

Criminal Justice (Mutual Recognition of Custodial Sentences) Bill 2021

Bill No. 103 of 2021

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Abstract

The [Criminal Justice \(Mutual Recognition of Custodial Sentences\) Bill 2021](#) implements EU [Council Framework Decision 2008/909/JHA](#) on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. It sets out how the transfer of sentenced prisoners will work within the EU. The new system is in addition to a current system operating under a Council of Europe Convention.



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Glossary

Terminology	Description
Appropriate court	Refers to the High Court.
Competent authority	Refers to the authority designated by the executing state or issuing state, as the case may be, to be the competent authority in that state for the purposes of the Framework Decision.
Executing state	Refers to the Member State to which a judgment is, or is to be, forwarded in accordance with Part 2 of the Bill for the purposes of its recognition and enforcement in that state.
Framework Decision	Refers to Council Framework Decision 2008/909/JHA of 27 November 2008 ¹ on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.
Issuing state	Refers to the Member State in which a judgment is delivered.
Judgment	Refers to a final decision, direction or order imposing a sentence on a natural person and, unless otherwise specified, includes a record in writing of that decision, direction or order or a certified copy thereof.
Member State	Refers to a state, other than the State, that is a Member State of the European Union, and not being such a Member State, the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Principality of Liechtenstein.
Minister	Refers to the Minister for Justice.
Sentence	Refers to a custodial sentence or measure involving deprivation of liberty imposed by a court for a limited or unlimited period of time on account of a criminal offence in criminal proceedings

Source: Section 2 of the Bill

Summary

The [Criminal Justice \(Mutual Recognition of Custodial Sentences\) Bill 2021](#) [the Bill] was published by the Minister for Justice, Heather Humphreys TD, on 29 July 2021. A General Scheme for the Bill was published by the Department of Justice. Pre-Legislative Scrutiny [PLS] was undertaken in relation to the Bill on Tuesday 29th June 2021.¹ The Joint Committee on Justice received an oral briefing from officials from the Department of Justice.

The Bill applies to custodial sentences which involve a term of imprisonment or detention in a closed environment (such as a youth detention centre). The Bill provides for measures to allow for the transfer of custodial sentences where an Irish person is sentenced in the EU or the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Principality of Liechtenstein, and an application has been made to transfer the sentence to allow the sentence to be served in Ireland. The Bill also provides measures in relation to the transfer of prisoners who have been sentenced to custodial sentences in Ireland to other Members States.

The Bill arises from the EU [Council Framework Decision 2008/909/JHA](#) [the Framework Decision] on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. The purpose of the Framework Decision is:

“... to establish the rules under which a Member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognise a judgment and enforce the sentence.”²

The purpose of the transfer of sentenced prisoners to their country of origin is to assist with the rehabilitation of the prisoner by removing the additional difficulties which attach to serving a prison sentence abroad. These include barriers to rehabilitation caused by language difficulties, cultural alienation and the absence of contact from friends and family. The transfer of foreign nationals from prisons can also assist the Member State as it may lead to a reduction in the overall prison population and reduce the cost of imprisoning criminals.

Under Article 29 of the Framework Decision, Member States were required to implement the Framework Decision by 5th December 2011. All 27 Member States have implemented the Framework Decision in their national legal orders.³

¹ See Joint Committee on Justice report on Pre-Legislative Scrutiny of the General Scheme of the Criminal Justice (Mutual Recognition of Custodial Sentences) Bill 2020 [33/JC/10]. Available at: https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_justice/submissions/2021/2021-07-07_report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-criminal-justice-mutual-recognition-of-custodial-sentences-bill-2020_en.pdf.

² See Article 1 of the Framework Decision.

³ For more information on the implementation status of the Framework Decision, see General Secretariat of the Council, *Implementation of Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union - Information about the state of implementation* (June, 2021). Available at <https://db.eurocrim.org/db/en/doc/3630.pdf>.

The new system of prisoner transfer set out in the Bill will operate alongside the current system which is based on a Council of Europe Convention and part of Irish law through the *Transfer of Sentenced Prisoners Act 1995*. A table outlining the main differences between the Council of Europe Convention and the EU Framework Decision can be found on page 19 of this Digest.

Prisoner transfers to and from the UK will continue to take place under the 1995 Act rather than this Bill. The Digest outlines current legal problems with transfers from the UK as the Government have indicated that they may introduce Committee Stage amendments to the Bill to address these issues.

Since the 1995 Act was passed, there have been 154 transfers into the State and 194 transfers out. Since 2017 there have been no prisoner transfers into the State.

Table of provisions

Section	Title	Effect
Part 1: Preliminary and general		
1.	Short title and commencement	Standard provision that defines the short title of the Bill and provides for commencement by Ministerial order. The Bill will come into operation upon a commencement order being made by the Minister for Justice. Commencement orders may be limited to particular provisions of the Bill or purposes.
2.	Interpretation	Standard provision that provides for the definitions of various terms within this Bill. Section 2(2) provides that words or expressions used in both this Bill and the Framework Decision have the same meaning unless the context requires otherwise.
3.	Application of Act	Provides that the Bill, if enacted, will apply to all sentences whether imposed before, on or after the date on which the Act comes into force.
4.	Executing state presumed to comply with Framework Decision	Provides for a presumption that the executing state will comply with the requirements of the Framework Decision, unless the contrary is shown.
5.	Competent authorities in State	Section 5 provides for the Minister and the appropriate court to be designated as competent authorities.
6.	Transmission of documents	Provides for the transmission of documents and the verification of the authenticity of documents and their copies.
7.	Annual report to Houses of Oireachtas	Standard provision that provides for the laying of an annual report on the operation of the Bill, if enacted, by the Minister, before each House of the Oireachtas. This report is to be laid within 4 months after the end of each year.
8.	Expenses	Standard provision for the payment of expenses out of funds to be provided by the Oireachtas.
Part 2: State as issuing state		
9.	Interpretation (Part 2)	Standard provision that provides for the definitions of various terms within Part 2 of the Bill.

Section	Title	Effect
10.	Application to forward judgment	<p>Section 10(1) provides for the different persons, referred to in Part 2 as “applicants”, who may apply in writing to the Minister to forward a judgment imposed in the State to a competent authority of an executing state for the purposes of the recognition of the judgment and enforcement of the sentences in that state.</p> <p>Sections 10(2) and 10(3) provide that the Minister may consider whether to forward such a judgment and that section 11 to 16 of the Bill shall apply to such a consideration.</p>
11.	Information to be provided to notification parties	<p>Section 11(1) provides for the persons who the Minister shall notify of the making of the application, referred to in Part 2 of the Bill as “notification parties”.</p> <p>Section 11(2) provides that the Minister shall notify the applicant and the notification parties in relation to specified decisions and receipts of decisions taken in respect of the application.</p>
12.	Opinion of sentenced person	<p>Section 12 provides that where an application is made in respect of a sentenced person in the State, the Minister is required to provide the sentenced person with an opportunity to provide their opinion in relation to the application.</p> <p>Section 12(3) provides that where a sentenced person is incapable of giving their opinion, the Minister shall give the legal representative of the sentenced person, or any other person considered by the Minister to be an appropriate person, an opportunity to give their opinion regarding the application.</p> <p>Section 12(5) provides that section 12 only applies where the Minister is satisfied that the judgment may be forwarded.</p>
13.	Consent of sentenced person	<p>Section 13 provides for the procedures that apply in relation to obtaining the consent of the sentenced person where a judgment is being forwarded.</p>
14.	Consent of executing state	<p>Section 14 provides for the criteria for forwarding a judgment to the competent authority of an executing state for the purposes</p>

Section	Title	Effect
		<p>of recognition of the judgment and enforcement of the sentence.</p> <p>It provides that a judgment to which an application relates may be forwarded to the competent authority of an executing state where:</p> <ul style="list-style-type: none"> a) the sentenced person is a national of the executing state and he or she lives in that state, b) the sentenced person is a national of the executing state and he or she will be sent to that state upon release from the enforcement of the sentence to which the judgment relates in accordance with an order included in, or ancillary to, the judgment, or c) in the case of any other executing state, the competent authority of the executing state has given its consent in writing to the forwarding of the judgment.
15.	Consultation with executing state	Provides for the circumstances where the Minister is satisfied that the judgment may be forwarded, in which the Minister shall consult with the competent authority of the executing state as to whether the enforcement of the sentence by the executing state would assist the social rehabilitation and reintegration into society of the sentenced person.
16.	Decision to forward judgment	Section 16 provides for the forwarding of a judgment by the Minister and the criteria that must be met prior to a judgment being forwarded.
17.	Forwarding of judgment	Section 17 provides for documents that the Minister is required to forward to the competent authority of the executing state where a decision has been made to forward a judgment. Section 17 also provides for notification requirements where a decision has been made to forward a judgment.
18.	Provisional arrest where sentenced person in executing state	Section 18 provides for the circumstances in which the Minister, upon deciding to forward a judgment to an executing state and the sentenced person is in the executing state, may

Section	Title	Effect
		request the executing state to arrest or otherwise detain the sentenced person prior to the competent authority of the executing state reaching a decision regarding recognition of the judgment and enforcement of the sentence in that state.
19.	Communications with executing state after judgment forwarded	<p>Section 19(1) provides that the Minister shall provide the competent authority with a translation of a judgment in a relevant language where such is requested by a competent authority.</p> <p>Section 19(2) provides that where a judgment has been forwarded with no consultation with the executing state, the Minister shall consider any reasoned opinion provided by the competent authority once the opinion is provided without delay following the forwarding of the judgment.</p> <p>Section 19(3) provides that the Minister shall provide the competent authority with any additional information regarding the request as the Minister considers appropriate where such is requested by a competent authority.</p>
20.	Consent of Minister to partial recognition and enforcement by executing state	Section 20 provides for partial recognition and enforcement by and executing state, where the Minister upon request of the competent authority of the executing state, gives her consent. The Minister may not give her consent where it would increase the duration of the sentence.
21.	Withdrawal of consent of sentenced person	Section 21 provides for the circumstances relating to section 13 of the Bill where a sentenced person may withdraw their consent prior to a decision by the competent authority of the executing state to recognise the judgment and enforcement the sentence in that state.
22.	Transfer warrant	Section 22 provides that the Minister may issue a transfer warrant following the receipt of a notification from the competent authority of an executing state of its decision to recognise a judgment. A transfer warrant provides for the lawful transfer of a sentenced person from their place of detention in the State into the custody of a person authorised by the competent authority of the executing state.

Section	Title	Effect
23.	Transfer of sentenced person	<p>Section 23(1) provides for a 30-day time period, following the notification of the Minister by the competent authority of its decision to recognise the judgment, in which the transfer of a sentenced person is to take place in accordance with a transfer warrant.</p> <p>Section 23(2) provides that where exceptional circumstances arises resulting in the transfer not taking place within the 30-day period, the Minister and the competent authority of the executing state shall agree a revised date. The transfer is required to take place with 10 days from the revised date.</p>
24.	Transfer of enforcement of sentence	<p>Section 24 provides for the circumstances where the law governing the enforcement of a sentence shall transfer to an executing state.</p> <p>Section 24(2) provides that a transfer of enforcement of a sentence will revert to the State where a sentenced person escapes from custody and the Minister receives notification from the competent authority of that state of the escape.</p>
25.	Continuation in effect of original order	<p>Section 25(1) provides that the original order authorising detention of the sentenced person shall continue to authorise detention at any time after the enforcement of the sentence reverts to the State in accordance with section 24(2).</p> <p>Section 25(2) provides that where a sentenced person escapes from custody in an executing state the outstanding sentence shall be suspended for the period during which the person is unlawfully at large.</p> <p>Section 25(3) provides that following the removal of a sentenced person from the State, the Minister may direct that the original order be varied or cease to have effect.</p> <p>Section 25(4) provides that sections 25 and 26 apply to that part of a sentence which is not transferred to an executing state in part and to which the Minister has given his or her consent under section 20(1).</p>

Section	Title	Effect
26.	Arrest of sentenced person following escape from custody in executing state	Section 26 provides for the arrest without a warrant, by a member of An Garda Síochána, of a sentenced person, who has escaped custody and is unlawfully at large following the transfer of enforcement of a sentence. Section 26 also provides for the procedures that apply in respect of the continued enforcement of the remainder of the sentence and the varying of an original order following an arrest.
27.	Rule of specialty (Part 2)	Section 27 provides for the rule of specialty as set out in Article 18 of the Framework Decision. Section 27 set out the procedures that apply where a sentenced person is transferred to an executing state and the Minister receives a request from the executing state in relation to offences (other than an offence in respect of which he or she has been transferred to the executing state to serve the sentence in relation to) under the law of the executing state committed before his or her transfer to that state.
28.	Withdrawal of Framework Decision Certificate	<p>Section 28 provides for the withdrawal by the Minister of a Framework Decision Certificate prior to the transfer of the enforcement of the sentence, in line with Article 13 of the Framework Decision.</p> <p>Section 28 sets out a number of circumstances where a withdrawal of the Framework Decision Certificate is required and matters that the Minister shall have regard to when considering whether to withdraw a Framework Decision Certificate.</p>
29.	Cessation of enforcement of sentence	<p>Section 29 requires the Minister to immediately notify the competent authority of the executing state where a sentenced person:</p> <ul style="list-style-type: none"> a) is granted a pardon in respect of the offence for which they have been transferred, b) has become immune from prosecution or punishment in respect of the offence for which they have been transferred, or c) obtains a declaration under section 2 of the Criminal Procedure Act 1993 that there has been a miscarriage of justice

Section	Title	Effect
		in relation to his or her conviction in respect of the offence for which they have been transferred.
Part 3: State as executing state		
30.	Interpretation (Part 3)	Standard provision that provides for the definitions of various terms within Part 3 of the Bill.
31.	Corresponding offences	Defines corresponding offences as acts or omissions constituting an offence in the issuing state that would constitute an offence if committed in the State.
32.	Consent to forwarding judgment	<p>Section 32(1) provides that where a sentenced person is a person, other than an Irish citizen living in the State or due to be released into the State following a sentence in an issuing state, a competent authority of the issuing state shall not forward a judgment unless the competent authority has obtained the consent of the Minister.</p> <p>Section 32(2) provides for the circumstances where Minister may give her consent under section 32(1).</p>
33.	Provision of reasoned opinion to issuing state	<p>Section 33 relates to the provision of a reasoned opinion in respect of a sentenced person, by the Minister to the competent authority of an issuing state.</p> <p>Section 33(1) provides for when a reasoned opinion may be given.</p> <p>Section 33(2) provides that the Minister shall have regard to the opinion of the sentenced person when providing a reasoned opinion under section 33(1).</p> <p>Section 33(3) defines a “reasoned opinion”, for the purposes of section 33, as “a reasoned opinion of the Minister that the enforcement in the State of a sentence imposed in an issuing state would not facilitate the social rehabilitation and successful reintegration of the sentenced person into society.”</p>
34.	Forwarding of judgment to Minister	Section 34 provides for the procedures that apply where a judgment and Framework

Section	Title	Effect
		Decision Certificate are forwarded by the competent authority of an issuing state. Section 34 also provides for the making of section 34 certificates, certifying that the requirements of section 34 have been met.
35.	Provisional arrest where sentenced person in State	Section 35 provides for provisional arrest of a sentenced person in the State where a request has been made in writing for the provisional by an issuing state.
36.	Power of adjournment and remand	<p>Section 36 provides that the appropriate court may adjourn proceedings brought under Part 3 of the Bill and remand an arrested person in custody or bail.</p> <p>Section 36(3) provides that the appropriate court shall have the same powers of remand as it would have if the person had been charged with an indictable offence.</p>
37.	Application for recognition and enforcement	Section 37 provides that the Minister shall make an application to the appropriate court following the issue of a section 34 certificate, for the recognition of the judgment in the State and for the enforcement of the sentence. Section 37 provides for the procedures that apply in relation to this application process.
38.	Grounds for refusal to recognise and enforce	Section 38 provides for the grounds upon which the court may refuse to grant an application under section 37.
39.	Partial recognition and enforcement	Section 39 provides for the court to consider partial recognition of a judgment where full recognition is not possible.
40.	Adaption	Section 40 provides that an appropriate court may make an order, of its motion or on application by or on behalf of the Minister, adapting a sentence so that it complies with the law of the State.
41.	Enforcement of sentence in respect of fewer offences	Section 41 provides that a sentence will not be considered an aggravation of a sentence where it is enforced in respect of fewer offences than those imposed in the original sentence in the issuing state by virtue of partial recognition or adaption.

Section	Title	Effect
42.	Warrant on foot of recognition	Section 42 provides that where an appropriate court has granted an application it may issue a warrant authorising the bringing of the person into the State from a place outside the State, the arrest of the person, and the detention of the person to await the order of the appropriate court under section 43(2).
43.	Committal order	Section 43 providing for the making of a committal order for the purpose of enforcement of the sentence. A committal order is an order committing the sentenced person to a place of detention.
44.	Effect of committal order	Section 44 provides that the effect of a committal order shall be to authorise the continued enforcement by the State of a sentence imposed by an issuing state. A committal order shall have the same force and effect as an order imposing a sentence, an order committing a person to a designated centre, and an order imposing a sentence of detention in a children detention school.
45.	Operation of warrants and orders	<p>Section 45(a) provides that for warrants made under sections 35(1), 42(1)(a) or (b), and committal orders under section 43, a sentenced person shall be deemed to be in legal custody where they are taken to or from any place under the warrant or order. A person who escapes, shall be liable to be retaken in the same manner as any person who escapes from lawful custody.</p> <p>Section 45(b) provides for the designation of a person by the Minister, authorised to take the sentenced person to or from any place under the warrant or order, or to keep the person in custody.</p> <p>Section 45(c) provides that a designated person under section 45(b) shall have all the powers of a member of An Garda Síochána.</p>
46.	Revocation and variation of warrants and orders	Section 46(1) provides that the Minister may bring an application to the appropriate court for an order revoking or varying the terms of a warrant issued under sections 35(1), 42(1)(a) or (b) or a committal order.

Section	Title	Effect
		<p>Section 46(2) provides that a sentenced person may make a written request to the Minister to bring an application for revocation or variation under section 46(1), which the Minister is required to bring unless the Minister is satisfied that it is not necessary.</p> <p>Section 46(3) provides that the application court may vary or revoke the warrant or committal order where it is satisfied that the revocation or variation is necessary for the purposes of the Bill.</p>
47.	Rule of specialty (Part 3)	<p>Section 47 provides for the application of the rule of specialty in respect of sentenced persons transferred to the State, in line with Article 18 of the Framework Decision.</p> <p>Section 47(2) provides that a sentenced person transferred to the State under Part 3 of the Bill shall not be proceeded against for the purpose of enforcing a sentence other than the sentence for which the sentenced person was transferred, except in the circumstances set out in this section.</p> <p>Section 47(3) provides for applications for a request to be made seeking the consent of the competent authority to bring proceedings, enforce a sentence or order of detention, or impose in the State a term of imprisonment or detention in respect of a domestic warrant that has been issued for arrest but has not been executed.</p> <p>Section 47(4) provides for the details to be included in a request.</p>
48.	Transfer to State of enforcement of sentence	<p>Section 48 provides for the circumstances where the law governing the enforcement of a sentence shall transfer to the State.</p> <p>Section 48(2) provides that a transfer of enforcement of a sentence will revert to the issuing state where a sentenced person escapes from custody and the competent authority of the issuing state receives notification from the Minister of the escape.</p>
49.	Cessation of enforcement of sentence by State	Section 49 provides for the circumstances and the procedures that are to apply where the

Section	Title	Effect
		enforcement of the sentence ceases. This may arise where the sentenced person has been granted a pardon under Article 13.6 of the Constitution, where the sentenced person has by virtue of an Act of the Oireachtas become immune from prosecution, or where the Minister is notified by the competent authority of an issuing state that the sentence has ceased to be enforceable.
50.	Information to be given by Minister to competent authority of issuing state	Section 50 provides for various circumstances where Minister is required to notify the competent authority of an issuing state without delay.
Part 4: Miscellaneous		
51.	Identification procedures	Section 51 provides for identification procedures that may be used by a member of An Garda Síochána when arresting a person under this Bill. The measures that may be used for the purpose of verifying or ascertaining the identity of the person include taking a person's fingerprint, palm print and photograph.
52.	Transit	Section 52 provides for the procedures that apply in relation to transit through the State of a sentenced person being transferred from an issuing state to an executing state. Section 52 also provides for the procedures to apply where a sentenced person is being transferred to an executing state and the transfer involves the transit through the territory of a Member State other than the executing state.
53.	Amendment of Act of 2003	Section 53 provides for an amendment to section 45B of the <i>European Arrest Warrant Act 2003</i> to provide for transfers under section 45B to be conducted using the provisions of this Bill.
54.	Amendment of <i>Criminal Justice (Mutual Assistance) Act 2008</i>	Section 54 provides for a consequential amendment to section 65(1)(b) of the <i>Criminal Justice (Mutual Assistance) Act 2008</i> .
55.	Amendment of <i>Criminal Justice (Forensic Evidence and DNA Database System) Act 2014</i>	Section 55 provides for consequential amendments to sections 31, 32 and 33(10) of the <i>Criminal Justice (Forensic Evidence and DNA Database System) Act 2014</i> .

Section	Title	Effect
56.	Amendment of Act of 2019	Section 56 provides for consequential amendments to section 3 of the <i>Criminal Justice (Mutual Recognition of Custodial Sentences) Act 2021</i> .
57.	Amendment of <i>Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020</i>	Section 57 provides for consequential amendments to section 22 of the <i>Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020</i> .
58.	Transitional provision	Section 58 provides that where a request is made, application granted, warrant issued or other related order made under the <i>Transfer of Sentenced Persons Act 1995</i> , prior to the commencement of the provisions of this Bill, it shall be deemed to have been made under this Bill and the provisions of this Bill shall apply accordingly.

Source: L&RS Analysis of the Bill

Background

This Bill Digest provides general background information in relation to:

- Framework Decision 2008/909/JHA; and
- Irish prison transfers.

Framework Decision 2008/909/JHA

The Bill gives effect to [Framework Decision 2008/909/JHA](#) of 27th November 2008. The Framework Decision⁴ applies the principle of mutual recognition (see below) to custodial sentences and measures involving the deprivation of liberty in order to facilitate the transfer of the offender where the offender does not live in the country where the measures were issued. This Framework Decision was part of a larger package of EU legislation aimed at harmonising procedures for the mutual recognition of custodial and non-custodial sentences across the EU.

In this context, three separate and complimentary Council Framework Decisions were adopted in 2008 and 2009:

- **Framework Decision 2008/909/JHA (*Transfer of Prisoners*)**
- Framework Decision 2008/947/JHA (*Probation and Alternative Sanctions*)⁵
- Framework Decision 2009/829/JHA (on *European Supervision Orders*)⁶

This Bill deals with the implementation of the first of those Framework Decisions. It relates to the treatment of offenders in the post-trial stage and applies mutual recognition to custodial sentencing and to measures involving the deprivation of liberty.

In 2016 the European Union Agency for Fundamental Rights published a report into the fundamental rights issues which arise in relation to the three Framework Decisions. It notes that the overarching goal of Framework Decisions 2008/909/JHA and 2008/947/JHA is promoting social rehabilitation.⁷

⁴ A **Framework Decision**, like a Directive, is binding on Member States as to the result to be achieved but leaves discretion to the Member State as to the principles and procedures to be applied. They do not have direct effect and so cannot be invoked at national level in the absence of State implementation. Post-Lisbon Treaty, Framework Decisions are no longer used as Regulations, Directives, and Decisions are the means of legislating in the EU.

⁵ The Framework Decision on the Probation and Alternative Sanction^s was implemented through the [Criminal Justice \(Mutual Recognition of Probation Judgments and Decisions\) Act 2019](#) [The Bill Briefing Page for the Criminal Justice (Mutual Recognition of Probation Judgments and Decisions) Bill 2018 (which includes a Bill Digest) is available [here](#)].

⁶ The Framework Decision on European Supervision Orders was implemented through the [Criminal Justice \(Mutual Recognition of Decisions on Supervision Measures\) Act 2020](#) [the Bill Briefing Page for the Criminal Justice (Mutual Recognition of Supervision Measures) Bill 2019 (which includes a Bill Digest) is available [here](#)].

⁷ European Union Agency on Fundamental Rights (FRA), *Criminal detention and alternatives: fundamental rights in EU cross-border transfers* (2016), at p 35 – 38. Available [here](#).

Mutual Recognition

The **principle of mutual recognition** goes to the heart of EU cooperation on criminal matters. It requires that the courts of Member States can refuse to execute warrants, judgments, or other decisions from other Member States only on certain strict grounds. There is a general presumption in favour of the legality of a legal instrument that is being executed.

Mutual recognition allows enforcement based on mutual trust in the **equivalence** between legal systems. This is based on a presumption that certain minimum protections, concerning human rights, specifically the right to a fair trial, apply in the Member State seeking execution. These presumptions can be rebutted where the accused can show that there is a real risk that those protections will not be applied.

Mutual recognition features heavily in the operation of the European Arrest Warrant [EAW]. The recent decision of the Court of Justice of the EU [CJEU] in [Minister for Justice v. LM](#) found that recent legislative changes to the organisation of the Polish judiciary could undermine the mutual trust required to enforce an EAW if the Irish courts felt this threatened the respondent's right to a fair trial due to concerns arising from the independence of their judiciary.

European cooperation on criminal matters

The need for greater cooperation at a European level in relation to the transfer of prisoners has long been recognised as a priority to ensure that people are given the best opportunity to achieve the sentencing aims of rehabilitation and deterrence. Cooperation also ensures that offenders cannot avoid the consequences of sentences imposed on them by moving jurisdiction.⁸ In this way the Framework Decision both recognises and supports the free movement of people within the EU.

Framework Decision 2008/909/JHA was approved following complications which arose in relation to the implementation of the [Council of Europe Convention on the Transfer of Sentenced Persons](#) of 21 March 1983 [the Convention],⁹ due to the consent of both States and the prisoner being required before a transfer could take place, and the lack of deadlines relating to dealing with transfer requests. The European Organisation of Prison and Correctional Services [EuroPris] has created an 'e-learning platform' on the Framework Decision.¹⁰ Table 1 (below) is a reproduction of a table provided by EuroPris outlining the key differences between the regimes for the transfer of prisoners under the Framework Decision and the Convention.

⁸ The European Commission have noted that prisoners overseas are often more likely to face custodial sentences when compared with nationals living in the jurisdiction as the sentencing judge may consider supervision and probation measures to be inappropriate due to a fear that a sentenced person may not participate or flee the jurisdiction. See Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention (November, 2014), at p. 3. This report is available [here](#).

⁹ The Council of Europe is a separate body (with a focus on upholding human rights) from the EU institutions of the European Council (sets the political direction of the EU) and the Council of the EU (responsible for passing laws). The Council of Europe has 47 members including a number of non-EU members such as Switzerland, Turkey and Russia.

¹⁰ Available [here](#).

Table 1. Differences between the Framework Decision and the Convention

	1983 Convention	Framework Decision 2008/909/JHA
Applicable law in relation to conditional release	Laws and rules of conditional release from the executing state shall apply	Laws and rules of conditional release from the executing state and the issuing state can apply (see Article 17)
Voluntary	The sentence can only be transferred if the sentenced person consents ¹¹	The sentence can be transferred if the sentenced person consents and, in some cases, even where he does not consent (see Article 6)
Translation	Judgment is translated in full	Judgment, in principle, is not translated as the essential elements of the judgment will feature in a translated certificate (see Article 23)
Transfer	The sentenced person is collected by the executing state	The sentenced person is brought by the issuing state (see Article 24)
Deadlines	There are no deadlines	There are deadlines (see Articles 12 and 15)
Pending sentences ¹²	Transfer of pending sentences not possible	Transfer of pending sentences possible (see Article 3)
Grounds for refusal	Grounds for refusal are undefined	Grounds for refusal are defined (see Article 9)

Source: [STEPS2 – E Learning Platform](#)

Prior to the Lisbon Treaty (2009), policy areas were defined according to a pillar structure, with sensitive matters of policing and judicial cooperation in criminal matters falling under the so-called “third pillar”. The EU had more restrictive competence in this field in terms of objectives, conditions, procedures and instruments as Justice and Home Affairs were traditionally an “inter-governmental” matter. Since 1 December 2014, EU policies for police and criminal justice matters are no longer

¹¹ The [1997 Additional Protocol to the Council of Europe Convention on the Transfer of Sentenced Persons](#), provides for certain circumstances where a prisoner can be transferred without their consent. These include where the sentenced person has fled the sentencing state to go the state of their nationality and where the sentenced person is subject to expulsion or deportation. The Additional Protocol is only binding on those countries which have ratified it. This currently stands at 39 countries, including Ireland.

¹² This refers to a situation where the sentenced person is residing in the executing state.

afforded a special status. They are now provided for under Title V of Part Three of the TFEU, entitled “Area of Freedom, Justice and Security.”

[Protocol 21 of the Treaty on the Functioning of the European Union](#) provides for the position of Ireland in the area of freedom, justice and security. It provides that where EU Directives come under that area Ireland is not bound by such measures. However, Ireland may opt-in to such measures.

Irish Prison Transfers

This section provides background information on Irish prison transfers. The areas considered are:

- Irish law relating to prison transfers; and
- Statistics.

Irish law relating to prison transfers

The Council of Europe Convention was implemented in Irish law with the passing of the [Transfer of Sentenced Persons Act 1995](#) [the 1995 Act]. Under the 1995 Act a sentenced person wishing to be transferred out of the State, to another Convention State, to serve the balance of their prison sentence can apply in writing to the Minister for Justice. [Section 4\(3\)](#) of the 1995 Act sets out the following conditions which must be met before the Minister can consent to a prisoner being transferred:

- a) the sentenced person concerned is, for the purposes of the Convention, regarded by the administering state as a national of that state;
- b) the order under which the sentence concerned was imposed on the sentenced person is final;
- c) the sentenced person has at least 6 months of the sentence concerned to serve or the sentence is of indeterminate length;
- d) the sentenced person or, in a case where the Minister or the administering state considers it necessary because of the age or physical or mental condition of the sentenced person, the legal representative of the sentenced person or any other person considered by the Minister or the administering state to be an appropriate person for the purpose, consents in writing to the transfer;
- e) the acts or omissions constituting the offence concerned would, if done or made in the administering state, constitute an offence under the law of that state; and
- f) the administering state agrees to the transfer.

If the Minister is satisfied that these conditions have been met and consents to the transfer, the Minister must then apply to the High Court for a warrant authorising the transfer of the prisoner into the State. [Section 9\(1\)\(a\)](#) of the 1995 Act provides the Minister with the power to vary the provisions of or revoke a warrant transferring a person out of the State. [Section 9\(1\)\(b\)](#) provides the Minister with the power to apply to the High Court in respect of the variation of any provisions in a warrant or to revoke a warrant transferring a person into the State. [Section 11](#) of the 1995 Act provides for an annual report to be made by the Minister in respect of the operation of the Act.

The [Transfer of Sentenced Persons \(Amendment\) Act 1997](#) [the 1997 Act] introduced amendments to provide for a situation where the sentence received was greater than the maximum sentence in Irish law for the relevant offence.

[Section 1](#) of the 1997 Act amends section 7 of the 1995 Act to allow for the adaption of the sentence imposed by the High Court in a manner compatible with Irish law upon application by the Minister. However, where the legal nature and the duration of the sentence are adapted, it cannot

aggravate the original sentence.¹³ It should be noted that an application for adaption of a sentence occurs during the application to the High Court for the warrant authorising the transfer, whereas an application for variation can occur at any time, when it appears to the Minister to be required to give effect to the Convention, once the warrant has been issued.

A number of cases have raised issues relating to the operation of the 1995 Act. One of the difficulties raised with the 1995 Act relates to the effect of being “released on licence” in the UK and whether the licence period should be considered part of the term of imprisonment in Irish law.¹⁴ The standard rate of remission for prison sentences in Ireland is 25%,¹⁵ whereas the effect of being released on licence was that the prisoner in the UK would serve 50% of their sentence in the community under supervision. Thus, a prisoner seeking a transfer of their sentence from the UK to Ireland would be likely to spend considerably longer in prison.

The Supreme Court considered this issue in *Sweeney v. The Governor of Loughlan House Open Centre & Ors*.¹⁶ The appellant¹⁷, who had applied for a transfer from the UK to Ireland, was charged with drug offences and was sentenced to 16 years imprisonment in the UK. Under the [Criminal Justice Act 2003](#) [UK], at the midway point in his sentence the appellant was entitled to serve the remaining 8 years on licence. No application had been made under the 1997 Act to adapt the sentence and the issue which arose was whether the sentence to be served in Ireland was one of 8 years imprisonment or 16 years imprisonment. Clarke J [as he then was] held that:

“there is a material difference in the legal nature of a sentence which, on the one hand, operates as a matter of binding law as one of 8 years actual imprisonment followed by 8 years in the community subject to terms and recall and, on the other hand, a sentence of 16 years imprisonment with the possibility of remission, even where that remission may amount, as in the Irish case, to an entitlement under the Prison Rules (S.I. No. 252/2007 – Prison Rules 2007, Rule 59) to that remission but subject to loss of remission in appropriate cases. The form and legal nature of the position in England and Wales is a sentence which is, by operation of law, in two halves. The form and legal nature of a sentence in Ireland is a single sentence, with the possibility of remission.

For those reasons, I was satisfied that the legal nature of the sentence imposed on Mr. Sweeney in England and Wales was one which provided for 8 years imprisonment followed by 8 years in the community on terms and subject to recall. In the light of the evidence, it does not seem to me to be possible to construe that sentence as being one of 16 years imprisonment in the sense in which that term is used in the 1995 Act, even though that is

¹³ [Section 7\(6\)](#) of the 1995 Act.

¹⁴ In the UK a person sentenced to a determinate custodial sentence will be released on licence at approximately the halfway point of their sentence. The offender is allowed to serve the remaining time on their sentence at an approved address. Prisoners who are released on licence are subject to seven standard conditions relating to behaviour and residence. Additional conditions can be added. Time spent while released on licence is supervised by probation officers.

¹⁵ [Rule 59 of the Prison Rules 2007](#) provides that a prisoner sentenced to a term of imprisonment greater or aggregate consecutive terms of imprisonment that exceeds one month “shall be eligible, by good conduct, to earn remission of sentence not exceeding one quarter of such term or aggregate.”

¹⁶ *Sweeney v. The Governor of Loughlan House Open Centre & Ors* [\[2014\] IESC 42](#).

¹⁷ The case involved an appeal from a decision of the High Court.

the way in which the sentence was described in the various documents to which reference has been made.”¹⁸

As the 8-year period of imprisonment had expired, the applicant was subsequently released. The importance of transposing the Framework Decision was also highlighted by Clarke J, who noted that while the Framework Decision has been designed to replace the Convention until it was transposed it could not be used in the interpretation of the 1995 Act, stating:

“Whatever may be the current policy view inherent in the Framework Decision as to the boundary between what may properly be regarded as part of the legal nature of a sentence as opposed to part of its enforcement or administration, there is no real basis on which such a view can be said to effect the existing meaning of the Convention let alone the proper interpretation of the 1995 Act.”¹⁹

The issue caused by release on licence was also considered by the Supreme Court in *O’Farrell, McDonald & Rafferty v. The Governor of Portlaoise Prison*.²⁰ This case involved three men who were convicted of terrorist offences in the UK and were sentenced to 28 years imprisonment. One of the issues which arose in this case was that the prisoners, when applying for the prison transfers in the UK, were informed by officials in the Department of Justice that they would have to serve the full 28 years subject only to any Irish remission and that this would lead to them serving a longer period in prison than if they were to remain in the UK.

Hogan J in the High Court initially ordered their release when the three men challenged the validity of the warrant transferring the prisoners from the UK to Ireland. Their release was ordered on the basis that the sentence period on the face of the warrant of 28 years was fundamentally invalid where they would have been released on licence after serving two thirds of their sentence in the UK. Hogan J also held that the High Court lacked the jurisdiction to adapt the warrants, as this would have had to have been done prior to the transfer.

The State subsequently appealed this decision and the matter was heard by a 7 Judge hearing of the Supreme Court. The Court delivered 5 separate judgments in a 4:3 split, although the minority dissenting judgments related to the position in Irish law in relation to variation and adaption and how these two separate concepts ought to be considered in light of the *Sweeney* judgment. However, there was consensus among all the judgments in the Supreme Court that the warrants issued for their transfer were defective.

The effect of the decision in *O’Farrell, McDonald & Rafferty* was that applications for transfers into the State were put on hold as the Department of Justice considered legal advice received from the Attorney General in relation to the outcome of this decision.²¹

¹⁸ [2014] IESC 42, at paras 4.13 – 4.14.

¹⁹ [2014] IESC 42, at para 2.8.

²⁰ *O’Farrell, McDonald & Rafferty v. The Governor of Portlaoise Prison* [2016] IESC 37.

²¹ Department of Justice, (April, 2018), *REPORT by THE MINISTER FOR JUSTICE AND EQUALITY, Charles Flanagan to the Houses of the Oireachtas on the Operation of THE TRANSFER OF SENTENCED PERSONS ACTS, 1995 and 1997 for the period 1 January, 2017 - 31 December, 2017*, at para 4.0. Available at

Another issue that has arisen in the case law concerning the 1995 Act is the conversion of “indeterminate sentences for public protection” [IPP].²² This issue was recently raised in the Court of Appeal in *McK v. Minister for Justice & Equality*.²³

Here the applicant was sentenced in the UK to an IPP, following his conviction for serious sexual offences. The initial tariff was due to be 8 years, subject to review by the UK parole authorities. This comprised of a minimum 16-year sentence of imprisonment²⁴ subject to an automatic 50% statutory remission. In 2011 the applicant applied for a prisoner transfer which was refused by the Minister on the basis of difficulties arising with the adaption of IPPs. The case concerned a judicial review²⁵ of this decision in the High Court, and ultimately an appeal of the High Court’s refusal to grant leave for judicial review.

The Minister raised the issue that an IPP was unknown in Irish law and that, on her view, the only sentence that could be imposed without appearing to amount to an aggravation would be an 8 year sentence, considerably shorter than the 16 year sentence which would have been imposed had the sentencing judge in the UK imposed a determinate sentence.²⁶ Hogan J in the Court of Appeal noted that three possible sentences were suggested. These included a life sentence, a sentence of 10 years and 8 months, and sentence of 8 years. Following a review of the case law on IPPs and the Supreme Court decisions in *Sweeney* and *O’Farrell, McDonald & Rafferty*, Hogan J stated:

“It is, perhaps, sufficient to say in the light of this trilogy of Supreme Court decisions that the present operation of the 1995 Act has proved itself to be hugely problematic and quite possibly in need of reform and change. One might add that the Minister was understandably cautious as to what the consequence what might be in Irish law if the UK IPP sentence fell to be adapted by the High Court under s. 7(5) of the 1995 Act. It would certainly be difficult to gainsay the Minister’s conclusion that the IPP sentence would be likely to correspond to a sentence of 8 years’ imprisonment in this State was unreasonable or even incorrect. Given the entirely foreign nature of the IPP sentence so far as Irish law is concerned, it seems likely in the wake of *Sweeney* and *O’Farrell* that the sentence imposed on Mr. M. in 2009 was likely to be adapted to one of 8 years’ imprisonment, with the

http://www.justice.ie/en/JELR/Transfer_of_Sentenced_Persons_Acts_Annual_Report_2017.pdf/Files/Transfer_of_Sentenced_Persons_Acts_Annual_Report_2017.pdf

²² An IPP was a type of sentence that was introduced in the UK where the offender had committed a serious violent or sexual offence that was insufficient to grant a life sentence. After a fixed minimum period of imprisonment, the offender could apply to the Parole Board for release, which could only be granted if the Parole Board was satisfied that the offender was no longer a threat to the public. The legislation abolishing IPPs was not retrospective, meaning that individuals sentenced to IPPs remain serving them. IPPs do not exist in Irish law. For more information of IPPs see Beard, “Sentences of Imprisonment for Public Protection” House of Commons Briefing Paper, Number 06086 (25 October 2017), available at <http://researchbriefings.files.parliament.uk/documents/SN06086/SN06086.pdf>.

²³ *McK v. Minister for Justice & Equality* [2018] IECA 110.

²⁴ The 16 years reflecting the period of imprisonment which would have been imposed had the applicant been the subject of a definite sentence.

²⁵ Judicial review is a procedure which allows an applicant to challenge the legality of a decision taken by a public body in relation to the applicant before the High Court. Judicial review involves a two-stage procedure where the applicant must initially seek the leave of the High Court to commence substantial proceedings.

²⁶ [2018] IECA 110, at para 7.

possibility of standard 25% remission as provided for by the provisions of our Prison Rules 2007 on top of that figure.

Any other conclusion as to the likely manner in which the sentence might be adapted by the High Court in the event of an application for that purpose under s. 7(5) of the 1995 Act would almost certainly have to be rejected as a potential aggravation of the duration of the sentence which had been imposed by the UK court, contrary to s. 7(6)(a) of the 1995 Act.”²⁷

The issues which have arisen in the case law were due to be addressed in the *Transfer of Sentenced Persons (Amendment) Bill*.²⁸ It has also been suggested that these issues may be addressed by way of Committee Stage amendments to this Bill.²⁹

Statistics

At the time of writing, there are currently 3,781 prisoners in custody in Irish prisons.³⁰ In 2019, of the 7,170 prisoners committed to prison, 5,353 were Irish, 132 were from the Britain and 881 were from EU countries.³¹

The Department of Foreign Affairs and Trade [the DFA] provide figures in relation to the number of Irish prisoners abroad to whom they provide assistance every year. These are set out in Table 2 (below).

Table 2. Irish prisoners abroad in receipt of assistance from the DFA

	2015	2016	2017	2018	2019	2020
Prisoners	59	58	68	50	47	27

Source: [The DFA](#)

Assistance is also provided to Irish prisoners serving sentences abroad by the Irish Council for Prisoners Overseas [ICPO].³² Speaking to the Joint Committee on Foreign Affairs and Trade, and Defence in November 2018, Ms Ciara Kirrane of the ICPO noted that they provide assistance and information to between 1,100 and 1,200 Irish citizens abroad every year, in approximately 30 countries.³³

²⁷ [2018] IECA 110, at paras 25 – 26.

²⁸ A Bill Briefing page on the Transfer of Sentenced Persons (Amendment) Bill is available on the Library & Research Service's internal website, accessed [here](#) (available to those with access to the Oireachtas intranet).

²⁹ See Parliamentary Question 589 *Prison Service* Dáil Éireann Debate, Tuesday - 13 July 2021. Available at <https://www.oireachtas.ie/en/debates/question/2021-07-13/589/>.

³⁰ Irish Prison Service, *Prisoner Population on Tuesday, 7 September 2021*. Available at https://www.irishprisons.ie/wp-content/uploads/documents_pdf/07-September-2021.pdf.

³¹ Irish Prison Service, *Nationality Group of persons committed by year*. This provides information for prison committals between 2007 and 2019. Available [here](#).

³² More information about ICPO is available at <https://www.icpo.ie/>.

³³ Joint Committee on Foreign Affairs and Trade and Defence, (29 November 2018) *Returning Irish Emigrants: Discussion*. Available at

The 2020 Annual Report by the Minister for Justice into the operation of the 1995 Act, outlines that since the 1995 Act was passed, there have been **154 transfers into the State** and **194 transfers out**.³⁴ In 2020 there were no inward transfers while 5 prisoners were transferred out of the State.³⁵ There have been a total of 563 applications received for transfer into the State,³⁶ with 8 new applications being made in 2020 and a total of 13 outstanding applications at the end of 2020.³⁷ Table 3 (below) is a reproduction of a table in the 2020 Annual Report showing the total number of prisoners who have completed prisoner transfers into the State.

Table 3. Inward transfers completed

	1996 – 2000	2001 – 2005	2006 – 2010	2011 – 2015	2016	2017	2018	2019	2020	Total
UK	74	30	24	5	-	-	-	-	-	133
USA	3	1	-	-	-	-	-	-	-	4
Canada	1	-	-	-	-	-	-	-	-	1
Hong Kong	1	-	-	-	-	-	-	-	-	1
Isle of Man	1	-	-	-	-	-	-	-	-	1
Panama	-	1	-	-	-	-	-	-	-	1
Belgium	-	-	-	1	-	-	-	-	-	1
Spain	-	-	3	2	1	-	-	-	-	6
Japan	-	-	1	-	-	-	-	-	-	1
Northern Ireland	-	-	1	1	-	-	-	-	-	2
Hungary	-	-	-	1	-	-	-	-	-	1
Italy	-	-	-	1	-	-	-	-	-	1
Estonia	-	-	-	1	-	-	-	-	-	1
Total	80	32	29	12	1	0	0	0	0	154

https://www.oireachtas.ie/en/debates/debate/joint_committee_on_foreign_affairs_and_trade_and_defence/2018-11-29/2/.

³⁴ Department of Justice, (July 2019), REPORT by THE MINISTER FOR JUSTICE to the Houses of the Oireachtas on the operation of THE TRANSFER OF SENTENCED PERSONS ACTS, 1995 and 1997 for the period 1 January, 2020 - 31 December, 2020, at para 1.2.1. Available at <https://www.gov.ie/en/publication/d95f1-transfer-of-sentenced-persons-acts-annual-report-2020/>

³⁵ *Ibid.*

³⁶ *Ibid.*, at para 2.1.

³⁷ *Ibid.*, at para 2.0.

Source: 2020 Annual Report on Operation of the Transfer of Sentenced Persons Act, at para 2.2

540 applications have been made for transfers out of the State,³⁸ with 22 new applications being made in 2020.³⁹ Table 4 (below) is a reproduction of a table in the 2020 Annual Report showing the total number of prisoners who have completed prisoner transfers out of the State.

Table 4. Outward transfers completed

	1996 – 2005	2006 – 2015	2016	2017	2018	2019	2020	Total
UK	38	63	3	3	3	-	4	114
Northern Ireland	21	16	-	2	-	-	-	39
Sweden	1	-	1	-	-	-	-	2
Netherlands	1	21	2	-	1	-	1	26
Germany	-	1	-	-	-	-	-	1
Scotland	1	1	-	-	-	-	-	2
USA	-	1	-	-	-	-	-	1
Poland	-	1	-	-	-	-	-	1
Spain	-	1	-	-	-	-	-	1
Lithuania	-	1	2	-	-	-	-	3
Bulgaria	-	1	-	-	-	-	-	1
Czechia	-	1	-	-	-	-	-	1
Albania	-	-	1	-	-	-	-	1
Romania	-	-	1	-	-	-	-	1
Total	63	107	10	5	4	0	5	194

Source: 2020 Annual Report on Operation of the Transfer of Sentenced Persons Act, at para 3.2

³⁸ *Ibid*, at para 3.1.

³⁹ *Ibid*, at para 3.0.

Principal provisions of the Bill

This section of the Digest examines the main provisions of the Bill. The Bill comprises 4 Parts and 58 sections. The Framework Decision is included in the Schedule of the Bill.

Part 1: Preliminary and general

Sections 1, 2, 3, 4, 7 and 8 are standard provisions and for that reason are not discussed below. A short synopsis of each provision is given in the Table of Provisions (above).

Competent authorities in the State

Section 5 provides for the Minister and the appropriate court to be designated as competent authorities.

Section 5(1) provides for the Minister to be designated as the competent authorities for the purposes of the Framework Decision and the Bill.

Section 5(2) provides for the appropriate court to be designated as the competent authority in respect of sections 27(1), 37(1), 39(1), 40, 42(1)(a) or (b), 43(1) or (2), and 47(3) of the Bill.

Transmission of documents

Section 6 provides for the transmission of documents and the verification of the authenticity of documents and their copies.

Section 6(1) provides that where the Minister is required to transmit a document or provide information, the Minister shall do so by any means capable of producing a written record that would allow the competent authority to verify the authenticity of the document or information.

Sections 6(2) and 6(3) provide that if a document is received by the Minister for the purposes of the Bill and it has been directly forwarded to the Minister by any means which has produced a written record of the document that would allow the Minister to verify the authenticity of the document, the written record of the document shall be deemed to be the document that was transmitted.

Section 6(4) provides that a document shall be deemed to be a true copy of an original where it has been certified as a true copy of the original by the competent authority of an issuing state.

Section 6(5) provides that a copy of a Framework Decision Certificate, a judgment referred to in a Framework Decision Certificate, a translation of a Framework Decision Certificate or a translation of a judgment referred to in a Framework Decision Certificate, or any other document transmitted in accordance with section 6(1) shall, unless the contrary is shown, be evidence in any proceedings of the matters specified therein without further proof.

Part 2: State as issuing state

Part 2 of the Bill provides for the procedures that will apply where Ireland is the state in which the judgment was issued. Many of the sections in Part 2 directly reflect the provisions of the Framework Decision, and as such are not discussed below. A short synopsis of each provision is given in the Table of Provisions (above).

Opinion of the sentenced person

Article 6(3) of the Framework Decision provide for the opinion of the sentenced person to be considered when deciding whether to forward a judgment. Section 12 of the Bill provides that where an application is made in respect of a sentenced person in the State, the Minister is required to provide the sentenced person with an opportunity to provide their opinion in relation to the application.

Section 12(1) provides that where an application is made in respect of a sentenced person in the State, the Minister shall provide the person with an opportunity to give their opinion regarding the application.

Section 12(2) provides that the opinion may be given in writing or orally. If given orally, the Minister shall arrange for a written record of the opinion to be taken.

Section 12(3) provides that where a sentenced person is incapable of giving their opinion, the Minister shall give the legal representative of the sentenced person, or any other person considered by the Minister to be an appropriate person, an opportunity to give their opinion regarding the application.

Section 12(4) provides that where an opinion is given under section 12, the Minister shall notify the competent authority of the executing state of the opinion.

Section 12(5) provides that section 12 only applies where the Minister is satisfied that the judgment may be forwarded.

Consent of the sentenced person

Article 6(1) and (2) of the Framework Decision provide for circumstances where the consent of the sentenced person is required in relation to the forwarding of a judgment. Section 13 of the Bill provides for the procedures that relate to obtaining the consent of the sentenced person where a judgment is being forwarded.

Section 13(1) provides that an application may not be forwarded to an executing state without the written consent of the sentenced person unless:

- the person is a national and resident of the executing state,
- the person will be sent to executing state upon release from the sentence in accordance with and order included in, or ancillary to, the judgment, or
- the sentenced person fled, or otherwise returned, to the executing state in circumstances in which the criminal proceedings to which the application relates were pending in the State against him or her, or
- the sentenced person fled, or otherwise returned, to the executing state before he or she commenced serving the sentence imposed by a court in the State to which the application relates.

Section 13(2) provides that where a sentenced person is incapable of giving their consent, the legal representative of the person or any other person considered by the Minister to be an appropriate person for that purpose may give the consent.

Consent of an executing state

Section 14 provides for the criteria for forwarding a judgment to the competent authority of an executing state for the purposes of recognition of the judgment and enforcement of the sentence,

in accordance with Article 4(1) of the Framework Decision. Section 14 provides that a judgment to which an application relates may be forwarded to the competent authority of an executing state where:

- a) the sentenced person is a national of the executing state and he or she lives in that state,
- b) the sentenced person is a national of the executing state and he or she will be sent to that state upon release from the enforcement of the sentence to which the judgment relates in accordance with an order included in, or ancillary to, the judgment, or
- c) in the case of any other executing state, the competent authority of the executing state has given its consent in writing to the forwarding of the judgment.

Consultation with an executing state

Section 15 provides for a consultation to take place between the Minister and the competent authority of the executing state prior to making a decision as to whether to forward a judgment. This section provides for the transposition of Article 4(3) and (4) of the Framework Decision

Section 15(1) provides that such a consultation should consider whether the enforcement of the sentence by the executing state would facilitate the social rehabilitation and successful reintegration into society of the sentenced person. Where the consent of the competent authority of the executing state is required prior to forwarding a judgment, such a consultation will be obligatory.

Section 15(2) provides that the Minister shall have regard to views, including a reasoned opinion, provided by the competent authority of the executing state.

Section 15(3) provides that section 15 only applies where the Minister is satisfied that the judgment may be forwarded.

Decision to forward a judgment

Section 16 provides for the forwarding of a judgment by the Minister and the criteria that must be met prior to a judgment being forwarded.

Section 16(1) provides that the Minister may forward a judgment to the competent authority of an executing state where the Minister is satisfied that paragraphs (a), (b) or (c) of section 14 applies.

Section 16(2) sets out certain criteria that are required prior to a judgment being forwarded. These relate to issues such as consent, the location of the sentenced person, whether consultations under section 15 have taken place and whether the Minister is satisfied that enforcement of the sentence by the executing state will assist in the social rehabilitation and reintegration into society of the sentenced person.

Section 16(3) provides that the Minister shall not forward the judgment to more than one executing state at any one time.

Section 16(4) provides that prior to forwarding the judgment, the Minister may invite and consider submissions from the sentenced person, the executing state or other appropriate persons.

Consent of Minister to partial recognition and enforcement by the executing state

Section 20 provides for partial recognition and enforcement of a transferred sentence, in line with Article 10 of the Framework Decision.

Section 20(1) provides that the Minister, where requested by the competent authority of the executing state, may give her consent to the partial recognition of the judgment and enforcement of the sentence by the executing state.

Section 20(2) provides that the Minister may not give her consent where to do so would aggravate the length of the sentence to be served.

Withdrawal of consent by a sentenced person

Section 21(1) provides for the withdrawal of consent by a sentenced person, where such consent is required under section 13(1), prior to a decision by the competent authority of the executing state to recognise the judgment and enforcement the sentence in that state.

Section 21(2) provides for the withdrawal of consent by the legal representative or other appropriate person in respect of the sentenced person, should the sentenced person be incapable of doing so.

Arrest of a sentenced person following escape from custody in the executing state

Section 26 provides for the arrest without a warrant, by a member of An Garda Síochána, of a sentenced person, who has escaped custody and is unlawfully at large following the transfer of enforcement of a sentence. Section 26 provides for the procedures that apply in respect of the continued enforcement of the remainder of the sentence and the varying of an original order following an arrest.

Section 26(1) provides An Garda Síochána without a power to arrest a sentenced person without a warrant whom they suspect is unlawfully at large following an escape referred to in section 24(2).

Section 26(2) provides that a sentenced person arrested under section 26(1) shall be brought before an appropriate court and the court, for the purpose of continued enforcement of the remainder of the sentence, may vary the original order.

Section 26(3) provides for different factors to be considered by a court when varying an original order.

Section 26(4) provides the court with powers of remand in respect of a person brought before the court under section 26(2).

Section 26(5) provides that where an original order is varied by an appropriate court under section 26(2) and there is a term of imprisonment that a sentenced person is required to serve by virtue of the imposition of a sentence on foot of a judgment, part of which is not transferred to an executing state, the term of imprisonment which is not transferred shall be reduced by the periods referred to in paragraphs (a), (b) and (d) of section 26(3). Section 26(5) also provides for remission in respect of the part of the sentence which is not transferred.

Withdrawal of a Framework Decision Certificate

Section 28 provides for the withdrawal by the Minister of a Framework Decision Certificate prior to the transfer of the enforcement of the sentence, in line with Article 13 of the Framework Decision.

Section 28(1) provides that the Minister may withdraw a Framework Decision Certificate at any time before the transfer under section 24(1) of the enforcement of the sentence to the executing state.

Section 28(2) provides for a number of circumstances where the Minister is required to withdraw a Framework Decision Certificate.

Section 28(3) provides for factors to be taken into consideration by the Minister when considering whether to withdraw a Framework Decision Certificate.

Section 28(4) provides that the Minister shall notify the competent authority of the executing state as soon as practicable after deciding to withdraw a Framework Decision Certificate.

Section 28(5) provides that where a Framework Decision Certificate is withdrawn and the sentenced person is in the State, the Minister shall revoke any transfer warrant in respect of the person.

Part 3: State as executing state

Part 3 of the Bill provides for the procedures that will apply where Ireland is the executing state. Many of the sections in Part 3 directly reflect the provisions of the Framework Decision, and as such are not discussed below. A short synopsis of each provision is given in the Table of Provisions (above).

Consent to forwarding a judgment

Section 32(1) provides that where a sentenced person is a person, other than an Irish citizen living in the State or an Irish citizen who upon release from the enforcement of a sentence in an issuing state will be sent to the State, a judgment shall not be forwarded unless the competent authority of the issuing state has first obtained the consent of the Minister.

Section 32(2) provides for the circumstances where the Minister may give her consent under section 32(1). These include where:

- the sentenced person is in the State or the issuing state,
- the Minister is satisfied that the enforcement of the sentence in the State would facilitate the sentenced person's social rehabilitation and successful reintegration into society having regard to the matters referred to in subparagraphs (i), (ii) and (iii) of section 16(2)(c), and
- the Minister is of the opinion, having regard to such factors as she considers relevant, that it is appropriate that such consent be given.

Provisional arrest where the sentenced person is in the State

Section 35 provides for provisional arrest of a sentenced person in the State where a request has been made in writing for the provisional by an issuing state in line with Article 14 of the Framework Decision.

Section 35(1) provides for the circumstances in which a warrant for the arrest, with the consent of the Minister, may be issued by the appropriate court.

Section 35(2) provides for factors which the Minister is required to have regard to in considering whether to provide her consent to the issuing of the warrant.

Section 35(3) provides that a warrant may be executed by any member of An Garda Síochána, even where the warrant is not possession of the member when executed. Section 35(3) also provides that the warrant shall be shown to the sentenced person at the time of arrest or, where the warrant is not in the possession of the member, within 24 hours of the arrest.

Section 35(4) provides a member of An Garda Síochána with powers of search and entry in respect of executing an arrest pursuant to a warrant issued under section 35(1).

Section 35(5) provides that the appropriate court shall remand the arrested person in custody or on bail pending the production to the court of the section 34 certificate.

Section 35(6) provides that if a section 34 certificate is not produced within 18 days of the arrest, the person shall be released from custody.

Power of adjournment and remand

Section 36(1) provides that the appropriate court may adjourn proceedings brought under Part 3 of the Bill and remand an arrested person in custody for the period of the adjournment.

Section 36(2) provides that a person arrested under a warrant issued under section 35(1) may be remanded in custody or on bail.

Section 36(3) provides that the appropriate court shall have the same powers of remand as it would have if the person had been charged with an indictable offence.⁴⁰

Grounds for refusal to recognise and enforce

Section 38(1) provides for the grounds upon which the court may refuse to grant an application to recognise a judgment and enforce a sentence, in line with Article 9 of the Framework Decision.

Section 38(2) provides that in respect of certain specified grounds, the appropriate court may, prior to refusing to grant an application, request additional documentation or information from the competent authority of the issuing state, and the Minister shall notify the competent authority of such a request.

Section 38(3) provides that an application shall not be refused in respect of a revenue offence on the ground that no tax or duty of the kind to which the offence relates is imposed in the State, or the rules relating to taxes, duties, customs or exchange control that apply in the State differ in nature from those apply in the issuing state.

Section 38(4) provides where the court is satisfied that no injustice would be caused to the sentenced person, that an application shall not be refused where:

- a) there is a defect, or an omission of a non-substantial detail, in the Framework Decision Certificate or any accompanying document grounding the application,
- b) there is a variance between any such document and such evidence as may be adduced so long as the court is satisfied that the variance is explained by the evidence, or
- c) there has been a technical failure to comply with a provision of this Act, so long as the court is satisfied that the failure does not impinge on the merits of the application.

Section 38(5) provides that the appropriate court shall consider whether any exceptional circumstances arise in respect where the sentenced person has less than six months of the

⁴⁰ An indictable offence refers to an offence in the Circuit Court or the Central Criminal Court that can be tried before a Judge and jury.

sentence remaining to be served, that would merit the serving of the remainder of the sentence in the State.

Partial recognition and enforcement

Section 39 provides for the court to consider partial recognition of a judgment where full recognition is not possible, in line with Article 10 of the Framework Decision.

Section 39(1) provides that prior to refusing to grant an application for recognition and enforcement, the court shall consider recognition and enforcement in part.

Section 39(2) provides that the court may not partially recognise a judgment and enforce a sentence where to do so would aggravate the duration of the sentence.

Section 39(3) provides that where the court is considering partial recognition and enforcement, the Minister shall seek the views of the competent authority of the issuing state.

Adaption

Section 40 provides that an appropriate court may make an order, of its motion or on application by or on behalf of the Minister, adapting a sentence so that it complies with the law of the State, in line with Article 8 of the Framework Decision.

Section 40(2) provides that an order adapting a sentence may be made *ex parte*, save where it would be in the interests of justice that it was made on notice to the sentenced person.⁴¹

Section 40(3) provides for adaption where the legal nature of the sentence is adapted to that of a sentence prescribed by the law of the State for a similar offence for which the sentence was imposed.

Section 40(4) provides that a sentence adapted under section 40(3) shall, as far as practicable, correspond to the legal nature of the sentence imposed by the issuing state and shall not be aggravated or adapted so as to exceed the maximum penalty in the law of the State for a similar offence.

Section 40(5) provides for adaption where the duration of the sentence is adapted to that of a sentence prescribed by the law of the State for a similar offence for which the sentence was imposed.

Section 40(6) provides for the periods of detention for which a person may be committed following adaption of the duration of a sentence.

Section 40(7) provides that the enforcement of a sentence that is incompatible with the law of the State due to its legal nature or duration shall not be considered unlawful solely by reason of the sentence not having been adapted.

Section 40(8) provides that a sentenced person may continue to be detained pursuant to a warrant issued under sections 35(1), 42(1)(a) or (b) or a committal order despite an application having been made for adaption under section 40.

⁴¹ An order made *ex parte*, refers to where order is made without the sentenced person being present in court.

Part 4: Miscellaneous

Identification procedures

Section 51 provides for identification procedures that may be used by a member of An Garda Síochána when arresting a person under this Bill.

Section 51(1) provides for the taking of a fingerprint, palm print or photograph by a member of An Garda Síochána, in order to identify a person.

Section 51(2) provides on a second or further occasion where the original has become damaged, lost or otherwise unsuitable for use.

Section 51(3) provides that the powers set out in section 51(1) shall not be exercised except on the authority of a member of An Garda Síochána of the rank of inspector or higher.

Section 51(4) provides that where a person fails or refuses to allow his fingerprint, palm print or photograph to be taken, the member may use such force as they consider reasonable to take the fingerprint, palm print or photograph.

Section 51(5) provides that the powers set out in section 51(4) shall not be exercised except on the authority of a member of An Garda Síochána of the rank of superintendent or higher.

Section 51(6) provides that an authorisation under section 51(5) may be given orally or in writing and where given orally, shall be confirmed in writing as soon as practicable.

Section 51(7) provides that a Garda must inform the person of an intention to use a power conferred under section 51(4) and of the authorisation that has been given under section 51(5).

Section 51(8) provides that where fingerprints, palm prints or photographs are taken under section 51(4), a member of An Garda Síochána of the rank of inspector or higher is required to be present when they are taken.

Section 51(9) provides that where fingerprints, palm prints or photographs are taken under section 51(4), the taking shall be recorded by electronic or similar means.

Section 51(10) provides that every fingerprint, palm print or photograph taken pursuant to section 51 and every record or copy shall be destroyed within 12 months from the date of the taking of the fingerprint, palm print or photograph, or on the expiry of the sentence of imprisonment imposed on the person to which an application under Part 2 or 3 of the Bill applies, whichever occurs later.

Section 51(11) provides for an offence where a person obstructs a member of An Garda Síochána in the exercising their powers under section 51. A person guilty of such an offence shall be liable on summary conviction to a class A fine or to imprisonment for up to 12 months or to both.⁴²

Transit

Section 52 provides for the procedures that apply in relation to transit through the State of a sentenced person being transferred from an issuing state to an executing state. Section 52 also

⁴² A summary conviction relates to a conviction for an offence in the District Court before a Judge without a jury. A “class A” fine refers to a maximum fine of €5000.

provides for the procedures to apply where a sentenced person is being transferred to an executing state and the transfer involves the transit through the territory of a Member State other than the executing state.

Section 52(1) provides that transit through the State of a sentenced person from an issuing state to an executing state shall be permitted where the Minister receives a request from the issuing state and the issuing state provides the Minister with a certified copy of the Framework Decision Certificate and a translation of the Certificate in English (where requested by the Minister).

Section 52(2) provides that the Minister may require an issuing state to provide further information in respect of the transit of the sentenced person, as the Minister deems necessary or expedient.

Section 52(3) provides that the Minister shall notify the issuing state at the time of receipt of request under section 52, if there exists an arrest warrant or pending prosecution in the State in relation to the sentenced person which may result in the detention of the sentenced person.

Section 52(4) provides that the Minister shall grant permission within one week of receipt of a request.

Section 52(5) provides for supervision by An Garda Síochána of the transit of sentenced person and the transferee shall be considered to be in the custody of any member of An Garda Síochána while accompanied by any such member.

Section 52(6) provides for the procedures that apply where an aircraft carrying a sentenced person being transferred from an issuing state to an executing state is in the State. Where such an aircraft lands, the issuing state is required to provide the Minister with the documentation set out in section 52(1) within 72 hours of landing.

Section 52(7) provides that where a sentenced person is being transferred to an executing state from the State, and the transfer involves the transit through the territory of another Member State, the Minister shall request the Member State to permit the transit and the Minister shall provide the Member State with a certified copy of the Framework Decision Certificate and a translation in a relevant language (if requested by the Member State).

Section 52(8) provides that the Minister may withdraw a request under section 52(7) upon receiving notification from the Member State of an arrest warrant or pending prosecution in the Member State in relation to the sentenced person which may result in the detention of the sentenced person.

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