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## **Extradition Between the UK and Ireland after Brexit – Understanding the past and present to prepare for the future\***

**Key words:** extradition, European Arrest Warrant, Brexit, Ireland, Common Travel Area

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### **Abstract**

The Republic of Ireland and the United Kingdom have a long, close and difficult history. The most recent phase of which dates from 1998 and the conclusion of the Good Friday Agreement. Since 1921, however, there has been unique practice between Ireland and the UK as regards the transfer of accused and convicted persons from one to the other. Indeed, there has been a special and close relationship between the two in that regard; albeit one not without difficulties. In recent times EU Justice and Home Affairs measures and the Good Friday Agreement have supplemented and strengthened the relationship. These include, since January 2004, the European Arrest Warrant (EAW). The EAW has been particularly important in streamlining the extradition process between the Ireland and the UK. This phase of history and co-operation is coming to an end. The UK's membership of the EU has now ceased, and a transition period during which the UK remains part of the EAW will end on 31st December 2020. The extradition relationship between the two is therefore facing a considerable challenge. There are several options open to Ireland, the UK and the EU as a replacement. Time, political will and the interests of third states, however, may well stand in the way of the conclusion of an agreement that optimally serves the interests of all parties and criminal justice. This paper considers the origins of extradition between the UK and Ireland and the alternative methods of extradition open to the UK and Ireland after Brexit. Consideration is given to the likely operation of a Norway-Iceland style agreement and whether such an agreement will be in place by the end of the transition and, if it was, whether its terms are likely to be sufficient for the needs of Ireland and the UK. The possibility of a bilateral arrangement on extradition between Ireland and the UK is also explored. Underlying the discussion is the critical point that the future extradition relationship must retain its 'special'

characteristics, and therefore maintain the trust and good will that has developed over the years and given rise to an effective extradition relationship between the two countries. In other words, the lessons of history must be remembered.

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#### **Introduction**

The United Kingdom's departure from the European Union will inevitably change the Ireland – UK extradition relationship. As both countries were European Union members extradition between them was governed by the European Arrest Warrant Framework Decision. This was implemented in Ireland by the European Arrest

Warrant Act 2003 and in the UK by the Extradition Act 2003. The UK's departure from the EU will almost certainly have a negative impact on the ability of Ireland and the UK to secure accused and convicted persons from each other efficiently and effectively. This regrettable position will most likely subsist regardless of the model of extradition that is adopted to govern the process. It is regrettable simply because the process has been a vital criminal justice tool in the fight against crime, be it national or transnational. 'Ireland's largest "trading partner" for EAWs is Britain.'<sup>1</sup> The importance of continued close co-operation is universally recognised. Ireland's Department of Justice and Equality 2017 Annual Report on the operation of the European Arrest Warrant Act 2003 stated '[t]he departure of the UK is particularly significant for Ireland on a range of issues. However, in the context of combatting crime and terrorism, the necessity to maintain a functioning system of extradition between the two States has been identified as the key priority'.<sup>2</sup> The shared land border and geographic proximity, the free movement of persons under the Common Travel Area and the history of politically-related violence between and within Great Britain and the island of Ireland all contribute to the priority. This paper considers the origins of extradition between the UK and Ireland and the alternative methods of extradition open to the UK and Ireland after Brexit. Consideration is given to the possible conclusion and terms of a Norway-Iceland style agreement and whether such an agreement might be sufficient for the needs of Ireland and the UK. The possibility of a bilateral arrangement on extradition between Ireland and the UK is also explored. Underlying the discussion is the critical point that the future extradition relationship must retain its 'special' characteristics, and therefore maintain the trust and good will that has developed over the years and given rise to an effective extradition relationship between the two. In other words, the lessons of history must be remembered.

## **Part 1 - The Past, 1921 - 1998**

### **The Context of Ireland – UK extradition**

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<sup>1</sup> R. Briscoe, 'Brextradition, (2017) Jan/Feb Law Society Gazette of Ireland' 36.

<sup>2</sup> Department of Justice and Equality, Report on the operation of the European Arrest Warrant Act 2003 (as amended) for the year 2017, p 4, cited at [http://www.justice.ie/en/JELR/European Arrest Warrant Annual Report for 2017.pdf/files/European Arrest Warrant Annual Report for 2017.pdf](http://www.justice.ie/en/JELR/European%20Arrest%20Warrant%20Annual%20Report%20for%202017.pdf/files/European%20Arrest%20Warrant%20Annual%20Report%20for%202017.pdf) <accessed 29-08-20>.

The context of Ireland-UK extradition is found in the common history between the nations. Indeed, the development of their extradition relationship is imperfectly shadowed by changes in the political position of both. In an extradition context the stages of that history are usefully given as 1800 – 1921, 1921 – 1965, 1965 – 1998, and 1998 – 2020. Two features of Ireland and UK history transcend all these stages; the close and inter-twined political and personal relationships between the countries and their populations on the one hand, and the tensions, conflicts, violence and criminality that has sporadically come to the fore between them on the other. This fact has led to a close yet sporadically dysfunctional extradition relationship. Illustrating the closeness of the relationship is the fact that the backing of warrants had subsisted between Ireland and the UK for a considerable period. The procedure has been described as where:

... the authorities of the jurisdiction where the person is wanted issue their normal warrant of arrest, which is sent directly to the authorities of the jurisdiction where he is, who endorse it if it appears to be in order, and give it to their policemen to execute as if it were their own. The suspect is then 'lifted', and handed over to the authorities of the country where he is wanted with the minimum of fuss – the unspoken premise being that the authorities of the requesting jurisdiction normally act lawfully and reasonably...<sup>3</sup>

Exposing the basis of the tensions between Ireland and the UK, albeit obliquely, was Ó Dálaigh CJ in discussing the legal basis of the backing of warrants prior to 1965, the Petty Sessions (Ireland) Act 1851. He said in *State (Quinn) v Ryan* that the Act purports:

... to authorise removal from the jurisdiction *instanter* without any opportunity, reasonable or otherwise, to invoke the Courts. There can be little doubt that this was the purpose of the Act when it was enacted. Ireland was then part of the entity known as the United Kingdom of Great

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<sup>3</sup> J. Spencer, 'The European Arrest Warrant' (2003-2004) 6 *The Cambridge Yearbook of European Legal Studies* 201.

Britain and Ireland and was in enjoyment of the benefits of the Act of Union. One of these benefits was the free interchange of alleged offenders subject to the formality of local backing of warrants. However unreal, the theory was that an Irishman, as a subject of the Queen, should have been as happy, safe and as much at home in Britain as in Ireland.<sup>4</sup>

In relatively modern times, the tensions have led to levels of violence and disorder which in turn affected criminal co-operation and extradition.<sup>5</sup> Features of this included the introduction of a political offence exception into the process and the refusal of certain extradition requests under it. Indeed, the exception was not uncommonly applied during the height of the Troubles between 1972 and 1979 where, as a US extradition case notes, political violence claimed 1770 lives, of which 1300 were civilians.<sup>6</sup> Fortunately, recent decades have witnessed lessened tensions and increased co-operation. In law, this is seen through joint membership of the EU from 1 January 1973, both being party to the European Convention on the Suppression of Terrorism 1977 and participation in the EAW as from 1 January 2004.

### **The Origins of the Process 1921-1965**

The history of extradition between Ireland and the UK in a formal sense is relatively short.<sup>7</sup> As 'extradition' generally denotes rendition between sovereign states Irish-UK practice began in 1921 with the declaration of the Irish Free State. In large part reflecting the close and inter-twined relationship between the two jurisdictions the pre-1921 process of rendition subsisted for over four decades after the creation of the Irish Free State. The system was one of backing of

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<sup>4</sup> Ibid at p 118-119.

<sup>5</sup> See, for example, T. Duffy, 'The Law v. the IRA: The Effect of Extradition between the United Kingdom, the Republic of Ireland and the United States in Combatting the IRA' (1991) 9(2) Penn State International Law Review 293.

<sup>6</sup> As noted in *Matter of Doherty* by Government of the United Kingdom (1984) 599 F. Supp 270 at 273.

<sup>7</sup> The origins of the recognition of warrants in both Ireland and England is discussed in P. O'Higgins, 'Irish Extradition Law and Practice' (1958) 34 British Yearbook of International Law 274 at pp 275 - 284.

warrants.<sup>8</sup> Unlike standard extradition practice no *prima facie* evidence was required<sup>9</sup>, nor did a hearing in the requested territory take place. Governing these arrangements were generally the Indictable Offences Act 1848 and the Petty Sessions (Ireland) Act 1851. These rules were extended to the Irish Free State by provision in both jurisdictions.<sup>10</sup> Any arrest warrant issued by a court in Britain or Ireland was immediately effective throughout those jurisdictions. The basis for this included section 29 of the Petty Sessions (Ireland) Act 1851 which *inter alia* provided:

Whenever any person against whom any warrant shall be issued by any justice or other such officer as aforesaid in England or Scotland ... for any crime or offence, shall reside or be, or be suspected to reside or be, in any place in Ireland, it shall be lawful for the said inspector general... to indorse the same in like manner and upon like proof as aforesaid, authorizing the execution of the same within his jurisdiction.<sup>11</sup>

The system of backing of warrants under the 19<sup>th</sup> century legislation existed until 1965. It operated relatively effectively. O'Higgins notes that the existence of the systems of the reciprocal execution of warrants seems never to have been considered as possibly incompatible with the independent status of the Free State. This was perhaps because of the restraint exercised by the British authorities in sending warrants to Dublin at a time when such actions might well have been

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<sup>8</sup> A description of the position is found in S. Baker, D. Perry, A. Doobay, 'A Review of the United Kingdom's Extradition Arrangements' 2011, paras 3.43 – 3.48, the 'Baker Review', found at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/117673/extradition-review.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf) <accessed 30-08-20>

<sup>9</sup> The UK statute governing extradition with colonies and Dominions (apart from Ireland who left the Commonwealth in 1949), the Fugitive Offenders Act 1881 contained a *prima facie* evidence requirement.

<sup>10</sup> Article 73 of the Irish Free State Constitution provided that the laws in force at the date of its entry into operation shall continue to be of full force. The British Order in Council, the Irish Free State (Consequential Adaptation of Enactments) Order 1923, provided that the provisions of any enactments applicable to the endorsement and execution in England of warrants issued by justices' courts or judges of courts in Ireland should apply to warrants issued by justices' courts or judges of courts in the Irish Free State.

<sup>11</sup> Cited at <http://www.irishstatutebook.ie/eli/1851/act/93/enacted/en/print.html> <accessed 30-08-20>

resented.<sup>12</sup> The need for a streamlined system was enhanced by the establishment of the Common Travel Area (CTA) between the UK, the Crown Dependencies and Ireland. As to the scale of extradition, during the passage of the Backing of Warrants (Republic of Ireland) Act 1965 the Solicitor General Sir Dingle Foot noted in the House of Commons that 'the figure has run for a long time at about 100 each way each year.'<sup>13</sup> The continuation and relative success of the backing of warrants scheme after 1921 has been put down to '... the mutual desire of the British and Irish governments of the time to deal with Irish extremists and at the same time to protect the essential rights of those interned and deported...'.<sup>14</sup> Challenges to the system after 1921 in both Ireland<sup>15</sup> and England<sup>16</sup> were unsuccessful.

The rendition practice between the Republic and Northern Ireland stands in contrast to that with Great Britain. This was in spite of the Free State's Customs and Excise (Adaptation of Enactments) Order 1924<sup>17</sup> and the UK's Irish Free State (Consequential Adaptation of Enactments) Order 1923<sup>18</sup> providing that warrants issued in each were to be executed in the other. Frustrating practice firstly was the 1928 Dublin High Court case of *O'Boyle and Rodgers v Attorney General and Duffy*.<sup>19</sup> It held that since Northern Ireland did not exist when the 1851 Act came into effect there was no authority for the Irish Government to extend it there. In response to the judgment the Northern Ireland authorities similarly refused to execute Free State warrants. Accordingly, there were no practically applicable

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<sup>12</sup> O'Higgins, *supra* note 7 at p 287.

<sup>13</sup> House of Commons Hansard, vol. 707, 24 Feb. 1965 at col 557, cited at [https://hansard.parliament.uk/commons/1965-02-24/debates/fb821017-1aac-4358-abf2-2a0c584bc2e5/BackingOfWarrants\(RepublicOfIreland\)BillLords](https://hansard.parliament.uk/commons/1965-02-24/debates/fb821017-1aac-4358-abf2-2a0c584bc2e5/BackingOfWarrants(RepublicOfIreland)BillLords) <accessed 30-08-20>.

<sup>14</sup> O'Higgins, *supra* note 7 at p 288.

<sup>15</sup> *The State (Dowling) v Kingston* (1937) 71 ILTR 223.

<sup>16</sup> *R v Commissioner of the Metropolitan Police, ex p Nalder* [1948] 1 KB 251. It would not be until 1965 that adverse judicial decisions in both jurisdictions were decided, mentioned presently.

<sup>17</sup> ECO., No. 1 of 1924, Dublin Gazette, 21 March 1924, section 9.

<sup>18</sup> SR &O 1923, No 401, para 8(1).

<sup>19</sup> See B. Warner, 'Extradition Law and Practice in the Crucible of Ulster, Ireland and Great Britain: A Metamorphosis?' (1987) *Conflict Quarterly* 57 at note 4. The disapplication of the 1851 Act as regards Northern Ireland in the case has been termed 'bad law' on account of the 1924 Order, Warner, *ibid* at note 4. See also M. McGrath, 'Extradition: Another Irish Problem' (1983) 34(4) *Northern Ireland Legal Quarterly* 295.



arrangements between the Republic and Northern Ireland from 1928 to 1965. Extradition within Ireland had ceased operation within a decade of the founding of the Irish Republic.<sup>20</sup> Notably, however, informal co-operation between the police forces within Ireland took place whereby suspected criminals were taken into custody and 'politely conducted to a convenient place on the Border and handed over to the corresponding authority.'<sup>21</sup> This practice, after coming under scrutiny in a case at the Irish Supreme Court<sup>22</sup> and in the House of Lords<sup>23</sup>, was part of the impetus within the Republic that led to the 1965 legislation that regularised Ireland – UK extradition practice. These cases, as well as the Irish desire to act in accordance with the relatively recently concluded European Convention on Extradition 1957, led to extradition relations between Ireland and the UK being put on a new legislative footing.

### **Extradition Hindered 1965-1998**

From 1965 to 2004 extradition between Ireland and the UK was governed by, in Ireland, the Extradition Act 1965 (in particular in Part 3) and the UK, the Backing of Warrants (Republic of Ireland) Act 1965.<sup>24</sup> This fact is notable in that extradition between almost all countries is governed by treaty not domestic legislation alone. In 1965 Ireland and the UK continued to eschew that practice, the two Acts being drafted following consultation. As the name of the latter suggests, the essence of the arrangement did not change. The reciprocal acceptance of arrest warrants remained at the heart of the system. That said, real amendments were made. As

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<sup>20</sup> Warner, *ibid*, at p 58. O'Higgins notes that there was one case between 1929 and 1947, that of White, who was arrested in Northern Ireland on a warrant issued in the Republic, O'Higgins, *supra* note 7 at note 4.

<sup>21</sup> O'Higgins, *supra* note 7 at p 294.

<sup>22</sup> In *State (Quinn) v Ryan* [1965] 1 IR 70 the Irish Supreme Court held that the s 29 of the Petty Sessions (Ireland) Act, 1851 was repugnant to the Constitution and invalid. Ó Dálaigh CJ stated that the "... claim made on behalf of the police to be entitled to arrest a citizen and forthwith to bundle him out of the jurisdiction before he has an opportunity of considering his rights is the negation of law and a denial of justice"

<sup>23</sup> In *R v. Commissioner of Police of the Metropolis Ex P. Hammond* [1965] AC 810 the House of Lords held that the requirement that a warrant from Erie be endorsed by the Inspector-General of the Royal Irish Constabulary before being acted upon by the English Magistrate was impossible to satisfy since that office had been disbanded in 1922. Accordingly, Hammond was released.

<sup>24</sup> With the significance of the Good Friday Agreement the parameters of the present period of extradition practice dates from 1998.

noted, Ireland's desire to give effect to the Council of Europe's European Convention on Extradition 1957 (ECE) conditioned the new law.<sup>25</sup> B. Lenihan speaking in the Dail Eireann said the Extradition Act 1965 is '... based almost entirely on the terms of the European Convention on Extradition.'<sup>26</sup> The UK, for its part, wanted to regularise relations after *Hammond*.<sup>27</sup> In support of the Backing of Warrants (Republic of Ireland) Bill Alice Bacon MP said in the House of Commons

The two countries are close together, there are a great many cases and the laws of the two countries are very similar. Because it is quick, simple and cheap to get from the Republic to the United Kingdom, particularly across the border into Northern Ireland, there are as many as 100 offenders who have to be returned to the Republic each year.<sup>28</sup>

The two 1965 Acts retained a system whereby a warrant issued by a judicial authority in the requesting state was passed to a judicial authority in the requested state for endorsement and execution. As before, the establishment of a *prima facie* case was not required.<sup>29</sup> This is in line with the ECE. As O'Higgins notes, it would have been absurd if Ireland required *prima facie* evidence from the UK and not from its fellow parties to the ECE.<sup>30</sup> The principle of speciality is also absent in the legislation, and there is no exception of nationals from the process.

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<sup>25</sup> Notably article 28(3) of the ECE permits parties to it to carry on extradition in a manner not in accordance with its terms where surrender takes place between them on the basis of the lawful execution of warrants. O'Higgins notes that this provision was inserted to permit the special form of extradition between Ireland and the UK if both became party to it, *supra* note 8. As it turned out, Ireland ratified the treaty in May 1966 whereas the UK did not do so until February 1991.

<sup>26</sup> Dail Eireann, Parliamentary Debates, Vol. 215, cols. 1879, 1880, as cited in O'Higgins, *supra* note 7 at p 377.

<sup>27</sup> Alice Bacon MP noted in a House of Commons debate on the Act that *Hammond* brought under scrutiny the long standing arrangements under, *inter alia*, the Petty Sessions (Ireland) Act 1851, House of Commons Hansard, vol. 707, 24 Feb. 1965 at col 540, cited at [https://hansard.parliament.uk/commons/1965-02-24/debates/fb821017-1aac-4358-abf2-2a0c584bc2e5/BackingOfWarrants\(RepublicOfIreland\)BillLords](https://hansard.parliament.uk/commons/1965-02-24/debates/fb821017-1aac-4358-abf2-2a0c584bc2e5/BackingOfWarrants(RepublicOfIreland)BillLords) <accessed 30-08-20>. A 'stop-gap' measure was introduced to temporarily address the situation in the UK by way of the Republic of Ireland (Consequential Adaptation of Enactment Order) 1964.

<sup>28</sup> At col 541-542.

<sup>29</sup> See for a discussion C. Campbell, 'Extradition to Northern Ireland: Prospects and Problems' (1989) 52(5) *Modern Law Review* 585 at p 590.

<sup>30</sup> O'Higgins *Supra* note 7 at p 891.

Significantly, however, both the UK and Irish legislation contained a form of the political offence exception. Section 2(2) of the Backing of Warrants Act 1965 *inter alia* provided that an order should not be made if it was shown to the satisfaction of the court that the offence specified in the warrant is an offence of a political character or that there are substantial grounds for believing that the person will be prosecuted for an offence of a political character. The Extradition Act 1965 in ss 44 and 50 *inter alia* provided that extradition may be barred for ‘... a political offence or an offence connected with a political offence or [where] there are substantial reasons for believing that the person named or described in the warrant will, if removed from the state... be prosecuted or detained for a political offence or an offence connected with a political offence.’ The two conceptions accordingly differed, with Ireland adopting the version found in article 2 of the ECE – which is wider and more inclusive than the version applicable in the UK. Further novel safeguards in both statutes included provision that to be subject to the process an offence must be imprisonable for at least six months imprisonment and found in both jurisdictions – in other words double criminality was introduced.<sup>31</sup> A right to apply to have the order set aside was also included. Under the Extradition Act 1965 a Minister was given the power to release the requested person on the basis of the offence being a political offence or connected with one, amongst other specified grounds under s 50(1)(4). There was no general discretion. The UK legislation gave no power to the Secretary of State to play a role in the process. The system of extradition between Ireland and the UK following the 1965 Acts, therefore, was a hybrid which incorporated aspects of orthodox international extradition agreements and the previously applicable backing of warrants system which eschewed all such features.

Of all the new features of the Ireland–UK extradition relationship after 1965 the political offence exception was the most notable and controversial. Whilst the exception was also introduced into the law governing extradition the UK and

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<sup>31</sup> Double criminality required the offences in the requesting and requested territories to correspond. In *R v Governor of Belmarsh Prison, ex p Gilligan (No 1)* [1999] 3 WLR 1244 (HL) the House of Lords held that the word ‘correspond’ was an ordinary word not used in any technical sense. The system of surrender was intended to be simple and expeditious, and the task of the magistrate was to simply apply ‘correspond’ on the basis of the perusal of the warrants.

Commonwealth states the political situation was very different.<sup>32</sup> As is well known conflict over the constitutional status of Northern Ireland began to erupt into sectarian violence in the late 1960s. The three-decade conflict between nationalists (primarily identifying as Irish or Roman Catholic) and unionists (primarily identifying as British or Protestant) had a significant impact upon extradition between the Ireland and Northern Ireland. The most pronounced and controversial effect of the exception was the refusal of extradition on that basis of individuals from Ireland to the UK. Indeed, the extradition of politically motivated offenders from the Republic to the UK was in the early 1990s ‘... by far the most politically contentious issue to have troubled the relationship between these two countries over the last 20 years or so.’<sup>33</sup> This fact followed a series of cases beginning in the early 1970s where the Irish courts upheld the exception.<sup>34</sup> Amongst these well-known cases are *Bourke v Attorney General*<sup>35</sup>, *The State (Magee) v O’Rourke*<sup>36</sup> and *Finucane v McMahon*.<sup>37</sup> In the latter, the Irish Supreme Court upheld Finucane’s appeal against extradition to Northern Ireland on the basis of the political offence exception. A notable aspect of the exception in Irish law was the vacillating position taken to its interpretation. The Irish Supreme Court had been required to interpret its nature and limits on several occasions, and was not wholly consistent this task.<sup>38</sup> In contrast, UK courts were generally more consistent, and interpreted the exception more restrictively. A House of

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<sup>32</sup> Whilst the Fugitive Offenders Act 1881 did not contain a political offence exception, it was introduced as between Commonwealth countries by the Fugitive Offenders Act 1967.

<sup>33</sup> G. Hogan, and H. Delany, ‘Anglo-Irish Extradition Viewed from an Irish Perspective’ (1993) Public Law 93 at p 93.

<sup>34</sup> Campbell, *supra* note 29 at p 591. In the period subsequent to the entry into force of the two 1965 Acts O’Higgins notes that there had been “a large number of cases of surrender”, *supra* note 7 at p 894.

<sup>35</sup> [1972] IR 36. Note that in these cases the offences occurred prior to 18 May 1989. That is the date the provisions giving force to the European Convention on the Suppression of Terrorism entered into force in both jurisdictions.

<sup>36</sup> [1971] IR 205. This case and that of *Bourke v Attorney General* were decided the same day by the Supreme Court. Subsequent to these cases the Sunningdale Conference in 1973 set up a joint Irish-UK Law Enforcement Commission to look into extradition. It failed to reach agreement on the political offence exception, see A. McCall, Smith, and P. Magee, ‘The Anglo-Irish Law Enforcement Report in Historical and Political Context’ [1975] *Criminal Law Review* 200.

<sup>37</sup> [1990] 1 IR 505.

<sup>38</sup> See B. Dickson, *The Irish Supreme Court: Historical and Comparative Perspectives*, (Oxford University Press: Oxford, 2019) at pp 151 et seq, and Hogan and Delany, *supra* note 33.

Lords example where an argument based on the exception was refused being *Keane v Governor of Brixton Prison*.<sup>39</sup> It is clear, then, that Ireland adopted both a wider legislative articulation of the exception and a more liberal interpretation of it than taken in the UK. This was a fact that gave rise to considerable disquiet.

The disparity in approach to the political offence exception by Ireland and the UK was gradually lessened. This began with the European Convention on the Suppression of Terrorism 1977. Reflecting a change in sentiment across Europe to politically motivated violence this treaty was designed to counter the operation of the exception. Article 1 lists offences not to be regarded as political offences for the purposes of extradition. The UK ratified the Convention in July 1978, and subsequently enacted the Suppression of Terrorism Act 1978. The Republic signed the Convention in 1986 and ratified it in May 1989. The approach taken in Ireland was subject to criticism on account of the legislation giving force to it failing to specify that certain offences, including murder, could not be regarded as political. Instead the Extradition (European Convention on the Suppression of Terrorism) Act 1987 created a judicial discretion on the point. It also failed to include the possession of firearms as an offence deemed not to be political and was unclear as to aspects of the use of explosives and automatic firearms.<sup>40</sup> That noted, the political offence exception under s 50 of the Extradition Act 1965 was 'considerably circumscribed' by ss 3 and 4 of the implementing legislation.<sup>41</sup>

A final development to be noted that affected extradition relations in the period leading up to Good Friday Agreement and subsequently the application of the EAW between Ireland and the UK was the increasing relevance of human rights in Ireland's extradition jurisprudence. The origins of which are found in *Finucane v McMahon*, mentioned above. In the case it was held by the Irish Supreme Court that Finucane had demonstrated that there was a probable risk of ill-treatment in the Maze Prison if he was returned and therefore in order to protect his

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<sup>39</sup> [1972] AC 204. See also *R. Governor of Winson Green Prison, Birmingham, ex parte Littlejohn*, [1975] 3 All E.R. 208.

<sup>40</sup> See Hogan and Delany, *supra* note 33 at p 103-104.

<sup>41</sup> *Ibid* at p 119. It is notable that whilst the approach in the UK was retrospective, that in Ireland was not. See on this point T.J. Duffy, 'The Law v. the IRA: The Effect of Extradition between the United Kingdom, Republic of Ireland and the United States in Combatting the IRA' (1991) 9(2) *Dickson Journal of International Law* 293 at p 311.

constitutional rights he was released. This case can be seen to have spawned further litigation. The right to a fair trial, for example, was put forward in opposition to extradition successfully in *McGee v O’Dea*.<sup>42</sup> The consideration of human rights led Irish courts to adopt an ‘interventionist’ approach, whereby an ‘in-depth examination of the requesting State’s practices and procedures’ was undertaken.<sup>43</sup> Ironically, this development counters the efforts to curtail the political offence exception – with the trust implicit in foregoing the exception being undermined through human rights scrutiny. It was the Good Friday Agreement and the European Arrest Warrant that ultimately acted to rekindle that trust.

## **Part 2 – The Present, 1998 - 2020**

### **Peace and Prosperity as the European Union expands**

Marking the start of the modern context of Ireland – UK co-operation is the Good Friday Agreement (GFA), signed on 10 April 1998. It signified the end of most of the violence of the Troubles. The agreement accepted that the people of Northern Ireland wished to remain part of the United Kingdom but that a section of the population in Northern Ireland and the majority of the people of the island of Ireland wished for a united Ireland. Irrespective of Northern Ireland’s constitutional status the right of the people of Northern Ireland to identify and be accepted as Irish or British, or both was enshrined. A new period of “North/South” cooperation began with the creation of new institutions designed to co-ordinate in twelve areas of mutual interest. Central to the Good Friday Agreement is the maintenance of the Common Travel Area. Under the CTA, British and Irish citizens can move freely and reside in either jurisdiction and enjoy associated rights and privileges, including the right to work, study and vote in certain election, as well as to access social welfare benefits and health services.

Pre-dating the GFA by a quarter-century was Ireland and the UK’s membership of the EU. Initially integration in the field of police and criminal justice matters was a challenge for the organisation as ‘jurisdiction, criminal trial and criminal

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<sup>42</sup> (1994) 1 IR 500.

<sup>43</sup> M. O’Higgins, ‘Pink Underwear, the European arrest warrant and the Law of Extradition’ (2007) 12(3) Bar Review 91 at p 92. The origins of this approach under the ECHR is found in the well-known case of *Soering v UK* (1989) 11 EHRR 439.

sentencing are seen as the last bastions of national state power.<sup>44</sup> Early attempts at cooperation can be traced back to the creation of the TREVI group in 1975, with the first significant step to close cooperation being the opening of the EU's internal borders through the establishment of the Schengen Area. Whilst neither the UK nor Ireland participated in the open border aspects of the Schengen Protocol both requested participation in the police and judicial co-operation elements of the Schengen acquis.<sup>45</sup> This decision from Ireland's perspective was made so as not to affect the existence of the Common Travel Area.<sup>46</sup> The then UK Prime Minister, Tony Blair, had made it clear that there was no question of the UK giving up border controls.<sup>47</sup>

Even with retained border controls Ireland and the UK were affected by the freedom of movement of persons. A concomitant of which was an increased risk of crime. A common effort was needed in response throughout the EU.<sup>48</sup> Whilst the Maastricht Treaty 1992 established Justice and Home Affairs as one of the EU's three pillars on an intergovernmental basis the Amsterdam Treaty 1997 created an 'Area of Freedom, Security and Justice' (AFSJ), a collection of home affairs and justice policies designed to ensure security, rights and free movement within the European Union. Significantly it endorsed the principle of mutual trust, which would go on to become the cornerstone of judicial cooperation in criminal matters within the European Union.<sup>49</sup> Amongst the significant strides made during this period in enhancing cooperation in criminal matters was the creation of the European Arrest Warrant, discussed presently. It was adopted in 2002.

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<sup>44</sup> W. Schomburg, 'Are we on the Road to a European Law-Enforcement Area? International Cooperation in Criminal Matters. What Place for Justice' (2000) 8 Eur J Crime Crim L & Crim Just 51.

<sup>45</sup> The application was made in accordance with Article 4 of the protocol Integrating the Schengen acquis into the Framework of the EU, which is annexed to both the Treaty on European Union and the Treaty establishing the European Community.

<sup>46</sup> Select Committee on European Scrutiny, Irish Application To Take Part in Elements of the Schengen Acquis, 24<sup>th</sup> report available at <https://publications.parliament.uk/pa/cm199900/cmselect/cmeuleg/23-xxiv/2308.htm> <accessed 30-08-20>

<sup>47</sup> Independent, 28 March 2000.

<sup>48</sup> Editorial Comments (June 1999) 36 Common Market Law Review 1119 at 1120

<sup>49</sup> C. McCartney, 'Opting in and Opting Out: Doing the Hokey Cokey with EU Policing and Judicial Cooperation' (2013) 77 J Crim L 543.

The final piece to the modern contextual puzzle to be noted is the step change in EU criminal justice cooperation in 2009 when the Treaty of Lisbon abolished the pillar structure and created Title V of the Treaty on the Functioning of the European Union which regulated the AFSJ. Importantly, the Court of Justice (CJEU) now had jurisdiction over the area, the Commission gained enforcement powers and the European Council changed to majority voting for police justice and criminal cooperation matters. Most of the new controls came into force on 01 December 2014 following the end of a 5-year transitional period. The UK and Ireland were hesitant to embrace such close cooperation in criminal matters, primarily because their adversarial justice systems differ significantly from civil law jurisdictions found in most other European countries. What is important from our present perspective is that both Ireland and the UK remained part of the European Arrest Warrant scheme, which is subject to the jurisdiction of the CJEU. Clearly the importance of the EAW was recognised in the opt-out and opt-in machinations that followed the Treaty of Lisbon. The UK had until the end of the transitional period to decide whether to continue to be bound by measures adopted before the Treaty of Lisbon entered into force. It chose to block opt-out of 133 policing and judicial cooperation measures but simultaneously opted back in to 35 (including the EAW) stating, 'where we believe it is in the national interest to participate we have pursued a policy of seeking "co-operation not control"'.<sup>50</sup> Both the UK and Ireland negotiated the ability to 'opt in' to new legislation on a case by case basis.

### **The European Arrest Warrant**

The EAW is a simplified procedure which enables surrender decisions to be made by judicial authorities on the basis of mutual recognition. The impetus for finalisation of the EAW FD was the terrorist attacks in the US on 11<sup>th</sup> September 2001. Its benefits have been well set out during the opt-in and out decision of 2014<sup>51</sup> and throughout the Brexit debate.<sup>52</sup> As demonstrated above, the strength

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<sup>50</sup> Hansard, HC Deb, 15 July 2013, vol. 566 (36), col. 777 (Theresa May).

<sup>51</sup> McCartney *supra* note 49.

<sup>52</sup> Select Committee on the European Union, Home Affairs Sub-Committee, Brexit: future EU-UK security and police co-operation, 2 November 2016 at p 8, cited at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/e>



of those arguments are heightened in light of the political history and situation between Ireland and the UK. The benefits of the EAW include the inability of Member States to refuse surrender of their own nationals, limited grounds for refusal, the absence of a double criminality requirement and the removal of political involvement. These have led to a faster and cheaper system of extradition than was available under the 1957 European Convention on Extradition.<sup>53</sup> Indeed, in most cases surrender will occur within 60 days of arrest or 10 days with the defendant's consent. Both Ireland and the UK implemented the Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States of 13 June 2002.<sup>54</sup>

Statistics reveal that the EAW quickly became an essential tool in the area of judicial cooperation in criminal matters with 185,575 arrest warrants issued and 56,298 executed across the EU since 2005.<sup>55</sup> The UK has been an active user of the scheme and from 2009 to 2019, the UK issued a total of 2,678 requests to other member states, securing the return of 1,625 individuals out of 1,894 arrested.<sup>56</sup> In the same time period, a total of 11,300 individuals were surrendered from the UK pursuant to EAWs. Ireland has surrendered 247 individuals to the UK since 2009, with 34 surrendered in 2019. The UK has surrendered 537 individuals to Ireland in the same time period including 58 people in 2019. Whilst the numbers surrendered to the UK from Ireland are only a small proportion of those requested by the UK, the UK 'remains the state

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[u-home-affairs-subcommittee/brexit-future-u-keu-security-and-policing-cooperation/oral/42904.pdf](https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/635/63502.htm) <accessed 29-08-20>.

<sup>53</sup> Home Affairs Select Committee, UK-EU security cooperation after Brexit, 4<sup>th</sup> report, HC 635, 21 March 2018, cited at <https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/635/63502.htm> <accessed 30-08-20>.

<sup>54</sup> Cited at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584> <accessed 26-08-20>.

<sup>55</sup> Report from the Commission to the European Parliament and the Council on the implementation of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States COM/2020/270, at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A270%3AFIN> <accessed 26-08-20>.

<sup>56</sup> Statistics are published by the National Crime Agency available at <https://nationalcrimeagency.gov.uk/what-we-do/how-we-work/providing-specialist-capabilities-for-law-enforcement/fugitives-and-international-crime/european-arrest-warrants> <accessed 29-07-20>

with which Ireland has the greatest interaction<sup>57</sup> In 2017 60 out of 76 EAW requests transmitted by the Central Authority were from the UK.<sup>58</sup> It was recognised by the Department of Justice that 'in the context of combating crime and terrorism, the necessity to maintain a functioning system of extradition between the two States has been identified as a the key priority.'<sup>59</sup>

There is no doubt that from the perspective of the UK and Ireland the EAW has transformed the scale of extradition.<sup>60</sup> Non-EU extradition traffic is approximately one-tenth of EAW surrenders.<sup>61</sup> Notable amongst these statistics is not just the number of surrenders, generally and between Ireland and the UK but also the volume of cases originating from Northern Ireland. In that regard from September 2018 to August 2019 the Police Service for Northern Ireland issued 38 EAWs, twenty-six of which related to the Republic of Ireland and 12 to all other EU states.<sup>62</sup> Conversely, the PSNI received 5 requests from the Republic of Ireland during that period, out of a total of 44 EAWs.<sup>63</sup> Clearly the EAW plays a crucial role in Ireland-UK criminal co-operation today. Its relevance is perhaps even wider than that. It has been described as

... the most emblematic and most widely implemented EU criminal law instrument. It aims to compensate for the freedom of movement enabled by the abolition of internal borders by ensuring that Member States' justice systems can reach extraterritorially in order to bring individuals who have

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<sup>57</sup> Report on the operation of the European Arrest Warrant Act 2003 for the year 2017, supra note 2, at p 4.

<sup>58</sup> However it should be noted that there was a notable increase in EAWs received by Ireland from the UK in 2017 as a result of the UK's commencement of participation in the Schengen Information System and a consequential policy of sending non-participating States, such as Ireland, all warrants registered by the UK on the SIS II.

<sup>59</sup> Report on the operation of the European Arrest Warrant Act 2003 for the year 2017, supra note 2 at p 4.

<sup>60</sup> Crown Office and Procurator Fiscal Service, International Cooperation on Law Enforcement, 2 February 2018, cited at <https://www.copfs.gov.uk/media-site/media-releases/1687-international-cooperation-on-law-enforcement> <accessed 30-08-20>.

<sup>61</sup> See Office of the DPP Annual Report 2017 at p 38, cited at [https://www.dppireland.ie/app/uploads/2019/03/AR2017\\_eng.pdf](https://www.dppireland.ie/app/uploads/2019/03/AR2017_eng.pdf).

<sup>62</sup> See <https://www.bbc.co.uk/news/uk-northern-ireland-49576159> <accessed 29-08-20>.

<sup>63</sup> Ibid.

taken advantage of the abolition of borders to flee the jurisdiction to face justice.<sup>64</sup>

An important point to note is that the UK leaving the EU does not alter the position of the movement of people between Ireland and the UK, the operation of the Common Travel Area continues. The arguments in favour of the EAW therefore subsist regardless of Brexit.

The operation of the EAW has undoubtedly strengthened the mutual trust between Ireland and the UK. Previously, as discussed above, Irish jurisprudence had been favourable to the accused and 'had an illustrious history of being acutely conscious of potential human rights violations.'<sup>65</sup> Ireland's strict and sometimes sceptical attitude towards extradition during the 1980's and 1990's has been said to have arose from a mix of philosophical, psychological, legal and non-legal factors.<sup>66</sup> Again as noted, the period of the Troubles in Northern Ireland was particularly problematic. This reticence carried over to the early days of the EAW, O'Higgins has argued, where the High Court continued to apply a *Ellis v O'Dea*<sup>67</sup> type approach in an EAW context.<sup>68</sup> Notwithstanding the cautious start, there is clear evidence that over the last 17 years the EAW has smoothed the extradition waters between Ireland and the UK as both re-embraced the principle of mutual trust and recognition. In the 2005 case of *Minister for Justice, Equality and Law Reform v. Altaravicius*, the Chief Justice, whilst accepting that the courts were not prevented from examining cases to ensure personal rights were guaranteed, stated they must 'do so with a benefit of a presumption that the issuing State complies with its obligations.'<sup>69</sup> In *Minister for Justice, Equality and Law Reform v McArdle* the

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<sup>64</sup> V. Mitsilegas, 'European Criminal Law After Brexit' (2017) 28 *Criminal Law Forum* 219 at p 230.

<sup>65</sup> E. Fahey, 'How to be a third pillar guardian of fundamental rights? The Irish Supreme Court and the European arrest warrant' (2008) 33 *EL Rev* 563.

<sup>66</sup> O'Higgins, *supra* note 43 at p 91.

<sup>67</sup> (1989) IR 530.

<sup>68</sup> As demonstrated in the case of *Minister for Justice, Equality and Law Reform v. Stapleton* where Peart J refused extradition on the basis of delay stating the Extradition Act 2003 mandates "that this court shall not order the surrender of a requested person if to do so would not be compatible with this State's obligations under the Convention or its protocols, or would constitute a breach of any provision of the Constitution." Unreported, High Court (Peart J.) 21st February 2006.

<sup>69</sup> Unreported, Supreme Court, 5<sup>th</sup> April 2006.

respondent opposed surrender to the UK on a number of grounds including abuse of process.<sup>70</sup> The Supreme Court dismissed those concerns 'taking the view that they were all matters that were relevant only to the criminal trial and the weight to be attached to evidence tendered at the trial.'<sup>71</sup> It should be noted, however, that whilst the principle of mutual trust underpinning the EAW enjoyed almost unfettered application during the first 10 years of application in recent years the pendulum has swung back toward an approach emphasising human rights.<sup>72</sup> To-date, this appears to be limited in the jurisprudence of both the UK and Ireland to cases concerning requests from eastern European states.<sup>73</sup>

The success of the EAW has not been without concerns on either side of the Irish sea. Criticisms have been made in relation to its disproportionate use, unsatisfactory standards, length of pre-trial detention and access to a fair trial. One result of which has been the agreement by the European Commission that a proportionality requirement was necessary to prevent warrants from being issued for offences which are not serious enough. Judicial authorities should use the European Arrest Warrant system only when a surrender request is proportionate in all the circumstances of the case. The Commission's Handbook on How to Issue and Execute a European Arrest Warrant states that the issuing judicial authorities should consider proportionality by weighing the usefulness of issuing a EAW in the specific case, with a list of suggested factors to be taken into account.<sup>74</sup> The EU has also embarked on a programme to strengthen procedural rights although the UK largely chose not to participate.

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<sup>70</sup> (2005) 4 IR 260.

<sup>71</sup> O'Higgins, *supra* note 43.

<sup>72</sup> G. Davies, 'Balancing the interference with private and family life of the person whose extradition is sought with the public interest in extradition: Has the pendulum swung too far?' (2015)79(5) *Journal of Criminal Law* 309.

<sup>73</sup> Examples that the "wheels to the concept of mutual recognition which underpin EAWs are stiffening" can be seen in the UK case of *Strzepa v Poland* [2018] EWHC 2093 where the court found that surrender for low level historical offending would be a disproportionate interference with the appellant's right to private and family life. In the Irish case of *Minister for Justice and Equality v Celmer* [2018] IEHC 119 the High Court refused surrender to Poland, after a Preliminary Ruling to the Court of Justice and European Union, due to systemic problems with the rule of law.

<sup>74</sup> 2017/C 335/01, at p 14-15, cited at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC1006\(02\)&from=SL](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC1006(02)&from=SL), <accessed 25-08-20>

## **Brexit and the Northern Ireland problem**

There is no doubt that the UK and Ireland have become so much closer and more intertwined as a result of common membership of the EU, particularly in the area of criminal justice cooperation. Hayward has demonstrated that membership of the EU was important for the Good Friday Agreement

because it created the context within which such cross-border cooperation was normalised and depoliticised. The fact that nationalists felt themselves equal and protected as Irish citizens in Northern Ireland has been in no small part connected to the broader framework of common EU citizenship.<sup>75</sup>

Accordingly, Brexit poses unique and challenging issues relating to Northern Ireland. This was recognised early on in the Brexit process where it was made clear by both the EU and the UK that their aim was 'to ensure that the Common Travel Area and Good Friday Agreement (of which the UK has a special responsibility as co-guarantor) are not affected by the UK's decision to leave the Union.'<sup>76</sup> Michel Barnier, the Chief Brexit Negotiator framed 'Ireland's concerns' as the 'Union's concerns' and by doing so 'effectively positioned the EU as a defender and guarantor of the Agreement, even as it was conducting negotiations with the UK.'<sup>77</sup> Just as the process of European integration was one of the catalysts for the depoliticization of Irish/Northern Irish cross-border cooperation the UK's departure from the EU removes this context and reintroduces a political dimension to cooperation. The Irish border still holds the potential for conflict. Northern Ireland, for all of its progress, is still a divided society and any action which draws attention to the border fuels tension.<sup>78</sup>

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<sup>75</sup> K. Hayward and M.C. Murphy, 'The EU's Influence on the Peace Process and Agreement in Northern Ireland in Light of Brexit' (2018) 17(3) *Ethnopolitics* 276.

<sup>76</sup> Barnier and Coveney hold press conference in Brussels (04/09/2017)', Mikk Media News Network.

<sup>77</sup> Hayward and Murphy, *supra* note 75.

<sup>78</sup> *Ibid.*

Adding further complexity to the position of Northern Ireland is the devolution of criminal justice. Since 2010 policing and justice have fallen under the remit of the NI Department of Justice and the Justice Statutory Committee of the NI Assembly. For its part the Police Service of Northern Ireland (PSNI) have repeatedly stressed that continued cross-border cooperation is key to combating organised crime and a resurgence of paramilitary activity in Northern Ireland.<sup>79</sup> The Joint Ministerial Committee (EU negotiations) was established to facilitate engagement between the UK Government and devolved administrations but for much of the negotiations Northern Ireland had no functioning Executive and therefore no representation on the Committee.<sup>80</sup> Hayward, Phinnemore and Komarova argue 'what the UK negotiates with the EU about criminal justice co-operation will uniquely impact Northern Ireland given the nature and challenges of cross-border cooperation on the island of Ireland' and recommend that the remit of the British-Irish Council could be expanded to include areas previously coordinated at EU level such as criminal justice cooperation.<sup>81</sup> The difficulties that the PSNI and An Garda Síochána will face if no replacement for the EAW is found have been recognised. To date, however, no solution has been proposed.<sup>82</sup>

### **Part 3 – The Future**

#### **The EAW Not an Option**

The first point to make in discussing the future extradition relationship between Ireland and the UK is that the EAW is not an option. At the beginning of the Brexit process the UK repeatedly stated that it wished to continue a close relationship with the EU in the field of criminal justice and this included access to the European Arrest Warrant (EAW).<sup>83</sup> Full participation in the EAW was always going to be

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<sup>79</sup> G. Ryan-White, European Arrest Warrant: What next for Northern Ireland post-Brexit?, Northern Ireland Assembly (5<sup>th</sup> July 2017).

<sup>80</sup> K. Hayward, D. Phinnemore and M. Komarova, Anticipating and Meeting New Multilevel Governance Challenges in Northern Ireland after Brexit (Queen's University Belfast and UK in a Changing Europe, May 2020).

<sup>81</sup> Ibid.

<sup>82</sup> Institute for Government, Negotiation Brexit: Policing and Criminal Justice, September 2018.

<sup>83</sup> Cmnd 9593, at p 56, cited at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachme>

problematic, however, as it is linked to the free movement of people and based on the concept of mutual trust between Member States. Michel Barnier set out the underpinnings of mutual trust as being, 'shared respect for fundamental rights as set out in the Charter of Fundamental Rights; by certainty that other Member States enforce and apply the rules the same way, under the jurisdiction of the European Court of Justice; and by the concept of EU citizenship, which allows Member States to lift the constitutional ban on the extradition of their own nationals.'<sup>84</sup> The UK consistently has stated that Brexit meant the end of free movement of people, the jurisdiction of the Court of Justice of the European Union (CJEU) and the Charter of Fundamental Rights. These red lines inevitably meant that the UK could not take part in the European Arrest Warrant. In March 2020 the UK acknowledged that participation of the European Arrest Warrant is not possible stating that they were now seeking a 'fast-track extradition arrangements, based on the EU's Surrender Agreement with Norway and Iceland ... but with appropriate further safeguards for individuals beyond those in the European Arrest Warrant.'<sup>85</sup>

### **An EU-UK Multilateral Treaty on the horizon?**

The preferable replacement to the EAW is an EU-UK multilateral treaty. This is simply because under such an arrangement the UK's extradition relations would be the same with all its former partners. In response to the UK's statement in March 2020 the EU published a draft agreement as the starting point for negotiations.<sup>86</sup> Surrender is set out in Chapter Seven.<sup>87</sup> The initial proposal closely mirrors the Norway-Iceland agreement, which in turn is very similar to the EAW.

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[nt\\_data/file/786626/The\\_Future\\_Relationship\\_between\\_the\\_United\\_Kingdom\\_and\\_the\\_European\\_Union\\_120319.pdf](#) <accessed 26-08-20>.

<sup>84</sup> M. Barnier, European Commission Speech (Vienna 19 June 2018), cited at [http://europa.eu/rapid/press-release\\_SPEECH-18-4213\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-18-4213_en.htm) <accessed 26-08-20>.

<sup>85</sup> Brokenshire, J., Written Question 28022, European Arrest Warrants: Gibraltar, cited at <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-03-11/28022/>, <accessed 26-08-20>.

<sup>86</sup> Available at [https://ec.europa.eu/info/publications/draft-text-agreement-new-partnership-united-kingdom\\_en](https://ec.europa.eu/info/publications/draft-text-agreement-new-partnership-united-kingdom_en) <accessed 28-08-20>.

<sup>87</sup> Ibid at p 255.

The minimum thresholds are identical<sup>88</sup> as are the mandatory grounds for refusal of a warrant<sup>89</sup>; namely amnesty, double jeopardy and insufficient age of suspect. The optional grounds for refusal are again identical to those found in Article 4 of the EAW<sup>90</sup> and the same territorial requirements are included.<sup>91</sup> Execution may not be refused on the ground that the offence may be regarded as a political offence,<sup>92</sup> although the UK and EU Member States would be able to make a declaration that this only applied to certain terrorism offences.<sup>93</sup> In contrast to this largely common ground are several areas of contention.

The position of nationals vis-a'-vis extradition is, of course, an issue with pedigree. The proposal provides that extradition would not be refused on the grounds that the person claimed is a national of the executing state. However, the UK and the EU on behalf of its Member States may make declaration that one's nationals will not be extradited. The other party would then be entitled to reciprocity. This allows those countries having constitutional bars on extradition of their own nationals to third countries outside of the EU, such as Germany and Latvia, to make such a declaration. Ireland does not have a constitutional bar on extraditing its citizens if

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<sup>88</sup> An arrest warrant may only be issued for acts punishable by the law of the issuing state by a custodial sentence or detention order for a maximum period of at least 12 months or, if the sentence has been passed or detention ordered, for a sentence of at least four months.

<sup>89</sup> As found in Article 3 of the EAW.

<sup>90</sup>Article LAW.SURR.80 1a) non-refusal due to tax differences b) prosecution in the executing state, c) a judicial decision has been made not to prosecute or proceedings halted, d) prosecution in statute-barred e) a final judgment on the same facts in a third state and the sentence has been served, f) the Member State undertakes to execute the sentence of a national or resident, g) offence committed in whole or part in the territory of the executing State or was committed outside of the territory of the issuing State and the law of the executing State does not allow prosecution for the same offence committed outside of its territory, h) request based on conviction at trial where the D was absent without their knowledge and no right of re-trial.

<sup>91</sup> Under both agreements a state will be permitted to refuse to enforce a warrant in circumstances where the offence in respect of which it is issued is regarded by the law of that state as having been committed in whole or in part within its territory, or where such offence is committed outside the territory of the State issuing the warrant and the law of the executing state does not allow prosecutions for the same offences when committed outside its territory.

<sup>92</sup> See Article Law.SURR.81: Political offence exception.

<sup>93</sup> I.e. the offences referred to in Article 1 and 2 of the Council of Europe Convention on the Suppression of Terrorism 1977, or Articles 1 to 4 of the Council Framework Decision on combating terrorism.



an international agreement is in place providing for extradition. A similar provision on extradition of nationals exists under the Iceland-Norway agreement, and a number of Member States have chosen to make a declaration, under article 7(2), that they will not surrender their nationals, or will do so only under certain conditions.<sup>94</sup> This demonstrates the extent to which the surrender of nationals was dependent on the principle of mutual trust and recognition. It seems reasonable to suppose that similar derogations would be made in relation to any UK-EU agreement. The UK will therefore lose the ability to extradite citizens from up to 8 countries in some circumstances and 16 if it isn't willing to return convicted nationals for the purpose of serving their sentence, a decision which would ultimately be in the hands of the courts, not politicians.

The relevance of nationality does not stop at the extradition, or not, of a state's own citizens. Recent CJEU case law has extended a degree of protection to citizens of the Union as such. In the 2016 case of *Criminal proceedings against Petruhhin*<sup>95</sup> Latvia was prevented from extraditing an Estonian citizen to Russia under a bilateral agreement. It was successfully argued that this could be 'contrary to the essence of the citizenship of the Union, that is to say, the right of the Union citizens to protection equivalent to that of a Member State's own nationals.'<sup>96</sup> The case of *Proceedings Related to Raugevicius*<sup>97</sup> extended the 'Petruhhin principle' to extradition for the purpose of enforcing a sentence, not just accusation warrants.<sup>98</sup> In the case of *Pisciotti v Germany*<sup>99</sup> the CJEU reaffirmed that Article 18 TFEU, the principle of non-discrimination on the grounds

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<sup>94</sup> Germany, the Czech Republic, France, Austria, Slovakia and Slovenia have chosen not to extradite their nationals. Poland will not allow extradition of a national under the agreement unless the offence was committed outside of its territory. Portugal will only extradite its own citizens in cases of terrorism or organised international crime. Greece, Luxembourg, Hungary, The Netherlands, Romania, Iceland, Norway and Croatia require any extradited citizen to be returned to serve their sentence. Available at [https://www.ejn-crimjust.europa.eu/ejnupload/News/Notifications\\_March\\_NO\\_Is.EN20.pdf](https://www.ejn-crimjust.europa.eu/ejnupload/News/Notifications_March_NO_Is.EN20.pdf) <accessed 31/07/2020>

<sup>95</sup> [2017] 1 CMLR 28.

<sup>96</sup> Ibid at para 16.

<sup>97</sup> [2019] 2 CMLR 3.

<sup>98</sup> Member States who make provision for the possibility that a sentence pronounced abroad may be served on its territory, are required to ensure that EU citizens, provided that they reside permanently in its territory, receive the same treatment as that accorded to nationals in relation to extradition.

<sup>99</sup> [2018] 3 CMLR 19.

of nationality, applied to extradition to third countries. The effect of this jurisprudence is that Member States are obliged to inform the country of nationality of the Union citizen when applying a third party extradition agreement and to give priority to a possible EAW, provided that state has jurisdiction and wants to prosecute the same offence. When the UK becomes a 'third country' for the purposes of extradition with EU countries after 31 December 2020 its requests for extradition will be secondary to any request from the country of nationality for all EU citizens. If the UK requests extradition of a Polish citizen from Ireland, for example, Ireland will first contact Poland to make them aware of the request and will give precedence to a Polish EAW request. Also brought to the fore here is the fact that the UK's leaving of the EU does not affect the jurisdiction of the CJEU in relation to remaining Member States when they apply any extradition agreement with the UK, whether it is a EU level agreement or not.

The rights of the requested person under article 11 of the EAW have been expanded to expressly include an array of further defence rights.<sup>100</sup> The UK published its response publicly in May 2020 and does not seek to include these further entitlements.<sup>101</sup> In contrast to the EAW but aligned to the Iceland-Norway agreement the EU proposal states that dual criminality is required as a condition for extradition except in defined circumstances. Importantly for Ireland and the UK this includes defined terrorism cases.<sup>102</sup> The Norway-Iceland agreement provides that the requirement may be waived, however. To date only Spain, Slovenia, Lithuania and Romania and, with a more limited scope, Poland have waived double criminality as set out in Article 3(4).

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<sup>100</sup> See Article Law.Surr.89: Rights of a requested person.

<sup>101</sup> Draft working text for an agreement on law enforcement and judicial cooperation in criminal matters

<sup>102</sup> The UK on the one hand, or the EU on behalf of any Member State on the other, may make a declaration on the basis of reciprocity that it will not require dual criminality if the offence is an offence listed in Article 78(4) and carries a penalty in the State requesting extradition of at least three years' imprisonment. The list of offences in Article 78(4) is the same as that set out in Article 2(2) of the EAW and Article 3(4) of the Norway-Iceland agreement and accordingly includes terrorism, drug trafficking, sexual exploitation of children, fraud, money-laundering, environmental crime, counterfeiting and piracy of products, rape, arson, and crimes within the jurisdiction of the International Criminal Court, namely war crimes, crimes against humanity, and genocide. It also includes broad concepts as "computer related crime", "racism and xenophobia", "swindling" (as opposed to "fraud"), "racketeering and "extortion" and "sabotage".

The UK and the EU are on a collision course in relation to dispute resolution and if an agreement is to be reached one party will have to alter their position. In the Norway-Iceland agreement Article 36 provides that disputes are to be referred to a 'meeting of representatives of the governments of the Member States of the European Union and of Iceland and Norway, with a view to its settlement within six months'. Article 37 also provides that Norway and Iceland 'shall keep under constant review the development of the case law of the Court of Justice of the European Communities' relating to the Norway-Iceland agreement as well as to those of similar surrender instruments, such as the EAW. The EU is proposing a single future relationship with the UK which is overseen by two layers of institutions: a Partnership Council and specialised committees dedicated to distinct parts of the agreement. Disagreements would be dealt with by the Partnership Council at the first stage with the possibility of arbitration in the second stage. However, if a dispute raises a question of interpretation of EU law, the question will be referred to the CJEU for a ruling. This ruling will be binding on the arbitration tribunal.<sup>103</sup> The UK wants no role for the CJEU and has instead proposed that a Joint Committee is responsible for the implementation and application of the agreement.<sup>104</sup> The UK recognises that the agreement would be terminated or suspended if dispute settlement fails.

A proportionality test for incoming requests is sought by the UK.<sup>105</sup> The insertion of section 21A to the Extradition Act 2003 brought such a test, and a human rights bar, into UK law for EAW requests. This followed disquiet over the large number of extradition requests for minor offences, which frequently made the headlines in British papers and resulted in public criticism from organisations such as Fair Trials International as well as academics.<sup>106</sup> Indeed, some requested persons faced lengthy extradition proceedings for offences such as 'cycling whilst drunk'<sup>107</sup> and

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<sup>103</sup> Commons Library Briefing, The UK-Eu future relationship: the March 2020 EU draft treaty and negotiations update, number 8923, 27 May 2020

<sup>104</sup> Supra note 101, Article Institutional 2

<sup>105</sup> Supra note 101, Article SURR 7

<sup>106</sup> T. Ostropolski, 'The Principle of Proportionality under the European Arrest Warrant — With an Excursus on Poland. (2014) 5(2) New Journal of European Criminal Law 167.

<sup>107</sup> C. Milmo, 'Polish man held in Wandsworth prison for two months on European Arrest Warrant seeking extradition for seven-year-old drunk-cycling conviction' 19 December 2012, The Guardian.

'theft of a chicken.'<sup>108</sup> Although it was possible to raise arguments akin to proportionality under Article 8 of the ECHR the amendment provided for a two-stage proportionality test in the UK.<sup>109</sup> The EU has taken the view that proportionality is a matter for the issuing state and not the executing state and proportionality as a principle is mentioned in the Handbook but not enshrined in the Framework Decision itself.<sup>110</sup> The UK has proposed that 'the United Kingdom and the Member States may require or permit the executing judicial authority to refuse to execute the arrest warrant on the basis that the surrender would be disproportionate'. This would take into account the seriousness of the offence, likely penalty and the possibility of taking measures less coercive than surrender.<sup>111</sup> Bonasera argues that the insertion of a proportionality test, in that it acts to protect requested persons, is a necessary mechanism for ensuring the human and financial cost do not outweigh the benefits of surrender in any future agreement.<sup>112</sup> Relevant here is the fact that the current recommendations in the EAW Handbook will no longer be applicable under the new arrangement (although a new handbook can be produced) and the list of 'less coercive instruments of mutual legal assistance', such as mutual recognition of financial penalties, may not be available between the UK and EU member states.<sup>113</sup> This lends weight to the inclusion of a proportionality test in any final agreement. Related in a sense

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<sup>108</sup> R. Prince, 'Hundreds of Britons will be extradited for minor crimes under new rules' 17 August 2009, *The Telegraph*.

<sup>109</sup> Firstly the National Crime Agency, as the designated authority, could refuse to certify an incoming request for surrender if it was clear that a judge would discharge the warrant on the grounds of proportionality. Secondly during an extradition hearing the court must consider the question of proportionality once the statutory bars to extradition have been dealt with. The proportionality test only applies in Part 1 cases concerning accusation (as opposed to conviction) warrants. The judge will consider the seriousness of the alleged conduct, the likely penalty if the Defendant is found guilty and finally the possibility of the requesting state taking measures that would be less coercive than the extradition of the Defendant. For further consideration of the test see *Miraszewski & Others v Poland* [2014] EWHC 4261 (Admin).

<sup>110</sup> See European Commission, Handbook on How to Issue and Execute a European Arrest Warrant, *supra* note 74 at para 2.4.

<sup>111</sup> *Supra* note 101, Article SURR 7

<sup>112</sup> J. Bonasera, 'Brexit and the European Arrest Warrant: The United Kingdom's Chance to Curtail Abuse of the Surrender System' (2017) 34(3) *Arizona Journal of International and Comparative Law* 637.

<sup>113</sup> See Davies, 'Facilitating cross-border criminal justice cooperation between the UK and Ireland after Brexit: 'Keeping the lights on' to ensure the safety of the Common Travel Area' in this special edition

to a proportionality test in that it acts to protect requested persons is the amendment to the EA 2003 that barred surrender on the grounds that a prosecuting decision had not been made. This was designed to protect individuals from lengthy periods of custody after surrender. The UK proposals includes a trial readiness provision.<sup>114</sup>

It is agreement on the substantive issues, of course, which is central to the conclusion of a multilateral agreement between the EU and the UK. Also of note, though, is the time it may take to come to an agreement if one is reached and the time taken to approve an agreement. As just discussed, the EU's proposed text meets a number of the UK's requirements. Accordingly relatively little amendment to the Extradition Act 2003 would be required. The UK is placed to benefit from the years of work Norway, Iceland and the EU put in to negotiating that agreement. The outstanding issues noted above, however, may provide considerable challenges. It should certainly not be presumed that the eventual agreement can be readily agreed and brought into force. From the EU's perspective the signing of such an international agreement is governed by Article 218 of the Treaty on the Functioning of the European Union (TFEU). The Council is required to obtain the consent of the European Parliament before adopting a Decision to conclude an international agreement. European Parliament ratification and the agreement and completion of formalities in all Member States is also required. This latter point led to the delay in the entry into force of the Iceland-Norway agreement. It should also be recalled that Norway and Iceland, although not EU Member States, are part of the Schengen Area. Membership of Schengen anticipates police and judicial co-operation, to compensate for the effect of the loss of border control on potential cross-border crime. Whilst the decision was made not to link the EAW to Schengen, the Council believed that it would be useful to apply the surrender procedure model to the Schengen countries given their privileged partnership with the EU Member States. The UK, of course, is not part of the Schengen Area. Whilst there may be willingness on the part of the EU negotiation team, agreement needs to be reached with each Member State and all need to implement the agreement, and decide which derogations to make,

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<sup>114</sup> Supra note 101, Article SURR 8

before it will come in to force. Considering this took 12 years to happen with the Norway-Iceland agreement this is very unlikely to happen by the end of 2020.

### **Alternative models of cooperation**

#### **- European Convention on Extradition 1957 – the default option**

If an agreement between the EU and UK is not concluded and ratified by 31 December 2020 the UK and Ireland will have to fall back on the 1957 European Convention on Extradition, in the medium term at least. This is clearly a second-best option. Indeed, the House of Commons Home Affairs Committee has noted that being forced to fall back on it would be a 'catastrophic outcome'.<sup>115</sup> There are a number of reasons for this. The Convention operates through diplomatic channels and therefore extradition would require political approval in the extraditing country. There are no strict time limits as there are with the EAW and it does not require states to extradite their own citizens.<sup>116</sup> The UK, therefore, would lose the ability to extradite nationals of a significant number of countries. Further, there will be no agreed exceptions to the dual criminality requirement. The act underlying the extradition request would need to be an offence in both the requesting and executing state. Whilst States may be willing to be flexible it is likely that the courts will deal frequently with dual criminality arguments. Practitioners have argued that this could result in delay and an increase in the number of appeals to the higher courts.<sup>117</sup> Conversely there are some safeguards in part 1 of the EA 2003 which will no longer be available such as

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<sup>115</sup> Supra note 52 at para 69.

<sup>116</sup> Prior to the EAW, 13 of the then 25 Member States refused to extradite their own nationals for constitutional reasons, and some of them—including Portugal, Slovakia, Latvia and Slovenia—revised their constitutions to avoid negative rulings from their constitutional courts in relation to surrender via the EAW. Germany's constitutional amendment allows the surrender of a German citizen to an EU Member State or international Court, but not to non-EU domestic courts and Slovakia is subject to the same limitations. Further constitutional amendment in Germany would require a parliamentary majority of two-thirds and the difficulties of achieving this are the reason why Germany has already chosen not to extradite its own nationals under the Iceland-Norway agreement or to the UK during the transition period.

<sup>117</sup> E. Grange and D. Reece-Greenhalgh, "Brextradition" – An analysis of the surrender arrangements between the UK and EU27 post-Brexit' 22 April 2020, Corker Binning, cited at <https://www.corkerbinning.com/brextradition-analysis-surrender-arrangements-uk-eu27-post-brexit/> <accessed 29-08-20>.

the absence of a prosecutorial decision in the requesting country, issues relating to speciality and importantly, the proportionality bar. An important point affecting the efficiency of the extradition process is the loss of the Schengen Information System II. Whilst distinct from the EAW, it operates alongside providing for real time warrants and alerts. Its loss means Interpol red notices relying on diplomatic channels will be relied upon. There is increased potential for missed opportunities to apprehend suspects. Most EU countries do not use Interpol, relying on the more effective SIS II. The UK could choose to give effect to red notices and will need to work diplomatically and practically with the EU 27 to try and amend usual practice to facilitate arrest in the UK. Overall, the 1957 Convention is now out of date and little used by most states. UK warrants may not be dealt with as a priority and UK prosecution authorities will have to rely on informal in-country relationships to a much greater extent.

It appears clear that reliance on the 1957 Convention could see a slow grinding of cooperation, previously lubricated by membership of the EU. This could negatively impact the security of both countries. Whilst peace in Ireland can be traced to the Good Friday Agreement, this is fragile.<sup>118</sup> If sectarian violence were to resurface a possibility is that requests for extradition under the 1957 Convention of any individuals wanted on IRA related terrorism charges, could be refused on the basis of Article 3 of the 1957 Convention, which prohibits extradition for offences 'regarded by the requested Party as a political offence or as an offence connected with a political offence.' Of course both Ireland and the UK remain party to the European Convention on the Suppression of Terrorism 1977, which stands in the way of reliance on the exception. There is no doubt, however, EU membership and the Framework Decision on the European Arrest Warrant 2002 acted to build the trust to render the revival of the exception unthinkable. The proposed UK-EU agreement, in line with the Norway-Iceland agreement, bars refusal of cooperation on the grounds that the offence may be regarded by the executing state as a political offence, connected with a political offence or inspired by political motives.<sup>119</sup> Whilst the proposed UK-

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<sup>118</sup> Hayward and Murphy, *Supra* note 75

<sup>119</sup> Article: LAW.SURR.81.

EU agreement would protect the UK and Ireland from problems that could arise in relation to sectarian terrorism charges, the 1957 Convention *per se* does not.

**- The UK and Ireland's preparation for operation of the 1957 Convention**

Notwithstanding the manifest difficulties, falling back on the 1957 Convention is an outcome extradition practitioners have been preparing for both in the UK and Ireland for some time. From a practical perspective, in order to give effect to the Convention, the UK needs to designate all EU Member States as 'Category 2' territories for the purpose of the EA 2003. This will bring them within the remit of Part 2 of the EA 2003 containing the provisions for the UK's extradition arrangements with countries with which it has a bilateral or multilateral treaty obligation. A sub-category of these Category 2 countries are those designated by the Home Secretary as exempt from the requirement to demonstrate a *prima facie* case against a requested person. Council of Europe countries who are not Member States (as well as Israel, Republic of Korea and South Africa) but who are signatories to the ECE 1957 are currently designated as not having to demonstrate a *prima facie* case. Article 62 of the Withdrawal Agreement provides that EAWs executed before the end of the transition period continue to operate under the Framework Decision. The effect of this would mean that provisional arrest warrants will not be required if a EAW has been executed before 31 December 2020. However the role of the CJEU in cases executed in the UK before 31 December 2020 but not yet concluded is unclear.

The UK has made certain legislative preparations for the event of a no-deal in relation to extradition and the application of the 1957 Convention. Amendments to the Extradition Act 2003 proposed in the Extradition (Provisional Arrest) (HL) Bill 2019<sup>120</sup> will create a power of arrest, without warrant, for the purpose of extraditing people for serious offences if a certificate has been issued by the designated authority and the extradition request comes

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<sup>120</sup> As of August 2020 the Bill was before the House of Lords.



from a 'designated category 2 territory'.<sup>121</sup> The amendment has been made because the power already exists under part 1 of the Act and this is preparatory to re-designating all EU countries as category 2 territories as requested by the police as part of its contingency planning for no deal. The Law Enforcement and Security (Amendment)(EU Exit) Regulations 2019<sup>122</sup> section 56 amends the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003<sup>123</sup> by adding to the list the 27 EU states, including, of course, Ireland. The Explanatory Notes to the Regulations provide that they '... ensure that the UK has the correct legal underpinning to operate the 'no deal' contingency arrangement (the 1957 Council of Europe Convention on Extradition) that would be used in lieu of the European Arrest Warrant (EAW)'.<sup>124</sup> The sole remaining Part 1 territory is Gibraltar, by section 55.

Ireland has also been making legislative preparations for a no deal scenario. The Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act s 93 amended section 14 of the Extradition Act 1965 to provide:

Extradition shall not be granted where a person claimed is a citizen of Ireland, unless — (a) the relevant extradition provisions or this Act otherwise provide, or (b) the law of the requesting country does not prohibit the surrender by the requesting country of a citizen of that country to the State for prosecution or punishment for an offence.

This was necessary because s 14 of the Extradition Act 1965 as amended provided that a citizen could only be extradited to Britain if the relevant extradition provisions provided such – whilst the EAW did, the ECE does not.<sup>125</sup> Without this amendment Ireland would not have been able to extradite its own nationals to the UK under the 1957 Convention.

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<sup>121</sup> Schedule A1 list of specified category 2 offences are Australia, Canada, Liechtenstein, New Zealand, Switzerland and the United States of America.

<sup>122</sup> SI 2019/742.

<sup>123</sup> SI 2003/3334.

<sup>124</sup> At paragraph 2.3, cited at [http://www.legislation.gov.uk/ukxi/2019/742/pdfs/ukxiem\\_20190742\\_en.pdf](http://www.legislation.gov.uk/ukxi/2019/742/pdfs/ukxiem_20190742_en.pdf) <accessed 29-08-20>.

<sup>125</sup> The amended 1965 Act is found here: <http://revisedacts.lawreform.ie/eli/1965/act/17/revised/en/html> <accessed 29-08-20>.

## - **The Future Operation of the 1957 Convention**

Whilst both countries are legislatively prepared to fall back on the 1957 Convention the problems attendant to a slow, costly, ineffective system would almost certainly impact extradition between the UK and Ireland. Briscoe, says of the difference between the ECE and the EAW;

it would be necessary in all cases to prove correspondence of offences between Ireland and Britain. Given the historical links, it is not anticipated that this would present a substantial issue. There would undoubtedly be delays encountered in using the convention as the basis of extradition, as it has more 'moving parts' – with, for example, the diplomatic transmission of extradition documents being a requirement.<sup>126</sup>

Mitigating the difficulties somewhat would be the close historical ties, shared language and similarities in legal systems, particularly their adversarial nature. In addition, police and prosecutors have traditionally had a close working relationship which underpins cooperation across the island of Ireland. The Intergovernmental Agreement on Co-operation on Criminal Justice Matters and the Joint Cross-border Policing Strategy are just two such examples, both predating EU membership and sitting outside of the EU framework. Mutual trust and recognition between the UK and Ireland is easier to achieve than between the UK and states with different legal traditions. As noted, UK and Ireland are close working partners for the purpose of extradition, and a simple and easy method of extradition is vital to the safe operation of the Common Travel Area. The need for legal and operational cooperation between Northern Ireland and the Republic of Ireland will not disappear but, as noted by Fletcher and Macano, 'the unifying forces which flow directly from commitment to comply with the EU's legal framework will. It remains to be seen what impact, if any, this will have on the future of internal cooperation in this field.'<sup>127</sup>

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<sup>126</sup> Supra note 1 at p 39.

<sup>127</sup> M. Fletcher and L. Mancano, 'Brexit and Scots Law: Policing and Criminal Justice' (2018) 22 Edinburgh Law Review 138

What does appear inevitable are challenges to aspects of the system of extradition governing Ireland-UK relations subsequent to the EAW. Indeed, this has already started. The case of *Minister for Justice and Equality v O'Connor* highlights the simple fact that uncertainty and change bring litigation.<sup>128</sup> The appeal highlights potential for legal challenges where post-Brexit arrangements or cooperation is too piecemeal to the point that it undermines the mutual trust and recognition. The patchwork of EU instruments in this area cannot be easily disaggregated as many mechanisms support or underpin each other, as seen with the SIS II mentioned above. The efficacy of a particular measure often depends upon the availability of a range of further cooperation mechanisms. The EAW process is assisted, for example, by cooperation measures that ensure extradited individuals are treated fairly after conviction including the European Prisoner Transfer agreement which enables individuals to serve custodial sentences in their home country. Further, it is difficult to say how the courts will deal with the delay inevitably caused by the departure of the UK from the EAW. Individuals being processed at the point the UK formally leaves the EAW may well be released from custody. If an arrest warrant has been issued but the wanted person has not yet been arrested new proceedings would have to be started.

Whilst the UK and Ireland have prepared for reliance on the 1957 Convention, it is not sustainable in the long term. The clear preference of both the UK and Ireland is for an EU wide agreement. As Mitsilegas has argued a UK-EU agreement is 'the most desirable in terms of ensuring legal certainty, the establishment of an EU-wide level-playing field for the UK, and operational efficiency to the extent that they have the potential to maintain the United Kingdom's position as close as possible to its current position as an EU member state.'<sup>129</sup> If such an agreement cannot be reached by 31 December 2020 it is argued that the UK and Ireland should be permitted to enter into a bilateral arrangement on extradition.

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<sup>128</sup> The appellant, Mr O'Connor, attempted unsuccessfully to avoid extradition from Ireland to the UK for a £5 million fraud on the basis that the EAW was unenforceable now that Article 50 has been triggered.

<sup>129</sup> V. Mitsilegas, 'The European Criminal Law Without the United Kingdom? The triple paradox of Brexit' (2017) 8(4) *New Journal of European Criminal Law* 437.

- **Is a bilateral agreement between the UK and Ireland a possibility?**

The difficulties facing the conclusion of an EU-UK agreement and the deficiencies of the fall-back reliance on the 1957 Convention have been discussed. An option that might form a bridge between the EAW and a multilateral agreement and mitigate the failings of the 1957 Convention is a bilateral extradition treaty between Ireland and the UK. There is clear precedent for Member States entering into extradition arrangements with third countries outside of an EU wide agreement. Member States retain competence with respect to entering and performing such agreements, until such time as the EU has concluded a corresponding agreement. Whilst extradition within the EU is of course governed by the EAW, extradition from EU Member States to third states is generally regulated by bilateral agreement. The EU *per se* has only concluded agreements with the USA and Norway and Iceland. It is also clear however, as Criminal Proceedings against Petruhhin<sup>130</sup> shows, EU law does provide for certain restrictions on the way that Member States can exercise their competence in cases where provisions of EU law may be involved. In the case the CJEU has confirmed that EU law still applies to issues that fall within the competence of Member States, such as extradition under a bilateral agreement but that the court does not question the competence of Member States to enter into such agreements unless the EU has already exercised its competence. Once an EU level agreement is reached there is precedent for the Commission enforcing exclusive competence. Infringement proceedings were launched against Austria, Bulgaria, Hungary and Romania for signing an agreement with 5 Western Balkan akin to the Prüm framework, governing the exchange of biometric data.<sup>131</sup> The Commission considers the agreement is in breach of EU exclusive competence in the area, as the exchange of such data between Member States is covered by the Prüm Council Decisions. A reasoned opinion has yet to be given in the case. In the scenario suggested, the UK and Ireland would be seeking to enter into a bilateral

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<sup>130</sup> Supra note 95.

<sup>131</sup> Security Union: Commission calls on 4 Member States to respect EU exclusive competence in the area of automated DNA, fingerprint and vehicle registration data exchange (Prüm Decisions) available at [https://ec.europa.eu/commission/presscorner/detail/en/INF\\_19\\_5950](https://ec.europa.eu/commission/presscorner/detail/en/INF_19_5950) <last accessed 30/02/20>.

agreement whilst EU wide negotiations are ongoing but not complete, and the agreement would cease to apply once an EU wide agreement is ratified. Such a scenario is provided for in Article 4 of the Council Decision adopting the Withdrawal Agreement. This provides Ireland the opportunity to obtain permission to negotiate a bilateral agreement with the United Kingdom if it necessary for the proper functioning of the Northern Ireland protocol.<sup>132</sup> Interestingly, however, even in this scenario it is possible for EU countries to continue to be bound by a bilateral agreement where it is subsequently superseded by an EU wide agreement. Finland and Sweden, for example, continue to apply the Nordic Arrest Warrant as a pre-existing agreement despite the EU concluding the EAW.

### - **Nordic Arrest Warrant – a way forward for Ireland and the UK?**

For 50 years prior to the EAW the Nordic countries<sup>133</sup> had a system of regional extradition. Historically this was not based on a multilateral treaty but based on direct cooperation regulated by national legislative processes, akin to the backing of warrants system between the UK and Ireland. A description from 1958 was in much the same terms:

The Police in the country where the person in question is staying will, upon request from the police in another Nordic country, return the person to that country without particular formalities. Thus, the situation may now be said to be that, practically speaking, one does not go through extradition in relations between the Nordic countries but that, instead, one has put to use an informal procedure for return of such persons where the police alone handles the case.<sup>134</sup>

There was no international duty to extradite, which meant it was national law which legalised “intra-Nordic extradition” subject to certain legal safeguards. In

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<sup>132</sup> For more detailed discussion see Davies ‘Facilitating cross-border criminal justice cooperation between the UK and Ireland after Brexit: ‘Keeping the lights on’ to ensure the safety of the Common Travel Area’ in this special issue.

<sup>133</sup> Denmark, Finland, Iceland, Norway and Sweden.

<sup>134</sup> Recommendation of 29 May 1958 from the Norwegian Council on Criminal Law, on extradition to Denmark, Finland, Iceland and Sweden (“Council on Criminal Law Recommendation 1958”) p. 10 as translated in G. Mathisen, ‘Nordic cooperation and the European arrest warrant; intra-Nordic extradition, the Nordic arrest warrant and beyond’ (2010) 79(2) Nordic Journal of International Law 1.

practice extradition was always facilitated by each of the countries unless specifically prohibited by legislation. There was strict observance of the 'aut dedere aut judicare' principle and any refusal would be followed by proceedings in the requested state. There was no need for dual criminality to be established, relying instead on mutual recognition of substantive criminal law and no *prima facie* requirement. Summary or fast track extradition was provided for in cases of consent and direct communication between judicial authorities was encouraged. There were very low penalty thresholds, no bar on the extradition of nationals and no political offences exception within the intra-Nordic context. None of the Nordic countries, although signatories, applied the European Convention on Extradition 1957 *inter se*. Similar to the UK and Ireland the Nordic passport union of 1954 provided for an area of free movement people and whilst formalisation of extradition was required to ensure legal certainty and protection it was thought the system had to be simple and effective.<sup>135</sup> Intra-Nordic extradition was underpinned by mutual trust and historically strong cultural, legal and linguistic ties between the countries.<sup>136</sup> It relied on flexibility and willingness to cooperate rather than on legal obligations.

Interestingly, the intra-Nordic system based on the national law of the five countries has been overtaken by a convention. In 2005 the Nordic Arrest Warrant (NAW) was agreed, despite Norway and Iceland not being EU Member States. It was inspired by the EAW, which ironically was itself based upon the previous Nordic system.<sup>137</sup> The NAW mirrors the substantive provisions of the Framework Decision and mutual recognition is made explicit. The notable differences are that there are lower minimum penalties, double criminality is abolished (there is no list at all) and there are no territoriality restrictions whilst there are limits on the speciality rule. Further, there is considerable shortening of the procedural time limits as compared even to the EAW. Overall the NAW is aimed at establishing 'an even more efficient extradition procedure between close neighbours.'<sup>138</sup> The point

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<sup>135</sup> For a full discussion see, Mathisen, *ibid*.

<sup>136</sup> K. Tolttila, 'The Nordic Arrest Warrant: What Makes for Even Higher Mutual Trust?' (2011) 2(4) *New Journal of European Criminal Law* 368.

<sup>137</sup> Mathisen argues that the inspiration of the EAW was the longstanding domestic arrangements in the five Nordic states, *supra* note 128. The NAW did not enter into force until 2012. See also A. Suominen, 'The Nordic Arrest Warrant Finally in Force' (2014) 4(1) *European Criminal Law Review* 41.

<sup>138</sup> Mathisen, *supra* note 134.

that can be drawn here is that it appears wholly possible for Ireland and the UK to conclude a bilateral extradition agreement, and with terms that provide for even closer co-operation than the EAW.

## **Conclusion**

There are lessons to be learnt from Ireland-UK extradition history. It has been seen that prior to the EAW the long-standing extradition relationship eschewed international practice and was governed by domestic legislation. The reciprocal acceptance of warrants remained at the heart of the system for many years although this practice was subsequently shaped by the European Convention on Extradition 1957 and later the European Convention on the Suppression of Terrorism 1977. Casting a shadow over the relationship between Britain and Ireland was the break down in extradition between Northern Ireland and the Republic between 1928 and 1965. The insertion of a political offence exception into the 1965 legislation resulted in a series of high-profile refusals to extradite which in turn exacerbated tensions. In spite of those tensions underlying extradition between the UK and Ireland throughout its history has been geographic proximity, the Common Travel Area and a shared legal heritage.

Membership of the EU and the signing of the Good Friday Agreement in 1998 have marked a period of peace of prosperity for the island. The UK and Ireland have become much closer and intertwined, particularly in the area of criminal justice cooperation. Largely as a result of membership of the EU cross-border cooperation was depoliticised. Thirty years after Ireland and the UK joined the EU the EAW came into force. It quickly became an essential tool for both Ireland and the UK, and in particular between Northern Ireland and the Republic. As such maintaining a functioning system of extradition is a key priority for both parties. Whilst the UK and the EU accept that continued membership of the EAW is not possible for the UK, its replacement remains unclear. The preference of the UK and the EU is for an EU-wide agreement which, in the short term at least, offers greater legal certainty and operational efficiency. The reality is that such an agreement will not be in place before the end of transition. Too many contentious hurdles need to be overcome. The default position is that as of 31 December 2020 the UK will fall back on the European Convention of Extradition 1957. Both the UK

and Ireland have prepared as well as they can for this. It is, however, not a long-term solution.

The optimal solution for the UK and Ireland is a bilateral extradition arrangement. It could mirror the EAW, but with provision to improve upon it in light of the Ireland–UK setting. The justification of the EAW is that it compensates for freedom of movement. The existence of the Common Travel Area, in operation since the creation of the Irish Free State (albeit suspended during the height of the Troubles) is central amongst the reasons for the close extradition relationship between the two nations prior to the EAW. The UK leaving the EU does not alter the operation of the Common Travel Area. The arguments in favour of an EAW-style system subsist in the Ireland-UK context regardless of Brexit. It is a truism that the closer any two countries are geographically, economically and politically the greater the need for cooperation. The UK and Ireland have no closer neighbour.

EU Member States retain competence with respect to entering and performing bilateral extradition agreements with third countries until the EU has concluded such an agreement. If an EU wide agreement was reached Ireland and the UK could abandon the bilateral agreement although, as seen, there is precedence for continued operation of a bilateral agreement. Finland and Sweden continue to apply the Nordic Arrest Warrant despite the EU reaching a subsequent agreement with Norway and Iceland. The Nordic Arrest Warrant is a potential template for the UK and Ireland. The Nordic countries have many similarities akin to those between the UK and Ireland, a shared history, languages, legal traditions and the abandoning of borders long before Schengen. This led to close Nordic extradition cooperation long predating the EAW. If Ireland and the UK were successfully to conclude a bilateral agreement such an agreement would likely be very influential in any later EU-UK agreement. Indeed given the legal and linguistic connections between the two states it is hard to see a larger agreement being made without the former being successful.

The principle of EU citizenship is at the heart of the EAW. When proposing the EAW the Commission argued for removal of the political offence exception stating that



Since the European Arrest Warrant is based on the idea of citizenship of the Union ..., the [political offence] exception provided for a country's nationals, which existed under traditional extradition arrangements, should not apply within the Common Area of Freedom, Security and Justice. A Citizen of the Union should face being prosecuted and sentenced wherever he or she has committed an offence within the territory of the European Union, irrespective of his or her nationality.<sup>139</sup>

Whilst Brexit changes the status of UK citizens, who no longer enjoy EU citizenship, it importantly does not change the fundamental tenet of the Good Friday Agreement. Citizens of Northern Ireland and the Republic of Ireland are to be treated equally, they can choose Irish citizenship, British citizenship or both. They are free to choose where to live, work and study. The shared history of the UK and Ireland, particularly in relation to their citizens living on the island of Ireland, lends strong justification to a continued close extradition relationship. The Nordic Arrest Warrant presents a blueprint for regionalised extradition cooperation which can run alongside the EAW. Features of the NAW, which in certain areas go beyond the provisions of the EAW, reflect the very high level of mutual trust between the Nordic countries. As noted above the mutual trust between all EU Member States has proved increasingly problematic in recent years, particularly after the expansion of the EU. In contrast, a level of mutual trust and even mutual recognition between Ireland and the UK is much easier to achieve. Whilst the EU continues to attempt to strengthen mutual trust, as it should, Mathisen argued that 'the necessary mutual trust may presently exist between smaller groups of neighbouring countries.'<sup>140</sup> This is exactly the case between Ireland and the UK. The NAW offers a lawful blueprint for a future which could see the UK and Ireland enjoy closer extradition arrangements than at present without harming or hindering the EAW.

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<sup>139</sup> Recital 12 of the Preamble in the Commission Proposal.

<sup>140</sup> Mathisen, *supra* note 134.