Judgment Title: Minister for Justice Equality and Law Reform v Bailey

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Judgment by: Hardiman J.

Status of Judgment: Approved

THE SUPREME COURT

Denham C.J. 174/2011
Murray J.
Hardiman J.
Fennelly J.
O'Donnell J.

Between:

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

Applicant

and

IAN BAILEY

Respondent

JUDGMENT of Mr. Justice Hardiman delivered on the 1st day of March, 2012.

This is the appeal of Mr. Bailey against the judgment of the High Cou delivered the 18th March, 2011, and its order perfected on the 13th Apr 2011, whereby it was ordered that Mr. Bailey be surrendered to France and that he be committed to prison pending such surrender. Subsequer it was ordered that the order for surrender and committal be stayed

pending appeal. Mr. Bailey was ordered to pay to the Minister the cost of the proceedings. The judgment of the High Court was that of The H Mr. Justice Peart who ordered the surrender of the appellant. The learn trial judge certified the following point as being one of exceptional public importance in accordance with the provisions of s.16(12) of the European Arrest Warrant Act, 2003 as amended by section 12 of the Criminal Justice (Miscellaneous Provisions) Act, 2009:

> "*Whether the surrender of a person is prohibited by Section of the Act where the offence for which surrender is sought is committed in the State and where the victim is a national of requesting State which seeks to exercise an extra-territorial jurisdiction to prosecute the offence under its own laws and circumstances where the Director of Public Prosecutions in this State has decided not to prosecute the person in respect that offence".*

The appellant seeks that the order mentioned above be set aside.
This case is unique on its facts and is of considerable legal importance raises a number of issues which are not governed by any direct authori In particular, there does not appear to have been a previous case where the forcible delivery of an Irish resident, long established in Ireland though not an Irish citizen, to another country was requested so that he could be subjected to proceedings there <u>for an offence allegedly committed in Ireland</u>. Moreover, this request for forcible delivery was made more than thirteen years after the crime was allegedly committed and after the Irish Public Prosecutor, the Director of Public Prosecutio (D.P.P."), had decided, following a detailed analysis of the case, that t evidence did not warrant a prosecution against Mr. Bailey. However th State says that these factors are totally irrelevant to the present case.

<u>Factual Background</u>.

From the European arrest warrant in this case and the other evidence offered, it appears that on the night of the 22nd - 23rd December, 1996, Sophie Toscan Du Plantier was found dead near a property she owned

Schull, County Cork, which is of course in Ireland. I mention expressl this obvious fact because it is essential to part of the legal analysis of c of the grounds of objection to delivery.

About thirteen years and two months later an authority in France issue European arrest warrant for Ian Bailey. Mr. Bailey is a British citizen who is long established in County Cork.

The warrant states that surrender is sought "*en vue de poursuites pénales"* which is translated as "*for the purpose of criminal prosecution*". The offence mentioned in the warrant is described as "*assassinat*" translated as "*murder*". The victim is identified as Sophie Toscan Du Plantier and the place of the crime is stated to be Cork, Ireland. The penalty applicable to the crime is described as "*Réclusion criminelle a perpétutié*" or "*criminal reclusion in perpetuity*".

In the warrant Mr. Bailey's nationality is stated to be British, but that c Sophie Toscan Du Plantier is not stated, event though this would seem be the alleged basis for French jurisdiction.

It appears therefore that Mr. Bailey's forcible delivery to France is required so that he can be <u>*investigated*</u> (see below) in that country for a offence allegedly committed *in Ireland* a considerable time ago, and already fully considered by the prosecuting authorities here. According the High Court judgment, this is regarded as possible in French law because of a very distinctive provision of that law, Article 113.7 of the Penal Code which is translated as follows:

> *"French criminal law is applicable to any felony a well as to any misdemeanour punished by imprisonment, committed by a French or foreign national outside the territory of the French Repub where the victim is a French national at the time when the offence took place."*

It thus appears that French law claims a very wide jurisdiction, in fact

worldwide jurisdiction, over crimes of sufficient gravity allegedly committed against French people wherever they occur.

Ireland does not claim any such worldwide jurisdiction in respect of offences committed against Irish citizens; Irish extraterritorial crimina law is discussed later in this judgment.

Accordingly it is clear that the procedures to which it is intended to subject Mr. Bailey, if forcibly delivered to France, would involve a criminal investigation (whose nature is discussed below) in respect of offence which took place outside the territory of France, and in the territory of Ireland. It would, accordingly, be an exercise of a French jurisdiction over a crime which took place extraterritorially, in the sen of outside the territory of France. Such proceedings would also, according to what the Court has heard, be *prima facie* statute barred si a ten year limitation period applies, which can however be displaced i certain ways. Neither the prescription period, nor its possible suspensi are the subject of any comment or information whatsoever in the warra

Opacities in the Warrant.

The European arrest warrant ("E.A.W.") in this case is in a common form, used whenever the E.A.W. procedure is sought to be operated. Paragraph (f) of this warrant provides a heading:

> "*Other relevant information in this case"* (optional information).

In a "note" to this heading the following words occur:

> *"It is possible to include here remarks pertaining extraterritoriality, the acts suspending the application of the statute of limitations, and other consequences of the violation."*

Despite the fact that this section of the common form warrant plainly gives an opportunity to state why and on what basis an extraterritorial jurisdiction is being exercised and in what manner the statute of

limitations is said to be suspended, these spaces have been left blank i
the warrant issued by the French authority. This is scarcely due to
ignorance of French law or of the E.A.W. procedure.

Ignoring the Irish Investigation.

The violent death of Madame Du Plantier was of course investigated b
the Garda Síochána and the fruits of this investigation were considered
by the Director of Public Prosecutions ("D.P.P."), the statutory public
prosecutor in Ireland.

The latter concluded "*a prosecution against Bailey is not warranted by
the evidence*". This decision was reviewed and confirmed on several
occasions from 1999 onwards.

The French request does not in any way enter into the question of *why*
the delivery of Mr. Bailey to France, against his will, should be effecte
when the police and prosecutorial authorities in Ireland have considere
the case and a decision has been made by a high and independent offic
that the evidence does not warrant prosecution of him. Instead, the
French authorities simply claim that they are entitled to the forcible
delivery of Mr. Bailey by virtue of the Council Framework Decision o
13th June, 2002 on the European arrest warrant and the surrender
procedures between Member States (2002/584 JHA) ("the Framework
Decision") as transposed into Irish law by the European Arrest Warran
Act 2003 as amended **(**"the Act of 2003"). The warrant makes no
mention whatever of the Irish public prosecutor and the decision he
made, that the evidence did not warrant a prosecution against Mr. Bail
nor of the fact that, as will be seen below, a French Court would be
allowed to refuse delivery in such circumstances.

Mr. Bailey has been very thoroughly investigated in Ireland in
connection with the death of Madame Du Plantier. There was certainly
as will be seen, no lack of enthusiasm to prosecute him if the facts
suggested that there was evidence against him. He has been subjected

arrest and detention for the purpose of questioning. He has voluntarily provided, at the request of the gardaí, forensic samples which have fail to yield incriminating evidence. The fruit of the investigation have bee considered not once, but several times by the D.P.P. who has conclude and reiterated that there is no evidence to warrant a prosecution agains him. But the French authorities, without commenting in any way on th Irish investigation and decision, or even acknowledging them as a mat of fact in the warrant which has been issued, claim to be entitled to bri Mr. Bailey to France, there to subject him to a procedure described below. It is, as will be seen, more than doubtful that France would deli a person to Ireland if the situation were reversed, but the State say that fact has no relevance.

An Unusual Feature.

In November, 2011, while this appeal was pending, the State authoritie in Ireland wrote to Mr. Bailey or his advisers and enclosed copies of certain newly discovered materials. These reached the Bailey side und cover of two separate letters. The first letter enclosed copies of e-mails which appeared to be written by the former D.P.P., Mr. Eamonn Barne and by Mr. Malachy Boohig, State Solicitor for West Cork, and a separate memorandum about this case written by an unnamed official the D.P.P.'s office. These documents appear to record an alleged attem by an unnamed senior garda or gardaí to procure Mr. Boohig to bring political pressure to bear on the independent D.P.P. to prosecute Mr. Bailey for the murder of Madame Du Plantier. This attempt was resiste by the person who was asked to set it in motion, Mr. Boohig, who immediately informed the D.P.P. who recorded the information as set out. Apart from that he preserved silence on the matter and kept it confidential until the last possible moment, in November, 2011.

Under separate cover there was disclosed to the Bailey side a documer unsigned in the form in which it was presented, being a forty-four pag analysis of the case of Madame Du Plantier produced by the then D.P. or in his office and concluding, as mentioned above, that "a prosecutio

against Bailey is not warranted by the evidence". This is a detailed and reasoned document, in which numerous individual pieces of evidence individually considered.

It is, of course, most unusual that documents of this sort, plainly documents internal to the prosecuting and investigative authorities, are disclosed in this fashion. It appears that the first set of documents were generated when the former D.P.P. sent them or some of them to his successor's office. The advice of the Attorney General was then taken following which the authorities were advised to disclose the document to Mr. Bailey, on the basis of their manifest importance.

The disclosures were made in November, 2011, just before the appeal this matter was due to be heard. Because of the disclosures, and to allo both parties to consider the position, the appeal was adjourned to Monday, 16th January, 2012. On the preceding Friday, 13th January, 2012, a motion was heard in this Court in which Mr. Bailey sought to admit this new material on the hearing of the appeal. The application w granted.

For present purposes all that now needs to be said about this newly disclosed material is, firstly, that the decision not to prosecute Mr. Bai was based on a detailed view taken of the evidence which was put forward by the gardaí and not, for example, on the basis of any *a prior* attitude, or on the basis of any technicality, and secondly, that it appea that the former D.P.P. considered that the garda enquiry into the case w "*prejudiced*" against Mr. Bailey, and flawed.

For reasons which will appear below, and at the request of the State, th portion of Mr. Bailey's case opposing his forcible delivery to France which relies on the newly discovered documents has not been heard, a least as yet. The State's request in this regard has also determined, in r mind at least, the order in which the other issues in the appeal should b addressed.

Unforeseen Development on the Appeal.

Mr. Bailey's appeal proper against the High Court order began on Monday 16th January, 2012. Mr. Bailey was represented by Mr. Martin Giblin S.C., Mr. Garrett Simons S.C. and Mr. Ronan Munro B.L. instructed by Frank Buttimer & Co. The Minister, the "Central Authority" for the purposes of the European Arrest Warrants Act 2003 was represented by Mr. Robert Barron S.C. and Mr. Patrick McGrath S.C. instructed by the Chief State Solicitor.

At the opening of the appeal it was indicated on behalf of Mr. Bailey t Mr. Garret Simons S.C. would argue the first three legal matters on which Mr. Bailey was relying. These were that his forcible delivery to France was precluded, separately and independently, by the terms of s.s.44, 42 and 21A of the European Arrest Warrants Act. It was indicte that Mr. Martin Giblin would later deal with the other issues which ma be described as the broader issues arising under s.37 of the Act. It was relation to these latter issues that it was proposed to deploy the new material.

The case proceeded as indicated above. The Court heard the submissic of Mr. Simons on behalf of Mr. Bailey on the first three issues and hea the Central Authority's submissions from Mr. Barron. It then heard Mr Simons in reply.

In the course of Mr. Bailey's case a statement of a French lawyer was forward as evidence of the state of relevant French Law. This had alre been the subject of comment by another French lawyer in support of th request in the warrant. In the course of his submissions, however, Mr. Barron produced as "additional information" a further statement of a French lawyer and who is also a high official, on behalf of the French authority. This document was given to each member of the Court in French and Mr. Barron undertook to produce an official translation the following day. It appears to me that nothing much turns on whether on reads the document in its original French or in English. The relevant

portions are extensively quoted and analysed having regard to both versions later in this judgment.

This document is of very considerable significance because it appears from it that it is intended, if Mr. Bailey is forcibly delivered to France, make him participate in an *investigative* procedure at the end of which may, or it may not, be decided to put him on trial. This was immediate recognised as a matter of great significance by both sides because of th provisions of s.21A of the Act of 2003, which is set out below.

Having heard both sides' submissions and seen the document presente by Mr. Barron on Wednesday 18th January, which itself was simply th translation of a document on French law produced the previous day, th Court intended, as previously arranged, to hear Mr. Martin Giblin S.C. the s.37 points.

However, Mr. Barron S.C. on behalf of the State intervened and asked that the Court would not then proceed to hear the rest of the submissio on behalf of Mr. Bailey, i.e. the s.37 points. He gave a number of reas for this. Remarkably, they all related to a row or, **as** Mr. Barron called "spat" within or between the law enforcement agencies:

> *"(a) The gardaí" might" object to the contents of the DPP's 2001 memorandum. He said that the Commissioner and the Superintendent in charge of the investigation objected to the contents of this document because they dissented from it on factual grounds.*
>
> *(b) He said that the document was open to substantial groun of objection.*
>
> *(c) He said that if one was to take the document into accoun one would need to hear what he called "the garda side".*
>
> *(e) He said that there were facts not included in the docume which would lead to different inferences or conclusions bein*

reached."

Mr. Barron made no comment at all on the allegation of a Garda attem to get a politician to intervene with the D.P.P. to have Mr. Bailey prosecuted, despite the finding that evidence did not warrant this. He neither admitted nor denied this. Mr. Barron, in answer to a question, said that he was making this request on behalf of the Minister. In answ to a further question, Mr. Barron said that the gardaí had had the D.P.P document for over 10 years, since 2001, the year it was written. Mr. Barron was then asked whether the gardaí had previously objected to t document as he was doing now and he said that "*they have internally objected*". However he went on to say that "*they can't verify that these objections went to the D.P.P."*.
There was then some further discussion on the effect of the French authorities' lawyer's statement, now available in translation. Mr. Barro said that its effect was that "I can't rely on **Olson** in the way I was doi yesterday".

This was a reference to a previous decision of this Court, **Minister for Justice v. Olson** which was a major plank in the State's argument that Mr. Bailey could be forcibly delivered to France despite the terms of s.21A.

Mr. Giblin S.C. on behalf of Mr. Bailey then said that the new docume handed into Court, and its original produced the previous day, made it clear that his side were entitled to win the s.21A point: there had been decision to bring Mr. Bailey to trial.

At the request of the State the appeal was then adjourned firstly to 12 noon and later to 2pm to allow Mr. Barron to take instructions as to whether he was asserting that he could succeed on the s.21A point. Af the second adjournment Mr. Barron said that the Minister's position ha not changed. He said that it was clear from the evidence and the statements of French law that the warrant was a warrant for the purpos

of prosecution, and that was sufficient for the purposes of s.21A. Mr. Barron repeated his request that the Court should not then hear the s.37 argument, which was obviously going to be fraught, but should fi give judgment on the arguments already offered. He further requested that, if Mr. Bailey were successful on one of these arguments, so that h was entitled to defeat the demand for his forcible delivery to France, th Court should nonetheless proceed to give judgment on the two other points raised as well.

This was a very unusual request by the State. The Court will normally proceed to hear all the grounds of appeal relied on before giving judgment on any of them. Moreover, the Court will not normally decid issues which it is not necessary to decide. Thus, if an appellant is entitl to succeed by reason of the Court's decision on the first point decided will not normally go on to decide the other points because it is unnecessary to do so in order to resolve the case. Indeed, any decision an unnecessary point will usually cause that part of the judgment to be regarded as "*obiter*", that is as not involved in the *rationale* of the resu and therefore not of binding effect.

However, in response to Mr. Barron's request, Mr. Giblin said that, by reason of the distress caused to Mr. Bailey and his family by the prolonged proceedings, he had no objection to the Courts deciding the legal issues which had already been argued before proceeding if need b to the next part of the case.

It was also said on behalf of Mr. Bailey that the new French material, although put before the Court by the State in support of the application for Mr. Bailey's forcible delivery to France, had the effect of establish that the Court could not order Mr. Bailey's delivery, having regard to t provisions of s.21A of the Act. This was because the new material established quite clearly, and in terms, that no decision had been made put Mr. Bailey on trial for the offence specified in the warrant. To appreciate this point it is necessary first to set out the provisions of

s.21A, which will shortly be done.

The effect of the foregoing is that, at the request of one party and by consent of the other, the Court is going to give judgment on the issues upon which it heard argument, or as many of them as may be appropriate, before if necessary hearing the rest of the case. This is at t request of the State parties, which was acquiesced in, for the reasons given, by Mr. Bailey's side. Moreover, since the new evidence about French law, produced by way of "additional information" in the Frenc language on Tuesday, 17th January and in an official translation on the following day, seems to have triggered the request to defer part of the argument, it seems logical to decide the point most obviously addresse by that evidence first. This is what has been described in the course of the hearing as "the s.21A point".

I may add that I would not have favoured deferring the hearing of the s.37 points on the grounds first mentioned by Mr. Barron, to do with tl need to contradict or controvert the decision of the D.P.P., at the suit o certain gardaí. Under our law, since the Prosecution of Offences Act, 1974, it has been the role of the independent D.P.P. to decide whether not a prosecution shall be taken. Prior to the passing of that Act, the ro was that of the Attorney General. It was decided to confer the role on a independent public official to avoid any suggestion of bias or conflict interest in the taking of that important decision in a particular case.

That role, therefore, is the role of D.P.P. and not of the Government of the day, the Minister for Justice, or any other holder of political office. Neither is it the role of the gardaí. It is their role to conduct an investigation, to seek advice where appropriate, from the law officers, including the D.P.P., and to carry out his or her instructions in the mat of preferring charges. It would be very wrong, and it is prohibited by statute, to bring any form of pressure to bear on the D.P.P. in the exerc of his role: it is particularly objectionable to do so, or to attempt to do by the intervention of any holder of political office.

The statutory prohibition to which I refer is contained in s.6 of the Prosecution of Offences Act, 1974 as follows:

> "6(1)(a) *Subject to the provisions of this Section it shall not b lawful to communicate with … the Director or an officer of t Director … for the purpose of influencing the making of a decision… not to initiate criminal proceedings or any particular charge in criminal proceedings".*

The Court does not sit here in order to arbitrate what Mr. Barron S.C. called "*a spat between the gardaí and the Director of Public Prosecutions*". The only aspect of this "*spat*", if that is what it was, which is of any relevance to the present proceedings is that the D.P.P. decided in the present case that the evidence produced to him by the gardaí did not warrant the bringing of a prosecution against Mr. Bailey The D.P.P. has succeeded to the functions of the Attorney General in t regard and that includes the function of directing when a prosecution should be brought, and when a prosecution should not be brought, in th name of the people of Ireland. It is important that a prosecution should brought where that it is appropriate; it is no less important that no prosecution should be brought when the evidence does not warrant it because to do so would seriously undermine respect for the law. That decision is for the D.P.P. to make and not for the gardaí or anyone else including this Court.

Section 21A of the European Arrest Warrants Act, 2003.

Mr. Bailey claims that his forcible delivery to France is precluded by t above section.

This provision in its present form provides as follows:

> *"21A(1) Where a European arrest warrant is issued in the issuing state in respect of a person who has not been convicte of an offence specified therein, the High Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for,*

that offence in the issuing state.
(2) where a European arrest warrant is issued in respect of a person who has not been convicted of an offence specified therein, it shall be presumed that a decision has been made to charge the person with, an try him or her for, that offence in the issuing state, unless the contrary is proved."
(Emphasis added)

On the hearing of the appeal, prior to the intervention of Mr. Barron described above, the appellant had taken issue with the following findings of the learned High Court Judge:

> *"…the investigating Judge in Paris has come to the view that there is sufficient evidence for the purpose of putting the appellant into the next phase of the prosecution procedure, and that before the matter can proceed further, his attendance before the investigating magistrate is required…this is what is sought to be achieved by having the appellant surrendered. I do not read Monsieur Tricaud's affidavit as disagreeing in any way that this is what is occurring in this case."*

It appears to me that, apart from any other consideration, a determinati "*that there is sufficient evidence for the purpose of putting the appella into the next phase of the prosecution procedure*" is not the same as a decision "*to charge the person with, and try him or her for, that offenc in the issuing State*". Indeed, as will be seen, they are two quite differe things, in French law.

The appellant also took issue with the High Court Judge's finding that

> *"It is also clear… that only at the end of the instruction or examination phase, which cannot occur until the appellant is brought before the judg can a decision be made to put the appellant on tria*

The appellant said that there was simply no evidence to ground these findings. The State parties had given no expert evidence of French criminal law and procedure to that effect so that the only evidential material before the High Court, and before this Court until additional material was supplied, was that of M. Tricaud, who was Mr. Bailey's expert on French law.

M. Tricaud had commented on the above findings of the learned High Court Judge as follows:

> *"Both above propositions of French law are incorrect. All phases of French criminal procedur can proceed in the absence of the Appellant. If the surrender of the Appellant is refused… his Honou Judge Gachon can proceed with the examination i his absence and further the Appellant can be tried and sentenced in absentia."*

It appears that it was to counter this expert's statement that the authori decided to produce a new statement of a Mme. Chaponneaux, describe as a *vice procureur* of the [French] Republic. The relevant portion of t expert's statement occurs on the second and third pages of the official translation into English.

The second page (there is no numbering in the original) is headed "*Th Investigation Phase"* and under this it is stated:

> *"If he were handed over to France by the Irish authorities, Ian Bailey would be <u>at the investigatio procedure stage of the case.</u>*"

It is further stated:

> *"The aim of the investigation is to reveal the truth must consequently examine evidence of both innocence and guilt"*

Later again Mme. Chaponneaux states:

> *"The code of criminal procedure lays down that th principle of the presumption of innocence, whereb person is presumed innocent as long as his/her gu has not been established, i.e. as long as a person h not been sentenced [condamné] by a trial court, since only such a court can convict the person subject to trial.*
>
> *This principle obviously applies to the investigatio of a criminal matter. Indeed, this is only an interlocutory procedure (procedure préparatoire) during which the person subject to trial (le justiciable) can be indicted (mise en examen). But he/she cannot, under any circumstances, be sentenced [condamné] at this stage of the procedure."*

The word "*condamné*" in the French original is rendered as "*sentenced* in the official English translation. It appears to me that "*convicted*" would be a more appropriate translation: the literal meaning of the wo is of course "*condemned*". But the point is not critical, since there can no "*sentence*" without a preceding conviction.

On the third unnumbered page of the translation, the investigative procedures are described in some detail. It is then stated that, after the procedure described has taken place:

> *"… the investigating judge notifies the person eith that he is or is not indicted" (le juge d'instruction notifie a la personne soit qu'elle n'est pas mise en examen, soit qu'elle est mise en examen)*"

The French phrase "*mise en examen*" is translated "*indicted*". It is this appears to me, which is the beginning of the trial and it is manifest fro the statement of the *vice procureur* that this is something which may, *may not*, happen in the case of Mr. Bailey.

The next statement of French law, following the one quoted above is a
follows:

> *"The indictment is the act by which the investigati*
> *judge officially brings proceedings against a perso*
> *on the ground of serious or corroborating evidenc*
> *rendering probable his participation, as perpetrat*
> *of, or accomplice in the acts of which he is charge*

A little later in the *vice procureur's* document it is stated:

> *"It must clearly be understood that the evidence in*
> *the case, supporting the charge against Mr. Ian*
> *Bailey or exonerating him, is not yet complete."*
> (all emphasis supplied)

The document from which extensive quotations have been made above
is, I believe, of evidential effect. It was sought to be admitted by couns
for the Minister as "additional information". Its contents are not
controverted by Mr. Bailey's lawyers. On the contrary, they rely upon
and say it proves their case for them, on the s.21A issue.

It must be remembered that the issue is whether the court is required to
refuse the surrender of Mr. Bailey on the grounds that "*it is satisfied th*
a decision has not been made to charge the person with, and try him o
her for, that offence…".

It is clear from the formulation of the subsection quoted above that the
decision in default of which the Court must refuse to surrender the per
is not merely a decision to charge him with the offence, but a decision
try him for that offence. This is made perfectly clear by the emphatic
punctuation of s.21A(1), in particular in the last two lines of the
subsection.

Against that background, one must consider the statement of the *vice*
procureur. It seems plain to me from that statement that no decision to

try Mr. Bailey for the offence mentioned in the warrant has in fact bee
taken. There is first the uncompromising statement:

> *"If he were handed over to France by the Irish authorities, Ian Bailey would be at the investigatio procedure stage of the case".*

This "investigation procedure stage" is described by the *vice procureu* as being "only an interlocutory procedure (*procedure pré paratoire*) o "*preparatory procedure*".

Moreover it is clear from the *vice procureur's* statement that the evidence in the case, for or against Mr. Bailey, is not yet complete and therefore, that this "*preparatory procedure*" is not yet complete.

M. Tricaud's statement that his preparatory procedure does *not* require Mr. Bailey's presence is not contradicted.

The view - that no decision can be made whether or not to try Mr. Bail for the offence in the warrant until after the end of the investigative sta - is fully borne out by the judgment of the learned trial judge in a passa quoted above:

> "*It is also clear…that only at the end of the instruction or examination phase… can a decision made to put the appellant on trial".*

Therefore, no decision has been made to put Mr. Bailey on trial or "to him for the offence specified in the warrant". This continues to be the position, and all the more clearly so, after the additional evidence of French law which has been presented.

It also appears from the statement of the *vice procureur* that the decisi to indict the person, the "*mise en examen*", is a decision for the examining magistrate alone and, still more significantly, that it is a decision which he has not taken, and which he may never take. The "indictment", which is "the act by which the investigating judge

officially brings proceedings against a person…", has not yet issued ar
may never issue.

It appears to me, therefore, that on the evidence of the French authoriti
themselves, the Court can be affirmatively satisfied "that a decision ha
not been made… to try Mr. Bailey for the offence in the warrant".

It will be noted from the terms of s.21A that the Court is prohibited fro
delivering a person if it is satisfied that a decision has not been made "
charge the person with, and try him for" the relevant offence.

I am prepared to accept that the term "*charge*" is something different
from "*to try him*". But s.21A(1) is expressed conjunctively, not
disjunctively. The Court has to enquire whether a decision has been m
both to charge the person with and to try him for the relevant offence.

Section 21A plainly requires that, before an unconvicted person can be
forcibly rendered to another country, there must be a decision to put hi
on trial for the offence set out in the warrant and not for instance to
deliver him simply for the purpose of being investigated or questioned
This was made clear by the Irish Government when the Framework
Decision was agreed in 2002.

In the course of the negotiations of the Framework Decision, Ireland
made a "*statement*" which is recorded in a Council document entitled
"*Corrigendum to the outcome of proceedings*" (6/7 December, 2001).
the course of this there can be found the following words:

> *"Ireland shall, in the implementation into domesti*
> *legislation of this Framework Decision, provides t*
> *the European Arrest Warrant shall only be execute*
> *for the purpose of bringing that person to trial or j*
> *the purpose of executing a custodial sentence or*
> *detention order".*

There are many good reasons for this stance, including the extremely

prolonged course that preliminary proceedings may take in inquisitoria systems. The French law appears to envisage a maximum period of detention of four years for this purpose, which would be objectionable the standards of any common law country. That is not to say that eithe the inquisitorial system, or the common law accusatorial system, is superior: merely that very prolonged imprisonment without charge is unacceptable in the common law system. This may explain the origins s.21A. But no such explanation is needed, as the words of the Section quite clear.

My learned colleague Fennelly J., in a judgment with which I am otherwise in complete agreement, discusses at paras. 114 and 115, hov the case might have been determined if s.21A were worded differently He considered, specifically, what the result might have been if the section were worded along the lines of the statement quoted above.

Since this exercise is irrelevant to the outcome, and since naturally no argument was addressed to an entirely hypothetical issue, I do not express even an indicative view on it.

But I am not to be taken as endorsing what Fennelly J. calls a "*broad, purposive and conforming*" approach to interpretation in a matter concerning human and civil rights. Nor do I consider that the result of this case reflects any deficiency in Irish legislation. A comparison with French legislation on the same topic, considered below, is instructive.

Some Authorities.

Section 21A was considered by this Court in **Minister for Justice v. McArdle** [2005] 4 I.R. 260. There, at pp 266 - 67, Murray C.J. said:

> "The mere fact that an arrest warrant is issued by a judge in a foreign jurisdiction may not of itself necessarily imply that it is issued only for the purpose of charging the person concerned and putting him or her on trial for an offence or

> offences… such a judge may require a suspected person to appear before him or to attend in his chamber in connection with the conduct of the criminal investigation rather than for the purpose c charging that person with a view to putting him or her on trial. Warrants issued for the purpose of suc investigation could not be considered as requiring surrender of a person for the purpose of being trie for an offence."

In the argument on the second day of the hearing of this appeal, before the French authorities' statement of French law was produced, Counse for the Minister and the "Central Authority" Mr. Barron S.C. had argu that a decision to place Mr. Bailey on trial had in fact been taken. He made this statement on the authority of the decision of this Court in **Olson v. Minister for Justice** [2011] I.E.S.C. 1 This case, which relat to a European Arrest Warrant issued by Sweden, is notable for its find that:

> "*Thus, the concept of the 'decision' in s.21A shoul be understood in light of the 'intention' referred to s.10 of the Act and the 'purpose' referred in Articl of the Framework Decision"*.

On the following page, however, it is said that:

> *"The requirement of the relevant decision, intentic or purpose can best be understood by identifying what is intended to be insufficient on the issuance and execution of a European Arrest Warrant. A warrant issued for the purpose of investigation of offence alone, in circumstances where the investigation might or might not result in a prosecution, would be insufficient."*
> (All emphasis supplied)

The last sentence quoted seems to me to be entirely apt to describe the circumstances of Mr. Bailey's case. It has been stated by the *vice procureur* that Mr. Bailey, if forcibly removed to France, will be so removed for the "*investigation procedure stage of the case*"; that this stage is merely a preparatory procedure after which he may, or may nc be sent for trial. The decision whether or not to send him for trial has r yet been taken; the investigative procedure may also end in his not bei sent for trial. At the end of the investigating procedure the investigatin judge will tell him "*soit qu'elle n'est pas mise en examen, soit qu'elle mise en examen*". This form of words precisely mirrors the **Olson** formulation, referring to "*a warrant issued for the purpose of an investigation of an offence alone, in circumstances where the investigation might or might not result in a prosecution*". This has bee explicitly held by this Court to be insufficient.

It is recorded above that, after the production of the French expert opinion and its translation on Wednesday 19th January, 2012, Mr. Barr stated that its effect was that he could not rely on the **Ollson** case as he had done the previous day. The reason for this statement is now, in my view, crystal clear. No decision to try Mr. Bailey for the offence mentioned in the warrant has been taken, and none can be taken until t conclusion of the "*investigation procedure stage*". Only then, accordir to the *vice procureur*, will the investigating judge notify him "*either th he is, or that he is not, indicted*". The presentation of this expert opinic has taken the ground from under the Minister's case as it was argued, a no alternative route to the same conclusion has been suggested to the Court. In my view, there is no such alternative route.

Accordingly, I would hold that the Court **is** bound, by the express term of s.21A(1) to refuse to surrender Mr. Bailey. I would also find that, o the basis of the material transmitted by the French authorities, through the Central Authority, the presumption in the following subsection has been rebutted or, in the words of the Act, that "*the contrary is proved*" **The Section 44 point.**

Mr. Bailey also independently objects to his forcible delivery to Franc
on the basis that it is prohibited by s.44 of the Act of 2003.

Section 44 of the European Arrest Warrants Act 2003, provides as follows:

> "A person shall not be surrendered under this Act
> the offence specified in the European arrest warra
> issued in respect of him or her was committed or i
> alleged to have been committed in a place other th
> the issuing state **AND** the act or omission of whic
> the offence consists does not, by virtue of having
> been permitted in a place other than the State,
> constitute an offence under the law of the State."
> (Emphasis supplied)

It appears that this section is intended to give effect to the 4.7 of the Framework Decision. This article is headed:

> "**Grounds for optional non-execution of the European arrest warrant**
>
> 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 Memb
> State as having been committed in whole or in par
> the territory of the executing Member State or in it
> place treated as such;
>
> or
>
> (b) have been committed outside the territory of th
> issuing Member State and the law of the executing

Member State does not allow prosecution for the same offences when committed outside its territor

In this instance, France is "the issuing Member State; Ireland is "the executing Member State".

On the hearing of this appeal, both sides, it appeared, agreed that s.44 represented an attempt to give effect, at least in part, to Article 4.7 of t Framework Decision. If that is so, it is of particular importance becaus the section would represent one of the very few instances where this State has actually availed of a power, or of an option, to decline forcib to deliver a person from Ireland on grounds that other countries have availed of: see the Sections of the French Penal Code cited elsewhere i this judgment. This accounts for the existence of what, to me, are disturbing cases where Ireland will forcibly render its citizens and residents to countries which, in similar circumstances, would not forci render *its* citizens to Ireland.

A number of differences between the Framework Decision and the corresponding part of the Irish statute will be noted. Amongst them are that Article 4 of the Framework Decision confers an option not to execute a warrant in certain circumstances, and confers that option on "the executing judicial authority".

Section 44 of the Act of 2003, by contrast, prohibits surrender in the event that the two conditions mentioned in this Section are met. These are the conditions which appear on either side of the emphasised conjunctive word "AND", in the version set out above.

Secondly, it will be observed that section 44 of the Irish legislation makes no attempt to enact a prohibition on surrender, or an option not surrender simply on the grounds set out at subparagraph (a) in the Framework Decision: instead, both the first and the second conditions out in s.44 must be met before surrender is prohibited, whereas the Framework Decision is disjunctively expressed. If, therefore, the case

were to be decided on the Framework Decision above, Mr. Bailey wou plainly be entitled to the protection of Article 4.7(a). But the Irish Stat is very different.

Thirdly, the second condition refers to a situation in which the facts sa to constitute the offence are not "constituting an offence under the law the State" whereas the second trigger for a refusal to execute the warra in Article 4.7 is that "*the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory*."

The wording of the Irish statute (I say nothing about the Framework Decision) is a little difficult to understand because of the use of too ma words and their deployment in a peculiar and rather unnatural order. I believe that the effect of the second part of s.44 can more naturally and comprehensibly be expressed as follows:

> "… and the act or omission… does not constitute a offence under Irish law, by virtue of having been committed in a place other than Ireland."

As appears from the preceding section of this judgment, French law is apparently prepared to assert jurisdiction in respect of a crime of sufficient gravity committed against a French citizen by a French or foreign national **(**re, anyone**)** anywhere in the world. On the other hand in a significant contrast, Ireland will exercise jurisdiction only over an Irish citizen for an extraterritorial offence of murder, regardless of the nationality of the victim. Since there is no dispute about this I will not out the provisions of s.9 of the Offences Against the Person Act 1861 a adapted by the Offences Against the Person Act, 1861 (Section 9) Adaption Order 1973, which brings that situation about, to which my colleagues have referred.
Mr. Bailey, of course, is not an Irish citizen, as the E.A.W. makes clea He is, and always has been, British. He is living here quite lawfully, ju as very many Irish people live quite lawfully in Britain.

That being so, one returns to a consideration of s.44. There is no dispu that the first condition set out there for the prohibition of the surrender a person has been met: the alleged offence specified in the European arrest warrant is plainly alleged to have been committed in a place oth than France, in Ireland. The entire issue arises from the second conditi as to whether the act constituting the offence does or does not constitu an offence under the law of Ireland by virtue of having been committe in a place other than Ireland.

One must ask what precisely is meant by the phrase:

> "*… the act or omission of which the offence consis does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State*."

Approach to this Question.

I am happy gratefully to adopt the interpretation of the Section first proposed by the learned Chief Justice as follows:

> "*The Section prohibits the surrender of a person where the act of which the offence consists does n constitute an offence in Ireland, by virtue of havin been committed, i.e. because it was committed, in place other than Ireland*."

Since the offence alleged here was in fact committed in Ireland, the requirement in the section to consider whether the facts alleged do not amount to an offence in Ireland, because they were committed outside Ireland, obviously requires consideration of a counter-factual hypothes This is what the Court is compelled to consider by the legislation, as w be illustrated below.

Principles of Interpretation.

For the purpose of this judgment, and without deciding any more gene point, I accept that this Court is to interpret the Irish legislation "*as far*

possible in the light of the wording and the purpose" of the Framework Decision. In particular, in this case, it must be considered in light of Article 4.7 thereof. But this cannot involve construing the Irish Act *contra legem* e.g. by the disregarding of the wording of the Irish Act, by the deletion of words from it or by the addition of words to it, or, for example, by ignoring of the fact that whereas the Article 4 of the Framework Decision gives an option to the executing judicial authority s.44 of the Irish Act is couched as a prohibition against execution of the warrant in certain circumstances.

An international example.

It may be useful, in view of the considerable difficulties involved in interpreting the Irish statutory text, to consider how the Framework Decision including Article 4.7 has been transposed into the law of another Member State. I propose to take the example of France, not simply because it is the requesting country in this instance, but because of the extremely transparent French process of annual re-issuing of legislation which is a feature of its governmental practice, so that one can speak of the 2012 edition of the Penal Code, the Code of Criminal Procedure etc., and also because of its excellent Legifrance service, an official government service for French legislation, together with commentary. This is available on *legifrance.gouv.fr* and is described as "*le service public de l'accès au droit*" or "*the public service for access to law*". On it can be found the Constitution of France, the legislative provisions which are "*en vigueur*" together with European law instruments and international law instruments. The ability to find, in one place, all the law actually in force is a refreshing contrast with the position in Ireland. The service also makes its contents available in English and Spanish. Comment or contrast with the position in Ireland is both painful and is unnecessary. In what follows, translation of French material comes from this source, unless otherwise stated.

The Framework Decision was given effect in French law by the additi to the *Code de Procédure Pénale* of some fifty new Articles. These are contained in Title X of the Code entitled "*International Judicial Co-operation*", under Chapter IV, entitled "*The European Arrest Warrant and Procedures for Transfers between Member States resulting from European Council Framework Decision of 13 June, 2004*". Chapter IV contains all the fifty articles referred to, divided into four sections vis:

> General Provisions **(Articles 695-11 – 695-15)**
> Provisions relating to the issuance of the European arrest warrant the French authorities **(Article 695-16 – 695-21)**
> Provisions relating to the execution of European arrest warrants issued by foreign authorities **(Article 695-22 – 695-46),** and
> Transit **(Articles 695-47 - 695-51).**

I now propose to look briefly at the French treatment of certain circumstances akin to those arising in this case. This is of interest for t interpretation of the Irish legislation because it is to be presumed that t French provisions accurately and fairly reflect the wording, and the purpose, of the Framework Decision.

Article 695.22 provides for the refusal of execution in certain cases namely:
"… (4) where the offence for which it [the European Arrest Warrant] l been issued may be prosecuted and tried by the French courts and the limitation period for prosecution or for executing the sentence has expired".

The foregoing is the translation of the French text:

> "(4) Si les faits pour lesquels il a été émis pouvaient être poursuivis et jugés par les juridictions françaises et que la prescription de l'action publique ou de la peine se trouve acquise."

It may be noted, incidentally, that the text in both English and French

distinguishes between prosecution on the one hand, and trial on the oth
("may be prosecuted and tried;" pouvaient être poursuivis et jugés). Th
if of interest in relation to the s.21A ground of objection, above.
Equally, Article 695.24 provides that :

> *"The execution of a European Arrest Warrant may be refuse*
>
> *1° if the requested person has been the subject of proceeding*
> *by the French authorities or these* ***authorities have decided***
> ***to initiate a prosecution*** *or to put an end to one in relation t*
> *the offences for which the arrest warrant has been issued;*
>
> *2° if the person wanted in relation to the execution*
> *a custodial sentence or safety measure is a French*
> *national and the competent French authorities*
> *undertake to put it into execution;*
>
> *3°* ***if the matters in respect of which it was issued***
> ***were committed wholly or partly on French***
> ***national territory;***
> *4°* ***if the offence was committed outside the territo***
> ***of the issuing member state and French law does***
> ***not permit the prosecution of the offence where i***
> ***committed outside French national territory****."*
> [Emphasis added]

Or, in the original:

> *"1° Si, pour les faits faisant l'objet du mandat*
> *d'arrêt, la personne recherchée fait l'objet de*
> *pousuites devant les* ***juridictions françaises*** *ou si*
> *celles-****ci ont décidé de ne pas engager les poursui***
> ***ou d'y mettre fin*** *;*
>
> *2° Si la personne recherchée pour l'exécution d'u*
> *peine ou d'une mesure de sureté privatives de libe*
> *est de nationalité française et que les autorités*
> *française compétetes s'engagent a faire procéder*

cette exécution ;

3º Si les faits pour lesquels il a été émis ont été commis, en tout ou en partie, sur le territoire français ;

4º Si l'infraction a été commise hors du territoire l'État membre d'émission et que la loi française n'autorise pas la poursuite de l'infraction lorsqu'elle est commise hors du territoire nationa
(Emphasis added)

This last provision 695.24(4), is the corresponding provision to our s.4 second phrase.

In the commentary on this Article in the Dalloz, 2012 edition of the Co it is stated that the investigating chamber may refuse to execute the European arrest warrant where the Acts were partially committed on French territory. The commentary cites three separate decisions, bearin record nos. 04-83.662, 04-83.663 and 04-83.664 of the Criminal Chamber of the Court of Cassation of 8th July, 2004. These concerned appeals by the Attorney General against the decisions of the investigat chamber of the Court of Appeal of Pau, refusing the surrender of three suspected terrorists (Aritza X, Amaya X and Yves X) to the Spanish authorities on foot of a European arrest warrant. The cases were appea by the authorities for alleged violation of Articles 113.2, already quote in this judgment and various sections of the fifty article code implementing the Framework Decision.

The order of the Cour de Cassation, insofar as relevant, is as follows:

Attendu qu'il résulte de l'arrêt attaqué et des pièces de la procédure qu' *[Aritza X.../Amaya X.../Yves X...]* devant la chambre de l'instruction ...a refusé de consentir à être remise aux autorités judiciaires espagnoles ;

Attendu que, pour refuser l'exécution de ce mandat, l'arrêt ... énonce qu'ils auraient été commis pour partie sur le territoire français;

Attendu qu'en cet état...la chambre de l'instruction a fait l'exacte application de l'article 695-24, 3 , du Code de procédure pénale ;

D'où il suit que les moyens ne sauraient être admis ;

Et attendu que l'arrêt a été rendu par une chambre de l'instruction compétente et composée conformément à la loi, et que la procédure es régulière ;

REJETTE le pourvoi".

This may be translated as follows :

Whereas it follows from the judgment under appeal and from the court records that [Aritza X…/Amaya X…/Yves X…] was apprehended…b virtue of a European arrest warrant issued…by an investigating judge the *Audiencia Nacional d'Espagne* for the purpose of criminal prosecution before the examining chamber… refused to consent to be surrendered to the Spanish judicial authorities;

Whereas, to refuse the execution of this warrant, having reiterated that the offences are… provided for by Article 695-23 of the Code of Criminal Procedure, the judgment recites that these [offences] were committed in part on French territory;

Whereas in these circumstances...the examining chamber correctly applied Article 695-24,3 of the Code of Criminal Procedure;

Hence it follows that the grounds of appeal are not made out;

And whereas the judgment was rendered by a court of competent jurisdiction and in accordance with the law, and in the absence of procedural irregularity;

The appeal is dismissed".

Thus, the lower court was entitled to refuse delivery to Spain on the ground that the offences were "committed in part" in the territory of th executing State (France).

Effect of the foregoing.

The effect of the foregoing provisions of French law appear to me to b that if the boot were on the other foot, if Ireland made a request to Fra for the delivery of a British citizen, like Mr. Bailey, from France to answer in Ireland a charge that he had murdered an Irish person in France, in circumstances otherwise identical to those of the present cas such an application would be liable to refusal on a number of grounds.

The most obvious of these grounds are, to continue the analogy with th present case, "the French authorities have decided not to initiate a prosecution" [Article 695.24(1)]; that the matters in respect of which t warrant was issued "were committed wholly or partly on French natio territory" [Article 695.24(3)]; and perhaps others.

A third available ground of objection is particularly suggestive. The French Code citation in question is Article 695.24(4) of the *Code de Procédure Pénale.* This deals with an offence committed outside the territory of the State which issues the European arrest warrant (France the example taken). If such a request is made to France (instead of by France, as here**)** the question is whether French law permits or does no permit the prosecution of the offence when it is committed outside French national territory. This is the question which arises as a matter French law, it appears to me, whether or not the offence was in fact committed outside French national territory.

The foregoing exploration of French law on some of the questions rais in this case is, of course, by no means conclusive of the position in Iris law. It is possible, though perhaps unlikely, that the Irish legislature ha less amply provided the Courts with powers of a protective or a defens nature against a European arrest warrant, than the French legislature ha

The real relevance of the French legislative provisions is that they, like the Irish ones, are designed to transpose into national law the provisior of the Framework Decision. It is clear from a consideration of s.44 of t Irish Statute and para. 695.24(4) of the French Code, that each provisi is directed as implementing, in the relevant country, Article 4.7(b) of t Framework Decision. It is, on that account, that the French provision cited is a useful and suggestive aid to the construction of the Irish statu enacted to the same end. Each provision addresses the same situation: forcible delivery is sought for an offence which was not committed in territory of the issuing State. Perhaps it was committed in the territory the executing State, or perhaps it was committed in the territory of a th State. There is no other possibility. Neither the Irish, nor the French, legislation distinguishes those situations. But in either case, delivery from France may be refused if French law does not permit the prosecution of the [i.e. the same] offence when it is committed outside France.

This, as it happens, precisely reflects the conclusion which I have com to in relation to s.44 of the Irish Statute. The French provision is both more elegantly and more precisely worded, and therefore easier to construe. But that, in itself, would mean nothing. What it signifies is th the Irish and French provisions are each attempts to implement the san part of the Framework Decision. The clear French provision therefore fortifies me in the conclusion to which I have come about the less transparent Irish provision.

As I have mentioned, neither the French nor the Irish provision distinguishes in its terms between an offence committed in the executi

State, and an offence committed in a third country. Once this is realise the conclusion I have mentioned above becomes inevitable. But in the High Court judgment in the present case this inevitable result is avoide by holding that s.44 prohibits surrender only in respect of offences wh are committed in neither the issuing nor the executing State. It is to thi central finding that I now turn.

The High Court Judgment.

The learned High Court Judge, in the course of his judgment, adopted very particular and, in my view, rather forced construction of s.44. In t course of doing so, in my view, he effectively amended the section. Having declared that he would "*interpret s.44 by reference to any othe relevant Sections of the Act of 2003, and in the light of the aims and objectives of the Framework Decision*" he declared that it was not *con legem* (against the law) to hold that s.44 of the Act of 2003 only prohil surrender in respect of offences which are committed in a country othe than the issuing State (France) and other than this State (i.e. in a third State). Therefore the section did not apply at all in this case.

Apart from the dubiety, as I see it, of amending or drastically glossing section of a statute in that fashion, I cannot see any basis, legal or logi for the interpretation of s.44 which the learned trial judge propounds. I was the Minister's case that the legislation makes no attempt, in s.44 o elsewhere, to import the provisions of Article 4.7(a) of the Framework Decision. Secondly, neither the Framework Decision nor the Act conta anything to suggest that either has in contemplation only a crime committed in a third State i.e. neither Ireland nor France. In my view t is simply the reading of words into the statute which the Oireachtas di not consider proper to use in the section.

The fact that the Framework Decision makes no attempt to limit the effect of the relevant portion (Article 4.7) to "third country" cases, tha to cases where the crime is alleged to have occurred in a country other than the issuing State (here, France**)** or the executing State (here,

Ireland), is in my view fatal to the basis of the learned trial judge's interpretation. If the Framework Decision is silent on this topic, and it appears to me to be silent, it cannot form the basis of an "interpretatio of s.44 along the lines suggested. Even more fundamentally, the readi of words into a statute cannot fairly be described as an interpretation o that statute.

Section 44.

Having thus been respectfully critical of the learned trial judge's approach, I must immediately concede that the section is not easy to construe. I repeat that this is the fault of the draftsmanship, particularl tendency to use too many words and to use them in an odd order. In th case, the offence was undoubtedly committed in Ireland, so that there no question of it not being a crime in Irish law. On one view, but in m opinion a simplistic one, that logic would operate to disapply the secti

But that, I think, is not the correct interpretation of the section. Like Fennelly J., I have derived considerable assistance from the very fine t book written by Mr. Remy Farrell S.C. and Mr. Anthony Hanrahan B. "*The European Arrest Warrant in Ireland*" (Clarus Press, Dublin , 201 Like Fennelly J. I consider it remarkable this authoritative source was expressly mentioned in argument. I wish to express my entire agreeme with what is said at para. 12-21 about s.44 in its application to a case l this:

> *"Where it is clear that the offence in the warrant i an extraterritorial offence, the court must consider whether the offence would be amenable to prosecution on an extraterritorial basis in this jurisdiction. This, clearly, amounts to the court engaging in a hypothetical test whereby it essentia substitutes the State for the position of the requesti State in relation to the offence described in the warrant".* (Emphasis added)

I do not easily yield to the proposition that the section enjoins a hypothetical test on the Court. But having considered the section at considerable length I believe it is open to no other interpretation. The learned authors continue:

> *"Presumably where the place of commission of the offence is Ireland the court must essentially ignore this fact and assume for the sake of the exercise th the place of the offence is another State. It is less clear what the position is where the requesting Sta has asserted extra territorial jurisdiction on a particular basis… Is the Court restricted to considering whether the State would exercise as extraterritorial jurisdiction on the same basis or c it consider whether extraterritorial jurisdiction mi be exercised on an alternative basis? The Act provides little assistance in this regard. However, 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 basis as opposed to on some other ground".*

In my view this construction arises from the words of s.44 itself, and from their being rooted, via Article 4.7 of the Framework Decision, in the principle of reciprocity. I entirely agree with Fennelly J.'s lucid treatment of the historical origins of this principle. I would indeed go further than Fennelly J. felt able to go at an earlier point in his judgme I do consider it clear that a principle of reciprocity underlines the extradition of suspects accused of committing extraterritorial offences. is unnecessary to consider the need for reciprocity in other circumstances.

In considering s.44 it is necessary to bear in mind the contents of the provision of the Framework Decision which it was endeavouring to

implement. This permitted a judicial authority to refuse to execute a warrant if (at 4.7(b)) the warrant related to offences which:

> "*have been committed outside the territory of the issuing member state [France] and the law of the executing member state [Ireland] does not allow prosecution for the same offences when committed outside its territory".*

This plainly raises the legal status in Irish law of offences committed outside Irish territory. But the offence here was in fact committed with Irish territory, so the exercise required by the Framework Document, a by s.44, is necessarily a hypothetical one. To those who consider this over elaborate and unduly removed from the facts of the present case, can only say that I do not disagree, but that the exercise required to be carried out is that enjoined by the statute and the Framework Decision and there is nothing the Court can do about that.

I am fortified in these conclusions by a citation from another distinguished text book, **Blextoon and Van Ballegooij** *Handbook on t European Extradition Warrant* [2005]. At p.74 the following is said:

> "*Only one provision in the Framework Decision alludes to the principle of reciprocity. According t Article 4, section 7 sub. (2) the executing judicial authority is allowed to refuse the extradition of a European Arrest Warrant, whenever such a warra envisages offences which may have been committe outside the territory of the issuing Member State a the law of the executing Member State does not all prosecution for the same offence when committed outside the territory of the executing Member State In the corresponding situation the executing State would simply not be able to issue an arrest warran due to a lack of jurisdiction. The provision restore the equilibrium by offering this state the possibilit*

> *restrict the scope of its performances to its own expectations in similar circumstances. The Section mirrors Article 7, section.2 of the European Convention on Extradition*".

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 learned Chief Justice that there is no reciprocity between Ireland and France on the facts of this case.

I wish to emphasise my agreement with the contents of the judgment c Fennelly J., commencing with the assertion that "a sensible and fair interpretation of Article 4.7(b) demands the recognition of a principle reciprocity". Viewed in that light, I agree that the second phrase of s.4 can only refer to a corresponding but (for that very reason) hypothetica offence of murder committed outside Ireland. I also agree that the issu whether the crime of murder generally, when committed outside Irelar would "constitute an offence under the law of the State".

Viewed in that light, I agree with the conclusion of Fennelly J. that it i quite possible to interpret s.44 in conformity with Article 4.7(b).

The crime here was committed not only outside France, but in Ireland.

If the positions were reversed, a murder outside Ireland is not a crime Irish law, unless committed by an Irish citizen.

Mr. Bailey is not an Irish citizen (and, in any event, the D.P.P. has determined there is no case against him).

Section 44 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. In view of this, I do not think it necessary to go on to consider Mr. Bailey's objections under s.42 or to hear and decide his objections under s.37. Whether Mr. Bailey won or lost on these ground it would make no difference to the fact that his forcible delivery to France must be refused. For the same reason, it is not necessary to go into the objection to delivery grounded on s.37.

Conclusion.

I would refuse to order the forcible delivery of Mr. Bailey to France.