Criminal Justice Notes

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

- A few days ago, in *Minister for Justice v Bailey* [2020] IEHC 528, the Irish High Court finalised its judgment refusing to execute the third EAW for the surrender of Ian Bailey to France in connection with the murder of Sophie Toscan du Plantier in Ireland in December 1996. It surely marks the end of an oppressive series of EAW litigation against Bailey stretching over ten years.

- In a decision handed down a few weeks ago in *R (on the Application of Highbury Poultry Farm Produce Ltd) v Crown Prosecution Service (Respondent)* [2020] UKSC 39, the UK Supreme Court considered whether EU regulations on standards in slaughterhouses imposed strict liability on operators. The question arose in the context of English criminal offences implementing the EU regulations.

The Ian Bailey EAW Litigation

Introduction

A few weeks ago, the Irish High Court handed down a decision which, hopefully, draws a red line under one of the most extraordinary cases in Irish and EU criminal law. The decision marks the third occasion on which French authorities attempted, unsuccessfully, to secure the surrender of Ian Bailey from Ireland to be prosecuted and punished in France for a murder that was actually committed in Ireland.

The associated European Arrest Warrant (EAW) litigation commenced in 2010. It offers disturbing insights into how the EAW can be used to subject a person to two national criminal procedures which combine oppressively to deny basic standards of due process and fairness in respect of the same criminal offence. The result for Ian Bailey (and his partner) has been a life-destroying Kafkaesque nightmare in which he has been the victim of repetitive litigation aimed at depriving him of his liberty, freedom of movement, privacy and reputation.

The silver lining in all of this has been the integrity of the Irish DPP and the tenacity of the Irish courts. They have been steadfast in applying the law and due process standards in the face of persistent attempts to pursue Bailey for the murder, despite the paucity of credible evidence against him.

The Irish proceedings

It all began nearly one quarter of a century ago in December 1996 with the brutal murder of French woman, Sophie Toscan du Plantier, outside her holiday home in a remote and scenic part of Ireland's rural West Cork. From very early in their investigation, the Garda (Irish police) focused on an Englishman and local resident, Ian Bailey, as their prime suspect.

Despite the different nationalities involved, it is quite clear that this was an Irish

murder. It was committed in Ireland, the 'suspect' was (and still is) resident in the same small community where it occurred and, insofar as we know, all the relevant evidence and witnesses were located there.

As is normal under Irish criminal law, the investigation was carried out exclusively by the Garda without supervision from a judicial officer, prosecutor or other independent authority. Their investigation file was submitted on several occasions to the independent DPP for a decision on whether to prefer charges against Bailey. On each occasion, the DPP decided against prosecution. He considered that the file did not contain sufficient reliable and admissible evidence upon which a jury could reasonably convict Ian Bailey of the murder.

Critically, the Garda investigation did not find any forensic investigation to connect Ian Bailey to the bloodied scene of the murder. Eye-witness evidence that allegedly placed him near the scene of the murder was poor by evidential standards and, for other reasons, was wholly unreliable. Alleged admissions by Bailey and circumstantial evidence could not withstand critical scrutiny. There was also disturbing evidence that the Garda may have used improper methods to exaggerate the case against Bailey or to force his prosecution.

The combined effect of these weaknesses in the Garda file was such that it did not provide a credible basis upon which to prefer charges against Bailey. The Garda evidence would not survive the forensic scrutiny that is applied at the trial stage to ensure that the fruits of the unsupervised police investigation were sufficiently credible and reliable to warrant conviction.

The first French EAW

Not content to leave the prosecution of the Irish murder to the Irish criminal justice authorities, the French judicial authorities opened a criminal investigation into it. They could do this because the murder of a French national anywhere in the world is a crime under French law and, as such, can be prosecuted in France. Surprisingly, given that the murder was still officially under investigation in Ireland, the Irish Ministry of Justice provided the French authorities with the Garda investigation file. Seemingly taking the controversial contents of the Garda file at face value, the French authorities duly adopted Ian Bailey as their prime suspect. Ignoring the Irish DPP's decision, they issued an EAW for his surrender to France in 2010.

The EAW legislation

Strange as it may seem, the Irish authorities could not refuse to execute the EAW on the basis that the crime occurred in Ireland, was still under investigation there and all the evidence, key witnesses and suspect were located there. Nor could they refuse execution on the basis that the DPP had decided that there was insufficient reliable and admissible evidence to prosecute Bailey. The EU EAW legislation did not prohibit surrender in such circumstances. It merely left discretion to the State concerned to refuse to execute the EAW. Controversially, Ireland had failed to take advantage of such discretion in its domestic law implementing the EU legislation.

Bailey was eventually saved from surrender by a separate discretion which the EU legislation conferred on Member States in respect of extraterritorial offences. It allowed a State to refuse to execute an EAW issued by another State for the surrender of a person in respect of

an offence that had been committed outside the territory of the latter State (in this case France). The requested State (in this case Ireland) could refuse to execute the EAW if it would not have jurisdiction to prosecute the same offence when committed outside its territory. Unlike the other discretions, Ireland did implement this discretion in its domestic EAW law by imposing a prohibition on surrender in such circumstances.

Reciprocity

The Irish Supreme Court interpreted the extraterritorial prohibition on surrender as being based on the principle of reciprocity. In other words, the Irish authorities would have to refuse to execute the French EAW for Bailey if they could not seek surrender in reciprocal circumstances. Reciprocal circumstances in this situation would be the murder of an Irish person in France by a non-Irish national (Bailey was an English national even though a long-time resident in Ireland). At that time, the extraterritorial murder of an Irish person by a non-Irish national was not an offence under Irish law. Accordingly, there was no basis upon which Ireland could have sought surrender in reciprocal circumstances. That being the case, Irish law did not permit the surrender of Bailey pursuant to the French EAW.

The second French EAW

Despite the finality of the Supreme Court's decision, the French issued a second EAW for Bailey's surrender in 2016. It was refused by the High Court essentially because it did not disclose any new facts or circumstances. Inevitably, the High Court considered itself bound by the earlier Supreme Court decision to the effect that surrender was prohibited due to a lack of reciprocity. Significantly, the High Court also indicated that the actions of the State in proceeding with a second French application in the absence of changed circumstances amounted to an abuse of process. The State did not appeal the High Court's decision.

The French trial

Undeterred by their failure to secure Bailey's surrender, the French authorities proceeded to put him on trial (in his absence) in France for the murder of Sophie Toscan du Plantier in Ireland. As is normal in French criminal procedure, the trial was conducted largely on the basis of the police file. Unlike the situation in Ireland, a French police file is compiled under the supervision of an independent prosecutor and investigating judge. In effect, the credibility and reliability of the police evidence is tested at the investigation and pre-trial phases, so that there is less need for the application of more stringent evidential rules and due process checks at the final trial phase. The latter can proceed mostly on the basis of statement evidence from the police file.

In Ireland, of course, the balance is the other way around. At the investigation stage, the police are left with unsupervised freedom to get on with the task of gathering evidence. Ultimately, the trial, rather than the investigation or pre-trial phase, is the centrepiece of the criminal process where the case against the accused will be tested in full. Critically, it is at the trial phase that police evidence is scrutinised closely through the examination and cross-examination of prosecution witnesses in person. The trial is also conducted in accordance with evidential and procedural rules designed to protect the accused against prejudice that may otherwise flow from having allowed the police excessive unsupervised freedom in building a case against a suspect.

These systemic differences have little significance for the relative integrity or fairness of criminal process in Ireland or France respectively. Each is designed to function as an organic whole with its own internal checks and balances. It is a very different matter, however, when the Irish police investigation stage (and its results) is lifted from the Irish process and inserted into the French process at the post investigation stage. That is what happened in the Bailey case.

The Garda file, which was compiled in the loosely regulated and unsupervised Irish police investigation stage, was treated by the French court as the equivalent of a French police file which would have been compiled under the scrutiny and supervision of an independent prosecutor and investigating judge. The statement evidence compiled by the Garda against Bailey was accepted at face value by the French court, even though it was not sufficiently reliable or credible to put him on trial within the norms of the Irish criminal process where it was compiled and for which it was intended. In effect, the Irish police investigation stage was combined with the French trial stage to produce a monstrous hybrid in which guilt was determined by the unadulterated results of an unsupervised, unregulated and flawed police investigation.

Bailey was convicted in his absence by the French court essentially on the basis of the untested evidence contained in the Garda file. He was sentenced to 25 years in prison.

The third French EAW

The French authorities issued a third EAW for Bailey's surrender in June 2019. There were two significant changes from the circumstances prevailing at the time of the previous two attempts to secure his surrender. The first, of course, is that the third EAW was issued for his surrender to serve the 25 year sentence in France, whereas the previous two were aimed at securing his surrender to be tried for the murder. The second change is that Ireland amended the law on extraterritorial jurisdiction over murder in a manner that seems to have been aimed at removing the basis for the Supreme Court's decision prohibiting Bailey's surrender to France on the first EAW (see above).

The Criminal Law (Extraterritorial Jurisdiction) Act 2019 was enacted to give effect in Irish law to the Istanbul Convention on preventing and combating violence against women. It seems that the government took advantage of this opportunity to change Irish law on extraterritorial jurisdiction over murder. Pursuant to the Act, Irish courts now have jurisdiction over murder committed abroad by a non-Irish national ordinarily resident in Ireland.

It is at least arguable, therefore, that if the Bailey type situation arises at some time in the future, Ireland could not refuse to execute an EAW such as the French EAW for Bailey. In seeking his surrender on the third French EAW, the State intimated that it would rely on the change in the law effected by the 2019 Act in support of its application to execute the third French EAW for Bailey's surrender.

The Irish High Court decision

As noted above, the Irish High Court refused to execute the third EAW. It based its decision on two primary grounds. The first was the reciprocity principle underpinning the Supreme Court's decision on the first EAW.

The High Court followed the Supreme Court's decision to the effect that the extraterritorial prohibition on surrender in the Irish EAW legislation reflected an application of the reciprocity principle. The High Court, however, seems to have adopted a more sweeping approach to the application of the reciprocity principle to the legislation.

It placed particular emphasis on the general premise that French extraterritorial jurisdiction is based on the nationality of the *victim*, while the comparable Irish jurisdiction is based on the nationality (now extended to include ordinary residence) of the *accused*. Since the 2019 Act did not affect the status of the *accused* as the focus of the Irish extraterritorial jurisdiction, the High Court concluded that the lack of reciprocity with the French remained.

The High Court's approach to the reciprocity issue can be questioned. The EAW legislation does not incorporate, or even refer to, the reciprocity principle expressly. It focuses instead on whether the Irish State could exercise jurisdiction over the offence in question if it was committed outside Irish territory. As a result of the 2019 Act, the Irish State now has jurisdiction over murder committed abroad by a non-national ordinarily resident in Ireland. It is submitted, therefore, that the extraterritorial question should really have been confined to whether the 2019 Act applies retrospectively to the Sophie Toscan du Plantier murder.

The second primary ground for the High Court's decision was its finding that Bailey had acquired, from the earlier Supreme Court decision, a vested right not to be surrendered in respect of the murder (the technical legal label of 'issue estoppel' is used in this context). That right was not necessarily absolute for all time. It could be removed by legislation which intended to deprive him of it. The High Court could find no such intent on the face of the 2019 Act. Accordingly, Bailey could rely on the vested right to defeat the third French EAW.

The High Court also followed its own previous decision to the effect that the *second* attempt to seek Bailey's surrender amounted to an abuse of process. Surprisingly, however, it went on to hold that the third attempt was *not* an abuse of process. The High Court attempted to explain this unusual position by focusing narrowly on the basis for the State's application in respect of the third EAW. In doing so, it found that there had been a change in the law (the 2019 Act) since the second application, and that it was reasonable to test the impact of that change by seeking Bailey's surrender on a third application.

It is respectfully submitted that this aspect of the High Court's judgment displays a preoccupation with abstract legal principle at the expense of the substantive justice of the case. Where a person has already suffered a prolonged executive and judicial procedure that has been denounced as an abuse of process, it borders on the surreal not to accept that subjecting him to another round of substantially the same procedure would be an even more grotesque abuse of process. This is surely so in Bailey's case, given the whole history of the proceedings and the impact that they have had on his life.

The High Court's reliance on the change in the law effected by the 2019 Act as a reasonable basis for the State to have a third bite of the cherry is not persuasive. Indeed, it could be argued that the State's action on this aspect actually compounded the abuse of process.The State secured the

enactment of the provisions in the 2019 Act seemingly on the understanding that it would overcome the Supreme Court's extraterritorial obstacle to Bailey's surrender. That same State then sought to rely on those provisions to pursue Bailey for a third time, even though he had fought for and secured the protection of the Supreme Court's ruling on the original application. Arguably, that should constitute an abuse of process in itself.

A further disappointing feature of the High Court's decision is its rejection of the argument that Bailey's surrender would amount to a breach of his right to a fair trial. In doing so, it is respectfully submitted that the Court did not give full consideration to the adverse effects of the contrived combination of an Irish police investigation with a French trial. It took the view that (if surrendered) Bailey could raise any concerns about the fairness of the proceedings in a rehearing or appeal before the French court. The apparent willingness of the French court in the actual trial to accept the Garda statement evidence at face value does not offer grounds for confidence that a French retrial or appeal would undo the prejudice suffered by Bailey.

Having said all that, the fact remains that the High Court felt able to refuse Bailey's surrender on technical legal grounds associated with reciprocity and issue estoppel. As it happens, given the extensive sensitivities surrounding the case, this may prove politically more palatable than a full-frontal assault on the substantive justice aspects.

Conclusion

The State was given two weeks to consider an appeal before the High Court's decision would be finalised. A few days ago, the State confirmed that it would not be appealing. Hopefully, that will finally bring an end to this most extraordinary EAW litigation and allow Ian Bailey some room to pick up the pieces of what is left of his life.

The fact remains, of course, that some major issues are still left unresolved. First and foremost is the fact that no one has been brought to justice in Ireland for the brutal murder in Ireland of Sophie Toscan du Plantier. This cannot be covered up by a trial and conviction in Paris that was based on unreliable and untested evidence. It remains the case that the original Garda investigation failed to gather credible and reliable evidence that would have warranted charging Ian Bailey or anyone else with the murder. Serious questions about why that is so need to be asked and answered convincingly.

Another issue is the manner in which Ian Bailey has been dealt with, first by the Garda and then by the Irish Justice Ministry. Despite repeated litigation, a judicial inquiry and an investigation by the independent Garda Ombudsman Commission into discrete aspects of his case, disturbing questions remain around the manner and extent to which the Garda pursued their investigation of Bailey. Similarly, serious questions remain around the manner and extent to which the Irish Justice Ministry contributed to securing the prosecution and trial of an Irish resident in France for an Irish murder that was still officially under investigation in Ireland.

Until all of these questions are answered fully and transparently, serious concerns over the administration of Irish criminal justice will persist and fester. While the Bailey case may be particularly unusual and extreme, it is merely one of a persistent stream of perceived culpable

failures of Irish criminal justice for victims and/or suspects across several decades.

Finally, questions arise over the EAW instrument itself and, especially, its potential to be used oppressively as in Bailey's case. Arguably, of course, much of the problem flows from the manner in which Ireland legislated for the EAW. Peculiar aspects of that legislation (and subsequent amendments) removed obstacles to Bailey's surrender that were otherwise envisaged by the EAW instrument itself. It does not follow, of course, that those aspects of the legislation (and subsequent amendments) were framed with the Bailey case in mind. Equally, however, the Justice Ministry's official explanations for not adopting the key discretions for prohibiting surrender are not wholly persuasive.

For further analysis of the issues raised above, see Dermot Walsh "The European Arrest Warrant in the Prosecution of Extraterritorial Offences: The Strange Case of the Irish Murder, the French Victim and the English Suspect" (2020) 45(1) *European Law Review* 48.

Criminal Law Strict Liability in EU Regs

Introduction

English law applies a presumption in favour of mens rea for criminal offences. What that means is that the prosecution will normally have to prove that the accused had a 'guilty mind' with respect to the proscribed conduct in a criminal offence. Typically, this requires proof that the accused acted with intention or recklessness when engaging in the proscribed conduct. Even if the statutory definition of the criminal offence was confined to the proscribed conduct and omitted words of intention or recklessness, the courts will normally proceed on the assumption that mens rea is required.

As every first-year criminal law student knows, the presumption can be rebutted. Where this happens, the offence in question is known as a strict liability offence. The prosecution will merely have to prove that the accused has satisfied the proscribed conduct in the criminal offence. There is no need to prove that he was intentional or reckless with respect to that conduct. He can still be guilty even though he may have been totally unaware that his act or omission satisfied the proscribed conduct.

One of the problems with these strict liability offences is that there is no absolute test for identifying them. They are most closely associated with regulatory type offences aimed at enforcing compliance with prescribed standards in certain business type activities. Typically, these will be punishable only by a fine, as distinct from imprisonment. They lack the moral opprobrium normally associated with what might be described as real or mainstream criminal offences.

In a decision handed down a few weeks ago in *R (on the Application of Highbury Poultry Farm Produce Ltd) v Crown Prosecution Service (Respondent)* [2020] UKSC 39, the UK Supreme Court considered whether EU regulations on standards in slaughterhouses imposed strict liability on slaughterhouse operators. The question arose in the context of English criminal offences implementing the EU regulations.

The facts

The appellant operates an approved poultry slaughterhouse which processes

75,000 chickens per day. The process involves live birds having their legs shackled to a moving line before being subjected to sequential steps including stunning, bleeding and scalding. The bleeding entails cutting the chicken's neck so that it is dead before being immersed in the scalding tank which removes its feathers. On several occasions a chicken went into the scalding tank while still alive as its neck had not been properly cut. In respect of each occasion, the appellant was charged with two offences under the applicable regulations.

The offences

The offences in question originated in EU regulations setting mandatory standards for slaughterhouse operations. The first stipulated that the animals shall be spared any avoidable pain, distress or suffering during their killing and related operations. The second stipulated that scalding should only be performed after the animal showed no signs of life after having been stunned and bled in the prescribed manner.

The EU regulations did not introduce criminal offences themselves. However, Member States were obliged to ensure compliance with the regulatory standards by prescribing penalties for infringement which were "effective, proportionate and dissuasive". The UK fulfilled that obligation by making breach of the regulatory requirements a criminal offence.

The magistrates trying the appellant's case were of the view that the offences were regulatory offences of strict liability. As such, it would be no defence for the appellant to argue a lack of intention or even negligence with respect to the breaches. It would be sufficient that the breaches occurred. The appellant challenged that interpretation unsuccessfully before a Divisional Court by way of a judicial review. They went on to appeal to the Supreme Court.

EU principles of interpretation

Significantly, the Supreme Court proceeded on the basis that the key question was whether the EU regulations imposed a strict liability standard for compliance. If they did, it was not open to the UK to prescribe a lower standard, such as intention or negligence with respect to an operator's failure to comply with the regulatory requirements. The focus, therefore, was on the relevant EU principles of legislative interpretation in this context, rather than the domestic principles of statutory interpretation. The former differ in some material respects from the familiar common law principles of statutory interpretation in penal matters.

The Supreme Court went on to highlight relevant factors to consider when interpreting EU legislation. The starting point, of course, are the terms of the provision in question, including its the preamble which usually consists of lengthy and detailed recitals. Comparison of the different languages in which the instrument is expressed will also assist in the interpretation of expressions used in the provision. Critically, particular importance is attached to the objectives and general scheme of the instrument and, more generally, the purposes of the EU. To divine these, the court can look at the recitals and at the preparatory materials behind the instrument.

The Supreme Court also emphasised that the imposition of strict liability in the context of criminal law is not contrary to EU law. On several occasions, the Court of Justice of the EU has recognised that Member States, where appropriate, have

discretion to adopt strict liability provisions in the enforcement of EU regulatory standards. This might be necessary, for example, where a regulation is aimed at ensuring a high level of compliance with the behavioural obligations imposed by it across the EU.

Application of the principles

Applying these principles to the EU regulations (and the associated English criminal offences), the Supreme Court had no difficulty in concluding that they incorporated the strict liability standard.

On the face of it, the relevant words used in both offences impose strict liability. They stipulate bluntly that the operators "shall .. ensure" compliance with the prescribed rules. There are no words to indicate that any failure to discharge that obligation needs to be intentional or negligent in order to import liability. Nor is there anything in the instrument as a whole to suggest a mens rea requirement. Significantly, application of the strict liability standard is in keeping with the overall purpose of the regulations which is to ensure a common high standard of observance in slaughterhouse operations across all Member States.

It follows that it was not necessary to prove that the appellant's breaches in this case were attributable to an intentional or negligent failure to comply with the regulatory requirements. It was sufficient to show that chickens in the appellant's operation suffered avoidable pain, distress or suffering during their killing, and/or were immersed in the scalding tank while they were still alive. There was no requirement to show that these events were attributable to fault on the part of the appellant or any of their operatives. The regulations imposed strict liability in respect of the harms in question in order to promote observance of the highest standards of care in the slaughterhouse operations.

The persuasiveness of the Supreme Court's analysis is clouded a little in respect of the offence of sparing the chickens avoidable pain etc. At one point, the recitals relating to this offence refer to inducing pain etc by "intention or negligence". Not surprisingly, the appellant pointed to this as strong evidence that there was no legislative intention to make the offence one of strict liability.

In overcoming this difficulty, the Supreme Court pointed, correctly, to the fact that words in the recital cannot displace clear provisions in the body of the regulation itself. In this case, the latter unequivocally impose strict liability. The reference to "intention or negligence" in the recitals by comparison does not necessarily signal that fault is always an essential element for the regulatory offences. Accordingly, the clear words of the regulation prevailed. The Supreme Court found further support for this interpretation in the legislative history of the provision.

Conclusion

An interesting and novel aspect of the Supreme Court's decision is its treatment of strict liability from an EU perspective. The EU principles of legislative interpretation allow the court to look at the underlying objectives of the measure within the broader regulatory and EU context. English principles of statutory interpretation in penal matters are more restrictive by comparison. Nevertheless, in this particular instance, the Supreme Court confirmed that it would have reached the same decision applying the English principles to the domestic criminal offences in question.