them, for better understanding, in a different order.*

[459] *In my view, it is perfectly possible to interpret s. 44 of the Act of 2003 in conformity with art. 4.7(b). Under that provision, correctly interpreted, the surrender of the appellant is prohibited for the following reasons. Firstly, the offence specified in the European arrest warrant was committed outside France, the issuing member state. Secondly, murder committed outside Ireland is not an offence under Irish law, unless the alleged perpetrator is an Irish citizen. Interpreted in the light of the Framework Decision, s. 44 applies where Ireland would not have the power to prosecute on the same basis as France: under Irish law, a person who is not an Irish citizen cannot be prosecuted for a murder committed outside Ireland.” (Emphasis added).*

The Judgment of Hardiman J.

50. The final judgment for the majority on the issue of s. 44 is that of Hardiman J.. It is appropriate to point out that Hardiman J., who agreed with the historical analysis of Fennelly J., also stated:-

“Having regard to 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, I agree with the Chief Justice that there is no reciprocity between Ireland and France on the facts of this case.”

51. In interpreting s. 44, Hardiman J. also cited with approval the authors of *The European Arrest Warrant in Ireland*. He agreed with the view expressed therein that the section enjoins a hypothetical test. That construction arises from the words of s. 44 and from their being rooted, *via* Article 4.7(b) in the principle of reciprocity. While he entirely agreed with Fennelly

J.'s lucid treatment of the historical origin of the principle, he said that he felt able to go further than Fennelly J. He considered it *"clear that a principle of reciprocity underlines the extradition of suspects accused of committing extraterritorial offences. It was unnecessary to consider the need for reciprocity in other circumstances"*.

52. Hardiman J. also cited the *Handbook on the European Arrest Warrant*. He went on to say at para. 354 that:-

"[h]aving regard to 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, I agree with the Chief Justice that there is no reciprocity between Ireland and France on the facts of this case."

53. Hardiman J. also said that he wanted to emphasise his agreement with the contents of the judgment of Fennelly J. from para. 355 onwards (see above). He stated: -

"Viewed in that light, I agree that the second phrase of s. 44 of the Act of 2003 can only refer to a corresponding but (for that very reason) hypothetical offence of murder committed outside Ireland. I also agree that the issue is whether the crime of murder generally, when committed outside Ireland would 'constitute an offence under the law of the State' (s. 44 of the Act of 2003)."

54. Hardiman J. noted the ingredients of the offence alleged; it was a crime committed not only outside France, but in Ireland. He said that if the position were reversed, a murder outside Ireland is not a crime in Irish law, unless committed by an Irish citizen. The appellant is not an Irish citizen. He held:-

"section 44 of the Act of 2003 operates to preclude his forcible delivery to France because Irish law does not confer a power to prosecute on the same basis as France: there is an absence of reciprocity.

I would refuse to deliver Mr. Bailey to France on this ground independently."

The Judgment of O'Donnell J

55. O'Donnell J. gave a dissenting judgment on this issue. Both parties in this case accept that his judgment is helpful in that it assists in the understanding of the majority judgments as it clarifies the interpretation that they rejected.

56. O'Donnell J. commenced by examining the argument put before the Court by the Minister to the effect that s. 44 did not apply because the offence was committed in Ireland. It is unnecessary for present purposes to outline precisely why O'Donnell J. rejected that argument. It is sufficient to say that, in coming to this conclusion, he noted that it would be extremely restrictive of surrender when the general thrust of the Framework Decision and the Act of 2003 is to facilitate surrender on the basis of trust in the issuing state's legal system.

57. Like his other colleagues, O'Donnell J. turned to Article 4.7(b) for assistance in the interpretation of s. 44 of the Act of 2003. He did so because the provisions of the section "were not clear". His view was that Article 4.7(b) applied to the exercise of any extraterritorial jurisdiction by the issuing state, including the exercise of such jurisdiction in respect of the territory of the executing state. On this reading, executing states have three options in respect of offences alleged to have been committed in whole or in part on their territory: surrender in all cases (if Article 4.7 is not implemented at all); surrender in no cases (if ss. (a) of Article 4.7 is implemented); and an intermediate provision which is provided by Article 4.7(b) of the Framework Decision.

58. In terms of that intermediate test, he proceeded on the basis that it was most productive to approach this difficult provision by seeking to interpret Article 4.7(b) of the Framework Decision first and then to consider if the section in the Act of 2003 can be read compatibly with it. He said that when faced with an unfamiliar and impenetrable text it was tempting to resort to familiar legal concepts such as in this case, reciprocity. Caution had to be exercised. O'Donnell J. stated:

“It is easy to reason in apparently logical steps, that reciprocity naturally comprehends that if a situation was reversed, the executing state would do the same; that ‘doing the same’ implies an identity (rather than similarity) of jurisdiction, which self-evidently is not present here; that Ireland's law on extraterritorial jurisdiction does not mirror that of France; that accordingly reciprocity is not present, and that therefore the appellant cannot be surrendered. However that reasoning occurs at some distance from the words of either the article or the section, and indeed is almost independent of them. It follows from the premise that the section embodies reciprocity, rather than from the words of either the article or the section. But that begs, rather than answers the question, whether either the section or the article embody the concept of reciprocity.”

59. In his view, reference to the concept of reciprocity in this context was not helpful and particularly as the starting point may be positively confusing. He referred to reciprocity in extradition reflected in the clear language of s. 8 of the Extradition Act, 1965. Extradition law may provide that surrender is not to take place unless the same circumstances apply between states and he referred to reciprocity with regard to the surrender of one’s own citizens. In terms of Article 4.7 this type of reciprocity did not apply as it was not depending on what the issuing state would do, it was asking a question of the law of the executing state.

60. According to O’Donnell J., Article. 4.7(b) could be read most intelligibly and simply as giving a power to executing states to refuse to execute an EAW when two conditions are satisfied. The first condition (where the warrant relates to an offence which has “been committed outside the territory of the issuing Member State”) is a purely factual inquiry which can be answered by recourse to the warrant itself. The second condition related to an inquiry as to the law of the executing state.

61. O’Donnell J. then considered the natural understanding of the word “offence” or “same

offences” as being the correct one and in the case before him, it related simply to murder. Article 4.7(b) therefore permits or requires an executing state to refuse surrender where the EAW relates to an offence of murder, committed outside the territory of the issuing Member State where the law of the executing Member State does not allow prosecution for that offence when committed outside its territory. As Ireland exercises extraterritorial jurisdiction for murder, that was all that was required. The Article did not require analysis of the precise basis upon which Ireland or any other executing State may exercise extraterritorial jurisdiction for that offence, it was enough to exercise such jurisdiction in the case of that offence. This interpretation had the benefit of being consistent with the use of the words “does not” in both Article 4.7(b) and s. 44 of the Act of 2003. The “same offences” in Article 4.7(b) and “offence” in s. 44 refer back to the same offence to which the EAW relates. This offence is the one selected from Article 2.2 of the Framework Decision or is the offence in the law of the Member State which is found to correspond with the offence specified in the warrant.

62. In the view of O’Donnell J., a focus on how Ireland defines the offence of murder would reintroduce a general principle of double criminality expelled by Article 2.2 of the Framework Decision and much diluted by Article 2.4 of the Framework Decision. The sole permissible ground for non-surrender was if *“the matter is not capable of being treated as an offence by virtue of its extraterritorial location.”* (Emphasis in original). In the remaining paragraphs of his judgment on this issue, O’Donnell J. referred to background material in support of his conclusion.

The outcome in Bailey No. 1

63. The outcome of *Bailey No. 1* was that by a majority of 4-1 the Supreme Court decided that s. 44 prohibited the surrender of the appellant Mr. Bailey to France. That result came about because it did not matter whether the question asked was either “was factual reciprocity satisfied?” or “was same basis of jurisdiction reciprocity satisfied?”, the answer to both

questions was “no”. Ireland, at that time (and at the relevant time for the purpose of this case) did not exercise extraterritorial jurisdiction for murder allegedly committed by a *non-citizen* outside the territory of the State. This applied regardless of whether the victim was Irish. Thus, no factual reciprocity was established. Also absent was any “same basis of jurisdiction” reciprocity as, unlike France, which was exercising jurisdiction on the basis of the French citizenship of the *victim*, Ireland does not (and did not) exercise jurisdiction on that basis, but rather on the basis of the citizenship of the accused person.

Bailey No. 3

64. Surrender of Mr. Bailey having already been twice refused, the French judicial authorities sent a third request for his surrender following his subsequent conviction in France of the offence of murder. Burns (P) J. in *Minister for Justice and Equality v. Bailey* [2020] IEHC 528 (hereinafter, “*Bailey No. 3*”) refused his surrender on a number of grounds. The Minister did not seek leave to appeal that decision. One of the grounds upon which Burns (P) J. found that his surrender was prohibited was because of s. 44 of the Act of 2003.

65. The appellant relied on aspects of the process by which Burns (P) J. reached his conclusions. Burn (P) J. having examined the relevant judgments in *Bailey No. 1* drew the following conclusions from his review:

“(i) article 4.7(b) of the Framework Decision and s. 44 of the Act of 2003 incorporate a principle of reciprocity;

(ii) article 4.7(b) of the Framework Decision and the latter part of s. 44 of the Act of 2003 are concerned with a hypothetical exercise whereby the State is substituted for the requesting state in relation to the offence in the warrant;

(iii) the concept or principle of reciprocity goes further than a mere requirement that the executing state also exercise some form of extraterritorial jurisdiction in respect of the particular category of offence;

(iv) the concept or principle of reciprocity requires reciprocity as between the respective bases on which both the issuing member state and executing member state exercise such extraterritorial jurisdiction;

(v) the extraterritorial laws of Ireland and France were the converse of each other, as the basis for the Irish exercise of extraterritoriality was, at the time, the nationality of the alleged offender, whereas the basis for the French exercise of extraterritoriality was the nationality of the victim; and

(vi) as the requisite reciprocity was not present, surrender was prohibited by s. 44 of the Act of 2003.”(Emphasis added).

66. Burns (P) J. refused to surrender on the following basis: -

“Applying the interpretation of s. 44 of the Act of 2003 as set out in Bailey No. 1, and in Pal, to the current application, I note that Irish law has now been amended so that Ireland now exercises extraterritorial jurisdiction in respect of murder, not only where the alleged offender is an Irish citizen, but also where the alleged offender is ordinarily resident within the State. Mr. Bailey is, and was at all material times, ordinarily resident within the State, and therefore Ireland could exercise an extraterritorial jurisdiction over him as regards an offence of murder committed outside of Ireland. However, that amendment has not brought about a reciprocal basis as between France and Ireland in respect of the exercise of extraterritorial jurisdiction for the offence of murder in this case. The French basis for extraterritoriality in this case remains the nationality of the victim, whereas the Irish basis for any such extraterritoriality is the nationality or ordinary residence of the alleged perpetrator. That being the case, the surrender of the respondent remains precluded by virtue of s. 44 of the Act of 2003.”

The outcome in Bailey No. 3 and the parties’ submissions on the decision

67. Therefore, unlike *Bailey No. 1*, where neither ‘factual reciprocity’ nor ‘same basis of jurisdiction’ reciprocity was present, in *Bailey No. 3*, Burns (P) J. considered that factual reciprocity was present (in light of the legislative change) while ‘same basis of jurisdiction’ reciprocity was not. Having taken the view that *Bailey No. 1* required both to be satisfied, he concluded that in the absence of the same basis of jurisdiction for extraterritorial jurisdiction as between France and Ireland, there could be no surrender.

68. The appellant submitted that the first part of the exercise which Burns (P) J. conducted was to ascertain whether Ireland could prosecute for the offence on the basis of the hypothetical counter-factual. He found that, under the provisions of the Act of 2019, Ireland could so prosecute as it had extended the reach of prosecution for murder to those persons resident in the jurisdiction for 10 years. Thus, there had been a change since the decision of the Supreme Court in *Bailey No. 1*. However, Burns (P) J. went on to find that by reason of the fact that France was seeking to assert jurisdiction on a basis that Ireland could not (*i.e.* citizenship of the victim rather than the suspect) that this aspect of the test identified in *Bailey No. 1* still could not be satisfied.

69. The appellant was not necessarily submitting that Burns (P) J. was correct in his view that what was required was a precise identity of the basis for reciprocity as the appellant conceded that the judgment of Fennelly J. may not necessarily be correctly understood in that light. This was, the appellant submitted, the basis upon which Hardiman J. had refused surrender in *Bailey No. 1*. Indeed, it is helpful to observe at this point that if the appellant’s sole submission was that all *Bailey No. 1* required was reciprocity as between the respective bases upon which the issuing state and Ireland exercise extraterritorial jurisdiction, surrender would have to be ordered. There is a *precise* reciprocity in the present case as to the basis on which Romania prosecutes extraterritorially for murder. It is on the basis of the alleged

perpetrator being a Romanian citizen. This is precisely the same basis for the claim of extraterritorial jurisdiction as that set out in the Offences Against the Person Act, 1861.

70. Instead, the appellant's submission is centred on finding (ii) of Burns (P) J., *i.e.* that “*article 4.7(b) of the Framework Decision and the latter part of s. 44 of the Act of 2003 are concerned with a hypothetical exercise whereby the State is substituted for the requesting state in relation to the offence in the warrant”.*

(Emphasis added). The appellant's submission is that the provisions of s. 44 demand a counter-factual situation where the requested person must be prosecutable if the only change is the place of commission of the offence *i.e.* a place outside the jurisdiction of this State.

71. In *Bailey No. 3*, the Minister had invoked the provisions of s. 3(5) of the Act of 2019 in submitting that the circumstances had changed. That section permitted a person who was ordinarily resident in this jurisdiction to be prosecuted for the offence of murder committed outside the jurisdiction of Ireland. That section was not utilised by the Minister in this case and it forms no part of this judgment. The Minister's submission in *Bailey No. 3* however was that as the jurisdiction to prosecute extraterritorially was no longer limited to the situation of an Irish citizen, this prohibition on surrender no longer applied.

72. Burns (P) J. was of the view that Hardiman J. held that the reciprocity required by s. 44 was that of the extraterritorial jurisdiction being operated on the same basis. He also construed the judgment of Fennelly J. as requiring reciprocity between the respective States as regards *the basis upon* which the extraterritorial jurisdiction is exercised. Burns (P) J. held that the reference in para. 455 to “in the same circumstances” should be read as a reference to “on the same basis”.

73. Burns (P) J. went on to say that if it was open to him he would have preferred the approach of O'Donnell J. He did however apply the reciprocity test that he held *Bailey No. 1* required. He held that although Mr. Bailey could now be prosecuted as an Irish resident for

an offence of murder committed outside the territory of Ireland, the fact that France operated its extraterritorial jurisdiction on the basis of nationality of the victim meant that there was no reciprocity.

74. Separately, Burns (P) J. held that the surrender of the respondent was precluded by virtue of an accrued or vested right on the part of Mr. Bailey to the benefit of previous judicial determinations refusing such surrender, which he had not been divested of by virtue of the enactment of the Act of 2019. He also found that he was bound by the determination in *Bailey No. 2* that the application was an abuse of process. The Minister did not seek leave to appeal against the decision.

Identifying the approaches to section 44 of the Act of 2003

75. It is a curious feature of the present case that the appellant relies on some aspects of the findings of Burns (P) J. but not on his finding that Fennelly J. had held that reciprocity required, with reference to the hypothetical offence, that the exercise of extraterritorial jurisdiction by Ireland must be on *the same basis* as the issuing state. Of course, the appellant had to avoid the latter approach because if the requirement of reciprocity means exercising jurisdiction *on the same basis* in the present case, the appellant must be surrendered. Romania and Ireland exercise extraterritorial jurisdiction for the offence of murder on precisely the same basis: the nationality of the suspect.

76. Instead the appellant's argument is that the correct approach, which is identifiable in *Bailey No 1*, is a hypothetical counter-factual exercise in which only the country in which the offence is perpetrated is transposed. His argument is therefore directed towards identifying the correct counter-factual which Burns (P) J. attributed to Fennelly J. in *Bailey No. 1*; the substitution of this State for the issuing state in relation to the offence on the warrant.

77. It is not necessary for this Court to assess whether Burns (P) J. was correct in his ultimate finding that the majority in *Bailey No 1* held that it was a requirement of s. 44 that, in

addition to Ireland being able to prosecute the offence extraterritorially, that reciprocity required that Ireland and the issuing state exercise that jurisdiction on precisely the same basis. As set out above, this is because in the present case such a shared basis can be readily identified. The only issue therefore is whether the relevant counter-factual is restricted to a transposition of the issuing state and Ireland.

DETERMINATION

78. Counsel for the appellant accepted that reciprocity was a factor in the decision under s. 44 (and Article 4.7(b) of the Framework Decision) on when surrender may be refused for extraterritorial offences. In his submission however, the concept of reciprocity was an exercise of sovereignty by a State who may make a decision to retain jurisdiction over the prosecution of certain persons found in their territory when the offence for which they are required were not committed on the territory of the other Member State. Thus, he submitted, reciprocity informed the interpretation of s. 44 but it had to be remembered that reciprocity was not to be understood as a matter of rule of law. Ireland was free to delineate the circumstances in which it would permit such surrender and it had done so in the present case by limiting the circumstances in which surrender would be ordered to that where Ireland would prosecute for the same offence if it had been carried out in another jurisdiction. The hypothetical counter-factual basis upon which the reciprocity must be examined, counsel submitted, was identified as a limited counter-factual by the majority in *Bailey No. 1*.

79. The appellant submitted that the trial judge in the instant case erred in transposing the *citizenship* of the respondent to that of Irish citizenship for the purpose of the hypothetical exercise. He submitted that was neither permissible or logical. The appropriate question to ask was: “Could Ireland prosecute a Romanian citizen for an offence of murder in Romania (or anywhere else)?” and not “Could Ireland prosecute an Irish citizen for an offence of murder committed outside Ireland?”.

80. The appellant submitted that the situation in the present case is the precise converse to that arising in *Bailey No. 3*. Although the issuing state exercises jurisdiction on the basis that its own nationals are suspects (in addition to victims) this does not resolve the issue as to whether Ireland would prosecute the respondent assuming a reversal of the relevant circumstances. The relevant circumstance, from the perspective of an assertion of Irish extraterritorial jurisdiction, is not the fact that he is a citizen of the issuing state – rather it is the fact that he is *not* an Irish citizen.

81. According to the appellant, this flows logically from the requirements of s. 44 which, in the first instance, requires the Court to consider whether Ireland could prosecute in the *same* circumstances. Those circumstances are necessarily identified by the dictates and requirements of Irish law – and not the law of the issuing state. From 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.”

82. The appellant submits that that the Minister’s approach is to take the view that because he is sought by his country of nationality, the appropriate hypothetical is to assume for the sake of the exercise that he is Irish. The appellant submits that this makes no sense. It would permit the exercise to be approached by reference to the dictates of the legal system in the issuing state and not those of Irish law in general and the provisions of the Offences Against the Person Act, 1861 in particular. Not only does it fly in the face of the words of s. 44 but it would require an entirely different analysis in cases where the issuing state was not the country of nationality of the person sought.

83. The appellant submits that the primary difficulty with the Minister’s case is that it

ignores the fact that on a straightforward application of the hypothetical counter-factual the appellant could not be prosecuted on an extraterritorial basis. The appellant submits that the Minister is ignoring the first leg of the analysis entirely *i.e.* the ability to prosecute on an extraterritorial basis.

84. The Minister on the other hand submits that the approach of the appellant would, if correct, produce an absurd result. In the Minister's submission, if the appellant was correct in his submission that reciprocity made it necessary that the requested person be an Irish citizen, the EAW would only be executed in *either* Member States that had not exercised the opt out provided for in Article 4.7(b) *or* in whichever Member State the requested person happened to be a citizen of. Aside from submitting that this would be an entirely random outcome, the Minister submitted it would also have the effect that the only Member State (save those who had not exercised the opt out) that could surrender would be the one of which the requested person was a national. Although the Framework Decision did not permit a blanket refusal against surrendering a Member State's own nationals, the outcome suggested would nonetheless, represent an astonishing reversal of traditional extradition practice (which, in fact, is partly reflected in the Article 4(6) opt out), which relates to a situation where the executing state may undertake to execute the sentence in its own jurisdiction. The Minister's argument appears directed towards the incongruous position of this State *vis-à-vis* the provisions of Article 4(7) of the Framework Decision in terms of its duties if such an interpretation was correct. The appellant's argument is directed towards a stand-alone interpretation of s. 44 of the Act of 2003.

85. The Minister submitted that the High Court judge correctly applied the law to the facts of this case. Acknowledging some difficulties identifying the precise basis of the Supreme Court decision in *Bailey No. 1*, the Minister submits that the judgments are consistent with the conclusion that if the executing Member State exercises extraterritorial jurisdiction on the

same basis as the issuing Member State, surrender is not prohibited. Furthermore, it was submitted that even if the judgments are not crystal clear, they are also consistent with the conclusion that if the facts when reversed would confer extraterritorial jurisdiction on Ireland, surrender is not prohibited by section 44. Both approaches are satisfied in this case.

86. The Minister submitted that when considered in its entirety, the treatment by Hardiman J. of the subject at paras. 347 to 360, includes a consideration of corresponding circumstances. As a matter of fact, Ireland and Romania do exercise extraterritorial jurisdiction on the same basis.

87. From the foregoing exposition of the judgments in *Bailey No. 1* a consensus emerges that s. 44 is to be interpreted in light of the wording and purpose of the Framework Decision together with the provisions of Article 4.7(b) thereof. The majority views expressed in the judgments of Denham C.J., Fennelly J. and Hardiman J. apply a principle of reciprocity to the provision. It is not a principle of reciprocity that might be found in other areas of extradition law (*e.g.* a refusal to extradite one's citizens unless the requesting country also does). The issuing state may not necessarily utilise the "opt-out" provisions of Article 4.7(b) even though the executing state does so. For the purpose of establishing the "offence" as per s. 44 or "same offences" as per Article 4.7(b), reciprocity informs that decision.

88. In my view, the judgment of Denham C.J. gives the greatest clarity in her reference to s. 44 enabling surrender where this State would exercise extraterritorial jurisdiction in reciprocal circumstances. Reciprocity requires this State "*to examine its law as if the circumstances of the offence were reversed.*" (Emphasis added). She identifies those circumstances as being "*a non-citizen of either the issuing or executing state is sought by the issuing State in respect of a murder of one of its citizens which took place outside the issuing State.*" (Emphasis added). The issue was whether this State could request the surrender of a non-citizen of either Ireland or the executing state in respect of the murder one of its citizens

which took place outside the State. As Ireland did not have that jurisdiction, there could be no surrender.

89. I have no doubt that the application of the test identified by Denham C.J. would lead to the surrender of this appellant. The relevant circumstances are that the issuing State is requesting the surrender by this State (the executing State) in respect of an offence of murder committed outside its jurisdiction by one of its citizens. In those circumstances, the answer to the question of whether Ireland could request surrender in respect of the offence of murder allegedly carried out by one of its own citizens that took place outside the State, is an emphatic yes. This applies regardless of whether the victim is a citizen of the issuing state (as here), of Ireland or of a third country. In the circumstances there is a reciprocity on the reversed circumstances of the offence.

90. At this point, I would add that I see nothing in the decision of Denham C.J. to distinguish between an offence for which Ireland could seek surrender and an offence for which Ireland could prosecute on an extraterritorial basis. Ireland could only seek surrender for an offence for which it is entitled to prosecute. Article 1.1 of the Framework Decision expressly requires that the request is for the purpose of conducting a criminal prosecution, unless of course there has already been a conviction and sentence. It would be a grave violation of the principle of mutual trust for Ireland to seek surrender where there was no basis in Irish law for prosecuting the offence.

91. With regard to the judgment of Fennelly J. (with whom Murray J. agreed on this issue), I disagree with the appellant's suggestion that para. 450 thereof "leaves no room for the contention that citizenship of the issuing state is something which could lead to a different result". On the contrary, I am of the view that there is significant convergence between the approach of Fennelly J. and the approach of Denham C.J., in so far as the reciprocity is "*in respect of offences of the type specified in the warrant in the same circumstances*".

92. In the immediately preceding paragraphs, Fennelly J. referred to the English law concept of corresponding circumstances, which he stated tends to a more consistent result, although Article 4.7(b) envisages more than a mere search for correspondence. The English approach was examined by Fennelly J. earlier in his judgment, paras. 438 to 440, where he noted that the authors of *Jones on Extradition* equate the concept of *corresponding circumstances* with *equivalent circumstances*. He further observed that this approach has been used consistently in UK legislation since 1967 (reflecting Article 7.2 of the 1957 Convention). I agree with the Minister's submissions, that in approving of the English approach in para. 449, Fennelly J. was adopting the approach of considering the issue from the perspective of corresponding or equivalent circumstances. In this case, Romania seeks the surrender of one of its citizens. In the corresponding or equivalent circumstances, Ireland would be able to prosecute one of its citizens for extraterritorial murder and hence the prohibition in s. 44 does not apply.

93. I also find that the correct interpretation of the judgment of Fennelly J., read as a whole, is that he refused surrender of Mr. Bailey because when the hypothetical exercise of reversing the facts was carried out or, to put it another way, the equivalent circumstances were examined, Ireland did not have jurisdiction to prosecute a third country national for a murder committed outside its territory. In short, Ireland did not exercise jurisdiction to prosecute a non-Irish citizen for a murder committed in France or other state outside Ireland.

94. I would also observe at this point that there is something to be gained from looking at the concept of reversed circumstances as they apply when a court is assessing whether there is correspondence of offences (double criminality). The court must look at the "act or omission" under s. 5 (not coincidentally it seems to me the same phrase used in s. 44) and apply those facts as if they occurred in this jurisdiction. That too engages a consideration of what facts are to be relevant for the assessment. It may not simply be a case of taking the facts entirely from

the warrant and only substituting Ireland for the name of the requesting state where it appears in the description of the facts in the warrant.

95. I am mindful of the fact that the appellant has sought to distinguish the approach to correspondence under s. 5 from the approach to extraterritoriality in s. 44. He appears to do so on two separate bases. The first is that s. 5 refers to a specific date from which to assess correspondence (the date of issue of the EAW) and no such date appears in s. 44 of the Act of 2003. The second is that s. 5 refers to the act or omission being committed in the State and therefore the legislation requires a clear transposition of the facts. In relation to the matter regarding the date of comparison, the appellant makes reference to the fact that the Minister relied upon the provisions of the Act of 2019 in *Bailey No. 3* but not in the present case. I do not consider that of particular relevance to whether the approach to correspondence can assist in understanding the approach to the counter-factual for the purpose of s. 44. Even if s. 44 is silent as to date, the Court would have to pick some date (date of offence, issue of warrant, date of arrest or date of hearing of the application) on which to undertake the appropriate test. The actual date has no impact on the test to apply (although it could have an impact on the outcome if the law had changed between any one of those dates). As regards the second matter, as indicated above, the wording of both sections is similar. I consider it sufficiently similar that it is at least worthwhile in looking at how the courts must approach the transposition of “act or omission” for the purpose of assessing correspondence.

96. I consider therefore, that the case of *Minister for Justice & Equality v. Szall* [2013] 1 I.R. 470 provides useful insight into what are the relevant factual matters that must be transposed when conducting an analysis of whether an offence can be said to correspond with an offence in this jurisdiction. In that case the Supreme Court grappled with an offence which involved a breach of a statutory regime. Clarke J. (as he then was) noted that:-

“[s]trictly speaking, therefore, an Irish offence which involves, as an important

ingredient, reference to an Irish statutory scheme, cannot have a strict equivalent offence in any other country for the Irish statutory scheme will not apply in that other country even though that requesting country may have its own (and perhaps quite similar) statutory regime.”

97. It is helpful to consider what is meant by a reference to an Irish statutory scheme as an important ingredient of the offence. Clarke J. stated:-

“To interpret the requirement of correspondence in a way which would exclude the possibility of correspondence in cases where the relevant Irish offence was defined by reference to compliance with or breach of an Irish statutory regime and where the offence in the requesting state did not also make reference to the relevant Irish statutory scheme would, as a matter of reality. (sic) exclude from the ambit of correspondence any offences which come within the scope of what I have described as breach of regime cases”.

Clarke J. held this did not seem to be the intention of the Oireachtas. Instead he held:-

“Where, therefore, the offence specified in the relevant European Arrest Warrant involves the same acts or omissions by reference to a regime in the requesting state then, at least at the level of principle, correspondence can be established provided that there is a sufficient similarity between the respective regimes to justify the conclusion that the substance of the acts or omissions which amount to offences in the respective jurisdictions is the same even though the specific relevant regimes will necessarily be, as a matter of law, different, emanating as they will from the legal systems of the two separate jurisdictions.”

98. Clarke J. had been assisted in reaching this conclusion by reference to the decision of the House of Lords in *Norris v. Government of the United States of America* [2008] 1 A.C. 920, the single judgment of which had cited the opinion of Lord Millett in *R(Al-Fawwaz) v.*

Governor of Brixton Prison [2002] 1 A.C. 556. The latter case involved a conspiracy to murder American citizens, officials, diplomats and others both in the United States and elsewhere. Clarke J. cited the following passage of Lord Millett, at paras. 109 - 110:-

“Given that the court is concerned with an extradition case. (sic) the crime will not have been committed in England but (normally) in the requesting state. So the test is applied by substituting England for the requesting state wherever the name of the requesting state appears in the indictment. But no more should be changed than is necessary to give effect to the fact that the court is dealing with an extradition case and not a domestic one. The word 'mutandis' is an essential element in the concept; the court should not hypothesise more than necessary.

The one point to which I would draw attention is that it is not sufficient to substitute England for the territory of the requesting state wherever that is mentioned in the indictment. It is necessary to effect an appropriate substitution for every circumstance connected with the requesting state on which the jurisdiction is founded. In the present case the applicants are accused, not merely of conspiring to murder persons abroad (who happen to be Americans), but of conspiring to murder persons unknown because they were Americans. In political terms, what is alleged is a conspiracy entered into abroad to wage war on the United States by killing its citizens, including its diplomats and other internationally protected persons, at home and abroad. Translating this into legal terms and transposing it for the purpose of seeing whether such conduct would constitute a crime 'in England or within English jurisdiction', the charges must be considered as if they alleged a conspiracy entered into abroad to kill British subjects, including internationally protected persons, at home or abroad.” (Emphasis added).

99. The importance of isolating the essence of the criminal acts alleged, in their bearing

upon the charge in question, had long been identified in a Canadian case of *In re Collins (No. 3)* (1905) 10 CCC 80. That case was cited approvingly in *Norris v. The Government of the United States of America* and in the judgment of Clarke J. In *In re Collins* the USA sought the extradition of Mr. Collins on a charge of perjury alleged to have been committed in California. It was contended that extradition should be refused on the basis that it was not unlawful under Canadian law to make a false deposition before a competent Californian tribunal or officer. The Canadian Court (Duff J.) held that the substance of the criminality charged was not that he took a false oath before AB but that he took a false oath before an officer who was authorised to administer the oath. Duff J. concluded that any other view would simply make nonsense of the extradition treaty.

100. Clarke J. cautioned against applying authorities from different jurisdictions as the statutory wording could be different but held that the decision in *Norris* was a persuasive precedent. For the purpose of establishing correspondence of offences, it was the essence of the acts in their bearing of the criminality alleged. It is of note that as far as assessment of correspondence is concerned, to transpose relevant circumstances as to jurisdiction may sometimes make it more difficult to establish correspondence (*e.g.* transposition of the place of the offence in the *Al Fawwaz* case) or easier in some situations (*e.g.* transposition of the identity of the victims in *Al Fawwaz* or of the statutory body in the *Norris* case).

101. When the case of *Minister for Justice and Equality v. Szall* was raised with counsel for the appellant in the course of the hearing, counsel made reference to the wording of the phrase “if [the act or omission were] committed in the State ...” in s. 5 of the Act of 2003, in submitting that the only matter that the Court was to transpose for the purpose of establishing correspondence were the *acts or omissions* to this State. It was noted however, that in the *Al Fawwaz* case cited with apparent approval by Clarke J., a transposition of the nationality of the victims was required for the purpose of considering whether the matter was a crime in

England. Even if counsel is correct in his submission that no element that relates to extraterritoriality is required to be considered in assessing correspondence (*e.g.* that the act was committed outside the issuing state), it does not eliminate the necessity for the Court to engage in a transposition of relevant circumstances. Those relevant circumstances may include the type of factual circumstances outlined in the cases cited by Clarke J. in *Minister for Justice and Equality v. Szall* above. Sometimes that may be transposing a regulatory/statutory regime *e.g.* the breach of a requirement imposed by the issuing state must be transposed by looking at whether there is a statutory scheme in this jurisdiction of sufficient similarity. In the *Norris* case, the requested person was charged with obstructing an investigation into price fixing; the offence of price fixing simpliciter was not an offence in English law although it might be an offence if the price fixing was combined with other elements such as deliberate misrepresentation. In those circumstances what was relevant for the purpose of assessing correspondence with an offence in England was whether it would have been an offence under English law to obstruct the progress of an equivalent investigation by the appropriate body *in England*.

102. At the level of principle there is no reason why this general approach to identifying the relevant “act or omission” would not also apply to the issue of establishing the relevant hypothetical counter-factual in considering whether s. 44 of the Act of 2003 applies. For 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. It seems to me that it was a similar exercise that Denham C.J. was carrying out when she held that the reciprocity required was for Ireland to examine its law as if the circumstances of the offence were reversed. It is the essence of the acts and their bearing on the issue of jurisdiction (to surrender or to prosecute) that must be reversed. The essence of the acts that bear on extraterritoriality are that the offence of murder is alleged to have been carried out in a third

country by a citizen of the issuing state. The essence of the acts, which may also be viewed as the equivalent facts, when applied to Ireland amount to an offence for which Ireland may request the surrender of its own citizen. That is the reciprocity at issue.

103. The judgment of Fennelly J. does not preclude such an assessment of the relevant circumstances. Fennelly J. expressly refers to Lord Justice Scott Baker's view that the extradition extraterritorial provisions are an aspect of double criminality but gives his own view that they require something more *i.e.* an element of reciprocity. The appellant concentrates on the reference in para. 450 to the relevant circumstance being that the person whose surrender is sought is not an Irish citizen. The appellant submits that this is the only relevant circumstance from the perspective of an assertion of Irish extraterritorial jurisdiction; it is not the fact that he is a citizen of the issuing state but rather it is the fact that he is not an Irish citizen. It is the dictates and requirements of Irish law and not the issuing state that, he submits, define the circumstances.

104. The references to "Irish citizen" in the judgment of Fennelly J in para. 450 and later at 459 must be seen in the particular *relevant* circumstances of that case. Mr. Bailey was not a citizen of France or of Ireland but was a citizen of a third country. It was relevant to the consideration of the issue that Ireland, as a matter of Irish law, could not prosecute a non-Irish citizen for the murder of another person (citizen of Ireland or not) in another country. Fennelly J. in para. 455 identifies that the words of the second part of s. 44 "*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.*" The reference to "corresponding but hypothetical offence" is indicative of the proposition that it is those relevant facts that must be assessed when considering if Ireland exercises extraterritorial jurisdiction in the reciprocal sense required.

105. There can be no objection to the application of such an approach to both establishing

correspondence and extraterritoriality on the basis that if a matter did not correspond there would be no requirement to consider whether extraterritoriality also prohibited surrender. This is because not all offences for which surrender must be ordered require correspondence to be demonstrated with an offence in this jurisdiction. The offence of murder, with which we are concerned, does not require correspondence with an offence here. Article 2.2 of the Framework Decision contains a list of offences for which no correspondence must be shown (they are subject to a different requirement of minimum gravity). Indeed, they are mostly offences of a grave nature such as murder, rape, terrorism, participation in a criminal organisation, trafficking in human beings *etc.* Thus, for more serious offences, where extraterritoriality is more likely to be claimed (in this jurisdiction at least), it is less likely that correspondence will have to be established.

106. I also consider the manner in which Murray J. and Hardiman J. expressed their agreement with the judgment of Denham C.J. on the issue of s. 44 and reciprocity on the facts, to be an indication of support for her approach to the relevant counter-factual.

107. In the course of argument, counsel for the appellant was asked about the policy reason that might have informed the Oireachtas in legislating in the manner advocated by him. The purpose of asking the question was not to question the right of the Oireachtas to legislate with a particular policy in mind, but rather to probe what the legislative intention might be. Counsel submitted that it was a matter of sovereignty. The Oireachtas had decided that it would only surrender where it would prosecute for the same offence *i.e.* on the actual facts alleged but with the countries only transposed in the counter-factual. Counsel pointed to some offences that might be classified as politically sensitive *e.g.* euthanasia, where s. 44 ensured that it was only where those persons could be prosecuted in Ireland for that precise offence, that they could be surrendered. This was central to the appellant's case, s. 44 had been transposed into Irish law by restricting surrender to extraterritorial offences where the person could also have

been prosecuted in Ireland on an extraterritorial basis.

108. I consider that rationale unconvincing for the primary reason that to restrict surrender in such a significant manner would require very clear wording on the part of the Oireachtas and such clear wording is absent in the provisions of s. 44 of the Act of 2003. Imposing such restriction on surrender would be contrary to Ireland's general obligation not to become a safe haven for those who are sought in other jurisdictions in relation to criminal offences (see O'Donnell J. in *Minister for Justice and Equality v. JAT (No. 2)* [2016] 2 I.L.R.M. 262) and when the legislation is viewed in light of the aims and objectives of the Framework Decision, a clear legal basis would have to be found within the wording of the section. Although we have been concerned with the interpretation of the second aspect of s. 44 namely, the meaning of "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", which itself requires an explanation of Irish law, it is relevant, where there is any ambiguity in its interpretation, to interpret it in a manner which is consistent with the interpretation of Article 4.7(b) and the general aims and objectives of the Framework Decision. That was the approach of the Supreme Court in *Bailey No. 1*.

109. Although not directly relevant to the interpretation of the second part of Article 4.7(b) on which the second part of s. 44 seeks to transpose, it is useful to return to the case of *JR*, to which I referred at para 39 above. That case involved the recognition by the issuing state of a third country sentence of imprisonment. The offence had been committed in the third country. Article 4.7(b) permits an executing judicial authority to refuse to execute the EAW where it relates to an offence which has "been committed outside the territory of the issuing Member State". The CJEU held the phrase had to be given an autonomous and uniform meaning throughout the EU as there was no reference in that phrase to the law of the Member States. In reaching its conclusion as to its meaning, the CJEU identified the purpose of Article 4.7(b)

at para. 68:-

“As regards, in the first place, the objective of the ground for optional non-execution of a European arrest warrant laid down in Article 4(7)(b) of Framework Decision 2002/584, that provision is 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”.

Moreover, the CJEU also referred to the purpose of the Framework Decision in providing for a system of surrender based upon the principle of mutual recognition and to that effect establishing a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law. In particular, the CJEU referred to the Framework Decision as seeking to prevent the risk of impunity of persons who have committed an offence. On that basis the CJEU held at para. 78 that the interpretation of the autonomous and uniform of the phrase “outside the territory of the issuing Member State” in art. 4.7(b) *“must be resolved by taking into consideration the criminal jurisdiction of that third State – in this instance, the Kingdom of Norway – which allowed prosecution of that offence, and not that of the issuing Member State”.*

In the present case, clearly national law is at issue, but the principle of conforming interpretation applies to the meaning of s. 44 itself. By this I mean that conforming interpretation applies to interpreting how *the operation of s. 44* is to be interpreted in so far as it seeks to bar surrender on the basis of Ireland’s exercise of extraterritoriality. It does not apply to the ascertainment of the nature or extent to which Ireland *exercises extraterritoriality* in the prosecution of offences. Thus, only Irish law governs how Ireland exercises its right to prosecute persons who are suspected of committing offences outside the territory of Ireland

but the principle of conforming interpretation with EU law governs how the provisions on the bar to surrender ought to be understood to the extent to which they can be so interpreted without such interpretation being *contra legum* or contrary to law. The appropriate counter-factual reciprocity to be identified in the law is one which ought not to be restrictive of surrender provided such an interpretation does not breach the clear intention of the legislature as set out in the Act.

110. The appellant submits that because the central issue is whether Ireland permits prosecution of the *offence* on an extraterritorial basis, it is only a simple reversal of the issuing State for Ireland that is required. This would mean applying a straightforward test as to whether on precisely the same facts with an identical perpetrator (*i.e.* one of Romanian nationality) and victim (*i.e.* one of Romanian nationality) but with a location in a third country (*i.e.* Romania), Ireland could prosecute. I do not consider that the restrictive intention urged upon this Court by the appellant, is found in the legislation and I do not consider that the majority of the Supreme Court in *Bailey No. 1* considered the legislation to impose such a restriction.

111. The appellant's argument depends on differentiating between the tests of factual reciprocity in the judgments of Denham C.J. and Fennelly J.. I do not consider that the test of factual reciprocity as set out in those judgments, differs. While Denham C.J. refers to offence for which there is *jurisdiction to surrender* and Fennelly J. to *jurisdiction to prosecute*, for the reasons set out above, I do not consider that a relevant distinction. There is no difference in the approach to what *facts are relevant* to that consideration. They are the essential acts relevant to the establishment of extraterritorial jurisdiction. In some situations, jurisdiction might be operated on the basis of the nationality of the alleged perpetrator or the victim. As I have said, it is not necessary for the purpose of the present case to decide if there has to be an identity of a *shared basis* for jurisdiction (as per Hardiman J. and Burns (P) J.) or if a simple

transposition of those facts and an assessment of whether Ireland would prosecute/surrender in those circumstances. This is because in the present case, once the essential acts or equivalent facts, relevant to the issue of extraterritoriality are examined using the factual hypothetical envisaged by the majority in *Bailey No. 1*, there is a reciprocity of claimed extraterritorial jurisdiction. In the present case, the relevant facts are the transposition not just of the issuing State with Ireland, but the transposition of the citizenship of the requested person. The fact that the victim is Romanian is not relevant to the exercise by Romania of extraterritorial jurisdiction nor to Ireland's exercise of the extraterritorial jurisdiction.

112. Finally, the appellant submits that his argument makes the interpretation of s. 44 much more simple than the complicated hypothetical counter-factual that might otherwise have to be carried out. While that approach may have the benefit of simplicity, that is not a reason for adopting it. Most importantly, I consider that the approach requiring the relevant factors to be reversed has been signalled by the majority in *Bailey No. 1*. Moreover, it does not produce the absurd results identified above that the simplistic approach urged upon us by the appellant would produce. Moreover, the courts, when assessing correspondence of offences, have already demonstrated that they are capable of carrying out nuanced and even complicated transposition of facts.

Preliminary Reference to the CJEU

113. At the time the decision in *Bailey No. 1* was delivered, Irish law did not permit a court in this jurisdiction making a reference in connection with the Framework Decision. That is no longer the position. In his notice of appeal, the appellant said that he was “not as such” asking the Court to make a reference to the CJEU but “that it was possible that such a reference will be sought in due course”.

114. The appellant criticised the Minister for failing to commit to a submission that the majority view in *Bailey No. 1* was correct. In the appellant's submission, it was not appropriate

that the Minister hold out a view that the judgment of O'Donnell J. was the correct interpretation of Article 4.7(b) and consequentially of s. 44 of the Act of 2003. Counsel for the Minister confirmed that the Minister's submissions were based upon the law as interpreted by the majority in *Bailey No. 1*. The Minister did not consider that there was any reason to refer this case to the CJEU for its opinion, but she reserved her position if such a reference were to be made.

115. I consider that the provisions of s. 44 were authoritatively interpreted by the Supreme Court in *Bailey No. 1*. If that interpretation appeared to be incompatible with the objectives of the Framework Decision, then this Court would be obliged to apply an interpretation consistent with the Framework Decision so long as such interpretation was not *contra legem*.

116. I have referred to the case of *JR* above. The CJEU placed significant reliance on the policy considerations underpinning the Framework Decision (and other instruments of judicial cooperation in the criminal sphere) in interpreting Article 4(7)(b). There is no reason to believe that any further interpretation by the CJEU would lead to the result sought by the appellant. Indeed, at its height I consider the appellant to be making an argument that the Framework Decision permits s. 44 to be interpreted as he suggests rather than compels that decision.

117. For the purposes of this appeal, there is no ground upon which the Court is obliged to interpret s. 44 in another manner so as to ensure compliance with the objectives of the Framework Decision. In light of the conclusion I have reached on s. 44 as a matter of Irish law, I consider there is no basis for making a preliminary reference to the Court of Justice of the European Union.

CONCLUSION

118. The decision in *Bailey No. 1* is the authoritative interpretation of the meaning of s. 44 as to when there is a prohibition of surrender as regards offences committed outside the territory of the issuing state. *Bailey No. 1* in the majority judgments set out a requirement of

factual reciprocity. That reciprocity requires a consideration of the hypothetical counter-factual situation in terms of when Ireland exercises jurisdiction over such an extraterritorial offence. The counter-factual situation is not limited merely to a substitution of Ireland for the issuing state. All relevant factors are to be considered.

119. In this case if the facts are reversed and the equivalent circumstances are examined, Ireland would have jurisdiction to prosecute an Irish citizen for the offence of murder in Romania. A relevant factor is the citizenship of the requested person and it is appropriate to reverse the citizenship of the requested person with that of an Irish person. Moreover, Romania exercises extraterritorial jurisdiction on the same basis as Ireland.

120. As a result of the foregoing, the answers to the questions asked are as follows:

What factual circumstances, if reversed, should the High Court take account of the purpose of considering whether there is reciprocity for the purpose of s. 44 of the European Arrest Warrant Act, 2003?

This question cannot be answered in the abstract. It is not possible to identify the factual circumstances which should be reversed in all cases. The High Court should take into account all factual circumstances relied on by the issuing state as founding its entitlement to prosecute for the offence concerned even though it was committed outside its territory. Thus, in the context of this appeal, the High Court properly took into account the nationality of the appellant as the jurisdictional circumstance relied on by Romania to assert its entitlement to prosecute the appellant and seek his surrender for that purpose. Romania exercises extraterritorial jurisdiction in relation to murder committed or allegedly committed by its own citizens; Ireland exercises extraterritorial jurisdiction in respect of murders committed or allegedly committed by its own citizens. Where, as here, surrender is sought for the purposes of a prosecution that relies on the nationality of the perpetrator, that fact should be reversed. That is what the High Court Judge did

and he was correct to do so.

The wider issue that this question raises – whether and to what extent other factual circumstances should be reversed for the purposes of s. 44 of the Act of 2003 – depends on issues regarding the substantive effect of s. 44 (and Article 4.7(b)) that do not properly arise in this appeal.

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?

Where extraterritorial jurisdiction is asserted by the requesting State on the same basis as which Ireland asserts extraterritorial jurisdiction for the offence, s. 44 does not operate to bar surrender. The issue of whether any lesser degree of reciprocity would suffice does not arise on the facts of this appeal and must await consideration in future proceedings.

121. The surrender of this appellant is not prohibited by s. 44 of the Act of 2003. I would therefore dismiss this appeal.