Irish Council for Civil Liberties

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IMPROVING JUDICIAL ASSESSMENT OF FLIGHTRISK: (FLIGHTRISK)

Domestic Research Report

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LUDWIG BOLTZMANN INSTITUTE Fundamental and Human Rights

BULGARIAN HELSINKI COMMITTEE

HELSINKI FOUNDATION FOR HUMAN RIGHTS

Fair Trials

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Project Description

This domestic research report was developed in the framework of the EU Project 'Improving judicial assessment of flight risk' (FLIGHTRISK) implemented by The Irish Council of Civil Liberties. The Consortium of this project is constituted by Ludwig Boltzmann Institute (LBI- Austria) , Bulgarian Helsinki Committee (BHC -Bulgaria), Helsinki Foundation for Human Rights (HFHR- Poland) , Irish Council for Civil Liberties (ICCL- Ireland), the National Institute of Criminalistics and Criminology (NICC- Belgium) and Fair Trials Europe (FTE- Belgium). The project started in June 2022 and will be finalised in July 2024.

About ICCL

The **Irish Council for Civil Liberties** (ICCL) is Ireland's oldest independent human rights body. It has been at the forefront of every major rights advance in Irish society for over 40 years. The four pillars of ICCL's work are Criminal Justice, Equality & Inclusion, Democratic Freedoms and Digital & Data. ICCL helped decriminalise homosexuality, divorce and contraception. We drove police reform, defending suspects' rights during dark times. In recent years, we led successful campaigns for marriage equality, data protection and reproductive rights.

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Introduction

Ireland continues to hold a disproportionate number of accused persons in pre-trial detention, a problem which appears to have been exacerbated by the Covid-19 pandemic. While the pandemic saw a marginal decrease (3.7%) in numbers of persons held in custody generally from 2019 to 2020, there was an increase of people held in pre-trial detention.[1] In 2015 14.2% of the prison population was being held in pre-trial detention, by 2020 the percentage jumped to 18.9%.[2] A total of 7,043 persons were committed to prison in 2022, with 2,697 of those on remand. At the end of 2022 the proportion of remand trial prisoners in custody for one year or more was 12% compared with 6% at the start of 2020.[3]

The pandemic also saw jury trials being suspended adding further to an already existing backlog.[4] Ireland has the lowest number of judges per inhabitant in the EU.[5] This lack of sufficient judges is adding to delays in securing trial dates.[6]

2020 saw an increase in the average duration of remand. In December 2020, 11.5% of all remand prisoners had been on remand for a duration of one year or more, compared with 6% in December 2019.[7] 50.5% of remand prisoners had been in custody for three months or less in December 2020, compared with 65.5% in December 2019.[8]

There is also an increase of those remanded in pre-trial custody for less serious crime. Since 2016, there has been a 56% increase in the number of people imprisoned while awaiting trial or sentencing for "public order offences and other social code offences".[9] Further, women are more likely than men to be remanded into custody for less serious offences.[10]

There has been a 21% increase in the daily average number of people held in pre-trial detention since 2017.[11] In 2020, the average number of pre-detention prisoners was 738, a 4.4% increase on 2019.[12]

884 prisoners were being held on remand or at trial on 4 April 2022.[13] On 1st April 2021 the number was almost half that at 428.[14] In February 2022 835 prisoners were being held in remand or at trial, up from 712 in February 2021.[15] Currently while remand prisoners are held in Cloverhill Remand Prison (389 of total 898 remand prisoners on 12th April 2023),[16] more than half are mixed in with other prisoners. Prison overcrowding has reached a tipping point with almost 200 people in prison sleeping on floors in April 2023.[17]

1 Irish Prison Service, Annual Report 2020, p.3.
2 World Prison Brief & Institute for Crime and Justice Policy Research, World Pre-Trial/Remand Imprisonment List, fourth edition, February 2020, p.11.
3 Irish Prison Service, Annual Report 2022, p. 3.
4 Jury trials were suspended for the most part during the pandemic, except during August 2020 and mid-November to December 2020· See various Courts Service announcements such as *https://www.courts.ie/news/covid-19-position-criminal-courts-justice-friday-13th-march; https://courts.ie/news/circuit-court-notice-court-business-during-level-5-restrictions.* Jury trials in all courts resumed on 12 April 2021.
5 European Commission, Rule of Law report 2021, Country Chapter for Ireland (Brussels, 20.7.2021, SWD(2021) 715 final), p. 6.
6 Shane Phelan, High Court president reignites row over lack of judges, saying up to 20 extra are needed to clear case backlog" The Irish Independent, March 11 2022, "…after a delay in the issuing of warrants of appointment to the five judges, Ms Justice Irvine said many trials, including rape and murder cases, would have to be cancelled".
7 Irish Prison Service, Annual Report 2020, p.3.
8 *Ibid*.
9 Conor Gallagher, "Growing number of people in pre-trial custody for minor offences", The Irish Times, November 25, 2020.
10 Irish Penal Reform Trust (IPRT), Progress in the Penal System, 2021, p.44.
11 Irish Penal Reform Trust (IPRT), Progress in the Penal System, 2020, p.35.
12 Irish Prison Service, Annual Report 2020, p.3.
13 Irish Prison Service, Prisoner Population on Monday 4th April 2022.
14 Irish Prison Service, Prisoner Population on Thursday 1st April 2021.
15 Irish Prison Service, Monthly Information Note – February 2022, p. 2.
16 Irish Prison Service, Prisoner Population on Thursday 12th April 2023.
17 *Ibid*.

Executive Summary

The crux of this project is the analysis of judicial assessment of flight risk, with a view to enhancing judicial deliberations, strengthening fundamental rights and bolstering mutual trust and recognition in cross-border criminal cooperation. This study is one component of a wider European Commission funded project which considers the national experience of five EU Member States (Austria, Belgium, Bulgaria, Ireland and Poland) with a view to conducting comparative research and providing a regional overview of the situation pertaining to flight risk across the EU.

This study will look at how domestic judicial authorities assess flight risk in the context of pre-trial detention proceedings. It will consider the existing legal framework, the procedures applied, and the key stakeholders involved in the application of pre-trial detention, when there is a perceived danger that the individual will seek to evade justice.

This report looks at the legal context (Section 2), including the regional European legal framework and the national legal framework. The principles stemming from common law and legislation are outlined here, with the concept of 'flight risk' falling under the scope of the 'risk of absconding justice' objection to bail as set out in the *O'Callaghan* judgement. A brief overview of the role of key actors and jurisdictions, including the police force, judiciary, prosecutors and legal counsel is provided in this section.

Section 3 deals with flight risk as a ground for pre-trial detention in Ireland. This includes an evaluation of the criteria for assessing flight risk, the burden of proof, the presumption of innocence and the approach of different actors; including defence lawyers' approach to rebutting flight risk and judicial deliberations on flight risk.

Section 4 offers some conclusions on the findings of this project, with Section 5 outlining recommendations for key stakeholders.

1.1. Key Objectives

Through the lens of the national context and experiences, the objectives of this project are to firstly raise awareness of the application of the regional situation and standards outlined in the European Convention on Human Rights (ECHR), and regional measures and guidelines in the day-to-day decision-making on flight risk as a ground for pre-trial detention.

Thereafter to identify and tackle obstacles for preventing the overuse of pre-trial detention fuelled by the concerns of flight risk, which may contribute to overcrowding and in turn undermine mutual trust between Member States.

Through these findings we hope to promote a deeper understanding of the reality of judicial decision-making when assessing flight risk in the context of pre-trial detention and how prosecutors present, and judges consider flight risk. It will also consider the evidence that may be presented by defence lawyers to oppose any perceived danger of flight risk.

Central to this study will be a risk assessment, with focus on any differences in flight risk assessment based on status or residence, belonging to a minority group, specific socio-economic background, and other similar criteria. This risk assessment, combined with an identification of legislative, institutional, or knowledge gaps should provide basis for further initiatives at EU or Member State level to effectively address the issues at stake.

1.2. Methodology

This project was designed to develop an improved understanding of the reality of judicial decision-making on flight risk assessment in pre-trial detention proceedings. This includes an understanding of how prosecutors present, and judges assess flight risk; what evidence is presented to oppose objections of flight risk; and any difference in flight risk assessment based on status or residence, belonging to a minority group, specific socio-economic background or other identifying characteristics.

The project looks at how judicial authorities of different Member States are assessing flight risk in pre-trial detention proceedings. It will specifically look at what legal standards govern the assessment of flight risk, how 'flight risk' is defined in national law and practice, what evidence is presented to support or disprove existence of a flight risk, and if and how an individualised assessment is carried out by judges on a case-by-case basis.

This project brings together a representation of European legal systems and practices from Austria, Belgium, Bulgaria, Ireland and Poland. Each domestic project partner carried out research in their respective legal system, which differ in legal traditions and practices (for example, Ireland is the only common law jurisdiction in this project). The

research methodologies applied in this research were carried out in three phases. The first phase was desk research, which examined the legal framework, case law and academic literature in the area of bail and pre-trial detention.

The second phase was an analysis of 50 judicial decisions which contain an assessment of flight risk in pre-trial detention proceedings. These decisions were diverse in their origin, with 6 Supreme Court, 7 Court of Appeal, and 37 High Court decisions reviewed. Due to the low volume of flight risk objections observed at District Court level, it was decided to focus on High Court bail hearings, which take place at Cloverhill Courthouse. Given decisions made on bail applications at Cloverhill Courthouse are not published, a group of qualified volunteers attended Court in-person and reported on flight risk cases as they arose.

The third phase of research involved conducting structured interviews with relevant stakeholders, including practitioners, prosecutors, judges and members of the police force. ICCL encountered difficulties in accessing stakeholders who were open to engaging in this research. Interviews were conducted with 13 practitioners, one sitting judge, a retired judge and a member of staff from the Director of Prosecutions. No response was received to a research request that was submitted to An Garda Síochána. The interviews were structured to ascertain the operational practices and perspectives of each stakeholder and were conducted anonymously to allow for open discussion. Data collected from these interviews has been used to inform the analysis set out in this report and the subsequent recommendations.

2. Legal Context

2.1. Regional Legal Framework

The current legal situation is that there is no harmonisation or approximation of law specific to pre-trial detention and flight risk. Notwithstanding this gap, a set of standards have emerged, through other mutual recognition instruments, human rights standards, procedural rights, and jurisprudence.

Article 82(2) Trend on the Functioning of the European Union (TFEU) provides the basics for judicial cooperation in criminal matters in the Union, and it is the starting point in any discussion relating to cross border cooperation. It sets out that such cooperation is based on the principles of mutual recognition of judgments and judicial decisions, and in order to do so provides a competence to harmonise rules of criminal procedure.

The particular rights relied upon relevant to the question of pre-trial detention include Article 5, the right to liberty of the person, Article 6 of the ECHR due process, and the absolute prohibition of cruel, inhuman, and degrading treatment contained in Article 3 ECHR. In addition, the core principles underpinning pre-trial detention include the presumption of innocence, which is crucial to counter arguments favouring pre-trial detention, and is enshrined in Article 48(1) of the Charter of Fundamental Rights and Freedoms and elaborated upon in Directive 2016/343 on the Presumption of Innocence in Criminal Proceedings.

Article 5 ECHR is perhaps the most often cited right in this context. In proclaiming the "right to liberty", Article 5 contemplates the physical liberty of the person. Its aim is to ensure that no one should be deprived of that liberty in an arbitrary manner. The right to liberty along with the right to life, prohibition of torture, inhuman and degrading treatment, and prohibition of slavery, is one of the so-called 'core' fundamental rights, it contains also a positive obligation to take active steps to provide protection against unlawful interference with the right to liberty.

Any deprivation of liberty, however short, interferes with the core fundamental right to liberty and in all cases must be based in law. Pre-trial detention must be seen by legislators, judges, prosecutors, and law-enforcement officers as an exceptional measure.

Therefore, the starting point for consideration of the legal basis for pre-trial detention and flight risk, is grounded in Article 5, and specifically to the provisions contained in paragraph (1)(c):

The core elements consist of the aim of the detention, namely to bring the individual before a competent authority. It then sets out the test that must be satisfied; that of a **reasonable suspicion** that an offence has been committed, and that the **detention is 'necessary'** in order to prevent the individual from absconding.

The standard or test applicable to a "reasonable suspicion" that a criminal offence has been committed, requires an *"existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence."*

Recently the Commission Recommendation 8.12.2022 in a bid to consolidate the legal standards surrounding pre-trial detention across the EU, noted that Member States should impose pre-trial detention "*only on the basis of a reasonable suspicion established through a careful case-by-case assessment, that the suspect has committed the offence in question and should limit the legal grounds for pre-trial detention to (a) risk of absconding; (b) risk of re-offending, (c) risk of interfering with the course of justice or (d) risk of a threat to public order*." (*emphasis added)*

Crucially, the Recommendation states that consideration of the specific circumstances of the case but also of the individual themselves must be examined. It provides that every decision by a judicial authority imposing pre-trial detention is duly reasoned and justified, and refers to the specific circumstances of the suspect or accused person. The individual affected should be provided with a copy of the decision, which should also include reason why alternatives to pre-trial detention are not considered appropriate. These principles clearly were borne from the previous jurisprudence of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) and serve to provide a template of criteria and grounds for judges deliberating on pre-trial detention in the context of flight risk.

Case law has established principles in assessing the suitability for bail or alternative measures pending the disposal of the case. At the outset, the Court has often commented that the severity of the offence, and the likely sentence that would follow, cannot alone demonstrate flight risk. Rather, the Court must consider a number of factors specific to the individual.

> ***"The risk of absconding has to be assessed in the light of the factors relating to the person's character, his morals, home, occupation, assets, family ties and all kinds of links with the country in which he is prosecuted."***

Although community links can and do form part of the factual matrix when conducting an in-depth analysis on flight risk, as the case law and Commission recommendations have both noted, a lack of community ties alone is insufficient to prove flight risk,

> ***"The fact that the suspect is not a national of, or has no other links with, the state where the offence is assumed to have been committed is not in itself sufficient to conclude that there is a risk of flight."***

The case law of the ECtHR, has consistently emphasised the importance that these grounds be rooted in fact. In *Panchenko v. Russia,* which questions whether the continued detention was justified on the grounds of a perceived risk of absconding, the Court noted that it was the absence of any specific facts, and the use of generic terms supporting the perceived Flight Right as well a failure to properly take into account family ties, his permanent address and the fact that the applicant had no criminal record, amounted to a breach of his Article 5(4) rights.

More recently, in the case of *Kotov v. Russia* the Court rejected the arguments of flight risk in circumstances where the risk of the applicant's absconding was not rooted in facts.

A series of cases before the Court of Justice of the European Union, raised the issue of detention in European Arrest Warrant (EAW) cases pending the decision of the executing authority on the validity of the warrant.

The issues stem from the the Framework Decision on the EAW which provides for a 90-day time limit, (an initial 60-day period with a possible 30-day extension) when considering the warrant. The case of *Lanigan* which involved the execution of an EAW in Ireland issued in the UK, questioned the validity of the pre-trial detention where the time limits provided for were exceeded. The Court considered firstly the spirit of the Framework Decision EAW, and the rationale for pre-trial detention pending surrender, which is firmly rooted in flight risk.

> ***"Pursuant to Article 12 of the Framework Decision, the executing judicial authority is to take a decision on whether a person arrested on the basis of a European Arrest Warrant should remain in detention, in accordance with the law of the executing Member State. That article also states that that person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding."***

Considering the requirement to ensure the surrender, the Court found that even in circumstances where the time limits were exceeded, this would not preclude the execution of the warrant or the continued detention. However, much like in the jurisprudence of the ECtHR, and in light of the fundamental rights at stake, a detailed, evidence-based 'concrete review' was set out which required the Court to consider;

> ***"all of the relevant factors with a view to evaluating the justification for the duration of the procedure, including the possible failure to act on the part of the authorities of the Member States concerned and any contribution of the requested person to that duration. The sentence potentially faced by the requested person or delivered in his regard in relation to the acts which justified the issuing of the European Arrest Warrant in his respect, together with the potential risk of that person absconding, must also be taken into consideration."***

2.2. National Legal Framework

Ireland is a common law jurisdiction with a written constitution, Bunreacht na hÉireann, which was enacted in 1937. The Constitution is the supreme law of the jurisdiction and can be amended only by referendum (popular vote). Under Article 29.6, Ireland has a dualist legal system whereby international treaties do not form part of domestic law save where the Oireachtas (Houses of Parliament) introduces them by way of legislation. An example of this is the European Convention on Human Rights Act 2003, which transposed the European Convention on Human Rights into Irish law. The criminal justice system in Ireland is adversarial, whereby generally applications are made before a Court by parties who are present to propose and oppose said application.

Bail is a system which allows for an individual to be released from custody on the basis of an undertaking that they will surrender to custody or attend Court on a Court-appointed date. As part of a bail arrangement the accused will normally enter into a 'recognisance', which is a legally binding commitment to forfeit a sum of money already given to the Court if they fail to abide by any terms imposed by the Court. There is a general presumption of release on bail in Ireland at a pre-trial stage. In *People (AG) v. Gilliland*[18] the Supreme Court outlined that a person should be granted bail unless *"there is a likelihood that if the prisoner is granted bail he will defeat the ultimate purpose of the imprisonment by absconding".*

The presumption of innocence and the right to liberty under Article 40.4.1 of the Constitution is the basis for the general entitlement to bail under Irish law.[19] This right to retain liberty pending trial is curtailed only where the accused person is likely to 'evade justice' through non-appearance in Court or interference with potential witnesses. In 1996, a referendum was passed to amend Article 40.4 of the Constitution to allow legislation to be enacted to restrict the basis on which bail could be granted. Before this, it was not open to the Courts to refuse bail on the basis that the accused was charged with serious offences or that there was a likelihood of the accused committing an offence if bail were granted.

2.2.1. The *O'Callaghan* judgement

The seminal case regarding bail is *People (AG) v. O'Callaghan*, where the Court recognised the inherent legal nature of the right to bail.[20] The Court indicated that the basic principle to be considered in whether to grant bail is whether the accused would attempt to evade justice, and that the sole purpose of refusing bail was to secure the attendance of the accused at trial.

On appeal, the Supreme Court rejected the premise that any likelihood of an accused person committing further offences while on bail would constitute a ground for refusing bail. Walsh J stated that the proposition that a person would be denied bail in order to prevent them from committing an offence is "preventative justice which has no place in our legal system and is quite alien to the true purposes of bail".[21] This was reaffirmed by the Supreme Court in *Ryan v. DPP,*[22] *People (DPP) v. Doherty*[23] and *The People (DPP) v. Brophy*.[24] A constitutional amendment passed by referendum in 1996 provided that a Court may refuse bail to an accused person where it fears that a person would commit a serious criminal offence while at liberty.

2.2.2. The Bail Act 1997

The Bail Act 1997 introduced a provision that a Court may refuse bail where a person is charged with a serious offence "if the Court is satisfied that such a refusal is reasonably considered necessary to prevent the commission of a serious offence by that person".[25] In deciding on a bail application, section 2 of the 1997 Act provides that the Court must take into account:

A	the nature and degree of seriousness of the offence with which the accused person is charged and the sentence likely to be imposed on conviction;
B	the nature and degree of seriousness of the offence apprehended and the sentence likely to be imposed on conviction;
C	the nature and strength of the evidence in support of the charge;
D	any conviction of the accused person for an offence committed while he or she was on bail;
E	any previous convictions of the accused person including any conviction the subject of an appeal (which has neither been determined nor withdrawn) to a Court; and
F	any other offence in respect of which the accused person is charged and is awaiting trial.

Where a person is admitted to bail, they may be directed by the Court to submit a sum of money equivalent to surety in lieu of surety. This normally happens where a person does not have access to a bank account.

[18] [1985] IR 643.
[19] Article 40.4, Bunreacht na hÉireann, 1937.
[20] [1966] IR 501.
[21] *Ibid,* at 507.
[22] [1989] IR 399.
[23] [2001] 7 JIC 3005.
[24] [1992] ILRM 709.
[25] Bail Act 1997.

2.3. Overview of key actors and jurisdictions

The main stakeholders in pre-trial proceedings are the accused, defence counsel, prosecution, An Garda Síochána (the Irish Police Service) and the Courts. Where a person is granted station bail, also known as recognisance, a person is arrested and brought into custody, where they may be charged and released on bail with instructions to appear before Court at a specific date and time. Under this procedure, the decision-maker is the police. When a person is brought before the Court, the prosecution, ordinarily through Gardaí Court presenters, will ordinarily present to the Court reasons for opposing bail. While not an official step in this procedure, ordinarily defence counsel will speak with the Gardaí outside Court to ascertain what the objections are, and whether any conditions can be agreed to that would alleviate the concerns. One practitioner noted that speaking with the Garda Court presenter before appearing in a bail application is essential to achieving the best outcome for the accused. Consultation with the client at this stage was reported as another essential pre-application step, to ensure that conditions are not consented to which are impossible for the accused to meet, such as ascertaining financial circumstances and working hours.

The jurisdiction to grant bail is vested in certain members of An Garda Síochána, trial judges, the District Court, the High Court, the Special Criminal Court, the Court of Appeal and the Supreme Court. The scope and nature of jurisdiction varies from one authority to another depending on the severity of the crime. If the accused does not comply with bail, the prosecution will notify the Court by way of appearance and the judge will issue a 'bench warrant', which gives An Garda Síochána power to arrest the accused and bring them before Court to answer all charges relating to bail.

2.3.1 An Garda Síochána and station bail

An Garda Síochána is the Irish police service. Under section 31 of the Criminal Procedure Act 1967 as amended by the Criminal Justice (Miscellaneous Provisions) Act 1997, when a person is arrested and brought into custody to a Garda station, the sergeant or member in charge of the station has the jurisdiction to release the person on bail if they believe it is prudent to do so and that person is not subject to a warrant for detention. This is referred to as 'station bail'. In *State (Lynch) v. Ballagh*, Walsh J. emphasised that the role of An Garda Síochána in station in is a narrow one regulated solely by section 31.[26]

2.3.2 The District Court

The District Court is the Court of first instance for the vast majority of bail applications. Where a person is charged with an offence and is not released by the Gardaí on station bail, they are to be brought before a District Court as soon as practicable. The District Court may release a person on bail with or without sureties.[27] In practice, the District Court will hear bail applications where: the Court remands the accused to a later sitting; the Court sends the accused forward for trial or sentencing; the Court remands the accused to a sitting of the Court in another district for the purpose of taking further evidence of an indictable offence charged against them; the Court adjourns the trial of the accused; the accused is appealing against a conviction to the Circuit Court; and it remands an accused for the preparation of reports relevant to sentencing.

2.3.3 The High Court

The High Court has original jurisdiction to grant bail to a person accused of any of the offences listed in section 29 of the Criminal Procedure Act 1967.[28] This includes where the accused has been charged with an offence under the Offences Against the State Act 1939, the Official Secrets Act 1967, murder, attempted murder, conspiracy to murder, piracy, genocide and treason.

Other scenarios where the High Court has jurisdiction over bail applications include: (i) where a person is appealing a bail decision from the District Court; (ii) where a person has served notice of appeal to the Circuit Court from a conviction in the District Court; (iii) where a person is being tried in the Special Criminal Court; (iv) where an application is made seeking an order of certiorari to quash a District, Circuit or Special Criminal Court conviction; (v) where a person has been convicted on indictment and has sought leave to appeal.

High Court bails are heard each Tuesday, Wednesday and Thursday, with bail applications on Tuesday and Wednesday reserved individuals remanded in custody in Dublin prisons, such as Cloverhill, Mountjoy and Wheatfield prisons, while the Thursday

[26] [1987] IRLM 65, at pp. 70 and 72.
[27] Criminal Procedure Act 1967, s. 22 and Part III generally.
[28] Criminal Procedure Act 1967, s. 29.

list is reserved for those remanded in custody in prisons outside Dublin, such as Castlerea, Cork and the Midlands Prison.

2.3.4 Special Criminal Court

There is one anomaly to the general presumption in favour of bail in Irish Courts, that is the non-jury Special Criminal Court. The Offences Against the State Act 1939 provides for the establishment of a Special Criminal Court.[29] The Special Criminal Court in its current form was established in 1972 to deal with terrorist offences that were deemed to be a threat to the State during the violent years of the Troubles in Northern Ireland. Over 50 years on and the Court has been expanded in terms of its jurisdiction to cover organised crime.

Cases involving terrorism and organised crime offences are automatically brought before a Special Criminal Court for trial. Other offences are brought before or sent for trial when the Director of Public Prosecutions certifies that the ordinary Courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. If an accused is sent for trial in the Special Criminal Court you cannot get bail unless the Director of Public Prosecutions directs otherwise.

2.3.5 Court of Criminal Appeal

The Court of Criminal Appeal has jurisdiction to hear bail applications where an appeal is ongoing. Where there has been a conviction, the Court may still grant bail to the accused pending outcome of the appeal. Where a person has been convicted the threshold which needs to be met to grant bail is higher than at pre-trial stage. The Court stated in *People v. Kirwan*[30] that "the fact that the applicants have been convicted by a jury weighs down the scales heavily against them".

2.4. Procedures Surrounding Pre-Trial Detention and Flight Risk

When a person is charged with an offence, they may be released on bail by the Gardaí under the station bail. When someone is charged with a "serious" criminal offence (an offence carrying a penalty of five years or more) they are remanded in custody and will be brought before a Court as soon as possible to make an application for bail. Bail applications are generally heard in open Court, unless there are factors pertaining to the case which qualify it for an *in camera* hearing, such as cases concerning children. It is also common practice for section 2 bail objections to be heard *in camera* with a view to safeguarding the accused's presumption of innocence and fair trial rights.

The majority of bail applications will take place in the District Court. The procedure followed on a bail application before the District Court may vary depending on the offence for which the accused is charged and the type of objections raised. The judge will raise the issue of bail and invite the prosecutor to submit any objections they may have to bail. If there are no objections, the judge will consider whether to attach conditions to an order for bail, and what those conditions should be.

Where the prosecution raises objections to bail, they are usually offered by a member of An Garda Síochána providing evidence on oath, who is then cross-examined by the defence. It is important to note that much of the evidence provided by the Garda is based on speculation and opinion, and therefore the scope for cross-examination is limited. Upon the conclusion of the submissions of prosecution and defence, the judge announces their decision.

If the accused is denied bail, they are remanded in custody. The periods of remand in custody are set out in section 24(2) of the Criminal Procedure Act 1967 as amended by Criminal Justice (Miscellaneous Provisions) Act 1997. If the period of detention is less than four days, the detention setting may be a Garda station, however the Court must be satisfied that there are adequate facilities to accommodate this.[31]

The maximum period of detention in remand following the first hearing at Court is eight days. Each subsequent remand following this initial period may be up to 15 days, unless the Court determines it would be unreasonable. The Court may extend this to 30 days if it is agreed to by the prosecutor and accused. Time served on remand by the accused is deductible from the sentence calculated by the Court if the accused is convicted and sentenced to imprisonment.

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[26] [1987] IRLM 65, at pp. 70 and 72.
[27] Criminal Procedure Act 1967, s. 22 and Part III generally.
[28] Criminal Procedure Act 1967, s. 29.
[29] For further information on the Special Criminal Court, see:
[30] [1989] ILTR 120.
[31] Criminal Procedure Act 1967, s. 25. For an overview of detention periods, see Annex 1.

2.4.1. **Admissibility of evidence in bail applications**

In bail applications the prosecuting member of An Garda Síochána will give evidence as to their objections to bail and why. The member will have to lay a basis for this belief, for example by referring to occasions in the past where the applicant has failed to answer to bail or breached bail conditions.

It will also happen from time to time that the member will refer to allegations made against the defendant by third parties in order to lay a basis for his belief. This raises the issue of admissibility of hearsay evidence in a bail application. In *DPP v. McLoughlin*, Hardiman J in the Supreme Court noted that evidence relied upon to ground the admission of hearsay must establish something more than that it is 'convenient' to the prosecution, or to the witness. It must also establish that "all reasonable steps have been taken to precure evidence in the usual form".[32]

In *People (DPP) v. McGinley*, the defendant was charged with sexual offences against a girl under the age of 15 years. There was an objection to bail in the High Court founded on the assertion that the accused had threatened to injure the complainant and her family if she reported the crime. Bail was refused despite the hearsay nature of the evidence, however this decision was overturned by the Supreme Court on appeal. While the Supreme Court affirmed that a Court is entitled to admit hearsay evidence in an application for bail in certain circumstances, the accused should be entitled to have evidence be given *viva voce* and cross-examined.

2.4.2. **Issues for judicial consideration**

The most common issues for consideration by a Court hearing a bail application are contained in the *O'Callaghan* judgement. Murnaghan J in the High Court outlined the factors the Court should consider when assessing whether an accused is likely to evade justice:

1	The nature of the accusation or seriousness of the charge. The reasoning is that the more serious the charge, the greater the likelihood of the prisoner not appearing to answer it or interfere with evidence or witnesses.
2	The nature of the evidence supporting the charge.
3	The likely sentence to be imposed on conviction. The greater the sentence is likely to be, the greater the likelihood of attempted evasion.
4	The likelihood of the commission of a further offence while on bail. (This factor was discounted by the Supreme Court on appeal and was instead introduced by referendum and institution of the Bail Act 1997).
5	The possibility of disposal of illegally acquired property.
6	The possibility of interference with prospective witnesses or jurors.
7	The prisoner's failure to answer bail on a previous occasion. This is also known as 'bench warrant history'.
8	The fact the prisoner was caught red handed.
9	The objection of the Attorney General or police authorities.
10	The substance and reliability of bailsman offered.
11	The possibility of a speedy trial.

The severity of the charge is a key consideration for the assessment of bail applications. Since a more serious charge would naturally lend itself to a more severe sentence, it is considered a motivating factor to abscond. Although, a charge of murder, carrying a mandatory sentence of life imprisonment, does not automatically lead to the denial of bail.

[32] [2010] 1 IRLM 1.

In a 2022 high-profile case concerning a lawyer accused of murder, it was alleged the accused had shot an intruder on his land in the back of the head after he had turned to leave the premises.[33] There were objections to his bail on both flight risk and risk of committal of another serious offence. The flight risk objection was grounded in the proposition that the accused has links to 'the north of Ireland', mainland Europe, the United States, and has considerable means. Under cross-examination, the accused stated that 'there was no possibility' of him attempting to evade justice, stating that 'I have to clear my name'.[34]

The accused's initial application for High Court bail was refused with the judge finding him to be a serious flight risk. It was found on the first instance that he had a "powerful incentive to evade justice" based on the seriousness of the charge, the strength of the evidence, the likely sentence in the event of a conviction and alleged ongoing threats to the accused."[35] The judge was also concerned that the full extent of his assets "was not known and the Court noted that three different addresses in south Dublin had been submitted by the accused."[36]

On appeal, the Court of Appeal granted him bail stating that he "enjoys a presumption of innocence and as part of that he enjoys a presumption in favour of bail…he has ties to the State as a member of the Bar of Ireland and as a person with significant assets in this jurisdiction." There is considerable weight in national Courts attached to the seriousness of a charge that an accused person faces, even warranting repetition by the Bail Act 1997.

While access to resources which would enable an accused person to flee, coupled with an incentive to flea the jurisdiction or evade justice generally is a consideration for the Court when assessing flight risk, this case demonstrates that each case is decided on its own merits and the Court will look beyond the simple fact of these conditions existing to assess whether flight is actually a risk in the specific circumstances of the accused. This is a fundamental aspect of the system, which allows for the flexibility of judicial discretion, however this discretion is something which leaves scope for bias, prejudice and undue leniency or rigidity to occur, particularly given the decision on bail is largely based on a factual analysis. Feedback from interviewees highlighted the reality that the outcome of a bail application can depend on which judge is sitting on that particular day.

2.4.3. **Conditions to bail**

Where bail is granted, ordinarily recognisance and sureties will be required by the Court. The amount set is decided in accordance with the probability of breaches being committed but cannot be so large that it effectively results in a denial of bail. The circumstances of the accused are therefore central to the Court's decision in this regard.

Other common conditions to bail include not committing other offences and being on good behaviour, however the Court has wide discretion to include conditions it deems appropriate, such as the requirement to reside at a particular place, surrender their passport, refrain from entering prescribed places or contacting certain people. Another common condition to bail is the requirement to 'sign on' at a particular Garda station a specified number of times per day or week.

In the aforementioned case concerning a lawyer charged with murder, there were strict conditions attached to the bail, including that the he provide a comprehensive financial statement to the Court setting out his assets, liabilities, all sources of income in recent years and details of any property in and outside the jurisdiction, an independent surety of €50,000 and his own bond of €50,000.[37] He was also ordered to surrender his US passport to Gardaí and undertake not to apply for any US passport, Irish visa or any other form of travel documents. The US embassy was to be informed that he is on bail on serious charges and they must contact gardaí if he applies for a passport or visa. Other conditions were that he reside at an address approved by the Gardaí, sign on daily at a named Garda station between 9am and 9pm, obey a curfew of 10pm to 8am at the provided address, provide a mobile phone number to Gardaí within 24 hours of his release and keep it on him. He was ordered to meet Gardaí within 24 hours of his release and provide access to all his Irish and foreign bank accounts. He was ordered to stay out of the area where the shooting occurred and other properties of his and have no contact with prosecution witnesses in the case. He was ordered

[33] Alison O'Riordan, 'Witness told gardaí barrister shot unarmed man in back of head' *The Irish Times* (Dublin, 25th March 2022). Accessible at: https://www.irishtimes.com/news/crime-and-law/courts/high-court/witness-told-gardai-barrister-shot-unarmed-man-in-back-of-head-1.4827881.
[34] Ibid.
[35] Eoin Reynolds, 'Barrister on murder charge granted bail on strict conditions by Court of Appeal', *The Irish Times,* Dublin 8 April 2022. https://www.irishtimes.com/news/crime-and-law/courts/barrister-on-murder-charge-granted-bail-on-strict-conditions-by-court-of-appeal-1.4848322.
[36] Ibid.
[37] Ibid.

not to leave the Republic of Ireland (to Northern Ireland) or join a gun club or purchase any firearms.

However, these conditions were relaxed twice, first one month after being granted bail[38] and a second time to facilitate "two short holidays".[39] This case highlights the potential class bias in the granting of bail and certainly in terms of relaxing bail pending a murder trial. This echoes sentiments expressed by interviewees, whereby while class may not be a standalone indicating factor for bail, the access to finance to facilitate committing to a high 'own bond' or independent surety is an important contributing factor.

In *Fitzpatrick v. Governor of Castlerea Prison*, the applicant brought an application to the High Court under Article 40.4.2 of the Constitution challenging the legality of his remand in custody and bail conditions.[40] The applicant had been charged with offences under the Offences Against the State Act 1939. The Court consented to the applicant's release upon him entering into a recognisance in his own bond of €1500 (to be lodged), with one independent surety in the same sum, of which €200 was to be lodged, and upon the applicant undertaking to reside at a stated address, to sign on at Galway Garda Station, observe a curfew, have no contact with certain witnesses, and to surrender his passport, as well as the usual conditions to be of good behaviour and not to commit any offence. He was not in a position to take up bail. Peart J in the High Court held that the District Court Judge had acted within his jurisdiction, and had evidence before him from which he could conclude that further remand was justified. He refused the application for release.

2.5. **Bail in European Arrest Warrant cases**

Section 13(5)(a) of the European Arrest Warrant Act 2003 explicitly provides the High Court with the power to remand a requested person in custody or to grant them bail. If granting bail the Act specifies that the same criteria are applied as any other bail application for a indictable offence.

While the same principles as ordinarily applied to bail objections (the *O'Callaghan* test but not section 2 of the Bail Act 1997) apply in EAW matters. However, the Courts have applied fundamental principles underpinning the EAW framework decision to bail has increasing the importance on assuring that the requested person reaches the requested state without absconding and therefore heightened "flight risk" is a matter that the Court can take into account. It is often repeated by the State that the procedure of surrender between Member States and decisions to grant bail are subject to the requested State's overriding obligation of ensuring that the individual respondent does not abscond in advance of their surrender.

The principles in *The People (Attorney General) v. O' Callaghan* apply to bail applications in rendition proceedings pursuant to the European Arrest Warrants.[41] The Court in *The Minister For Justice, Equality and Law Reform v. Fustiac* found that unconvicted persons whose rendition is being sought by another Member State on foot of a European Arrest Warrant have a presumption in favour of granting bail based on *O'Callaghan's* principles, subject to the possibility of the presumption being rebutted.[42] The relevant test for bail in EAW cases is laid down in *Fustiac* where Edwards J held:

> ***"As I stated in Minister for Justice, Equality & Law Reform v. Zielinski I am satisfied that, in cases where the prisoner has not been convicted, the Gilliland case may be regarded as clear authority for the proposition that the fundamental criterion to be applied to bail applications in extradition matters is that set out in The People (Attorney General) v. O'Callaghan [1966] I.R. 501, namely "is there a likelihood of the prisoner attempting to evade justice?". Moreover in applying that criterion, the Court seized of the issue should have regard to those factors identified in O'Callaghan as of potential relevance, and consider them to the extent that they are in fact relevant in all the circumstances of the case, as well as any special circumstances tending to magnify the risk of the prisoner absconding."***

It was reported by one practitioner that the primary indicating factors that will be assessed for flight risk in EAW cases are (i) whether the accused was charged with the offence prior to leaving the jurisdiction; (ii)

[38] Tom Tuite, 'Barrister accused of murder has some bail terms suspended to take short trip', *The Irish Times*, Dublin 18 May 2022. https://www.irishtimes.com/news/crime-and-law/courts/district-court/barrister-accused-of-murder-has-some-bail-terms-suspended-to-take-short-trip-1.4882150.

[39] Andrew Phelan, 'Judge relaxes murder accused barrister's bail conditions so he can go on 'holiday', *Irish Independent,* Dublin 5 September 2022. https://www.independent.ie/irish-news/crime/judge-relaxes-murder-accused-barristers-bail-conditions-so-he-can-go-on-holiday/41963037.html.

[40] [2012] IEHC 160.

[41] [1966] IR 501.

[42] [2011] IEHC 134.

how much time the accused spent in this jurisdiction pending the charge; and (iii) if returned from abroad, did the accused consent to EAW. In *Minister for Justice, Equality & Law Reform v. Zielinski,* Edwards J reflected on the inherent flight risk element of EAW cases coupled with the presumption of bail in this jurisdiction.[43] He compared the reasoning of the Supreme Court in *Corbally*, where it was decided that on an application for bail in the case of a convicted person who has an appeal pending, the Court of Criminal Appeal ought not to approach the matter on the basis that there is an effective presumption in favour of the granting of bail, but rather should only grant bail where there are strong reasons for doing so. It should therefore consider whether the interests of justice required that it should exercise its discretion to grant bail in all the circumstances of the particular case.

Edwards J acknowledged there will be a theoretical risk of absconding in every case, but that the existence of that theoretical risk should not necessarily inhibit the Court from releasing a prisoner. He stated that there must be a "real and significant risk" that the prisoner might abscond.

In *Minister for Justice v. McArdle*, the appellant was the subject of an EAW issued by the kingdom of the Netherlands in respect of two offences (voluntary manslaughter and concealing a body from criminal investigation).[44] The appellant was remanded in custody following his arrest and he sought bail, which was refused by the High Court. It was held that the appellant did not have the benefit of any presumption in favour of bail and that the High Court Judge had conducted a risk assessment, which he was required to do, and had reached a conclusion that was not unreasonable. It was held that the denial of bail was a decision which came within the range of discretion of the High Court Judge and the appeal was dismissed.

2.6. **Procedural guarantees**

The accused person has certain procedural guarantees at pre-trial stage. When an arrested person is taken into custody or detained, they are entitled to be given notice of their rights. The treatment of persons in custody regulations are the regulations which cover a prisoners legal entitlement. They are derived from Regulation 8, Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987 and 2006. A copy of these rights is supplied to all persons in custody on entering the Garda station when their details are entered in the Custody Record (C84), the form handed to the prisoner is the C72(S).

The accused person has a constitutional right to legal advice in criminal proceedings. Criminal legal aid may be applied for in the District Court, where most criminal cases originate, or in the Special Criminal Court, where offences under the Offences Against the State Act are tried. In a legal aid application, the Court will consider the financial circumstances of the accused, including income, family circumstances and other relevant details.

There is a specific legal aid scheme for custody issues, which covers the fees for a solicitor and barrister in certain cases, such as: (i) applications for bail in the Superior Courts; (ii) judicial review proceedings on matters concerning criminal matters or where the liberty of the applicant is at issue; (iii) applications under the Extradition Act 1965 and the European Arrest Warrant Act 2003, and; (iv) Habeas Corpus applications. Under this scheme, translations or interpretation services may only be engaged by the solicitor on record where it is found to be essential to the preparation and conduct of the client's bail motion.

Practitioners reported that while there is ordinarily time to meet with their client ahead of the hearing of a bail motion, there is a lack of facilities to ensure that the meeting is held in private, out of earshot of Gardaí, and with sufficient time.

[43] [2011] 2 JIC 1001
[44] [2019] IECA 174.

3. Flight Risk as a Ground for Pre-Trial Detention

3.1. Criteria for Assessing Flight Risk

An accused person's failure to answer to bail on a previous occasion suggests a flight risk and likewise this is a factor that a Court could legitimately take into account in deciding to refuse bail.

Regardless of whether the risk of flight is found to be present on the balance of probabilities, the Court must consider whether conditions may be imposed which would alleviate those risks. In *People (DPP) v. Lynn*,[45] the Court of Appeal considered whether bail should be granted to a person facing 21 counts of theft charges. The accused had fled Ireland in 2007 to Portugal and then went to Brazil, where he resisted attempts by the Irish authorities to extradite him. He was in custody in Brazil for nearly five years until his extradition to Ireland in 2018 where he remained in custody.

His request for bail was at first instance refused by the High Court on the basis that he was a flight risk. On appeal, it was submitted that the High Court judge erred in law and/or in fact on the basis that the respondent had established on the balance of probabilities that the appellant was a flight risk, but the question of whether the imposition of appropriate conditions would obviate any such flight risk was not considered. The Court of Appeal expressed its concern at the delay in bringing the appellant to trial, which was almost two years from the date of his return to Ireland. The Court noted that this is a factor that must be taken into account when assessing bail applications, even where there is a flight risk present. The Court also considered that while the risk of flight was not negligible, it was much diminished due to the fact that the accused had already served a large portion of any likely sentence. The Court concluded that the interests of justice required that bail be granted subject to stringent conditions and the payment of a large surety.

3.2. Flight Risk and the Burden of Proof

The burden of proof in every bail application is on the prosecution, as set out by the Supreme Court judgment in *People (AG) v. Gilliland*.[46] Every bail application starts from the position that the applicant is entitled to bail. In *O'Callaghan*, the Court held that the standard of proof required in a case such as this is proof that the applicant will *probably* interfere with a witness. A Court must consider the seriousness of the offence charged, the nature of the evidence supporting the charge, and the record of the accused.

In *DPP v. McLoughlin*, Denham J. said that "a finding that as a matter of probability, a person had or would, or someone on his direction had or would, intimidate or interfere with witnesses, should be made expressly by the Court. The test is not whether the members of An Garda Síochána have fears or an apprehension for witnesses. The Court itself should be satisfied of the probability of the risk of interference or intimidation and make that finding expressly."[47]

Therefore in flight risk cases the prosecution objecting to bail must prove that there is more than a possibility of a flight risk – there must be a probability that an applicant will abscond based on the evidence. The police merely indicating that they fear flight is not enough.

In *Vickers v. Director of Public Prosecutions*, the Supreme Court confirmed that the standard of proof required under section 2 of the Bail Act 1997, being that the refusal of bail is "reasonably considered necessary", is not the same as the probability standard required under *O'Callaghan*.[48] The section 2 objection, that there is a real risk that a serious offence may be committed, must be considered by assessing the likelihood of the commission of an offence, which can only be assessed by reference to the evidence.

[45] [2018] IECA 178.
[46] [1985] I.R. 643
[47] [2010] 1 I.R. 590.
[48] [2010] 1 I.R. 548.

3.2.1 Presumption of innocence - Bail post-conviction

A convicted person can apply for bail post-conviction pending their appeal. The relevant principles were laid down in *DPP v. Corbally*:

> ***"[B]ail should be granted where notwithstanding that the applicant comes before the Court as a convicted person, the interests of justice requires it, either because of the apparent strength of the applicant's appeal or the impending expiry of the sentence or some other special circumstance. It must always be borne in mind that the applicant for bail in this situation is a convicted person and the Court of Criminal Appeal should therefore exercise its discretion to grant bail sparingly."***[49]

There must be a "strong chance of success on appeal. There should be enough materials before the Court to enable it to hold that there is at least a strong chance of success before it grants bail."

However, the Courts have been abundantly clear that the circumstances must be exceptional to outweigh the tendency against granting bail once a person has been convicted. In *McGinley v. Minister for Justice* the defendant sought a post-conviction application for bail pending the determination of judicial review proceedings against the refusal of their application for enhanced prison remission.[50] The defence relied on the strength of the judicial review prospects, the imminence of release and "a host of other factors… including his family, his wife's willingness to lodge an amount of money, the fact that he is not perceived as a flight risk, and his compliance with bail for a long time pre-trial. However, none of these factors are exceptional and do not constitute special circumstances but in any event, nowhere remotely near the very high threshold at which post-conviction bail would be appropriate."[51]

3.3. Defence Lawyers' Approach

The adversarial nature of the bail application process in Ireland is such that it is for the prosecution to present to the Court stateable objections to the granting of bail to the accused person. As outlined above, these objections may either fall under s. 2 of the Bail Act 1997 or the *O'Callaghan* principles. For the counsel representing the accused person, their role is to put forward arguments which alleviate the concerns raised by the prosecution.

In practice, the prosecution will outline to the defence counsel what their objections are before they step foot in a Courtroom, and in the case of s. 2 Bail Act 1997 objections, the prosecution must outline the grounds for objecting under that section in writing beforehand. The defence counsel will meet with their client ahead of the hearing of the application to both give advice and receive instructions. Participants reported that the facilities in Cloverhill Courthouse are poor and inadequate for facilitating a fully private discussion between client and counsel, with some reporting issues with the Prison Service not arriving with their client until shortly before the Court is sitting, leaving only a short number of minutes to conduct a consultation with their client. Following the discussion between client and counsel, a discussion will ordinarily take place between the prosecution Garda and counsel to ascertain what conditions might be appropriate for the case. There may at this stage be an opportunity for 'bail by consent', whereby the prosecution agrees to the conditions proposed and do not oppose the application when it is heard by the Court.

The delays in the criminal justice system and rise in pre-trial detention were cited by practitioners as having the real potential to impact on their instructions from their clients, particularly in circumstances where pleading guilty may result in the accused person spending less time in custody than pleading not-guilty where they have been denied bail. This arises more in cases where an accused person has been refused High Court bail on a summary matter (i.e. an offence which carries with it a maximum sentence of no more than 12 months that may be dealt with by a judge sitting in the District Court without a jury). The inadequacies of facilities in courthouses was cited as a major concern by participants. Given bail applications are a factual determination within a legal framework, the client's instructions are fundamentally essential to what is presented to the Court by counsel, this is affected by inadequate facilities to conduct consultations with clients.

While an undertaking to surrender a passport and not to apply for a new passport or travel document is a common condition used to alleviate flight risk concerns, a judicial participant noted that the surrendering of a passport is not enough on its

[49] *DPP v. Corbally* [2001] 2 I.L.R.M. 107-108.
[50] [2017] IEHC 549.
[51] *McGinley v. Minister for Justice* [2017] IEHC 549, para. 46.

own. This is reflected in the judicial reasoning on bail conditions, where ties to the jurisdiction is key. Signing on at a prescribed Garda station a prescribed number of times a day or week is a common condition where the risk of absconding arises, as it ensures there is direct contact between the accused and the State.

Circumstances which give rise to a flight risk objection may also give rise to circumstances whereby the accused has difficulty abiding by strict bail conditions. In *Secansky v. Commissioner of An Garda Síochána and Ors,*[52] the accused was a Slovakian national who ordinarily resided in Slovakia, the alleged incident took place on a visit to Ireland in February 2009, when he was arrested and released without charge. He subsequently returned to Slovakia and arrived again to Ireland for the purpose of meeting his employer. Upon his arrival to Ireland he was charged with rape under section 2 of the Criminal Law (Rape) (Amendment) Act 1990. Bail was granted by the Court, despite a flight risk objection, subject to the following conditions: (i) make a €10,000 cash lodgment; (ii) surrender of travel documents; (iii) reside at an address within the jurisdiction; and (iv) sign on daily at a garda station. The accused was unable to meet those terms and was remanded in custody for 385 days before he returned to Slovakia.

3.4. **Judicial Deliberations on Flight Risk**

In *Minister for Justice and Others v. Zielinski,* the Edwards J set out the list of 'positive factors' and 'negative factors' in assessing whether the subject of the EAW was a real and substantial flight risk.[53] The 'positive factors' which were in the applicant's favour included that he had a family network in Ireland, he is of limited means, there is no evidence that he had previous convictions, he is prepared to surrender his passport, his father and/ or mother were in a position to stand as an independent surety for him, he was prepared to agree to a signing on condition.

Negative factors which weighed against the granting of bail included that the applicant was a convicted person, meaning he had incentive to abscond, the applicant had already absconded from the requesting State, as a foreign national he is likely to have fewer ties to Ireland than an Irish national would have, the State is objecting to bail on flight risk grounds, he had given a false name on another occasion when arrested in respect of a domestic matter. Following an assessment of these factors, the Court found that there was a real and significant risk that the applicant would abscond and the application for bail was refused.

The general consensus of participant practitioners was that Judges will consider how far away a trial date is in the context of offence charged. However, one senior practitioner said that he has not noticed an increase in awareness of length of pre-trial detention in line with the rapid rise in delay periods.

3.5. **Alternative Measures in the context of Flight Risk**

Being released on bail is the primary alternative to pre-trial detention in Ireland. This is caveated by the plethora of conditions available to the Court to apply to the granting of bail. Section 6 of the Bail Act 1997 provides for conditions that may be attached to release on bail, including a residence condition, reporting requirement to a Garda Station and stay away orders from certain locations or people. It was a strong belief amongst practitioners surveyed that generally speaking judges consider pre-trial detention to be the option of last resort.

In *People (Attorney General) v. O'Callaghan* the Supreme Court made it clear that the vital issue to consider in any bail application was whether the individual was likely to evade justice by flight.[54] In relation to the fixing of recognisances, counsel relied upon the following passage from the decision of Walsh J. at pp. 518 to 519:-

> ***"If persons come from a humble walk in life or are of little means it is most likely that their friends or those of them who are prepared to go as surety for them are of the same condition and the amount of bail required must be just and reasonable in all the circumstances having regard to the condition and ability of the accused, bearing in mind all the time the overriding test of the probability of the accused failing to appear for trial."***

The principles which should guide the Court in approaching an application such as this are to be found in the judgment of the Supreme Court in *Maguire v. Director of Public Prosecutions (No. 2).*[55] In this case, the Supreme Court granted bail to the applicant. Taking into consideration a pre-trial

[52] [2021] IEHC 731.
[53] [2011] IEHC 45.
[54] [1966] 1 I.R. 501.
[55] [2005] 1 IR 371.

incarceration period of 20 months, Hardiman J. held as follows: "In these circumstances we consider that the interests of justice require the release on bail of an untried prisoner to whom the State cannot afford a trial until June, 2005. [...] It is sufficient for the purpose of the application that, on the basis of the materials produced in this case, it appears to us that the interests of justice require the release of the applicant on bail. "

In an earlier Supreme Court decision Keane C.J. in *The People (Director of Public Prosecutions) v. Coffey stated*:[56]

> ***"... the Court has expressed its concern and its very deep concern that in a case where the applicant was arrested and charged with the offence of murder in December, 2000, the Court is now informed that because of the state of the list in the Central Criminal Court, the case will not be heard until June 2003, so that at that stage he will have spent two and half years in custody on a charge of which he is presumed by the law to be innocent. That, of course, is a very unacceptable state of affairs indeed and pays scant respect to the clearly established right of the applicant to a trial with reasonable expedition, a right particularly important in circumstances where there is pre-trial incarceration as there undoubtedly is in this case. That is a factor which this Court considers must be taken into account in considering whether the applicant should be admitted to bail at this stage."***

This practical approach allows the Court to look at the circumstances surrounding any potential denial of bail in the context of how the system actually works in practice. However, while the Court will take periods of pre-trial delay into consideration, and cases where the accused is in pre-trial detention are given priority in the running of trial dates, practitioners reported during interviews that the system is strained by delay periods.

3.5.1. Own bonds and independent sureties

If granted bail, the accused or their independent surety (e.g. a parent, spouse/partner or other suitable person approved by the District Court) may be required to lodge a proportion of the bail sum set. In *DPP v. Broderick*, the Supreme Court confirmed that the amount of money set must not be set solely on the basis of the seriousness of the charge, but must take into account the financial circumstances of the accused.[57] This case concerned an appeal to the Supreme Court against a refusal by the High Court to reduce the bail amount (€50,000 own bond and €50,000 independent surety) set in the District Court in a drugs case involving a large seizure of cocaine and diamorphine. The Supreme Court held that Butler J. was in error in finding that "if the applicant could handle €1.3 million worth of drugs and was part of a criminal gang, he could meet the bail as fixed by the District Court." Kearns J. stated that the approach taken in the High Court was a "flat contradiction of the presumption of innocence."

The efficacy of independent sureties was addressed by a judicial participant, noting there is a personal relationship of trust between the independent surety and the accused which adds an additional element of responsibility for the accused in adhering to the bail conditions. Furthermore, the fact that the independent surety is willing to surrender a significant sum of money should the accused breach their bail conditions speaks to this relationship of trust which is powerful in alleviating concerns of the Court regarding the risk of evasion of justice.

3.5.2. European Supervision Orders

The European Supervision Order (ESO) is a mutual recognition instrument introduced by the Council Framework Decision 2009/829/ JHA of 23 October 2009. It sets out the rules by which Member States must recognise each other's decisions on supervision measures as alternatives to pre trial detention.

Ireland transposed the European Supervision Order into Irish law through the Criminal Justice (Mutual Recognition of Decisions on Supervision Measures) Act 2020. The Act provides for an Irish resident who is charged with an offence while in another Member State to have their bail conditions monitored in the State in which the person is ordinarily resident. The Act sets out the process for a person who has already been granted bail in Ireland to make an application to Court for a supervision order. Given its relatively recent introduction, it is too early to suggest feedback on the operation of the Act, however none of the practitioners surveyed had experienced the granting of an ESO.

One Practitioner recounted a case where a national of another Member State was charged with an offence while visiting Ireland. The client was admitted to bail

[56] [2002] 4 IR 526.
[57] [2006] IESC 34.

and made an application for an ESO so that they could return to their country of residence. This application was refused as the Court found they were 'unlikely to return'. Another Practitioner noted that there is a low awareness of ESO in legal practice, and that legal culture takes time to shift. This is an important consideration when assessing the implementation of ESO or new developments in criminal justice, given a Judge is unable to engage with arguments which have not been presented to it.

3.5.3. **Common bail conditions with flight risk**

In *Li Jiuan Choong, and Ching Ann Low v. DPP*, Butler J. admitted the accused persons to bail with a parcel of conditions despite having found both to be at risk of flight.[58] These conditions included an order that the applicant

i	Not commit any offence and otherwise be of good behaviour;
ii	Reside at an address and report daily at a Garda Station local to that address between the hours of 9am and 9pm;
ii	Remain indoors and maintain a curfew between the hours of 10pm and 8am and be available if required to members of An Garda Síochána calling to said address between those hours;
iv	Notify in writing and seek approval in writing from the prosecuting Garda or in his absence the Member In Charge of the reporting Garda station of any subsequent change or variation in (a) address (b) the reporting condition or reporting Garda Station and (c) in the curfew condition and said change to be approved in writing and Surrender any travel documents and undertake not to apply for any new or duplicate passport or for any other travel documentation and;
v	Appear in Court at each and every remand until the charges shall be disposed of according to law.

The most common bail condition proposed to alleviate flight risk concerns is the surrender of passport. In *Lee v. District Court Judge Malone & Ors*, the accused was admitted to bail and directed to hand up his passport following an arrest arising from the refusal of the United States immigration authorities at Shannon Airport, Ireland, to allow the accused to travel.

One of the issues which arose in an appeal to the Supreme Court was whether the High Court was correct to admit the respondents to bail on their own bond in a nominal amount and without independent sureties when he knew they were a flight risk.

In one case, the accused was charged with offences under the Passports Act 2008. The possibility of surrendering the accused's passport to alleviate concerns of flight risk were outweighed by the circumstances that the accused had the means to get a false passport, he has family living in New Zealand and had 32 prior bench warrants for not showing up in Court or violating bail.

In *DPP v. Curtis and Anor*,[59] the accused was denied bail. In denying bail, the Court considered: the seriousness of the charges and sentence if convicted, strength of the evidence (the accused had been 'caught red handed'), and capacity to flee. On the capacity to flee, the Court noted that the accused had the connections and means to obtain genuine passports via fraudulent means.

Other conditions include 'signing on' at a Garda station a specified number of times per day or week.

[58] Appeal Nos: 72 and 74/2014, Unreported, 8th day of May, 2014.
[59] [2020] IECA 85.

4. Conclusions

Overall, the issues highlighted by practitioners relate to the lack of proper facilities available for proper consultation with their client, long delays in the criminal justice system which may have led to longer periods of pre-trial time. Practitioners were surprised to hear that there has been an increase in pre-trial detention and did not report a noticeable increase in denial of bail. The rapid rise in prisoners held on remand awaiting trial is symptomatic of the increasing delays in the criminal justice system, with the delays in securing trial dates having an impact on the duration of pre-trial detention.

Generally, there was consensus among participants that the operation of the rules surrounding bail applications in Ireland are well-founded in the right to liberty and due weight is afforded to the presumption of innocence. There is a legal presumption to be granted bail and each decision on bail is taken on its own facts, with submissions being made to the Court by the accused and prosecution. However, issues remain with the discretionary nature of the bail procedure, which allows for inherent bias of the decision-maker to affect the outcome.

It was reported that the presumption of innocence is taken seriously generally. While there are benefits to an adversarial system in the protection of fair trial rights, it was highlighted through the course of interviews that judicial discretion may lead to inconsistencies with the application of the rules on bail:

> ***"While applications for bail are generally considered fairly and in accordance with the law, it depends on what judge you get, in the district Court a year or 2 ago the practice was in front of a judge where it was more likely than not they were going to be denied bail, also Flight risk is used a lot for non-nationals even if they've been here a long time, when someone is working with gardai then it is said there's evidence against them, and when they aren't helpful that is used against them also – this isn't necessarily based in law but will be squeezed into evidence"***

This is exacerbated by a system where judicial training on bail rules and procedures is not provided to those judges who are assigned to oversee the bail list.

In December 2022, the EU Commission made an important recommendation that if a suspect is a foreign national with no links to a State, this on its own cannot be used as a reason to conclude that there is a flight risk.[60] From our research it would appear that the judiciary in Ireland rely heavily on this factor tipping the chances of bail more in favour of Irish nationals and against nationals of other states including EU Member States.

The conditions attached to bail is something which can have a major impact on the accused's life, and while they may be avoiding a period of detention, questions of proportionality are important. While there is a judicial principle that bail conditions must be proportionate and not amount to an effective denial of bail, in practice the range of conditions applied to bail varies greatly. This is not necessarily reflective of judicial decision-making alone, as each stakeholder has a role to play in ensuring the conditions proposed to the Court are proportionate.

[60] EU Commission, Recommendation on the procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, 8 December 2022, "The fact that the suspect is not a national of, or has no other links with, the state where the offence is assumed to have been committed is not in itself sufficient to conclude that there is a risk of flight. "

5. Recommendations

5.1. National Decisions-Makers (Legislators)

ICCL recommends:

1.	The Department of Justice should liaise with relevant bodies such as the Irish Prison Service and the Central Statistics Office to compile and distribute more comprehensive statistics regarding rates of remand.
2.	Measures should be taken to increase the number of judges to address the long periods of delay in the criminal justice system.
3.	The Bail Act 1997 should be independently reviewed to assess its compatibility with Ireland's international human rights obligations under the International Covenant on Civil and Political Rights (ICCPR).
4.	The Bail Act 1997 should be amended to allow for refusal of bail in a much narrower set of circumstances by *inter alia* reducing the number of "serious offences" listed in the Schedule which would limit the practice of preventive detention.
5.	Comprehensive statistics and data should be compiled relating to the granting of bail and the use of pre-trial detention including the reasons why bail is refused, and bail conditions given (not simply the statistics of those currently in pre-trial detention).
6.	The practice of preventive detention should be phased out and alternatives to pre-trial detention be examined.
7.	The State should work to ensure that criminal trials are expedited as quickly as possible where pre-trial detention is needed by increasing the number of criminal trial judges and Courtrooms.
8.	The State should legislate for the right to compensation where a person is subject to lengthy pre-trial detention only to be later acquitted or given a non-custodial penalty.

5.2. Judges

ICCL recommends:

9.	The Judicial Council should introduce training on the rules surrounding bail for members of the judiciary who are selected to sit on the bail list.
10.	The judiciary should stop the practice of refusing bail for non-serious offences, particularly where the time spent in pre-trial detention is likely to be longer than any potential sentence on conviction.

5.3. **Prosecutors**

ICCL recommends:

11.	Prosecutorial powers should be removed from Gardaí and there should be a reduced reliance on Garda Court Reporters. The recommendation of the Commission on the Future of Policing in Ireland on the cessation of the practice of Gardaí prosecuting cases in Court should be implemented as a matter of urgency.
12.	Training should be provided to Gardaí and prosecutors on European Supervision Orders and alternatives to pre-trial detention.
13.	Gardaí should request only those bail conditions they reasonably believe are absolutely necessary to meet any reasonable objection to bail.

5.4. **Practitioners**

ICCL recommends:

14.	Training should be provided to lawyers on alternatives to pre-trial detention, including European Supervision Orders.
15.	Defence lawyers should be vigilant in advising clients on appropriate conditions and in challenging any proposals for unnecessary, disproportionate or unduly onerous conditions, and suggest other more proportionate or suitable alternatives, particularly where the charge is at the lower end of the scale.

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Annex 1: Periods of detention

Allowable periods of police detention for the purposes of investigating offences	SECTION 4 CRIMINAL JUSTICE ACT 1984
Initial period	6 hours
First extension authorised by Superintendent	6 hours
Second extension authorised by Chief Superintendent	12 hours
First extension by District or Circuit Court	24 hours (by District Court on application of Superintendent)
Second extension by District or Circuit Court	
Total	**48 hours**

Allowable periods of police detention for the purposes of investigating offences	SECTION 42 CRIMINAL JUSTICE ACT 1999
Initial period	6 hours
First extension authorised by Superintendent	6 hours
Second extension authorised by Chief Superintendent	12 hours
First extension by District or Circuit Court	
Second extension by District or Circuit Court	
Total	**24 hours**

Allowable periods of police detention for the purposes of investigating offences	SECTION 30 OFFENCES AGAINST THE STATE ACT 1939
Initial period	24 hours
First extension authorised by Superintendent	24 hours (by Chief Superintendent or higher)
Second extension authorised by Chief Superintendent	
First extension by District or Circuit Court	
Second extension by District or Circuit Court	
Total	**48 hours**

Allowable periods of police detention for the purposes of investigating offences	SECTION 2 CRIMINAL JUSTICE (DRUG TRAFFICKING ACT 1996
Initial period	6 hours
First extension authorised by Superintendent	18 hours (by Chief Superintendent or higher)
Second extension authorised by Chief Superintendent	24 hours
First extension by District or Circuit Court	72 hours
Second extension by District or Circuit Court	48 hours
Total	**168 hours (7 days)**

Allowable periods of police detention for the purposes of investigating offences	SECTION 50 CRIMINAL JUSTICE ACT 2007
Initial period	6 hours
First extension authorised by Superintendent	18 hours
Second extension authorised by Chief Superintendent	24 hours
First extension by District or Circuit Court	72 hours
Second extension by District or Circuit Court	48 hours
Total	**168 hours (7 days)**

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