Neutral Citation: [2013] IEHC 534

THE HIGH COURT

[2011 No. 184 EXT.]

BETWEEN/

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

- AND -

FERENC HORVÁTH

Respondent

JUDGMENT of Mr Justice Edwards delivered on the 5th day of November 2013

Introduction

This case raises a number of complex and interesting questions concerning the Court's jurisdiction to execute a European arrest warrant that purports to seek the surrender of the respondent for the purposes of conducting a criminal prosecution in certain somewhat unusual circumstances. Those questions include:

> • How is this Court to treat the respondent who, having been tried *in absentia* under the law of the issuing state, is now the subject of what is described under the law of that state as a "*non-conclusive*" conviction and sentence by a court of first instance, which is not final, and which is the subject of a pending appeal (which it is contended will amount to a full re-hearing) to a court of second instance, which appeal was not initiated by the respondent but rather by his state appointed defence lawyer without any instructions from the respondent, and which appeal the respondent has no intention of prosecuting unless forced to return to the issuing state?
>
> • Can the respondent, whose surrender is sought so that the said appeal can proceed, be regarded as being wanted "*for the purposes of conducting a criminal prosecution*", when he is already the subject of conviction and sentence, albeit that the conviction and sentence is characterised under the law of the issuing state as "*non-conclusive*" ?

Background to the Present Proceedings

The background to the present proceedings is extraordinary and unprecedented in this Court's experience and to the best of its knowledge the warrant presently before the Court is the third in a series of European arrest warrants issued by the requesting state (Hungary) in respect of the same offences. For the avoidance of confusion it is proposed to refer to the present warrant as "EAW No. 3". The Court is no longer directly concerned with the earlier two warrants, which later in this judgment will be designated as "EAW No. 1" and "EAW No. 2" respectively. However, for a full understanding of the issues before the Court in the present case it is necessary to set out the full history of the case covering the circumstances in which all three warrants came to be issued, and concerning what happened in relation to EAWs Nos. 1 and 2, respectively.

Relevant Chronological History

On the 12th June, 2007 a European arrest warrant was issued by the requesting state seeking the rendition of the respondent for the purpose of prosecuting him in respect of a total of seventeen offences involving forgery and various forms of fraudulent and corrupt conduct. This warrant will now be designated, and hereinafter referred to, as "EAW No. 1". The ticked box procedure was purportedly invoked in respect of all seventeen offences and the boxes relating to "corruption", "swindling" and "forgery of administrative documents and trafficking therein" were indicated in part E I of the warrant. The judicial authority that issued EAW No. 1 was Dr. Balász Németh, a Judge of Veszprém County Court. This warrant relates, for the most part part, to the same offences as are the subject matter of the current warrant, "EAW No. 3".

EAW No. 1 was endorsed for execution by the High Court on the 5th September, 2007 and the respondent was arrested on foot of EAW No. 1 on the 24th September, 2007. He was brought before the High Court for the purposes of an arrest hearing in accordance with s. 13 of the European Arrest Warrant Act 2003, as amended, (hereinafter "the Act of 2003") and was remanded in custody with consent to bail. The Court has been informed that it was some weeks before he was in a position to take up his bail.

On the 3rd April, 2008, unbeknownst to the High Court, the Central Authority and the respondent, and notwithstanding the existence of ongoing surrender proceedings under the Act of 2003, the issuing state proceeded to try the respondent in his absence. He was convicted *in absentia* on all counts and a sentence of three and a half years' was imposed upon him. It seems that a state appointed lawyer had been appointed by the Court of Trial in the issuing state to represent the respondent's interests at his trial *in absentia*. It appears that following the respondent's said conviction and sentencing the said lawyer, state appointed, filed an appeal against both conviction and sentence. Once again, this was done unbeknownst to the respondent, and it was done on the state appointed lawyer's own initiative and without instructions from the respondent.

On the 22nd October, 2008 points of objection were filed on behalf of the respondent in respect of EAW No. 1. The issues raised related to whether or not paragraph 2 of article 2 of Council Framework Decision 02/584/J.H.A. of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, O.J. L190/1 18.7.2002 (hereinafter referred to as "the Framework Decision") could in fact be relied upon in the circumstances of the case, an alleged lack of correspondence in the event that paragraph 2 of article 2 of the Framework Decision could not be relied upon, and what the respondent contended was an alleged failure on the part of the State to properly implement the provisions of article 26 of the Framework Decision.

On the 10th November, 2008 the High Court (Peart J.) conducted a surrender hearing in respect of EAW No. 1, as required by s. 16 of the Act of 2003. Judgment was reserved.

On the 25th November, 2008 Peart J. delivered his judgment refusing surrender in respect of four of the seventeen offences to which the warrant related, and directing that the respondent be surrendered in relation to the remaining thirteen offences. A notice of appeal to the Supreme Court was immediately lodged on behalf of the respondent.

The outcome of the High Court case was communicated by the Irish Central Authority to the issuing judicial authority by a letter of the 26th November, 2008.

It appears that due to an administrative error the Order of the High Court as perfected failed to reflect that the Court had refused to surrender the respondent in relation to four offences. The error was adverted to and on the 19th December, 2008 an amended order was obtained from the High Court that correctly reflected Peart J.'s judgment and speaking order.

On the 12th January, 2009 a notice of cross appeal was filed on behalf of the applicant for the purpose of appealing against so much of Peart J.'s said judgment and Order as related to his refusal to surrender the respondent on four out of the seventeen offences to which the warrant in question related.

On the 28th January, 2009 an amended Notice of Appeal was filed on behalf of the respondent that addressed a typographical error contained in the original Notice of Appeal.

The next event to occur in this chronology was on the 27th May, 2010 when two further European arrest warrants were purportedly issued in relation to the respondent by the issuing state. This occurred unbeknownst to anybody in this jurisdiction including the respondent. The new warrants were not, however, issued by the same judicial authority as had issued EAW No. 1. They were issued by a different judicial authority, *i.e.*, Dr. Kovács Tamás, President of the Council at the High Court of Justice of Gyõr. Moreover, this Court has used the word "purportedly" in the first sentence of this paragraph deliberately and advisedly because circumstantial evidence to be recounted later in this chronology suggests that one is a corrected version of the other, and that although they bear the same date these two documents may not in fact have been actually prepared on the same day, and that it is likely that the date appended to the first in time was simply not changed in the correction process.

The first of the warrants dated the 27th May, 2010 (which will now be designated as "EAW No. 2") ostensibly sought the rendition of the respondent for the purpose of executing an enforceable judgment specified in paragraph (b)2 of that warrant as being the "*non-final decree of Veszprém Megyei Bíróság (The Court of Veszprém County), number 1.B.713/2005/46., dated 3 April 2008*". This was in fact the judgment convicting and sentencing the respondent in his absence. EAW No. 2 states at Part E thereof that it relates to fourteen offences. However, the accompanying description of the circumstances in which those fourteen offences are said to have occurred describes eighteen incidents in total comprising the seventeen incidents that were the basis of individual charges specified in EAW No. 1 and one additional incident.

The second warrant dated the 27th May, 2010 (which is EAW No. 3, with which the Court is presently concerned) seeks the rendition of the respondent for purpose of prosecuting him for the very same fourteen offences to which EAW No. 2 relates. The underlying domestic measure is specified in paragraph b(1) of EAW No. 3 as being an arrest warrant, or judicial decision having the same effect, of "*Veszprém Megyei Bíróság (Court of Veszprém County), dated 3 April 2008, number 1.B.713/2005/46*".

The appeal in respect of EAW No. 1 was heard by the Supreme Court on the 30th June, 2010. This occurred in circumstances where the issuing judicial authority in respect of EAW No. 1 had not thought to appraise anybody in Ireland of the fact that the respondent had been tried in his absence in the issuing state and had been convicted and sentenced to three and a half years in jail, and of the fact that an appeal had been lodged on the respondent's behalf to a court of second instance (the High Court of Justice in Gyõr). Nor had anybody in Ireland been appraised of the more recent and seemingly odd, some might even say schizophrenic, circumstance in which a different issuing judicial authority had ostensibly issued two further European arrest warrants simultaneously, one for the purpose of seeking the respondent's surrender for the execution of the sentence imposed upon him *in absentia*, the other one seeking his surrender for prosecution in respect of the same offences. There is, of course, nothing odd or schizophrenic about it if, as this Court now believes to have been the case, these warrants were not in fact issued simultaneously, the true position being that EAW No. 3 is a later and corrected version of EAW No. 2 and that there was simply a failure to change the date in the correction process.

The preponderance of the argument before the Supreme Court at the hearing of the appeal in relation to EAW No. 1 related to whether correspondence was required to be demonstrated in respect of some or all of the offences to which that warrant related, and as to whether it was possible to say which offences had been certified pursuant to article 2(2) of the Framework Decision. The appeal hearing was concluded within the day and judgment was reserved. The respondent has urged upon this Court that it was apparent during the course of the Supreme Court hearing that the applicant had, at no point, made any enquiry of the issuing state as to which offences were covered by the ticking of the relevant boxes in the article 2(2) list and which were not. In the circumstances the respondent was optimistic of receiving a judgment in his favour.

On the 30th July, 2010, and while the Supreme Court having reserved judgment was still deliberating on the appeal, the issuing state transmitted EAW No. 2 to the applicant. It was received in this state on the 2nd August, 2010. As a result the applicant became aware for the first time that the respondent had been tried *in absentia*, convicted and sentenced to three and a half years' imprisonment.

Understandably the applicant was concerned about this turn of events and on the 25th of August 2010 the Hungarian authorities were written to in the following terms (*inter alia*) in an effort to clarify the position:

> "I refer to the European Arrest Warrant (No.2) transmitted by your office in respect of Ferenc Horváth (issued 27 May 2010 by the High Court of Justice of Gyõr)
>
> You will be aware that Mr. Horváth's surrender was ordered on 26/11/2008 by the High Court on foot of a previous European Arrest Warrant, issued 12/06/2007 by Veszprém County Court (EAW No.. 1). Mr. Horváth appealed the decision to the Supreme Court and an appeal judgment is currently awaited.
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> On review of EAW (No.2) it appears that the warrant is based on a non final decree of 03/08/2008 and that the proceedings are currently before an Appellate Court. The warrant appears to relate to the same offences that are the basis for EAW (No. 1) and that the subject is no longer sought for prosecution, but has now been convicted *in absentia* for the said offences.
>
> The Supreme Court and Mr. Horváth will need to be informed of these developments. In order to determine how best to proceed, we will require clarification from your office on the following:

(1) Please clarify the status of both warrants. Are both warrants still in force or has EAW (No. 1) been cancelled as a matter of Hungarian Law by virtue of the issuing of a second warrant?

(2) Please note that the Central Authority cannot proceed with both warrants. In order to proceed, one of the following must occur:

(i) The first warrant (issued 12/06/2007) should be withdrawn, As the subject was tried in absentia, we will require an undertaking from the judicial authority regarding a right to a retrial in the event of Mr. Horváth's surrender. The guarantee is required in order to satisfy the provisions of section 45 of the EAW Act, 2003. A draft guarantee is attached overleaf for completion by the issuing judicial authority.

(ii) The convictions which are the subject matter of EAW (No.2) should be set aside and the warrant should be formally withdrawn. I must inform you that this course of action is not without risk. It is likely that further argument would be required as to the status of the first warrant in circumstances where the Respondent was convicted of the offences in Hungary, prior to the making of High Court surrender order on 26/11/2008. Even if the convictions were set aside, the surrender Order was made in November 2008, after the appellant was convicted but without the High Court or this office, being informed of the convictions and without the High Court determining whether or not surrender should have been refused having regard to section 45 of the EAW Act 2003. It would appear that the appellant would have a new ground of appeal, which is likely to succeed.

(iii) Both warrants should be withdrawn, the convictions should be set aside and a third warrant should be prepared which seeks the appellant for prosecution.

(3) If the issuing judicial authority decides to proceed on the basis of EAW (No.2) it should clarify what offences are the subject of the warrant and the sentence imposed in respect of each offence In particular, please clarify whether the offence at paragraph 5 should be regarded as two offences and if so, whether the reference to fourteen offences is an error?

As proceedings are currently before the Supreme Court, I would be obliged to receive a response to this request as a matter of extreme urgency.

Yours Sincerely"

The said issuing judicial authority replied by faxed letter dated the 26th, August 2012 stating (*inter alia*):

"1. EAW (No.1) was cancelled by the issuing authority (Veszprém County Court) on 13.08.2010. The reason of the cancellation was precisely that EAW (No.2) was issued by the High Court of Justice of Gyõr.

2. The Veszprém County Court tried the appellant in absentia, It passed a sentence, which was appealed. The proceedings therefore continued before the Appellate Court (High Court of Justice of Gyõr). As explained under point 1), the first EAW was withdrawn. The second EAW, issued by the Appellate Court seeks the appellant for criminal proceedings and not for the enforcement of a sentence. Therefore no guarantee for retrial will be given."

The said letter gave no indication as to whether or not EAW No. 2 would in fact be withdrawn, and in those circumstances the applicant decided not seek to have EAW No. 2 endorsed for execution by this Court pending clarification of the position.

The applicant wrote to the solicitor for the respondent on the same day (26th August, 2010) informing them of the situation and intimating an intention to apply to the Supreme Court on the 1st September, 2010 to strike out the proceedings in respect of the EAW No. 1.

On the 1st September, 2010 the proceedings in respect of EAW No. 1 were struck out by the Supreme Court and the respondent was discharged from his bail.

On the 28th October, 2010 in circumstances where it had heard nothing further concerning whether or not the Hungarian authorities wished to proceed to seek the respondent's rendition on foot of EAW No. 2, the applicant once again wrote to the Hungarian authorities in the following terms:

"I refer to the European Arrest Warrants transmitted by your office in respect of the above named individual.

With regard to EAW No.. 1 (issued 12/06/2007 - Your Ref: B.713/2005), I am to inform you that as the warrant was withdrawn by the Hungarian authorities, the appeal proceedings were struck out by the Supreme Court on 07/10/2010 and Mr. Horváth was discharged from proceedings.

Regarding EAW No..2 (issued 27/05/2010 - Your Ref: Bf.45/2008/16), we have been advised that additional information/further clarification will be required from your office on the following before proceeding to seek endorsement of the warrant by the High Court:

(i) Regarding section (d) of the warrant, please clarify/confirm that the requested person was permitted to attend the trial which led to the non-final decree of 3rd April 2008. It appears that the requested person was summoned in person or otherwise personally informed of the date and place of the trial which led to the non final decree of 3rd April 2008.

(ii) Please provide any material from which it can be established that the requested person was actually aware of the date and place of the trial which led to the non-final decree of 3rd April 2008.

(iii) If the requested person did not have actual knowledge of the date and place of the trial and/or was not permitted to attend the hearing, then an undertaking pursuant to Section 45 of the EAW Act, 2003 that the requested person will be re-tried and that he will be informed of the place, date and time of the re-trial and that he will be permitted to attend the fresh hearing will be required. I attach overleaf, a draft undertaking for completion by the judicial authority that issued the warrant.

(iv) Please provide a schedule of the offences indicating the Hungarian statutory provision that relates to each of the

offences that form the basis of the warrant.

(v) Please confirm that surrender is sought in respect of 14 offences and that there is an error in the numbering of the offences.

(vi) Please confirm that all offences listed in the warrant are covered by the offence of 'corruption' that has been ticked in the Framework list of offences in section e(I).

(vii) The warrant states that a sentence of three years and six months has been imposed.

Please clarify whether this sentence was imposed in respect of the all of the offences that are the subject of the warrant, as would appear to be the case.

Please note that we will require a detailed reply to each of the above questions before proceeding further.

I would be grateful to receive a response to this request at your earliest convenience.

Yours sincerely,"

This letter received no specific reply and, in consequence, EAW No. 2 was never at any time placed before this Court for endorsement. However, what happened next in terms of the chronology was that on the 16th December, 2010 yet another European arrest warrant (the warrant with which the Court is presently concerned, i.e. EAW No. 3) also dated the 27th May, 2010 was transmitted to the applicant by the Hungarian authorities. The letter accompanying it stated (*inter alia*):

"The Ministry of Public Administration and Justice of the Republic of Hungary as central authority presents its compliments, and has the honour to transmit the corrected *European Arrest Warrant* Nr. Bf.45/2008/16 issued by the Court of Appeal of Gyõr on 27 May 2010 accompanied with its English translation

The Ministry of Public Administration and Justice of the [*sic*] has the honour to inform you that the Court of Appeal of Gyõr (High Court of Justice of Gyõr) seeks Ferenc HORVÁTH (born on 11 December 1971 in Veszprém) for criminal proceedings and not for enforcement of a sentence. The Veszprém County Court as the court of first instance passed the sentence against the named person in absentia, which was appealed; therefore the sentence is not final. The named person - in the proceeding first instance - has been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia. Currently, the High Court of Justice of Gyõr conducts the criminal proceeding second instance; therefore, no guarantee shall be given for retrial."

In the unprecedented situation, certainly in the experience of this Court, created by the issuance of EAW No. 3 in the circumstances described above, the applicant understandably felt the need to seek legal advice before placing EAW No. 3 before this Court for endorsement. That was done, and advice was received, and then on the 10th May, 2011 the applicant wrote to the Hungarian authorities as follows:

"I refer to the 'corrected' European Arrest Warrant (Nr. Bf.45/2008/16) received by fax from your office on 16/12/2010 for the above named individual.

Following consultation with our legal advisors, we have been advised that further information will be required from your office before proceeding to seek endorsement of this warrant:

(i) Please confirm that the requested person was convicted at first instance and that a sentence of 3 years was imposed.

(ii) Please confirm that the requested person is now sought for the purposes of prosecution and not to serve that sentence imposed at first instance.

(iii) Please confirm that his surrender is sought for the purposes of an appeal hearing and that the appeal is a full hearing of the case.

I would be obliged to receive a response to this request as soon as possible."

The Hungarian Authorities responded by faxed letter on the following day (11th May, 2011) stating (*inter alia*):

"The Ministry of Public Administration and Justice of the Republic of Hungary as central authority presents its compliments, and – with reference to your transcript dated 10 May 2011 – has the honour to inform you on the followings:

The Veszprém County Court as court of first instance imposed a prison sentence of 3 years 6 months on ***Ferenc HORVÁTH*** (born on 11 December 1971) Hungarian national. The sentence No. 1.B.713/2005/46 was appealed, therefore it is not final. The case is being continued before the High Court of Justice of Gyõr under the file number Bf.45/2008.

According to the above mentioned facts and to your request the Ministry of Public Administration and Justice hereby confirms that

- the named person was convicted at first instance and that a sentence of 3 years and 6 months was imposed on him;

- the named person is now sought for the purposes of prosecution and not to serve the above sentence imposed on him at first instance;

- the named person is now sought for the purposes of an appeal hearing and this appeal is a full hearing of the case."

At that point the applicant considered that there was sufficient clarity as to the position to enable EAW No. 3 to be placed before this Court for endorsement. That occurred on the 18th May, 2010 and on that date EAW No. 3 was duly endorsed by Peart J. for

execution in this jurisdiction, thereby commencing these proceedings.

The respondent was arrested by Det. Garda Vincent Healy on the 20th October, 2011 in execution of EAW No. 3. He was brought before the High Court in the normal way. There was then the usual arrest hearing in the course of which a notional date was fixed for the purposes of s. 16 of the Act of 2003. The respondent was admitted to bail, and the matter was then adjourned for mention to the date that had been fixed. Thereafter the matter was further adjourned from time to time as is usual to allow points of objection and affidavits to be filed by the respondent, to allow time for the applicant to respond to the issues raised and seek further information from the Hungarian authorities in the light of the case being made by the respondent, and then to allow the respondent yet more time to address issues arising out of the additional information received from Hungary.

In due course the Court was informed that the matter was ready for a s. 16 hearing and a date was fixed for that purpose. The case was heard spread over several dates commencing on the 26th July, 2012. There were further hearings on the 11th February, 2013, and the 12th February, 2013 following which judgment was reserved, subject to a possibility alluded to by the Court that it might in the course of its deliberations form the opinion that the documentation and information provided to it was not sufficient to enable it to perform its functions under the Act of 2003, in which case it would invoke s. 20 of the Act of 2003 and seek additional information or clarifications from the Hungarian authorities. Thereafter the matter was listed for mention from time to time, and on various dates the Court did in fact request the applicant to seek yet further information from the issuing judicial authority. The final piece of information requested by the Court was received on the 8th August following which this Court was in position to determine the issues in this case and write this judgment.

The Points of Objection
The points of objection filed on behalf of the respondent were pleaded in the following terms (excluding points not ultimately relied upon; and also excluding a chronology contained therein, a more expanded version of which has already been set out above):

> "1. The respondent pleads that the present proceedings amount to an abuse of process having regard to manner in which previous proceedings seeking to litigate the same matters set out in the European arrest warrant herein were disposed of…. It is pleaded that the case now being made by the applicant is substantially the same case made before the High Court and Supreme Court in respect of EAW 1. All of the material upon which the applicant relies for the purpose of seeking the surrender of the respondent was easily ascertainable at the time when the proceedings in respect of EAW 1 were determined. The applicant took no steps to ensure such material or information was available at the time of those proceedings. The applicant now seeks to re-litigate the very same issues. It is pleaded that this amounts to an abuse of process and contravenes the rule in *Henderson v. Henderson*.
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> 2. The failure of the authorities in the issuing state to convey or communicate to the applicant and the executing judicial authority the fact of the conviction of the respondent as of 3rd April, 2008 amounts to an abuse of the process of the High Court. It is pleaded that the earlier proceedings were brought for the benefit and at the request of the issuing judicial authority. It was incumbent on the issuing judicial authority to notify the applicant or the executing judicial authority that the basis upon which the surrender of the respondent was sought no longer existed.
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> 3. The decision of the authorities in the issuing state to proceed to convict and sentence the respondent in his absence amounted to a flagrant denial of his right to due process and a fair trial. At the time of the said conviction and sentence the whereabouts of the respondent were well known to the applicant as he was the subject of strict bail conditions. As such same were within the knowledge and procurement of the issuing state. Notwithstanding same the issuing state chose not to notify the respondent of its intention to proceed against him in his absence. It is pleaded that same amounted to a gross and wilful violation of his rights pursuant to Article 6 of the European Convention on Human Rights. In the premises the basis upon which the surrender of the respondent is now sought is an order of conviction and sentence procured on foot of a prima facie breach of the respondent's rights pursuant to the Convention. It follows that his surrender on foot of same would amount to a breach of the same rights.
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> 4. The surrender of the respondent is prohibited by reason of section 45 of the European Arrest Warrant Act 2003 as amended by reason of the following:
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> The respondent was convicted and sentenced of the offences set out in EAW3 in his absence. Said procedure took place without prior notification to him. At that time, he was resident in this jurisdiction, abiding by strict bail terms and residing at an address well known to the authorities. He was contesting an application for his surrender for the purposes of prosecution for identical offences. It is set out in the additional information accompanying EAW3 that no guarantee of a retrial shall be given, rather the respondent's surrender is sought for the purposes of an appeal hearing.
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> 5. By reason of the actions of the requesting State the respondent if surrendered faces an appeal hearing and not a hearing of first instance. The respondent has in effect been denied a right of appeal that he would otherwise have been entitled to [sic]. In the premises the surrender of the respondent if ordered is prohibited by reason of section 37 of the European Arrest Warrant 2003 as amended and in particular his right to a fair trial as guaranteed by article 6 and his right to appeal as guaranteed by Article 2, protocol number 7 of the European Convention on Human Rights.
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> 6. [Not being pursued]
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> 7. [Not being pursued]
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> 8. [Not being pursued]
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> 9. In all of the circumstances of the case the institution of the present proceedings is oppressive of the respondent and would be in breach of part 3 of the European Arrest Warrant Act 2003 as amended.
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> 10. [Not being pursued]"

Evidence adduced on Behalf of the Respondent
The Court has received and has taken full account of an affidavit sworn in these proceedings by the respondent on the 14th February, 2012. In large measure this affidavit recounts events forming part of the chronology already recited and to that extent it is unnecessary to rehearse its contents. However, in addition, the respondent speaks of his personal situation and his reaction to some

of the events that have taken place and it is appropriate to quote what he says in that regard:

> "26. Therefore, it appears to me that as matters stand I have been deprived of my right to be present at my first instance hearing which is a direct result of a decision taken by the Hungarian authorities at a time when my location was easily ascertainable by the authorities as I was on bail in this jurisdiction at the time contesting my surrender for the purposes of prosecution.
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> 27. It also seems to me that if my surrender to Hungary is ordered on foot of these proceedings, I would be prosecuted for an offence other than the offences set out in EAW3, namely offence number 10 in EAW1.1 believe same to be the case as I was convicted of said offence in my absence and my surrender is now sought for an appeal hearing,
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> 28. I have been living in Ireland since the 3rd of August 2006. When I first arrived here I worked as a painter and builder up until February 2009. At that time I commenced work as a dog groomer and now co-own "Doggie Style" along with my wife. We have 3 employees and plan to employ a 4th person.
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> 29. I participate in the business on a daily basis; I train the dog groomers, I work as a dog groomer myself, I also repair and set up the various equipment and transport. Furthermore I attend to the banking and post office duties as my wife does not drive.
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> 30. I met my present wife in Ireland in August 2007 and got married on the 21st of January 2010. While we do not have any children together we have other responsibilities to our employees. We also have two outstanding bank loans: a car which is due for redemption in May 2013 and a business loan which is due for redemption in November 2015.
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> 31. I felt a huge relief when the previous European arrest warrant proceedings were finally struck out by the Supreme Court. For the first time in a long time I felt like a free man, my movements were no longer restricted and furthermore I was able to plan my life ahead."

It appears to the Court that the references in paragraph 27 of his affidavit to EAW3, and EAW1, respectively, should probably be transposed and read the other way around. However, the point that he is making is quite clear.

The Court has also been provided with an affidavit from a Hungarian lawyer, a Mr Gábor Magyar sworn on the 12th July, 2013. He states the following:

> "2. I have been asked to examine the court papers relating to the prosecution of the respondent in the requesting state. As appears from the European arrest warrant dated 27th May, 2010 the respondent was convicted on 3rd April, 2008 by the Court of Veszprém County and sentenced to imprisonment for a period of 3 years and 6 months. I understand that as of that date the respondent was in Ireland and was the subject of proceedings in respect of the European arrest warrant dated 12th June, 2007. As such the respondent was convicted in his absence.
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> 3. It appears from the file that on 27th May, 2010 the Appeal Court issued the second European arrest warrant which bears that date. The Veszprém County Court withdrew the first European arrest warrant on 13th August, 2010. i.e. after the second warrant dated 27th May, 2010 had been issued. On 16th December, 2010 or perhaps a few days shortly before that date the Appeal Court issued the third European arrest warrant which is also dated 27th May, 2010. It would seem that the third European arrest warrant is a corrected or rectified version of the second European arrest warrant. The principle difference as between the second and third warrants is that the second warrant refers to an enforceable judgement in the form of a non-final decree of a sentence of 3 years and 6 months whilst the third purports to be for the purposes of prosecution.
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> 4. I have been asked to express a view as to whether there are any procedural differences between hearing a case at first instance as opposed to second instance. The second-instance court may review the facts established by the first-instance court. It may correct and complete them. It may even hear new evidence, if necessary. If the facts established by the first-instance court are "irreparable", the second-instance court quashes the first-instance judgment and sends back the file to the first-instance court.
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> 5. After the second-instance judgement a petition for review will be available on points of law only. If surrendered, the respondent will be tried at second instance. Therefore the only appeal that he will have available to him at the conclusion of his trial will be a review on points of law.
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> 6. I have also been asked to express a view as to whether it was correct to proceed to conviction against the respondent in circumstances where his whereabouts was known to the Hungarian authorities: The defendant's absence in criminal proceedings, when his whereabouts are unknown is not an obstacle to conducting criminal proceedings under the law of Hungary. That rule is obviously not applicable if the defendant's whereabouts are known to the judge conducting the trial. If it transpires that the defendant stays abroad, the judge has to separate the defendant's case from other co-defendants (if necessary), issue an arrest warrant (if he hasn't done so) and stay the proceedings. The proceedings should not be continued before a refusal by the requested state to execute the arrest warrant."

The Court has also been provided with an affidavit of the respondent's solicitor, Catherine Almond, exhibiting the submissions relied upon by Mr. Horváth in his Supreme Court appeal in respect of EAW No. 1, and also concerning efforts made by her to ascertain what requests for additional information had been made by the applicant to the Hungarian authorities, and what information had been received. The Court has taken this fully into account.

In addition the Court has a further affidavit from the respondent, and also a further affidavit from Ms. Almond, both sworn on the 23rd October, 2012 for the purpose of replying to additional information furnished by the Hungarian authorities on the 19th September, 2012. The Court will review these affidavits later in this judgment after it has referred to the said additional information.

Finally, the Court has also been provided with yet another short affidavit of the respondent personally, sworn on the 29th January, 2013 for the purposes of updating the Court concerning his personal circumstances. He informs the Court in this affidavit that his wife was at that stage pregnant with their first child and in the second trimester of pregnancy. Moreover, a son of his from a previous relationship, then 19 years of age, had recently moved to Ireland from Hungary and was living with, and being supported by, the respondent and his wife.

Additional Information
On the 6th September, 2012 the applicant communicated this Court's first request for certain additional information to the Hungarian authorities. It did so in the following terms:

> "I refer to the European Arrest Warrant issued by the High Court of Justice of Gyõr on the 27 May 2010 which stands adjourned before the Irish High court as the issue of whether the respondent is sought for the purpose of prosecution of the offences in the warrant remains to be determined by the Court. The issue arises in circumstances where a decision, described as an non final decree, was made by the Court of Veszprém County in the absence of the respondent on the 3 April 2008, to convict and sentence him in respect of the offences and the case is now before the High Court of Justice of Gyõr on appeal. The Court has concerns regarding its jurisdiction to order surrender unless this issue is resolved[.]
>
> The Irish High Court must be satisfied that Mr Horváth has not been convicted for the offences in the warrant by the County Court of Veszprém. The High Court must also be satisfied that there is no appeal against conviction for the offence pending in any Court.
>
> Under Irish law a person can only appeal if they have been convicted of an offence. It is not possible to say that a prosecution is in progress if an appeal is pending. It is not clear from the information before the Irish Court why the matter is before the appeal court if the respondent has yet to be prosecuted for the offences.
>
> The Central Authority has been advised that the following questions should be answered to assist the court in determining the issue. It would be very helpful if you could answer each of the questions set out below.
>
> 1. Is there a conviction against the respondent in respect of the offences set out in the European arrest warrant dated 27th May 2010, as a consequence of the order made on the 3 April 2008?
>
> 2. If not what order was made on the 3 April 2008 by the County court of Veszprém. Please send a copy of the order with a translation.
>
> 3. Is that order under appeal?
>
> 4. If so, what is the issue to be decided by the court in the appeal?
>
> 5. Please send copies of the Documents of appeal lodged with the High Court of Justice of [Gyõr] with a translation.
>
> 6. Was he notified personally of the date of the trial? If so, please provide information as to how he was notified personally.
>
> 7. If he was not notified personally of the date of trial, was any attempt made to notify him? If so please describe what effort was made to notify him.
>
> 8. Was Mr. Horváth legally represented at his trial?
>
> 9. If so, was the legal representative appointed by Mr. Horváth or by the Court?
>
> 10. Was the conviction appealed automatically as a matter or law, or was it appealed by one of the parties to the proceedings?
>
> 11. If appealed by one of the parties, please identify who appealed the order.
>
> 12. Please specify the legal provision under which it was appealed.
>
> The Irish Court is also concerned that Mr. Horváth was convicted while the first European arrest warrant which sought him for prosecution was proceeding through the Irish Courts. The Hungarian authorities were informed at all stages of the hearings in Ireland and enquired frequently as to the status of the case.
>
> 13. Please explain why the Hungarian authorities did not inform the Irish authorities before August 2010 that a trial was proceeding in this case, or that he had been tried and convicted *in absentia* in 2008 and an appeal had been lodged against the conviction, given your knowledge of the status of proceedings in Ireland.
>
> We are aware that the legal systems in the member states vary and it would be very helpful to us if you could set out clearly the processes involved in a prosecution in Hungary from first instance to final determination, with a description of all the phases in the case and the status of the case at each stage. A description of the relevant legal provision for each stage would also be helpful or alternatively translated copies of the relevant provisions.
>
> I would be obliged to receive a response to this request by 25/09/2012 at the very latest."

The Hungarian authorities responded by faxed letter dated the 19th September, 2012, in the following terms:

> "The Ministry of Public Administration and Justice of Hungary acting as central authority presents its compliments and - with reference to your fax letter dated 6 September 2012- has the honour to inform you on the following:
>
> 1. Ferenc Horváth was condemned by the County Court of Veszprém for 3 years and 6 months of imprisonment. The judgment is not final yet since the counsel lodged an appeal against it. Therefore the case is on-going at the Appeal Court of Gyõr since 17 June 2008.
>
> 2. The judgment is under appeal.
>
> 3. The counsel lodged an appeal against the judgment in order to the defendant be acquitted.
>
> 4. The copy of the appeal lodged by dr. József Szõllõsi is annexed.
>
> 5. Ferenc Horváth was notified of the date and place of the hearings via public notice.

6. Ferenc Horváth was represented at the trials by designated counsel in the procedure of first instance (at the County Court of Veszprém). On 22 May 2012 Ferenc Horváth gave an authorization to Magyar Gyõrgy & Associates Law Firm. The authorization was lodged to the County Court of Veszprém on 7 June 2012. The authorization is annexed to our letter.

7. The conviction was appealed by dr. József Szõllõsi, the delegated counsel of Ferenc Horváth.

Please be informed that the judgment of the County Court of Veszprém and the relevant provisions of the Hungarian Act on the Criminal Proceedings are sent by post."

Despite the representation contained in the penultimate paragraph of that letter a further week went by during which nothing was received by the applicant in the post. In the circumstances the applicant wrote again to the Hungarian authorities on the 27th September, 2012 in the following terms:

"I refer to our request for clarification dated 6th September 2012 (copy attached) and your subsequent reply dated 19th September 2012.

Please provide clarification on the following:

(i) Please clarify the nature of the appeal currently before the High Court of Justice of Gyõr.

- Does the appeal involve the evidence against the respondent being presented again to the court by the prosecutor in the presence of the respondent rather than a simple review of the evidence presented in the County Court of Veszprém?

- Will the respondent be permitted to challenge the evidence against him?

- Will the respondent, should he choose to, be able to adduce evidence in his defence for consideration by the court?

(ii) Please provide a certified translation of the attached document. This document appears to be a copy of the appeal lodged by dr. József Szõllõsi and is referred to at point 4 of your reply dated 19th September 2012.

(iii) We note the Judgment of the County Court of Veszprém and the relevant provisions of the Hungariann *[sic]* Act on the Criminal Proceedings have been forwarded to this office by post. To date, we have not received these documents. If possible, please forward same as an attachment to the email address referred to below.

In addition to the above, we note your reply dated 19th September 2012 does not included [sic] a response to points 2, 4, 5 and 13 of the attached request. It is still open to the Hungarian authorities to respond to these queries. We strongly recommend the requested information be furnished in advance of the next court date, the 2nd October 2012."

Shortly thereafter, hard copy documents consisting of a 52 page reasoned judgment of the County Court of Veszprém of the 3rd April, 2008 in Hungarian, together with a translation, as well as the relevant legislative provisions governing Hungarian criminal procedure, were received by post and were placed before this Court by the applicant. The latter document, which is in English, expresses itself as being officially certified by the Ministry of Public Administration and Justice of Hungary "for use abroad", and consists of the entirety of Chapter XIII, Titles I to V inclusive, and also Chapter XIV, Titles I to IV inclusive, of Act XIX of 1998 on the Criminal Proceedings of Hungary.

Moreover, a further faxed letter was received from the Hungarian authorities on the 1st October, 2012 stating:

"The Ministry of Public Administration and Justice of Hungary acting as central authority presents its compliments and - with reference to your fax letter dated 27 September 2012- has the honour to inform you on the following:

1. Please be advised that according to the Council Framework Decision of 13 June 2002, only the European arrest warrant should be sent with translation. The copy of the appeal and judgment of the County Court of Veszprém were sent as supplementary information. The supplementary information should not be sent furnished with translation obligatory.

2. The defendant was condemned for 3 years and 6 months of imprisonment by the County Court of Veszprém.

3. The Court of Appeal of Gyõr informed our Ministry on 29 November 2010 that Ferenc Horváth was sentenced by the County Court of Veszprén. On 25 November 2010 the Appeal Court of Gyõr informed us that the County Court of Veszprém held several hearings in the ease, which were many times default by Ferenc Horváth. He did not excuse his absence of the hearings despite of the fact that he were notified by the court of the consequences of the default of the regular summon. Ferenc Horváth was not to be found, his residence was also not found and the national arrest warrant issued on 8 February 2007 did not lead to result. The EAW was issued on 12 June 2007 and the prosecutor made a motion in order to conduct the procedure in the absence of the defendant.

4. Please be advised that the Appeal Court of Gyõr conducts the procedure of second instance which means that it is a full revision of the procedure of first instance. It involves the revision of the circumstances of the case, the revision of the evidences and the legal classification of the crime and the sentence as well. According to our information Ferenc Horváth is represented at the trial by Magyar Gyõrgy & Associates Law Firm. Ferenc Horváth is permitted to challenge the evidence against him."

As regards the documents that had eventually arrived by post, the documents in question are lengthy it is not proposed to recite them either in whole or in part. It is sufficient to state that this court has considered them in depth and at length and has had full regard to their contents.

Further Evidence of the Respondent in Reply to Additional Information
As indicated earlier in this judgment, both the respondent and his solicitor have filed further affidavits seeking to respond to certain assertions of the Hungarian authorities within the additional information just reviewed.

The respondent has personally deposed to the following matters:

"2. I make this affidavit for the purpose of replying to the letter dated the 19th of September 2012 from the Ministry of Public Administration and Justice of Hungary to the Department of Justice and Equality (hereinafter referred to as the

letter).

3. I note at point 5 of said letter, it is said that 'Ferenc Horváth was notified of the date and place of the hearings via public notice'. I say that I never at any time received any notification nor was made aware of any 'public notice' concerning any criminal proceedings against me. In this regard I note that it is not specified in point 5 of the letter exactly what hearings are referred to nor are any details given of the 'public notice'.

4. I note at point 6 of said letter, it is said that 'Ferenc Horváth was represented at the trials by designated counsel in the procedure of first instance (at the County Court of Veszprém.)' I say that I never at any time appointed or instructed any counsel to represent me in the procedure of first instance at the County Court of Veszprém nor did I at any time issue any instruction to any counsel in connection with said proceedings, nor did I ever meet with any counsel in connection with said proceedings.

5. I note that at point 6 of said letter it is set out that 'on the 22nd of May 2012 Ferenc Horváth gave an authorisation to Magyar Gyõrgy & Associates law firm.' I say, I completed said authorisation solely for the purpose of the European Arrest Warrant proceedings which are currently pending before the High Court in Ireland. In this regard I refer to the affidavit of Catherine Almond sworn herein.

6. I note that at point 7 of said letter it is set out that 'the conviction was appealed by dr. József Szõllõsi,the delegated counsel of Ferenc Horváth'. I say that I never at any time instructed or retained dr. József Szõllõsi in connection with any criminal proceedings nor did I at any time instruct him to appeal any proceedings. I was entirely unaware of the criminal trial and the appeal."

The respondent's solicitor, Ms. Almond, has further deposed that:

"2. I make this affidavit for the purpose of replying to the letter dated the 19lh of September 2012 from the Ministry of Public Administration and Justice of Hungary to the Department of Justice and Equality (hereinafter referred to as the letter).

3. At point 6 of said letter it is sets out that 'on the 22nd of May 2012 Ferenc Horváth gave an authorisation to Magyar Gyõrgy & Associates Law Firm.' I say that I contacted the said Magyar Gyõrgy & Associates for the purposes of the European Arrest Warrant proceedings which seek the surrender of Ferenc Horváth to Hungary, which proceedings are currently pending before the High Court in Ireland. Magyar Gyõrgy & Associates were engaged solely for the purposes of the European Arrest Warrant proceedings. I requested the respondent to complete the power of attorney dated the 22nd of May 2012 in order that Messrs Magyar Gyõrgy & Associates could access the court papers relating to the prosecution of the respondent in Hungary and so be in a position to comment on same."

Yet further Information sought at the Request of the Court

There were two further requests for additional information sent to the Hungarian authorities at the behest of this Court. The first was by letter from the applicant dated the 31st May, 2013 arising out of a detailed consideration by this Court of Chapters XIII and IV of Act XIX of 1998 on the Criminal Proceedings of Hungary. The request forwarded was in the following terms:

"The judicial authority in the State considering this application for the surrender of Mr. Ferenc Horváth is finalising Judgment in the matter but has raised an issue for clarification through the Central Authority of Ireland by way of a request for further additional information from the Hungarian Central Authority. The Court has raised the issue of the implications of Section 347(2) of the Hungarian Penal Code. This is contained in Chapter XIV, headed "Procedure of the Court of Appeal" (Act XIX of 1998). This was earlier provided for the information of the Court and in translation is as follows:

'347

(1) The non conclusive ruling of the Court of First Instance may be appealed unless prohibited by his Act. The arrangement of the appeal against the ruling shall be governed by the rules of appeal against a Judgment. If evidence is taken the Court of Appeal shall adjudicate the appeal against the ruling at a trial, otherwise at a panel session.

(2) The ruling may be enforced regardless of an appeal unless this Act stipulates that the appeal has a delaying effect. In exceptional cases both the Court of First Instance and the Court of Appeal may suspend the enforcement of the ruling.'

The Court is anxious to know what is the effect of this as far as the appeal of Mr. Horváth is concerned. In short:

1. Has the enforcement of the sentence imposed by the Court of First Instance been suspended either by the Court of First Instance or the Court of Appeal pending the conclusion of the appeal?

2. Does the Act stipulate that the appeal has a delaying affect on such sentence?

3. Is that ruling (i.e. in relation to sentence at first instance) capable of being enforced regardless of the appeal to the extent that if the Respondent is surrendered, will he commence serving such sentence pending the determination of the appeal in the matter?"

A reply was received from the Hungarian authorities by faxed latter dated the 4th June, 2013 stating:

"The Ministry of Public Administration and Justice of Hungary acting as central authority presents its compliments and - with reference to your fax letter dated 31 May 2013 - has the honour to inform you as follows:

Section 347 of the Hungarian Act on Criminal Proceedings concerns to rules of appeal regarding injunction.

As a rule, the injunction may be executed regardless of an appeal. In exceptional cases both the Court of First Instance and the Court of Appeal may suspend the execution of the injunction. The appeal has a delaying effect only in exceptional cases but not in general.

Nevertheless the County Court of Veszprém has passed a judgment against Ferenc Horváth and not an injunction (The

> Court always passes a judgment when it decides that the defendant is guilty or it dismisses him/her.) Therefore the sentence of the Court of First Instance may not be executed if an appeal is lodged against it.
>
> If Ferenc Horváth would be surrendered to Hungary he will not have to start to serve a sentence at once, since his case is on-going at the Court of Appeal of Gyõr. His surrender is requested for conducting a criminal procedure. He was sentenced by the County Court of Veszprém for 3 years and 6 months of imprisonment, which sentence is not final and not executable right now
>
> The punishment of the Court of First Instance may be reduced, upheld, repealed or released by the Court of Appeal."

The final request for additional information, again communicated by the applicant to the Hungarian authorities at the behest of this Court, was by letter dated the 7th August, 2013, and was in the following terms:

> "The proceedings in this case will next be mentioned in the High Court on 12th September 2013. In advance of this date, the presiding Judge (Edwards J.) has directed this office to seek clarification from the issuing judicial authority on the following points:
>
> 1. What is Mr. Horváth's respondent's status under Hungarian law at this time i.e. after conviction at first instance, but pending appeal? In particular, does he continue to enjoy the presumption of innocence at this time?
>
> 2. If the answer to question 1 is No, is Mr Horváth to be regarded under Hungarian law as being a convicted person pending the determination of his appeal?
>
> 3. If the answer to question 2 is Yes, is it correct to characterise the respondent as a convicted person at this time to whom the presumption of innocence will be restored only if he is successful in the appeal?"

The Hungarian authorities have duly replied by fax letter dated the 8th August, 2013, stating:

> "The Ministry of Public Administration and Justice of Hungary acting as central authority presents its compliments and - with reference to your fax letter dated 7 August 2013 - has the honour to inform you that the status of Ferenc Horváth is defendant at the second instance as well. He continues to enjoy the presumption of innocence at the second stage of trial."

Submissions and Authorities cited

Both sides furnished the Court with helpful written legal submissions which were later supplemented and amplified by oral submissions. The Court was also referred to a number of authorities including *Minister for Justice, Equality and Law Reform v. Koncis* [2011] IESC 37, (Unreported, Supreme Court, 29th July, 2011); *Minister for Justice, Equality and Law Reform v. Majer* (Unreported, *ex tempore*, Peart J., High Court, 30th July 2010); *Minister for Justice and Equality v. Gherine* [2012] IEHC 535, (Unreported, High Court, Edwards J., 30th November, 2012); *Minister for Justice and Law Reform v. Tobin (No. 2)* [2012] IESC 37, (Unreported, Supreme Court, 19th June, 2012); *Bolger v. O'Toole* (Unreported, *ex tempore*, Supreme Court, 2nd December, 2002); and *Krombach v. France*, E.C.H.R., 2001-II.

The Abuse of Process Issue

Counsel for the respondent contended that it is clear from the chronology of events that at all times throughout the previous proceedings the Hungarian authorities were kept fully appraised of the progress of the proceedings. He submitted that it is also clear in retrospect that these proceedings were misconceived and based on the assumption that the respondent would be prosecuted on his return to Hungary.

It was submitted that what is striking is that no explanation of any sort has been forthcoming from the Hungarian authorities as to how and why the first set of proceedings were maintained over such a period of time. More striking still is the apparent failure on the part of the applicant to seek or canvass any explanation for same. In the circumstances the court is left with no explanation as to how lengthy and expensive proceedings were brought and maintained on an incorrect basis that was explicitly known to the issuing state throughout.

It was further contended that the only proper inference to draw from these facts, where there has been a clear and studied silence from the Hungarian authorities, is that they have acted in bad faith. It was suggested that any court would have little hesitation in characterising a party on whose behalf litigation was being conducted who remained silent and allowed the litigation to continue on a false premise in such terms. Counsel for the respondent submitted that, the principle of mutual trust notwithstanding, there is no reason for the Court to take any other view in the present case. It was contended that as such, the situation that presents itself in the present case is considerably more problematic from the applicant's perspective than even the situation that presented itself in *Minister for Justice and Law Reform v. Tobin (No. 2)* [2012] IESC 37, (Unreported, Supreme Court, 19th June, 2012).

Counsel for the respondent forthrightly acknowledged that the decision of the Supreme Court in *Tobin (No. 2)* represents a problematic precedent as the majority did not agree on the basis upon which the appeal was to be allowed. It was submitted that close analysis of the judgments reveals that there is no clear majority for any of the propositions advanced in that case. Nevertheless, it was urged, the various individual judgments contain some important statements of principle.

The principle dissenting judgment on this issue was given by Denham C.J., with whom Murray J. agreed. Both noted that the issue was not one of *res judicata* but rather abuse of process. Denham C.J. acknowledged that abuse of process could be advanced as a ground for resisting surrender, albeit that it would require some additional factor. She stated at paras. 45 and 46:

> "Thus, on the claim that this subsequent warrant is an abuse of process, I am satisfied that a second or subsequent warrant seeking the surrender of a person is not of itself an abuse of process. To establish abuse of process there would have to be additional factors.
>
> As pointed out in *Bolger v. O'Toole and Ors.* (Unreported, *ex tempore*, Supreme Court, 2nd December, 2002), if there was an abuse of process, a subsequent application may fail. Thus, even though there has been no *mala fides* by any person or institution, and the fact that a subsequent warrant is not *per se* invalid, it is necessary to consider whether there are factors, or whether the cumulative effect of all the circumstances are such that the appellant has suffered, an abuse of process."

Denham C.J. went on to conclude that there were no such additional factors that would give rise to a plea of abuse of process. It was submitted by counsel for the respondent that, in the present case, even applying this yardstick it is clear that there are very significant additional factors apart from the repetitious and unnecessary nature of the present litigation that give rise to the plea of abuse of process. Firstly, it was submitted that in the absence of an explanation as to the extraordinary course of the earlier proceedings the attitude of the Hungarian authorities was tantamount to acting *mala fides*. It was urged that the presence of bad faith *simpliciter* must be regarded as amounting to such an additional factor. Secondly, it was submitted that the manner in which the Hungarian authorities have proceeded has, *de facto*, deprived the respondent of one of his rights of appeal as he will be returned for the purpose of a second instance hearing. It was suggested that whilst this is a matter which forms a free standing basis for objection itself, it is also relevant as an additional matter to be taken account of for the purpose of the test as formulated by Denham C.J.

It was submitted that O'Donnell J. also approached this issue on the basis that abuse of process could, in principle, arise in extradition proceedings. However, he also concluded that the argument did not avail the appellant. It was contended that his reasoning in this regard repays close scrutiny as it is manifestly distinguishable from the facts of the present case. At para. 36 he pointed out a flaw in the argument advanced by the appellant:

> "*Re Vantive Holdings* [2009] IESC 69, [2010] 1 I.R. 118 is a decision which follows in a line of authority through *A A. v. The Medical Council* [2002] 3 I.R. 1, to the well known case of *Henderson v. Henderson*. It is implicit in this line of authority that a litigant may be precluded from pursuing a relief to which he or she might otherwise be entitled, because, to put it perhaps at its broadest, of some culpable failure on their part, most normally, to include that point in earlier litigation brought by them arising out of the same matter. It is self-evident however that the particular point sought to be addressed in this case could not have been addressed in *Tobin (No. 1)* simply because the Act of 2009 had not been enacted."

In counsel for the respondent's submission this is clearly fundamentally different to the present proceedings as the case that is now being made is one which not only could have been made in the first set of proceedings, but, it appears with hindsight, should have been made at that time.

Later, at para. 47 of his judgment , O'Donnell J. considered that there was no abuse of process on the part of the Minister where he had little choice but to bring the proceedings as he was obliged to do so under the Act of 2003. Nor was there any abuse of process on the part of the Hungarian authorities as they had no responsibility for the peculiarities of s. 10 of the Act.

> "The Minister responded to these arguments by observing first that there may be some difficulty in reconciling a wide-ranging abuse of process of jurisdiction with the provisions of the Framework Decision and the European Arrest Warrant Act 2003, and the fact that those provisions set out the exclusive grounds for refusal of surrender. However, taking the argument at its height, it was submitted that it provided no satisfactory principle which could reconcile this case with the acknowledgement that a determination of an extradition request did not normally bar further application for surrender. The argument that the inclusion of the fleeing requirement was mistaken could not be said to render the subsequent proceedings an abuse of process. To rely that mistake as bringing the case within the principle established in cases such as *Vantive* where a party deliberately failed to bring forward a case that could and should have been brought in the first proceedings, was to blur important distinctions of fact, law, and constitutional status. The requesting judicial authority here, being the Hungarian courts, had no responsibility whatsoever for the form of the Irish legislation. On the other hand, it was a legal obligation on the part of the Minister as a matter of domestic law (and arguably on the part of the Executive as a matter of international law) to make an application pursuant to the warrant once it was issued. The Oireachtas which enacted the law had however no responsibility for the manner in which a relevant application was made. To acknowledge as the Minister did, that the fleeing requirement should not have been included in the Act of 2003 was to do no more than to state the obvious in light of the decision of this Court that that requirement was something which was not required by the Framework Decision."

This situation in the present case is, it was submitted by counsel for the respondent, entirely reversed. He contended that it is the fault of the Hungarian authorities that unnecessary proceedings were brought and maintained in the first place. Moreover, it was urged, they would appear to have deliberately failed to bring forward the case that they ought to have in the first place.

Whilst Fennelly J. concurred with Hardiman J. that the appellant ought to succeed in relation to abuse of process he clearly differed with Hardiman J. as to the extent of the abuse of process. At para. 13 he concluded:

> "I would confine the decision on abuse of process to the special and unique circumstances of this case. There was an arrest warrant; the appellant was arrested and taken before the Court; he opposed his surrender through the judicial process in accordance with the law. He succeeded. It was not then suggested that the law was erroneous. The appellant had no reason to expect that it would be changed, if he successfully invoked its provisions. The law was changed. His surrender was sought a second time. I would allow the appeal and decline to order the surrender of the appellant."

Contrary to the view taken by O'Donnell J. it would appear that Fennelly J. considered that the fact that s. 10 had been out of kilter with the Framework Decision and was effectively a type of legislative mistake was a matter to be put into the scales in the appellant's favour. O'Donnell J. seems to have taken the view that this was a matter which counted against the appellant whilst other members of the Court considered that it was wrong to characterise it as a legislative mistake in the first place.

The judgement of Hardiman J., however, was the most critical as regards the position of the Minister. Having set out a detailed chronology of the events he observed as follows at para. 77:

> "By far the single longest period of delay - forty-four months or just short of four years in aggregate - was caused by the misconceived attempt forcibly to deliver Mr. Tobin on the specious ground that he had fled from Hungary. There was never any evidential support for that proposition. If the State did not know that, such ignorance must be due to negligence of a dramatic sort. If they did know it then they maintained proceedings which they knew to be based on a falsity. While it is possible that some extraordinary degree of inattention, total failure to analyse the facts of the case, or deficient information from the requesting State may have prevented their knowing positively that Mr. Tobin did not flee from Hungary, no such excuse could be available after Mr. Tobins 'Points of Opposition' and certainly, after the hearing in the High Court when the evidence established that he did not flee so clearly that the learned High Court Judge (Peart J.) dismissed the application *ex tempore*. Likewise, the Supreme Court announced its decision to dismiss the appeal at the conclusion of the hearing, reserving the delivery of a reasoned judgment.

Counsel for the respondent submitted that it can also be said that there was "never any evidential support" for the proposition underlying the first set of proceedings in the present case. Similarly it must be said that if the (Hungarian) state did not know this it was due to negligence of a dramatic sort and if they did know then the previous proceedings were based on a deliberate falsity.

In concluding that the second set of proceedings against Mr. Tobin amounted to an abuse of process Hardiman J. conducted an exhaustive review of the relevant authorities. He ultimately distilled the following general principles from those cases at para. 129:

> "I wish to emphasise certain phrases from the cases just cited, firstly the reference in *Johnson v. Gore Wood* [2002] 2 A.C. 1, to 'the underlying public interest that there should be finality in litigation and that a party should not be twice vexed in the same matter'. Secondly, the fact that it is unnecessary 'before abuse may be found, to identify any additional element such as collateral attack on a previous decision, or some dishonesty...'. Thirdly, to the need 'to protect the respondents to successive applications... from oppression' and fourthly, the emphasis on the desirability '... that litigation should not drag on forever and that a defendant should not be oppressed by successive suits where one would do', and the important legal value of 'finality', so as to provide 'closure' for the parties."

He also noted that the preponderance of the case law concerned commercial and civil proceedings and that many of the cases involved limited companies. Whilst such cases are undoubtedly of great concern to the participants he noted that criminal proceedings were of an entirely different character in terms of the impact they were likely to have on participants. In this regard he considered extradition cases to fall into a similar category. He referred to the case of *Green v. United States* (1957) 355 US 184 at paras. 135-137:

> "Having described the rule, Mr. Justice Black continued, at pp. 187-188:
>
> > 'The underlying idea, one that is deeply engrained in at least the Anglo-American system of jurisprudence is that the State, with all its resources and power, should not be allowed to make repeated efforts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that, even though innocent, he may be found guilty'.
>
> The *Green* ease concerned criminal trials and the other cases cited above related to civil actions or applications. This present proceeding is, strictly speaking, neither a civil action nor a criminal trial. In its incidents however, it is much more closely akin to a criminal than to a civil proceeding. A person whose surrender is sought is arrested and lodged in prison and if he obtains his liberty on an interlocutory basis, it will be on bail. If unsuccessful, he will be committed to prison to await his involuntary departure to the requesting State and, if so rendered, he will be imprisoned. In the course of the argument on the present appeal Mr. Murray S.C. stressed that this case - Tobin 2 - was unique even amongst European Arrest Warrant cases, but it too is of course more closely akin to a criminal than to a civil proceeding.
>
> Accordingly, and on the basis of *Green*, I would add to the list of topics and values to be considered in assessing whether a particular proceeding is an abuse of process the following: the massive disparity of resources and power between the State and an individual and the vulnerability of the individual and his family to embarrassment and expense; their vulnerability to 'ordeal'; and the need to avoid 'compelling him [and them] to live in a state of continuing anxiety and insecurity', and instead to provide 'closure' in the phrase of Denham J."

Hardiman J. went on to conclude that in the circumstances the second set of proceedings did amount to an abuse of process having regard to the effect they were inevitably likely to have on the appellant.

Counsel for the respondent has submitted that there exist many striking similarities as between the case of *Tobin (No. 2)* and the present case, particularly in terms of the extent of the delay and the unsustainable nature of the original proceedings.

In reply, counsel for the applicant contended that there has not in fact been any abuse of this Court's process and stated that while it was true that there had been a regrettable failure of communication on the part of the Hungarian authorities that did not in itself amount to an abuse of this Court's process. Indeed, it was difficult to isolate what, if anything, in the chronology could be said to have been abusive of this Court's process. It certainly was not an abuse of the process to issue EAW No. 1. Neither was it an abuse of the process to subsequently seek to try him *in absentia* or, indeed, to actually try him *in absentia*, as Hungarian domestic law permits that. There was a delay in informing the Irish Central Authority and this Court about that trial and its outcome, and that was regrettable and should not have happened, but the Irish authorities were ultimately informed (admittedly at the 11th hour) while proceedings were still ongoing in this jurisdiction and while the matter was still before the Supreme Court and awaiting judgment. It was also not an abuse of this Court's process to issue EAW No. 2 and then to substitute the corrected version of it that is EAW No. 3. At most it represented a lack of sure-footedness on the part of the second Hungarian judicial authority to become involved, namely the High Court of Győr, concerning how to proceed at that point, particularly in the light of representations contained in correspondence received from the Irish Central Authority.

The Court was referred by counsel for the applicant to *Minister for Justice, Equality and Law Reform v. Koncis [*2011] IESC 37, (Unreported, Supreme Court, 29th July, 2011). In that case three European arrest warrants had been received from Latvia. The first warrant issued in December 2004 had never been endorsed and was not proceeded with. A second warrant issued in September 2005 had been indorsed in August 2006 and was executed. Following his arrest on foot of the second warrant the respondent in that case had spent six months in custody awaiting a surrender hearing. There had ultimately been an order for the respondent's surrender on foot of it, following which he was again remanded in custody. The respondent appealed the surrender order to the Supreme Court. While his appeal was pending the respondent discovered that he had been tried, convicted and sentenced in his absence in Latvia. In the circumstances he successfully applied for his release under Article 40.4.2° of the Constitution. However, it seems that the second warrant was never withdrawn. Rather the Latvian convictions were subsequently set aside, and the Latvian authorities maintained their request for the respondent's surrender. Subsequently, and on the advice of the applicant, the Latvian authorities issued a third warrant in November 2007. The appellant later withdrew his appeal against this surrender on the second warrant, and the appeal was struck out on consent. Some months later the applicant applied *ex parte* to the High Court to vacate the indorsement and surrender orders on the second warrant, and that application was granted. The third warrant was then indorsed. For reasons which are not clear after some further months the indorsement and surrender order on the second warrant were then reinstated by consent, and after some further months yet there was an attempt by the applicant to have them vacated a second time, which was opposed. A surrender order was made by Peart J. in the High Court on foot of the third warrant in November 2008, and on the same day he indicated he would make no order on the applicant's motion to set aside the earlier surrender order. The respondent then appealed again to the Supreme Court.

The appeal to the Supreme Court was on thirteen grounds, one of which was abuse of process. Ultimately, just five grounds (which

did not include the abuse of process ground) were proceeded with. In her judgment at para. 27, with which the other two members of the Supreme Court agreed, Denham C.J. made the following remarks upon which the applicant places some reliance:

> "This case arises on a request on foot of a third warrant. This warrant relates to the same offences as the second warrant; the history has been set out previously. In essence, there is a third warrant coming after a second warrant for the same offences on which there was an order of the High Court for the surrender of the appellant, an appeal to this Court, which was struck out on consent, a motion to the High Court, and an order of *habeas corpus*. The key to the situation is the order for release under Article 40.4.2 of the Constitution on the 20th February, 2007, on the second warrant."

Later at paras. 32-35 in her judgment the Chief Justice further stated:

> "This case illustrates an unfortunate history of confusion and lack of communication. The European arrest warrant process was introduced to provide for new expedited procedures between member states, in place of the previous extradition procedures. These new procedures have not worked efficiently in this case.
>
> 33. While there is no express provision in the European Arrest Warrant Act, 2003, as amended, referred to as 'the Act of 2003', for a second warrant to 'go again', it is not expressly excluded. I am of the opinion that as long as the procedures are in accordance with the Act of 2003 and that fair procedures have been followed that there is no reason why a second warrant on the same offences could not be issued, it would depend on all the circumstances of the case.
>
> 34. In this case, counsel for the appellant submitted that the appellant should have been surrendered within ten days of the order of the High Court of 21st December, 2007, on the extant second warrant, or not at all. He said that he did not have to argue that the State could not issue another warrant but that in this case the Minister was bringing a third warrant when there was an extant order of the High Court on the second warrant.
>
> 35. While there was an order of the High Court to surrender on foot of the second warrant, this was the subject of the court order of *habeas corpus* and the release of the appellant. It is understandable why in logic and practice it was decided not to rearrest the appellant on foot of the second warrant on which he had previously been arrested and then released.
>
> There is no reason why, in the circumstances, there should not have been a third warrant issued. The issue of second or subsequent warrants was considered in *Minister for Justice, Equality and Law Reform v. O'Falluin/Fallon* [2010] IESC 37, where Finnegan J., giving the judgment with which the other members of the Court agreed, stated:-
>
> > 'It is, of course, part of our jurisprudence that there should not be repeated attempts to procure a conviction: *E.S. v. Judges of the Court Circuit Court and the Director of Public Prosecutions* [2008] IESC 37. However proceedings under the European Arrest Warrant Acts are not criminal proceedings and the same principles will not apply. In the present case the attempted extradition was discontinued without any decision being made. Again the European arrest warrant of the 21st June 2004 resulted in an order for the appellant's surrender: all issues of law raised by him were determined against him and an order for his surrender made. His appeal against the order of the High Court was withdrawn. His surrender on foot of that European arrest warrant did not occur solely because of the failure to effect his surrender within the times stipulated in the Acts: again there was no decision on any issue which could create an estoppel in the appellant's favour or give rise to *res judicata*. Counsel for the appellant did not draw to the court's attention any issue either in the three judgments delivered in the High Court on the European arrest warrant of the 21st June 2004 or in the judgment in the Supreme Court on the application under Article 40.4.2 which could conceivably give rise to an estoppel or issues of *res judicata*. I am satisfied that neither estoppel nor *res judicata* arises.'
>
> In the circumstances of this case there has been no decision which could create an estoppel or give rise to *res judicata* in favour of the appellant."

The Chief Justice ultimately concluded at para. 38:

> "In all the circumstances, I am of the opinion that the history of the case, which includes a High Court order and a subsequent enquiry and order pursuant to Article 40.4.2° of the Constitution ordering the release of the appellant on the second warrant, is not a bar to the third warrant. The obligation of the courts under the Act of 2003 is to surrender the appellant pursuant to the warrant where there has been compliance with the Act. The Courts are not given a general discretionary power to refuse surrender. A third warrant has been issued and it is the obligation of the courts under the Act of 2003 to surrender the appellant if there has been compliance with the Act. In all the circumstances, I would dismiss the first ground of the appeal raised on behalf of the appellant."

The applicant in the present case makes the point that the circumstances of the present case are much less egregious than those in *Koncis*. In that case the Irish Courts were never informed by the authorities in the issuing state about the fact that the respondent had been tried *in absentia*. It was the respondent who drew the Court's attention to what had happened. That is not true here. While there was certainly delay in informing the Irish Courts they were ultimately informed by the Hungarian authorities. Moreover, in *Koncis*, the respondent had been remanded in custody for many months until he secured release under Article 40.4.2° of the Constitution. In the present case the respondent has been on bail throughout save for a period of some weeks in the immediate aftermath of his arrest on foot of EAW No. 1.

It was also urged by counsel for the applicant that both the present case and the *Koncis* case are distinguishable in an important respect from *Minister for Justice and Law Reform v. Tobin (Nos. 1 and 2).* In both the present case and in the *Koncis* case, surrender orders had been made by High Court, whereas in *Tobin No. 1* the respondent had won in both the High Court and the Supreme Court and there had been no surrender order until the High Court gave judgment in *Tobin No. 2*. Moreover, the matter had only come back before the Irish Court due to the unique circumstances of the law having been changed.

Counsel for the applicant has also sought to distinguish the present case from the circumstances of the conjoined cases of *Minister for Justice and Equality v. Gherine and Gherine* [2012], IEHC 535 (Unreported, High Court, Edwards J., 30th November, 2012) in which this Court deprecated the failure of the Italian authorities to inform it that the respondents had been tried *in absentia*, and had regarded the failure to do so as being sufficiently serious to justify the Court in bringing it to the attention of Eurojust. Once again it

was urged upon the Court that the circumstances of that case were much more egregious than those of the present case, and yet the court had ultimately found that there had not been a deliberate attempt to abuse the Court's process. The cases in question were distinguished on the basis that, as had also occurred in *Koncis*, the Court learned about the trial *in absentia* from the respondents rather than from the authorities in the issuing state, and secondly that although the warrants sought the respondents for prosecution they had in fact been acquitted of some of the relevant offences at their respective trials *in absentia*. It was submitted that none of that was true here

Decision on the Abuse of Process Issue

I have carefully considered the helpful submissions on both sides in this matter and the detailed circumstances of the case. It is certainly regrettable that the Irish Central Authority was not informed about the respondent's trial, conviction and sentence *in absentia* until long after it occurred. It should not have happened and, echoing what I said in *Minister for Justice and Equality v. Gherine and Gherine* [2012] IEHC 535, (Uunreported, High Court, Edwards J., 30th November, 2012), I consider that if what has occurred in the present case were to be replicated it could potentially have implications for the trust and confidence which this Court currently has in relation to Hungary, its courts and institutions. Moreover, this Court has not been assisted by the Hungarian authorities failure to provide any explanation for the delay in informing the authorities in this case about the trial of the respondent *in absentia* before Veszprém County Court on the 3rd April, 2008, particularly after they were notified by the authorities in this country on the 24th September, 2008 that the respondent had been arrested here on foot of EAW No. 1. I do not agree, however, with the submission made on behalf of the respondent that bad faith must inevitably be inferred in the circumstances. I do not believe that a solid basis exists for the drawing of any such inference. What occurred may simply have been due to ineptitude and inefficiency on the apart of the authorities in Hungary, and a case of the right hand not knowing what the left hand was doing, rather than any bad faith. Moreover, the failure to provide an explanation may be due to an unwillingness to admit to such shortcomings, and perhaps even embarrassment concerning the shambles that this case has degenerated into procedurally.

There are a number of important factors that have restrained this court from any rush to infer *mala fides*. It is, of course, the case that many aspects of Hungarian criminal procedure are entirely unfamiliar to us here in Ireland. A good example is this notion that you can be the subject of a "non-conclusive conviction" at first instance, another is the apparently routine occurrence of trials proceeding *in absentia* when defendants fail to turn up, and another is the idea that you can be represented and defended in your absence, and that an appeal can be lodged by, a lawyer that you have never met or instructed.. Things may have happened in Hungary which are entirely normal within their procedures but which we would regard as strange and unusual. There may have been an unjustified assumption at the Hungarian end as to what our expectations were and as to what could be taken for granted, or taken as understood. In this Court's view it is far more likely that the breakdown occurred due to lack of appreciation (perhaps on both sides) of the other side's expectations due to unfamiliarity with each other's legal systems rather than as a result of any bad faith.

Another important feature is that there was a different judicial authority concerned with EAW No. 1, than is concerned with EAW No. 2 and EAW No. 3. Even if there was bad faith on the part of the first judicial authority, and in the Court's view no such inference is justified on the available evidence, the only complaint that can be made with respect to the second judicial authority is that he has displayed some lack of sure-footedness concerning the correct form in which to present his warrant for the purposes of securing the respondent's return for trial at second instance. That is most certainly not evidence of *mala fides*, far from it in this Court's view. Indeed, the Court has been impressed in general terms with the engagement by the presently involved judicial authority in seeking to respond to most of the concerns raised by the applicant in this case and in swiftly addressing queries. True enough, the criticism can be levelled that there has been no engagement with the demand for an explanation concerning the delay in notifying the Irish authorities about the trial *in absentia*. Having said that, the actual default in respect of which the explanation was sought was that of the first judicial authority involved (*i.e.*, Veszprém County Court) and not that of the present judicial authority (the High Court of Gyõr).

I think it is an important point that no set of proceedings has reached finality in this jurisdiction and so the respondent cannot contend that he has been the beneficiary of an ostensibly conclusive ruling in his favour. He was in fact the subject of just one order in the High Court heretofore, and that was an adverse order overall (he did persuade the Court that the minimum gravity had not been satisfied in the case of four out of seventeen offences, however he was surrendered on the majority of offences). This is not a case of repeated attempts to secure a conviction against him in the *Henderson v. Henderson/Re Vantive Holdings* sense. In the Courts view the fact that he is wanted to face a second instance trial which might have the effect of reversing the non-conclusive conviction at first instance is an important distinguishing feature.

This Court accepts that even if there has been no deliberate attempt to abuse the Court's process that is not automatically the end of the matter. It accepts that if the overall circumstances of a case are such as to oppress a respondent that can amount to an abuse of the process. There has certainly been significant delay in the present case, the respondent has been briefly deprived of his liberty, and no doubt the continuing uncertainty as to his fate has caused him much worry and anxiety. However, and in fairness to him, he makes very little of this in his affidavits. Moreover there is medical evidence whatever to suggest that he has been suffering stress and anxiety at a pathological level such as might justify this Court in concluding that the circumstances had reached the level of oppression. I have previously characterised the attempts made to extradite the respondent as a procedural shambles and that is very much to be regretted. While it must be accepted that this can only have added to the respondent's burden I do not believe that the evidence goes so far as to establish that he has been oppressed at a level that would justify a finding of abuse of the process.

In the circumstances I am not disposed to uphold the objection based upon abuse of process.

The Deprivation of Right of Appeal Point

Counsel for the respondent contends that what is proposed by way of "second instance trial" is not a retrial in as much as the respondent will be deprived of his right of appeal or second instance hearing under Hungarian law. It was submitted that this amounts to a deprivation of his right to appeal as guaranteed pursuant to article 2 of the 7th Protocol to the European Convention on Human Rights:

> "1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which ft may be exercised, shall be governed by law.
>
> 2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against an acquittal."

In support of his argument, counsel for the respondent has drawn the Court's attention to the decision of the European Court of Human Rights in *Krombach v. France*, E.C.H.R., 2001-II. In that case the applicant was convicted in his absence. French law

specifically provided that a person who had been convicted in their absence, and was thereby regarded as being in contempt, was precluded from exercising their right to a cassation appeal. The Court concluded at para. 100 that this amounted to a breach of the applicant's rights under the 7th Protocol:

> "In the present case the applicant wished both to defend the charges on the merits and to raise a preliminary procedural objection. The Court attaches weight to the fact that the applicant was unable to obtain a review, at least by the Court of Cassation, of the lawfulness of the Assize Court's refusal to allow the defence lawyers to plead (see, *mutatis mutandis,Poitrimol*, cited above, p. 15, § 38 *in fine*; *Van Geyseghem*, cited above, § 35; and, *a contrario*, *Haser*, cited above).
>
> By virtue of Articles 630 and 639 of the Code of Criminal Procedure taken together (see paragraph 59 above) the applicant, on the one hand, could not be and was not represented in the Assize Court by a lawyer (see paragraph 46 above), and, on the other, was unable to appeal to the Court of Cassation as he was a defendant *in absentia*. He therefore had no real possibility of being defended at first instance or of having his conviction reviewed by a higher court.
>
> Consequently, there has also been a violation of Article 2 of Protocol No. 7 to the Convention."

It was submitted that if the Hungarian authorities were entitled to substitute the second instance appeal as the "retrial" contemplated under Section 45 the practical effect would be to deprive the respondent of his entitlement to a retrial under the 7th Protocol. As such his surrender cannot be predicated on such a basis.

The Court does not accept this argument and indeed agrees with submissions made by counsel for the applicant to the effect that there is no obligation on the Hungarian authorities to provide the respondent with an identical form of appeal following a second instance trial to that which he enjoys arising out of his first instance trial. Moreover, the circumstances of the present case are wholly different from those in the *Krombach* case. What article 2 of the 7th Protocol requires is that there be "the right to have his conviction or sentence reviewed by a higher tribunal" and that "the exercise of this right, including the grounds on which it may be exercised, shall be governed by law". The requirement of governance by law is not intended to leave the very existence of the right of review to the discretion of the state; what is to be determined according to law are the modalities by which the review by a higher tribunal is to be carried out.

In this particular case the affidavit of the Hungarian lawyer, Mr. Gábor Magyar, sworn on the 12th July, 2013, makes clear (at paragraph 5 thereof) that in Hungarian criminal procedure there is a right to a review on a point of law following a second instance trial. The same is true in this country following a conviction on indictment before either the Circuit Criminal Court or the Central Criminal Court. There is a right to appeal to the Court of Criminal Appeal but only on a point of law. The decision of the jury as to the facts is unassailable in any court as long as there was some evidence to support it. Accordingly, there is nothing objectionable about only affording a limited appeal of this sort following a trial at second instance, which is in fact an appeal in itself at which both matters of fact and matters of law can be ventilated, and at which the respondent continues to enjoy the presumption of innocence according to the additional information supplied in this case. I do not consider that the limitation on any further appeals to points of law breaches the respondent's rights under article 2 of the 7th Protocol in any way, and I am not disposed to uphold this objection.

The Section 45 Point

Counsel for the respondent makes a very simple point in relation to section 45, and it is this. He contends that there is nothing in the wording of s. 45 (*i.e. s*. 45 in the form that it was enacted prior to the 2012 amendment) to confine its application to cases where surrender is being sought for the execution of a sentence. The Court was not initially persuaded by this argument, and was inclined to accept the submission of counsel for the applicant that s. 45 has simply no application where a respondent is wanted for prosecution. If that had remained the position it would have been the intention of the Court to surrender the respondent. Indeed, conscious that Mr. Horváth was waiting a long time to know his fate the Court indicated late last week that it had decided to surrender him and stated that it would furnish its reasons in the written judgment that it was then finalising on Tuesday of this week. However, while the matter was "in the breast of the Court" to quote from the jurisprudence, the Court has had a change of mind as a result of further reviewing the evidence and the authorities and some further reflection on the complex issues thrown up by this case. The position is that the Court is now disposed to uphold the s. 45 objection having come to view that the submission of counsel for the respondent is in fact correct.

Notwithstanding its change of mind the Court was in any event satisfied, and remains satisfied, that because the respondent is wanted for second instance trial, and not to serve a sentence, it is correct to say that he is wanted for prosecution. In coming to that conclusion the Court has had regard, *inter alia*, to the decision of Peart J. given *ex tempore* in *Minister for Justice, Equality and Law Reform v. Majer* (Unreported, *ex tempore*, High Court, Peart J., 30th July, 2010). This was another Hungarian case in respect of which the surrender of a respondent was sought for the purposes of trying him at second instance. However, and this is an important distinction that the court is alive to, it did not involve a trial *in absentia* and s. 45 did not arise for consideration. The respondent in that case, having been tried and convicted at first instance was sentenced to three years and six months' imprisonment. The prosecution lodged an appeal against leniency and the respondent cross appealed against conviction and sentence thereby rendering the conviction at first instance "non-conclusive" and triggering the trial at second instance procedure. However, before the trial at second instance came on he left Hungary and this led to the issuing of a European arrest warrant seeking his return. Various objections to his surrender were ventilated before Peart J. in the High Court. In the course of his *ex tempore* judgment, a transcript of which has been produced before this Court, Peart J. stated:

> "The warrant makes it clear that his surrender is not sought so that he can serve the three year and six month sentence, but rather so that he can have what is described as 'a second instance prosecution', which is a procedure in the Hungarian state which follows upon the lodgement of the appeals and that is made clear in the letter of 23 February 2010, which provides some additional information in relation to the purpose of the surrender application.
>
> Now Mr. Byrne, on the respondent's behalf, has pointed to the statement that the purpose of the application for his surrender is to have him returned to Hungary for the purpose of these appeals or, as described in the letters, for the purpose of the second instance prosecution. It is submitted that that purpose—namely so that the appeal procedures can be gone through—is not a purpose contemplated by the Framework Decision on the European arrest warrant or within the provisions of section 10 of the European arrest warrant Act, which makes provision for four different circumstances where this Court can grant an order for surrender.
>
> Those purposes are where the issuing state intends to bring proceedings for an offence, or where someone is the subject of proceedings for an offence, or where somebody has been convicted of an offence, but not yet sentenced. Finally, where someone has been both convicted and sentenced the person can be arrested and surrendered.

> Now in this case where the issuing judicial authority has made it quite clear that they are not seeking his surrender so that he can serve the sentence, but rather so that he can receive a second prosecution[, t]he submission is that it is not within any of those four categories of circumstance where he can be arrested and surrendered. By way of further background the situation appears to have been that following the lodgement of these appeals the Respondent was summoned to the appeal hearings for 20 October 2004 and 1 December 2004, but that he didn't appear for those appeals and that led to the issue of this European arrest warrant.
>
> The further information provided by letter dated 23 February 2010 does state that the purpose is to carry out what is described as 'the criminal procedure at second instance against him'. I am satisfied that that is the equivalent of saying that its purpose is to carry out a criminal prosecution at second instance against him. The letter of the 25 February states that if surrendered he will not be serving the three year and six month sentence but that this criminal procedure at second instance will be carried out against him. The additional information most recently received by letter of 26 July 2010 describes the conviction and sentence which resulted in the three year and six month sentence as a 'non-final judgment' and then goes on to describe, as I have said, how the dates in October and December of 2004 were fixed and that he didn't attend and that that appeal procedure was suspended by an order of 8 December 2004.
>
> Now without going in to any great detail the submissions of both Mr. Byrne, and Mr. Farrell for the applicant, I am satisfied that the circumstances of the present case where following the lodgement of the appeal against conviction by the respondent, and the appeal against leniency of sentence by the applicant, that those circumstances are sufficient to come within section 10 because, in my view, he is still the subject of proceedings in the issuing state for the offence referred to and that is within section 10, paragraph (b) of the Act.
>
> This procedure I refer to is in my opinion the equivalent of a second instance prosecution and Mr. Farrell has referred to the fact that article 1, paragraph 1, of the Framework Decision does not make any distinction between a first instance prosecution or a second prosecution when it refers to the European arrest warrant being issued in respect of a prosecution. It is important to emphasise, as frequently happens, that the European arrest warrant procedures have been brought in order to accommodate differences in criminal codes and procedures in different member states. There are great differences between procedures, prosecution procedures, appeals procedures, sentencing procedures, and so on among the different member states and this Framework Decision enabling a single procedure for extradition to be introduced is intended to accommodate, as far as possible, all these different procedures.
>
> It is inevitable when a court in this country looks at the information available in relation to procedures in, for instance, the Republic of Hungary that those procedures will look unusual and perhaps be difficult to understand. It is easy enough to try and draw distinctions sufficient to exclude what is happening in the issuing state from the scope of the 2003 Act here simply because we may not be familiar with what is going on. I am satisfied that the reality of the situation, from the information available, is that this gentleman, having lodged an appeal and the prosecution having lodged an appeal, is facing a prosecution even if it is a second prosecution for this offence. It is described as being 'a second instance procedure'.
>
> That, as I have said, in my view, brings him within the concept of being subject to proceedings in the issuing state for the purpose of section 10, paragraph (b), of the Act."

Unfortunately, the *Majer* case, though helpful as far as it goes, does not deal with s. 45 of the Act of 2003. Moreover, the mere fact that the Court is satisfied that it is correct to say that the respondent is wanted for prosecution is not dispositive of the matter. The Court was initially of the view that that was the case for a number of reasons which it is satisfied to discount. Before explaining why, it may be convenient to set out the relevant statutory provision:

Section 45, as it applied in this case, is in the following terms:

> "A person shall not be surrendered under this Act if—
>
> (a) he or she was not present when he or she was tried for and convicted of the offence specified in the European arrest warrant, and
>
> (b) (i) he or she was not notified of the time when, and place at which, he or she would be tried for the offence, or
>
> (ii) he or she was not permitted to attend the trial in respect of the offence concerned,
>
> unless the issuing judicial authority gives an undertaking in writing that the person will, upon being surrendered—
>
> (I) be retried for that offence or be given the opportunity of a retrial in respect of that offence,
>
> (II) be notified of the time when, and place at which any retrial in respect of the offence concerned will take place, and
>
> (III) be permitted to be present when any such retrial takes place."

For completeness, I should also set out article 5(1) of the Framework Decision which provided the option for the State to require an undertaking before surrendering in certain instances where a person had been tried *in absentia*. Article 5(1) provides:

> "The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:
>
> 1. where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered *in absentia*, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment;"

The first thing to be said is that the fact that article 5(1) of the Framework Decision is expressed differently to s. 45 does not assist in circumstances where the Framework Decision is not directly effective, and the domestic statutory provision appears clear and unambiguous in its terms. The Court cannot resort to trying to give it a conforming interpretation where the provision is clear on its face and there is nothing to suggest that a literal interpretation would fail to give effect to the intention of the Oireachtas. While article 5(1) envisages that conditions might be imposed before a person who had been tried *in absentia* is surrendered it is confined to cases where the warrant seeking that person's surrender "has been issued for the purposes of executing a sentence or a detention order", s. 45 contains no such limitation and there is nothing in the provision considered either alone, or in the context of the Act of 2003 as a whole, to suggest that Oireachtas intended other than to impose more extensive conditionality than that envisaged by the Framework Decision.

Secondly, while initially reassured by the representation provided in late additional information to the effect that the respondent will enjoy the presumption of innocence at his second instance trial, and forming the view that in those circumstances he could not be regarded as being a "convicted" person, a view supported by the characterisation of the result of the trial at first instance as "non-conclusive" in Hungarian law, I now consider that to be an erroneous view. The Court has arrived at the view following a close consideration of all of the evidence, including Chapter XIII, Titles I to V inclusive, and also Chapter XIV, Titles I to IV inclusive, of Act XIX of 1998 on the Criminal Proceedings of Hungary, that the respondent is in truth a convicted person, notwithstanding that the initial verdict is "non-conclusive" by virtue of an appeal having been lodged against it, and the fact that the respondent will have the benefit of the presumption of innocence at his second instance trial.

While it can be dangerous to look at the laws and procedures in a foreign state through the lenses of common law spectacles, and in particular to attempt comparisons, it is not always an unhelpful or invalid exercise. The important thing is to appreciate the limitations of the exercise.

I have found it helpful to consider whether in any circumstances in Irish law a convicted person may undergo a full rehearing with the benefit of the presumption of innocence. That does indeed occur at the hearing of District Court appeals.

In *The State (McLoughlin) v. Shannon* [1948] I.R. 439 Davitt J. explained the nature of a District Court appeal in the following way at 449:

> "It seems to me that when a defendant, aggrieved by the decision of a District Justice in a criminal case, takes an appeal therefrom to the Circuit Court he seeks, and obtains, a hearing of the case *de novo*. He, in effect, asks the Circuit Judge to hear the whole matter again and to substitute for the order made by the District Justice (of which he disapproves) the order of the Circuit Court (of which he hopes he can approve)."

Similarly, in *Ex parte McFadden* (1888) Judgments of the Superior Courts of Ireland 165, (as cited in In *re G, an infant* [1960] N.I. 35, and cited in turn in Walsh, *Criminal Procedure*, (Dublin, 2002) at p.1154), Palles C.B. observed:

> "… although the word used in the section is 'Appeal', still, reading that word in the light of the numerous cases on the subject that have been decided since the time of Lord Raymond, there is no doubt that it means that you are to have a 'new trial' - a new investigation of your guilt, with an opportunity to both parties to bring forward new evidence, and a decision upon that evidence by an independent tribunal and an independent mind."

Moreover, the position is further confirmed by the following remarks from the judgment of Lavery J. giving judgment in the Supreme Court in *Attorney General v. Mallen* [1957] I.R.344 at 352, where the learned judge said:

> "I have thought it necessary to set out the procedure in some detail because it shows, in my opinion, that the conviction or order, though appealed to the Circuit Court and there either confirmed or varied, retains its essential character of a conviction or order of the District Court.
>
> The appeal is a true appeal though by way of re-hearing and is not a re-trial except in form. The defendant appealing comes before the Circuit Court as a convicted person. He does not rid himself of the conviction by serving notice of appeal. He is not called on to plead and his task is to show, if he can, that the conviction was wrong in whole or in part. This situation is not altered by the circumstance that there is a re-hearing."

None of the above, of course, bears directly upon the position under Hungarian law. What it does illustrate, however, is that the concept of a "non-conclusive" judgment at first instance may not be as alien to the eyes of an Irish lawyer as it appears at first sight. Having carefully considered the provisions of Chapter XIII, Titles I to V inclusive, and also Chapter XIV, Titles I to IV inclusive, of Act XIX of 1998 on the Criminal Proceedings of Hungary I believe that the position there in relation to the second instance trial procedure as it applies to this respondent is very similar in many respects to that that obtains in relation to appeals against summary convictions in the District Court here in Ireland, important differences of course being that, whatever about in theory, trials *in absentia* do not in practice occur in Ireland, and in Ireland appeals cannot, or certainly ought not, to be lodged by a lawyer without instructions. However, insofar as the status of a defendant who has been tried and convicted at first instance, and in respect of whose conviction an appeal has been lodged, is concerned I believe the position in both countries is similar.

I am satisfied that in Hungary the lodging of an appeal renders what would otherwise be the conclusive decision and judgment of the court of first instance "non-conclusive." That does not mean that the person is not convicted, or that the conviction is set aside by the lodging of an appeal. It simply means that the person concerned has a right to a full re-hearing before a court of second instance, with the benefit of the presumption of innocence (which means in our understanding that the prosecution still bears the burden of proving the case against the accused beyond reasonable doubt. The Court accepts that the analogy may not apply perfectly at an inquisitorial trial in a civil law system such a Hungary. Nevertheless, the accused has the benefit of the presumption of innocence as it operates in such a jurisdiction.). It is clear to this Court that the accused's task is to persuade the court of second instance, if he can, that his conviction was wrong. However, it is also clear to me that he does not come into Court as an unconvicted person. He remains convicted, albeit not conclusively, and it is simply the case that the decision of the court below is effectively stayed pending ratification or overruling, as the case may be, by the court of second instance.

The status of conviction has important implications for him in terms of s. 45. That section is engaged where (*inter alia*) a person is the subject of a European arrest warrant and he "was not present when he … was tried for ***and convicted of*** the offence specified in the European arrest warrant" (this Court's emphasis). Where that condition (contained in s. 45(a)) is fulfilled, and one of the further conditions demanded in s. 45(b)(i) or (ii) is also fulfilled, as appears to be the case here, surrender cannot take place without an undertaking in writing having been provided by the issuing judicial authority stating that the person will upon being surrendered:

"(I) be retried for that offence or be given the opportunity of a retrial in respect of that offence,

(II) be notified of the time when, and place at which any retrial in respect of the offence concerned will take place, and

(III) be permitted to be present when any such retrial takes place."

In this case the Hungarian authorities have expressly stated that no such undertaking will be provided. In the circumstances the Court has no choice but to uphold the s. 45 objection and refuse to surrender the respondent.

Conclusion
As the Court is not in receipt of an undertaking in the form required by s. 45 of the Act of 2003 it must refuse to make an order pursuant to s. 16(1) of the Act of 2003 and discharge the respondent from his bail.