Criminal Justice Notes

In this month's edition of KLS Criminal Justice Notes:

- **The extraordinary measures being introduced in Ireland and the UK to combat the threats posed by the Covid-19 virus are exceptional by any standard. While they may be deemed necessary and even desirable in the interests of all, they have police state characteristics which need to be scrutinised closely.**

- **In a decision a few weeks ago, the CJEU, sitting as a Grand Chamber, curbed the capacity of the State to apply a change in its criminal law in a manner that would deprive a person of double criminality protection under the European Arrest Warrant regime. It could have implications for the extraordinary *Bailey* case which is back in the Irish courts again.**

Covid-19 and the benign police state

Introduction

The designation 'police state' is generally associated with a situation in which the police (or other executive authority) are conferred with sweeping discretionary powers to regulate and control most aspects of social, economic, cultural and political life. These will include coercive powers to take away individual liberty and personal privacy; to restrict freedom of movement, public gatherings, use of property etc; and to compel cooperation and compliance.

Typically, such measures are associated with totalitarian regimes where they are used by the ruling elite first and foremost to secure their position in power, and to govern through fear rather than consensus. There is no absolute reason, however, why they cannot be deployed temporarily in a representative democracy primarily to respond to a threat against the people, rather than to serve the partisan self-interest of those in power. In other words, the police state could be benign, even desirable in certain extreme circumstances, rather than threatening and objectionable.

If the current assessment of the threat posed by the Covid-19 virus to life, social cohesion and the established economic and political order is correct, it is easy to appreciate the necessity for resort to the extraordinary measures being introduced in Ireland and the UK. Nevertheless, it is important to be vigilant over what lies beneath the surface of benign police state instruments.

The current measures confer sweeping and unprecedented powers on Government Ministers, medical health professionals and executive state officers to intrude on many of the most basic rights and freedoms of the individual and whole communities. They are backed up by police powers which are extensive and draconian even by war-time standards. While they may be essential to address the threats posed by the virus, it is also important to be aware of their content

and the threat that they themselves can present to the health and well-being of our democracies and the values on which they are based.

The statutory contexts

The new measures in Ireland and the UK are being introduced against statutory backgrounds that are similar in some respects, but significantly different in others. Each already has established public health legislation which includes extensive regulatory powers, backed up by police and criminal justice measures, to combat public health threats posed by infectious diseases. Broadly, these are found in the Health Act 1947 (and consequential regulations) in Ireland and the Public Health (Control of Disease) Act 1984 (and consequential regulations) in England and Wales. There are separate measures in Scotland and Northern Ireland.

For the most part, the Acts do not directly create a whole new body of criminal offences, nor do they confer draconian enforcement powers directly on the police. These aspects come into plain sight if, and when, the relevant Government Minister makes regulations under the Acts in order to prevent the spread of an infectious disease.

In Ireland, the regulatory powers and related provisions provided by the 1947 Act are exceptionally broad and severe. Nevertheless, in the past few days, they have been expanded and deepened even further through the emergency enactment of the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020. It is confined to emergency social welfare measures and amendments to the 1947 Act. A further emergency measure is making its way through the legislative process at the time of writing (25th March 220). It deals with matters such as: rental tenancies, wages and employment matters, re-enlistment of defence forces personnel, civil registration and other health matters.

The response has been more complex in the UK, partly but not exclusively, due to the existence of separate health jurisdictions. As in Ireland, the UK legislation already provides exceptionally broad and intrusive measures to deal with threats posed by infectious diseases. At the time of writing, further extraordinary measure (the Coronavirus Bill 2020) are about to be enacted in response to the threats posed by the spread of Covid-19.

In contrast to its Irish counterpart, the UK Bill runs to over 360 pages. In addition to coercive measures encroaching on fundamental rights and liberties, it deals expressly with aspects of: health support systems, the food supply chain, statutory sick pay, pensions, national insurance contributions, court and tribunal proceedings, inquests, the postponement of elections, school closures, registration of births and deaths, the disposal of dead bodies, and time limits for surveillance warrants and retention of fingerprints and DNA profiles, among others. It is an exceptionally disparate and complex piece of legislation, which is a concern in itself.

The key provisions of the Irish Act expire on the 9th of November 2020, but can be continued in force by a resolution of both Houses of the Oireachtas. Most of the comparable provisions in the UK Act remain in force for two years, and there is provision to extend that.

It is not intended (or possible) in the current note to do anything more than offer a broad outline of some of the key

regulatory and related provisions in the Irish and UK measures encroaching on fundamental rights and liberties from police and criminal law perspectives.

Regulatory powers

The Irish legislation empowers the Minister for Health to make regulations for the purpose of preventing, limiting, minimising or slowing the spread of Covid-19 or to deal with public health risks arising from it. The striking feature about this power is that it enables the Minister to control virtually all forms of public movement and physical interaction throughout the country. This is draconian by any standards. It extends to, among other things: restrictions on travel to and from the State; prohibition on events where the numbers likely to attend pose a risk of infection to those attending; and the temporary closure of premises or any other place (including businesses, schools, universities, churches, social venues etc).

The Minister can also declare an area or region in the State to be an "affected area"; that is, an area where there is thought to be sustained human transmission of Covid-19 or where there is a high risk of infection or contamination spreading through travel from that area. Travel to, from and within such areas can be restricted, and persons living in or visiting them can be required to remain in their homes or other places specified by the Minister. Similarly, events in an "affected area" can be prohibited. These come close to draconian curfew or 'lock down' powers.

Obstruction or non-compliance with any aspect of obligations, prohibitions or restrictions imposed in the regulations will be made a criminal offence. Equally, it will be an offence to refuse or fail, when requested, to give information required under the regulations where that information is within one's personal knowledge.

The comparable provisions in the UK are more complex, partly because the Public Health (Control of Diseases) Act 1984 already confers extensive regulatory powers on a Government Minister in England and Wales only. These enable the making of extensive and extremely intrusive regulations on international and domestic travel, restrictions on working or trading, the closure of premises, the holding of events or gatherings and keeping children from school, among others. The Coronavirus Bill makes similar provision for Northern Ireland and Scotland.

The UK Bill also makes further draconian provision for all the jurisdictions in the UK. So, for example, when the appropriate Minister in each of the three jurisdictions ((Executive Office in Northern Ireland) issues the appropriate declaration, he or she may issue a direction prohibiting or imposing restrictions on the holding of an event or gathering (including events or gathering of a specified type) while the declaration remains in force. He or she can also issue a direction imposing prohibitions or restrictions on entry to, departure from or the location of persons in specified premises. This can include the closure of premises. In respect of the UK as a whole, the Secretary of State may direct suspension of port operations and the taking of consequential measures to give it effect.

Detention and related restrictions

The Irish legislation gives a medical health officer a far-reaching summary power to order the detention of a person suspected of being a potential source of infection and risk to public health. For this purpose, a potential risk of infection is given an

extraordinarily wide interpretation. It is not confined to a person showing symptoms. It extends to any person who may have been in contact with such a person, or anyone who attended an event that may also have been attended by a person who is believed to be a probable source of infection. Equally, it extends to a person who has travelled from, to or within a part of the State subject to an affected areas order, or who has been in contact with any such person. The same applies to a person who has travelled from a place outside the State where there is believed to be a significant number of infected persons.

The net effect is that a very large number of people are potential subjects of a detention order issued by a medical health officer, with no judicial sanction required. That number will continue to rise significantly for the immediate future. Resistance will trigger the threat of coercive action by gardai. That can include using force to break into dwellings and to physically restrain and carry away the targeted person or persons to detention. By any standards, these are an extraordinary representation of the raw executive power of the State over the individual.

Under the UK legislation, these is provision for a public health officer (and a constable and an immigration officer) to require a potentially infected person to go to, and remain in, a place for immediate screening and assessment for the virus. If tests show infection, he will be subject to further detention and associated obligations. A failure to comply is a criminal offence. There is also a body of provisions for the making of regulations giving the State extensive and deeply intrusive powers over the liberty, person and property of an individual who may be infected.

Police powers

The sweeping obligations and restrictions that can be imposed in Irish regulations are backed up, not just with penal provisions, but also with commensurate police powers. The Act, itself, states that where a member of the Garda Síochána suspects with reasonable cause that a person is committing a criminal offence under the regulations, he or she may direct that person to take such steps as the member considers necessary to ensure compliance. Failure to comply with such a direction is itself an offence for which the member has a summary power of arrest.

A member of the Garda Síochána is not given an express power to impose a fixed penalty on a person found in public in breach of a requirement under the legislation. However, where a member believes on reasonable grounds that a person is committing or has committed an offence under these provisions, he or she may demand the person's name and address. A refusal or failure to comply is in itself an offence for which the person may be arrested summarily. An arrest in any of these circumstances can result in a criminal prosecution for the alleged offence.

These provisions are of immense significance. Clearly, by making regulations, the Minister for Health is expanding the reach of coercive Garda powers enormously. Since the nature and extent of the ministerially imposed restrictions can intrude widely and deeply into all aspects of social, cultural, economic and political life, it must follow that Garda powers will do the same. Despite the absence of an express power to impose fixed penalties, they position the Garda as the masters of the street and all movements on it.

The measures place the Garda in the frontline of the enforcement of the draconian restrictions envisaged by the regulations. They will have to take the initiative in intervening to correct non-compliance on the street and in the community on a daily basis. In doing so, however, they are moving far beyond their conventional policing role, to enforcing radical, government directed, restrictions on the norms of civil society. Even if such restrictions and interventions are accepted as necessary and desirable, that does not change the fact that they carry within them the strains of a police state.

The UK measures also introduce some draconian police powers. As currently framed, however, they do not include express provision for some of the powers conferred on their Irish counterparts. Specific powers conferred on the constable include an exceptionally broad power to enter any place for the purpose of enforcing the emergency provisions in respect of potentially infected persons. Another, more unusual example, is a power to require a potentially infected person to go to and remain at a place for immediate screening and assessment. The constable may use force to enforce such a requirement.

Surprisingly, perhaps, the UK legislation does not yet give constables express summary powers to take coercive actions against persons in public who do not appear to be complying with regulatory requirements, orders or directions issued under the legislation. Nor does it give them express powers to impose fixed penalties for any such transgressions, although there are indications that the introduction of such powers may be imminent.

Police support to other officers

Police officers are not the only personnel with enforcement responsibilities under the legislation. Significantly, Irish regulations may provide for their implementation or enforcement by a "relevant person", or group of such persons, as may be specified in them. For this purpose, a relevant person could include: an authorised officer under the Health Act, a medical health officer, an officer of the Minister for Justice and Equality, officers of customs and excise, or a person (or group of persons) appointed by the Health Services Executive.

None of these persons are trained and sworn police officers. Nor do they have the general powers, privileges and authority of a member of the Garda Síochána. Critically, however, the legislation states that when exercising a power or function under the regulations, a relevant person may require a member of the Garda Síochána to assist by, for example, temporarily detaining a person, bringing a person to any place, breaking open any premises, or any other action in which the use of force may be necessary and lawful. The member shall comply with such a requirement.

There are precedents for gardaí being statutorily required to use their coercive powers and authority to overcome opposition to measures taken by certain administrative officers in the exercise of their limited statutory functions. Nevertheless, what is envisaged under the Covid-19 regulations is of an entirely different dimension. They designate gardaí, as the enforcement tools of Government agents whose functions, impacting directly on the rights and freedoms of individuals, will be determined by a Government Minister rather than directly by law. It is tantamount to gardaí,

with their extensive powers to use force against person and property, being deployed directly as agents of the Government. This turns on its head one of the most fundamental aspects of the rule of law in our society, namely the principle that police officers are independent of external executive direction in the exercise of their law enforcement powers.

Although the UK legislation does not include a provision as broad as its Irish counterpart, it does make similar provision with respect to controls over a potentially infected person. Where a public health officer has required such a person to go to and remain at a place for immediate screening and assessment, he or she may request a constable to remove that person to that place. Interestingly, the legislation states that the constable may (not must) comply with the request.

Conclusion

The police powers and criminal law enforcement provisions underpinning some of the measures introduced to combat the threats posed by the spread of Covid-19 are undoubtedly unprecedented in their impact on fundamental human rights and freedoms. So long as their use is targeted in a proportionate manner at those threats, they are unobjectionable and even desirable. The problem, of course, is that such broadly framed measures have a tendency to expand beyond their initial remit, sometimes by oversight, and sometimes because governments cannot resist the temptation to dip into them as an expedient response to other pressing challenges that arise from time to time.

Another concern is that the extraordinary measures gradually become accepted as ordinary, as people become accustomed to abiding by them in their daily lives. It is interesting, for example, that many people are complying submissively with draconian and unprecedented restrictions on their freedom of movement, even though many of those core restrictions (at the time of writing) are based on mere government requests or guidance as distinct from legal requirements issued pursuant to the legislation.

To avoid or limit long-term damage to our established values, it is vital that the use of these measures is subject to close scrutiny and that they are removed as soon as we emerge from the Covid-19 threat. At the very least, that requires a robust and transparent framework for recording and publishing data on all instances in which the powers are used against individuals and groups. It also requires much tighter restrictions on the duration of the legislative provisions and on the scope for renewing them from time to time.

EAW and the double criminality rule

Introduction

Council Framework Decision 2002/584/JHA introduced the European Arrest Warrant (EAW) to provide a speedier and more simplified extradition facility between EU Member States. It replaced the more cumbersome and time-consuming extradition arrangements, based on a 1957 Council of Europe Convention, with a more streamlined surrender procedure which dispensed with (or diluted) most of the established restrictions on extradition. Critically the EAW procedure was a vital component in the establishment of an EU area of freedom, security and justice in which

judicial decisions on criminal matters could move freely and be enforced on the basis of mutual recognition and trust in each other's criminal justice procedures and standards.

Not surprisingly, such a novel and ambitious instrument continues to generate a substantial volume of case law addressing the many issues that arise in its application across the diverse criminal justice regimes of 28 Member States. The latest example is provided by an interpretation handed down a few weeks ago by the EU's Court of Justice (CJEU), sitting as a Grand Chamber, in the case of *Procureur-generaal v X* (C-717/18).

The facts

The defendant had been convicted in Spain on 21 February 2017 for the offence of glorification of terrorism and humiliation of the victims of terrorism in respect of conduct (a 'rapper' song performance) between 1 January 2012 and 31 December 2013. He was sentenced to imprisonment for two years. Under Spanish law that was the maximum sentence applicable to the conduct at the time. The maximum sentence for the offence was increased to three years' imprisonment in March 2015, but that only applied to conduct occurring from that date.

Before serving his sentence, the defendant went to Belgium. In May 2018, the Spanish authorities issued an EAW for his surrender from Belgium to serve the sentence. In the EAW proceedings before the Belgian court (Ghent Court of First Instance), an issue arose over the application of what is known as the "double criminality" rule. This refers to a long-standing principle whereby extradition/surrender will normally be refused, in the absence of verification that the conduct for which the person is wanted in the issuing State would also constitute an offence in the executing State if it occurred there. The Ghent Court in the defendant's case refused to execute the EAW as it considered that the double criminality rule was not satisfied. On appeal by the prosecutor, the Ghent Court of Appeal referred to the CJEU for a ruling on whether the double criminality rule applied in respect of the offence for which the defendant's surrender was sought.

The double criminality issue

One of the more dramatic and controversial features of the EAW legislation is that the double criminality rule has largely been removed from 32 prescribed offences, or categories of offence. It is sufficient if the conduct (or alleged conduct) of the requested person comes within the scope of any of these offences, as defined by the law of the *issuing* Member State, and is punishable by a maximum sentence of at least three years imprisonment in that State. Where those requirements are satisfied, there is no need to verify compliance with the double criminality rule.

Clearly, by increasing the maximum sentence for the terrorism offence in question from two years to three years, the Spanish authorities moved it from the offences for which double criminality had to be verified to the prescribed offences for which double criminality did not need to be verified. Accordingly, when seeking the surrender of a person from another Member State, they would not have to establish that the law of that State (Belgium in this instance) recognised an offence consisting of the same conduct.

The issue that arose in the *X* case was whether that change in Spanish law

applied to the EAW for the defendant, even though the maximum sentence applicable to him under the law at the time he was sentenced was two years imprisonment. In other words, when the EAW legislation applied a punishment threshold of imprisonment for three years as the threshold for the double criminality exemption, was it referring to the punishment generally applicable to such an offence under domestic law at the time the EAW was issued, or was it referring to the punishment applicable under the law at the time of the facts of the case giving rise to the EAW? The difference was critical on the facts of *X*. Under the former interpretation, double criminality would not have to be verified in the execution of the EAW. Under the latter interpretation, it would have to be verified.

The EAW provisions

Article 2 of the Framework Decision does not specify which version of the domestic law in the issuing State is applicable for the purposes of the double criminality exemption, where that law has been amended between the time of the conduct for which the EAW was issued and the time of issue of the EAW. Article 2(1) stipulates generally that an EAW may be issued for acts punishable by the law of the issuing Member State by a custodial sentence for a maximum period of at least twelve months or, where sentence has already been imposed, by a custodial sentence of at least four months. The defendant in the instant case clearly comes within the latter category. Article 2(2) goes on to make further provision for a select group within that category. It stipulates that for certain prescribed offences punishable under the law of the issuing Member State by a maximum custodial period of at least three years, verification of double criminality is not required. The two provisions are clearly linked, but it is not wholly clear which version of the domestic law applies for the purposes of art.2(2).

Following its settled case law, the Court looked not just at the literal wording of the provision, but also at the context in which it appears, and the objectives pursued by the rules of which it is part.

The literal interpretation

A literal interpretation might suggest that the double criminality provision in art.2(2) is meant to apply simply if the *offence* is on the prescribed list, and is punishable under the law of the issuing State by a custodial sentence of at least three years at the time of issue of the EAW (even if the offence could not have attracted such a sentence at the time it was committed). Such an interpretation would attach significance to the difference in wording where art.2(1) refers to "acts" punishable by the law of the issuing State (suggesting that it relates to the facts of the instant case), and where art.2(2) refers to the punishment applicable to certain prescribed "offences" (suggesting that it relates to the offence independent of the instant case).

The contextual interpretation

The Court rejected the literal interpretation. Taking a contextual approach, it noted that under art.2(1) a person convicted of an offence could be surrendered where the sentence imposed was imprisonment for at least four months. Clearly, art.2(1) could only be referring to a sentence actually imposed under the law as it existed at the time of the conduct constituting the offence, as distinct from a sentence that could have been imposed under the law at the later time when the EAW was issued. The Court considered that the same must apply to art.2(2). To do otherwise would undermine the consistent application of the two

provisions which clearly were meant to operate in harmony. The mere fact that art.2(1) referred to "acts" punishable by the law of the issuing State, while art.2(2) referred to offences", was not a sufficient difference to support a contrary interpretation.

The Court found further support for its contextual interpretation in art.8 of the Framework Decision which specifies the minimum official information that must be set out in the EAW form by the issuing Member State. That information is intended to enable the executing judicial authority to give effect to the EAW swiftly. It includes information on the penalty imposed, or scale of penalties applicable, and that must be set out in a form contained in an Annex to the Framework Decision. This form asks for the maximum length of custodial sentence that may be imposed under the law of the issuing State, as well as the length of sentence actually imposed, in the case.

As the Court points out, this information relates to concrete elements of the instant case in respect of which the EAW has been issued. It follows that it is referring to the issuing State's law applicable to the facts of that case, as distinct from a later version applicable to the offence at the date of issue of the EAW. It is the former, therefore, that must be applied by the executing judicial authority in determining whether the penalty threshold for the application of the double criminality exemption in art.2(2) has been satisfied.

The purposive interpretation

Turning to the purpose of the EAW Framework Decision, the Court emphasised the objective of achieving a simplified, accelerated and effective surrender arrangement with a view to contributing to an EU area of freedom, security and justice based on mutual confidence between Member States. In the Court's view that objective would be undermined if the executing judicial authority could not proceed on the basis of the issuing State's law on the penalty threshold for the offence as stated in the EAW application (i.e. the law applying to the facts giving rise to the instant case). The executing judicial authority could experience difficulty in ascertaining the applicable version of the law of the issuing State where that law had been amended after the date of the facts giving rise to the instant case. This would also generate delay and uncertainty contrary to the purpose of the Framework Decision.

In addition, adopting the law on the date of issue of the EAW, as the operative date for the art.2(2) double criminality provision, would undermine the requirements of foreseeability encompassed by the principle of legal certainty. It would bring within the scope of the double criminality provision persons who, at the time of committing the offence, could not have foreseen that they would come within that provision. Moreover, it would permit Member States to bring such persons within the scope of the provision by the simple expedient of subsequently amending the penalties in respect of the offences for which their surrender was sought.

The result

The Court's interpretation does not make it easier to secure the surrender of the defendant in this case. It will be necessary to verify compliance with the double criminality rule; i.e. that the conduct of which he was convicted would amount to an offence under the law of the executing State had it occurred there.

Commendably, however, the Court's interpretation promotes a more consistent, coherent and predictable approach to the enforcement of EAWs generally, and the application of the double criminality exemption in particular. In doing so, it resists the temptation to allow Member States the freedom to facilitate the surrender of convicted persons by amending their domestic law to increase the maximum penalties applicable after they had committed the offence and before their surrender was sought. This, of course, can also be interpreted as a concession to the rights of the offender and due process values.

Implications for Bailey case

Although the decision in *X* is concerned specifically with the interpretation of the art.2(2) double criminality provision, there is room to argue that it has broader application. In particular, the Court reacted against the notion that a State could deprive a requested person of protections he would otherwise have enjoyed, through the simple expedient of subsequently changing the penalties that were applicable to the offence in question. This could have implications more broadly for a State changing its criminal law in a manner that would have the effect of removing an existing prohibition on surrender in respect of conduct that had already occurred. Presumably, the CJEU would not allow the State to take advantage of such expediency in seeking to secure the surrender of a person in respect of such conduct.

The extraordinary *Bailey* case, currently before the Irish courts again pursuant to a third EAW for the surrender of Ian Bailey (an English national resident in Ireland) to France, could provide an interesting example. In 2012, the Irish Supreme Court overturned the execution of an EAW for his surrender to France to be tried for the murder (in Ireland) of Sophie Toscan de Plantier (a French national). The basis of the Supreme Court's decision was that, under Irish law at the time, the Irish authorities could not have sought the surrender of an English national (such as Bailey) from France for the alleged murder of an Irish national in France. As such, the French application did not satisfy the principle of reciprocity which, in the Supreme Court's view, was required for the execution of an EAW in the particular circumstances of this case.

In 2019, the Irish State amended its law so that a foreign national resident in Ireland (such as Bailey) could be tried in Ireland for murder or manslaughter committed abroad. This could have the effect of overcoming the reciprocity obstacle and remove the prohibition on Bailey's surrender. The change in the law was effected at a time when it would have been within the contemplation of the Irish authorities that France would eventually issue a third EAW for Bailey's surrender. The CJEU's decision in the *X* case suggests that they may not be permitted to apply that change in the law against Bailey, should they attempt to do so.