

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

ZOLTAN HUBA HENN

APPLICANT

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 21st day of March, 2019

1. On the 30th October, 2018, this Court gave an ex tempore judgment in respect of a European Arrest Warrant ("EAW") dated the 20th October, 2016. In that EAW, the respondent is sought for prosecution in respect of one offence of swindling in Hungary. The Court rejected all the respondent's points of objection to his surrender save for a final determination in respect of his objection to surrender on the grounds of the real risk of being subjected to inhuman and degrading treatment in the Hungarian prison system on surrender. The Court sought further information in respect of those conditions from the Hungarian authorities.

2. On the date I gave the ex tempore judgment, the respondent was arrested on a further EAW dated the 19th June, 2018. This EAW is the subject matter of this judgment. This is only a partial judgment as this does not deal fully with the issue of prison conditions.

3. This EAW states that the respondent's surrender is sought in respect of an enforceable judgment of "*imprisonment of two (2) years + imprisonment of one (1) year*". These refer to 165 counts of fraud and 3 counts of fraud: the precise total is a matter of controversy in the proceedings.

4. Under wide ranging points of objection, the respondent contended his surrender was prohibited. The Court will proceed to deal with the uncontested and contested matters at issue in this application under s.16 of the European Arrest Warrant Act 2003 as amended ("the Act of 2003").

Identity

5. The Court is satisfied on the basis of the affidavit of Sergeant James Kirwan, member of An Garda Síochána, the affidavit of the respondent and the details set out in this EAW that the respondent, Zoltan Huba Henn, who appears before me, is the person in respect of whom the EAW has issued.

Endorsement

6. I am satisfied that the EAW has been endorsed in accordance with s.13 of the Act of 2003 for execution in this jurisdiction.

Sections 21(a), 22, 23 & 24 of the Act of 2003

7. Having scrutinised the documentation before me I am satisfied that I am not required to refuse the respondent's surrender under the above provisions of the Act of 2003.

Part 3 of the Act of 2003

8. Subject to further consideration of ss. 37, 38 & 45 of the Act of 2003 and having scrutinised the documentation before me, I am satisfied that I am not required to refuse the surrender of the respondent under any other section contained in part three of said Act.

The Background and Contents of the EAW

9. This EAW was issued on the 19th June, 2018, by a judicial authority named the Penal Enforcement Unit of the Budapest Environs Regional Court. At point (b) in the EAW, under the heading "Enforceable Judgment", it stated "Imprisonment of Two (2) Years + Imprisonment of One (1) Year". Underneath the sub-heading "reference", the second EAW stated:

"Judgment Number 9(b) 686/2013/10 of the Rackeve District Court dated 22nd January, 2014, final and absolute as of 16th April, 2014 + judgment number 1(b) 5/2011/29 of the Paks Town Court dated 13th May, 2011, final and absolute of 21st June, 2011".

10. At point (c) in the EAW, under the heading "Length of the Custodial Sentence or Detention Order Imposed" it stated, "Imprisonment of 2(2) Years". Under "Remaining Sentence to be Served" the EAW stated, "Imprisonment of 1(1) Year". At point (d), the EAW stated he did not appear in person at the trial resulting in the decision but it grants him a right of retrial at point 3.4 and it said this right to a retrial is not tied to a deadline.

11. At point (e), the EAW stated:

"This warrant relates to in total: 165 count felonies of fraud (s.373 (1) of Act C of 2012 on the Criminal Code [hereinafter: CC], CC s.373 (3) (b) + 164 count felonies (CC s.373 (1) CC s.373 (2) BC) plus 3 count felonies of fraud (s.318 (1) of Act (iv) of 1978 on the Criminal Code [hereinafter: CC], CC s.318 (4) (a) + 2 count felonies (CC s.318 (1), phrase 1 of CC s.318 (2))".

12. In the description of the circumstances in which the offences were committed, the offences are broken down into further parts. Under the heading A in point (e) of the EAW, it is stated:

"in the time period between 20th December 2010 and 28th November 2011, defendant Zoltan Huba Henn using false names (...false names given...) offered job opportunities in Ireland, on online advertising pages. In the advertisements, he requested the persons responding to the advertisements to pay amounts varying from €25 to €125 as managing, administration, or travel costs or as deposit or security payments. The defendant communicated with the people applying for the advertisement by telephone or by emails using false names or his own.

The clients had to transfer the amounts of money requested by the defendant to bank account (number given) held in the defendant's own name, Zoltan Huba Henn at Raiffeisen Bank. Later, they had to wire the given amounts of money to Zoltan Henn or Huba Henn through Western Union to the address of 15 Beachgrove, Co. Dublin, Ireland.

Defendant Zoltan Huba Henn never provided the job opportunities offered by him in the advertisements to his clients

applying for them. Upon having obtained the requested amounts of money, he became inaccessible to the injured parties”.

13. The EAW then proceeded to indicate the names of 165 people, with dates, a financial institution and a payment in Hungarian currency referable to each name. It also indicated the name of the respondent or an alias to whom these payments were made. Finally, the EAW indicated:

“Having obtained the amount of money in the foregoing manner, Zoltan Huba Henn withdrew the money from his bank account in cash in the Ireland based branch of Western Union and used it”.

14. As with all the offences in the EAW, the issuing judicial authority has ticked the box of swindling. This is an indication that they are relying on Article 2, para. 2 of the 2002 Framework Decision. This would mean that double criminality/correspondence of offences does not have to be demonstrated.

15. Under the heading B in point (e), there is a further subdivision into three separate parts. Under B(1) it is indicated that an offence was carried out in early October 2010 and later on the 14th October, 2010, where he borrowed money from another person indicating he would buy television sets from the borrowed amount and having sold them he would pay back an increased amount to the injured party and give him a further TV set. It is said he could not fulfil what he had promised and he did not have the chances of doing so. It is said that he misled the injured party.

16. Under B(2) in point (e) of the EAW, it is stated that on the 29th October, 2010 in Paks the defendant falsely claimed that he would buy a settee within two days for club and borrowed money for that purposes. It is said that he did not pay back the borrowed money and did not intend to do so at the time of borrowing it and had not got the financial means to do so. Under B(3) it is said that on the 31st October, 2010 in Paks he borrowed more money which again he is said not to have paid back in time. It is said that he didn't intend to pay this back at the time of borrowing as he did not have the financial means to do so.

17. By letter dated 1st October, 2018, further information was sent by the issuing judicial authority. This stated that the respondent:

“[w]as sentenced to one-year imprisonment, suspended to a two year period of probation, on the basis of decision number 1.b.5/2011/29 of the Paks City Court dated 13th May, 2011, final on 21st July, 2011, for the felony of fraud and two misdemeanour counts of fraud.

The defendant stayed at an unknown place during the procedure, and therefore he was not present when the judgment was announced.

Enforcement of the penalty of imprisonment was ordered by judgment number 9.b.686, 2013, 10 of the Rakeve District Court announced on 22nd January, 2014 and final on 16th April, 2014. The defendant stayed at an unknown place during this procedure too and therefore he was not present when the judgment was pronounced.

According to the data of notification issued by the court the place and perpetration of the criminal acts, included in decision no. 1.b.5/2011/29 of the Paks City Court is Paks, early October, 2010; Paks, 29th October, 2010; Paks, 31st October, 2010.

In accordance with the data of the notification issued by the court in connection with decision number 9.b.686/2013/10 of the Rakeve District Court announced on 22nd January, 2014 and final on 16th April, 2014, the place and perpetration of the felony and fraud committed continuously and the 164 misdemeanour counts of fraud is “Szigetujfalu, 20th December, 2010 – 28th November, 2011 and Szigetujfalu, 20th December, 2010 – 28th November 2011”.

The Respondent's Objections

Point of Objection No. 1 - Lack of clarity re enforceable judgment

18. Counsel for the respondent claimed a lack of clarity because the EAW did not include any insertion after the heading “Arrest warrant or judicial decision having the same effect” at point (b) in the European Arrest Warrant. The heading “Enforceable Judgment” is thereafter filled in and that is an indication that this is an EAW issued for the enforcement of a judgment. In many jurisdictions and indeed quite possibly most correctly, where surrender is sought for the purpose of prosecution an arrest warrant is issued at domestic level for the perpetrator. Thereafter point (b)1 is filled in under the heading “Arrest warrant..”. In circumstances, where there is an enforceable judgment because a sentence has issued against the person, it is more usual that point (b)2 is filled in. That is what has happened in this particular case. That is all that is required. This is a point of objection of no consequence.

Point of Objection No. 2 - Lack of clarity re remaining sentence

19. Counsel submitted that the warrant was unclear because the enforceable judgment referred to “two years + one-year imprisonment”. It referred to Rákeve District Court and to a judgment of Paks Town Court. It said however that he only had one-year imprisonment remaining. Counsel further pointed to point (f) in the EAW which is headed “Other circumstances relevant to the case (optional information)”. This stated as follows:-

“As the convict did not go to prison voluntarily, the court with a view to enforce the implementation of imprisonment, on 3rd September, 2014, issued a Hungarian arrest warrant regarding the imprisonment of two years and one year, thereby having interrupted the prescription period of five years.”

20. Counsel also referred to the additional information set out above. He submitted that there was no reference to how the suspension of the sentence came about. He submitted that the sentence was also unclear as to what the respondent was being surrendered for.

21. Counsel for the minister submitted that there was no lack of clarity. Counsel submitted that the respondent was wanted for a sentence of two years but that he had one year remaining to serve. It was submitted that this was sufficient information and that the issuing judicial authority was not under any obligation to give further information. The issuing judicial authority could choose to give effect only to one year of the sentence. Counsel submitted however, that if the Court was of the view further information was required, the Court could seek that information under s.20.

22. It is further noted that on the 11th December, 2018, the central authority sought further information from the issuing judicial authority having consulted with their legal advisors. One question asked was as follows:

"Please advise as to the exact time left to serve and in relation to which sentence".

Unfortunately, despite the considerable period of time that elapsed since that request and the repeated requests for that information sent by the central authority, the issuing judicial authority did not respond.

23. In my view, there is a lack of clarity at present in this case. The information dated the 1st October, 2018 indicated that a sentence of one-year imprisonment was suspended for a two-year period and that that sentence was enforced by the Rákeve District Court on the 22nd January, 2014. At point (b) of the EAW, there is an indication that two separate judgments were given namely one in Rákeve District Court and a second one in Paks Town Court. The enforceable judgment in the EAW referred to the two years sentence plus one-year sentence. In the order that the sentences are referenced underneath the heading "Enforceable judgment", it appears that the second in time, namely the sentence of one year, is the sentence of Paks Town Court. At point (c) however, which refers to the length of the sentence, it is then stated that there was a two-year sentence of imprisonment. The next inclusion is that the remaining part of the sentence is one year. It is difficult to understand how all that information is to be understood in light of the information at point (f) in the European Arrest

Warrant. That information stated that he did not go to prison voluntarily and that the Hungarian arrest warrant was issued regarding the *two years* and the *one year* imprisonment (emphasis added).

24. It should also be noted that in respect of the offences relating to the judgment in Rákeve District Court, an earlier EAW seeking this respondent's surrender issued on the 26th November, 2013. That EAW however sought his surrender in respect of the prosecution for these alleged offences. There is a dispute about the nature and extent of those offences and that will be addressed later in this judgment but it is not disputed that the said warrant related to the same incidents. That EAW was endorsed for execution in this jurisdiction but was withdrawn on the 24th November, 2015.

25. The respondent has sworn an affidavit in which he has stated that he moved to Dungarvan in October 2013 and has been in Dungarvan since then. He had a child with his partner who was born on the 21st November, 2013. It is also the case that he was arrested on the 10th June, 2015 in respect of the EAW dated 26th November, 2013. He remained on bail on that EAW until it was withdrawn on the 24th November, 2015. That warrant it can be said was defective because there had been no domestic warrant issued upon which that EAW was based. In accordance with the decision of the Court of Justice of the European Union ("CJEU") in the *Bob-Dogi* (C-241/15) case an EAW issued in those circumstances was not an EAW envisaged by the Framework Decision.

26. The importance of the information as to the respondent's whereabouts, is that it renders it unclear how he could have served a period of time in respect of the Rákeve charges subsequent to the decision of the 22nd January, 2014. More importantly however, even apart from the evidence of the respondent, the EAW lacked clarity as to why it stated that there was a two-year plus a one-year sentence having been imposed but yet it is only a length of a two year sentence is two years with one year left to serve being imposed thereon.

27. In the circumstances, further information would be required from the issuing judicial authority before surrender could be ordered. I will consider further below whether to make this further request.

Point of Objection No. 3 - Lack of clarity re the number of offences

28. Counsel for the respondent under this objection submitted there was a lack of clarity as to the number of offences for which the surrender of the respondent was sought. He referred to point (e) of the EAW and the reference to 165 counts of fraud and the statements made thereafter. He also submitted that the additional information of the 1st October, 2018 in relation to Rákeve District Court, had referred to a felony of fraud committed continuously and the 164 misdemeanour counts of fraud.

29. In the view of the Court, the EAW and the additional information are clear as to the number of offences. In the first place, the EAW at point (e) referred to "*165 count felonies of fraud + 3 count felonies of fraud.*" These are each further divided into the relevant sections of the code. This further breaking down is indicated because the references to the codes are contained in brackets.

30. In the section dealing with the description of the offence under part A of point (e), 165 names of persons who were defrauded are set out. It is therefore clear that these are the 165 count felonies of fraud. In respect of the offences of 3 counts felony of fraud, it is clear that they relate to the Paks offences which are under part B of point (e) and are then subdivided into three offences.

31. In the letter of the 1st October, 2018, there is a further reference to the three offences dealt with by the Paks Court. In relation to the Rákeve District Court offences, the letter also refers to a felony of fraud committed continuously and the 164 misdemeanour counts of fraud. In total, the letter refers to 168 counts of fraud, which is the total number stated in the European Arrest Warrant.

Point of Objection No. 4: Incorrect designation of Article 2 para 2 of the Framework Decision

32. The next point of objection was that the offences from the Paks Court do not satisfy Article 2 para. 2 of the Framework Decision. Counsel submitted that the offences could not be said to be within Article 2 para. 2 because the punishment available for these offences was less than the three years available in respect of the ticking of the box. This argument was based on the description in the EAW of these offences as counts of felony of fraud but the contradictory description of some of these counts (in the further information) as misdemeanour counts of fraud in both the Paks City Court and the Rákeve District Court.

33. This issue is further complicated by the references in the EAW concerning the nature and legal classification of the offences and the applicable statutory provision. Dealing with the offences under A, the EAW stated that the penalty for a felony shall be imprisonment not exceeding three years if the fraud involves a minor value and it is committed by either of the means referred to in subparagraphs B(a) - B(c) of ss. (2) of the Criminal Code of 2012. The EAW then proceeded to state that the penalty for a misdemeanour shall be imprisonment not exceeding one year if and it lists a number of matters including (a) that the fraud results in minor damage or (b) the fraud results in damage under the petty offence limit and it is committed: B(a) in criminal association with accomplices, B(b) at a place of emergency, B(c) on a commercial scale (habitual offence), B(d) under the false pretences of soliciting donations for charitable purposes. The EAW then indicated the provision in respect of sentencing of multiple counts of offences. The EAW also stated that for the purposes of the Criminal Code of 2012, the amount of value damage or loss shall be construed:

(a) "*Minor between 50,000 + 1 and 500,000 florins.*"

The EAW also said that crime is deemed to be committed on a commercial scale habitual offence if the perpetrator is engaged in criminal activities of the same or similar character to generate profits on a regular basis.

34. In relation to the offences from the Paks Court, there is a reliance on the Criminal Code of 1978. The information provided stated that the punishment for a felony is imprisonment of up to three years if (a) the fraud causes a greater damage and (b) if the fraud causes a smaller damage it will be a misdemeanour imprisonment of up to two years. The issuing judicial authority has also provided information about cumulative crime. In a case of accumulation of crime only one punishment is to be inflicted. It appeared, however, that the principle punishment shall be inflicted taking the gravest one as a basis from among the items of punishment of all the crimes. It appears that if the act orders imprisonment of definite duration for at least two of the crimes being in accumulation and the upper limit of the item of punishment in accordance with ss. 2 is not sufficient for achieving the aim of punishment than that may be increased by half but not reach the joint duration of the upper limit of punishments established for the several crimes. It seems to me that the information of the 1st October, 2018 indicated that two of these offences were misdemeanour matters. In those circumstances, it is possible that the ticking of the box does not appear to apply to this matter. This is because the issuing judicial authority has in fact stated that the misdemeanour imprisonment is up to two years. In my view, the accumulation punishment only applies to a situation where there is imprisonment of definite duration under an act. The crimes here do not call for definite duration imprisonment rather they call for imprisonment of up to a certain period.

35. In the ordinary course, the principle of mutual trust requires that the executing judicial authority accepts a designation under Article 2 para 2 of the Framework Decision. Offences can only be designated as Article 2 para. 2 offences where they carry sentences of at least three years' imprisonment. The problem in the present case is that there is a description of these offences in two separate areas as either felonies or as misdemeanours. That is an unfortunate lack of clarity. That lack of clarity is compounded by the different penalties that appear to apply for misdemeanours and felonies as set out. It appears that a penalty for a felony is only three years if the fraud involves a minor value and is committed either on a commercial scale or in association with accomplices. Minor value is said to be in excess of 50,000 + 1 and 500,000 florins. In the Rákeve Court offences, the defrauding in all except one case was less than €50,000. That case may well be the count of felony. However, the result of that is that the penalties available for the other offences may not appear to reach the level of minimum gravity required for an indication under Article 2 para. 2 of the Framework Decision. In those circumstances correspondence must be established.

36. It is unsatisfactory that the executing judicial authority should be left in any doubt as to whether the correct designation has been made. That the Court has had to embark upon this is because of the different indications given as to whether the offences are misdemeanours or felonies and the different penalties for each of those which the issuing judicial authority has provided. In the circumstances, and prior to the final decision on this issue, and whether correspondence/double criminality has in fact been met, if the box is incorrectly relied upon, it would be necessary to have further information.

Point of Objection No. 5: An ambiguous guarantee of a right to a retrial

37. Under this heading the respondent objected to his surrender as he submitted that the guarantee as to a retrial or appeal was ambiguous. He submitted that the phrase not tied to a deadline was ambiguous. He submitted that the requirement under the act was to have a deadline. If there was a timeframe there had to be a deadline.

38. This referred to the fact that the issuing judicial authority had indicated at point (d) that he would have a right to a retrial in respect of the decision. In my view, there is no issue with the Hungarian judicial authorities indicating that the timeframe is not tied to a deadline. This simply means he may claim his right to a retrial or appeal at any stage. There is no reason not to accept this assurance and in those circumstances I reject that point.

39. There is however another issue with point (d) and compliance with s.45 of the Act of 2003. Point (d), as complete in the EAW, made no distinction between the two different trials that applied here. The EAW referred to a trial in Rákeve District Court and the trial in Paks Town Court. The central authority also had a concern about that and in their letter of 11th December, 2018, to which reference has already been made, the central authority asked for confirmation "*that section (d) is to be read as applying to both of the trials which resulted in sentences being imposed on Mr. Henn*". No response to that has been received.

40. In the ordinary course, the Court may be prepared to accept an overall indication of a retrial as covering all relevant trials. The problem in the present case however is the lack of overall clarity in respect of the sentences and the designation of offences that should be covered by Article 2 para. 2. The lack of clarity with respect to the separate trials, is heightened in the present case where there was an express request as to that information but that information has not been supplied. In all those circumstances, the Court is of the view that it would be appropriate to seek further information provided. The Court will deal with the request for information at the end of its decision.

Point of Objection No. 6 – Location of Offences

41. Counsel for the respondent submitted that in answer to a query about the location of these offences by the central authority, the issuing judicial authority had not given an indication as to where the 165th offence had occurred but only 164 of the alleged offences. In the view of the Court, this is an incorrect reading of the information in the letter dated the 1st October 2018. As set out above the information in terms of the Rákeve District Court offences refers to the place of perpetration of the felony of fraud committed continuously and the 164 misdemeanour counts of fraud is Szigetújfalu 20th December, 2010 – 28th November, 2011, and Szigetújfalu, 20th December, 2010 – 28th November, 2011. It is clear that there is a reference to the single count and the 164 counts separately but there is also a reference twice to the location of Szigetújfalu and to the dates 20th December, 2010 – 28th November, 2011. In those circumstances, it is clear that the indication is being given that the single count was committed in Szigetújfalu and that the 164 counts were also committed in Szigetújfalu.

42. In those circumstances there is clarity as to the place of commission. There is also clarity therefore that these offences were committed in the issuing state and surrender is not prohibited under s.44 of the Act of 2003.

Point of Objection No. 7 – Lack of Clarity in Description of Offence

43. Under this heading counsel for the respondent submitted there was a lack of clarity in the description of the offences. This arose in circumstances where the description of offences lists out those people who were defrauded. They are listed under the heading of the names that were used by the defendant to communicate with the people applying for the advertisement. At one point instead of a particular name it is stated: "*In the name of unidentifiable advertisers*". Counsel submitted that this information is too uncertain and lacks clarity with respect to offences for which he is being surrendered.

44. This point is also rejected by the Court. This is simply a statement that some of the names of the advertisers were unidentifiable. This is not a ground for refusing surrender. If there is any difficulty with these matters they can be dealt with at the retrial in the issuing state.

Point of Objection No. 8 – Retrospectivity of Offences

45. This claim arose out of the response to a request by this Court in respect of the previous EAW that had been issued in respect of this respondent. The earlier EAW had referred to 109 offences of a swindling nature. That EAW dated 18th October, 2012, had referred to 109 counts of offences. It gave a description of the circumstances in which the offences were alleged to have been committed which was similar to the narrative count set out above. In particular, the same dates were at issue, 20th December, 2010 and 9th November, 2011 (although the offences in the present EAW extend to 28th November, 2011). The same aliases were used. And virtually every other matter was the same. It said however that it referred to 109 individuals. In the present EAW, there is reference to 165 individuals.

46. That previous EAW also referred to the fact that the acts he was charged with were classified as one count of the felony of fraud in violation of s.318 of the Hungarian Criminal Code and 108 counts of the misdemeanour of fraud in violation of s.318 of the Hungarian Criminal Code. It then referred to s.318 of Act (iv) of 1978 the Hungarian Criminal Code. The present EAW refers to the applicable statutory provision or code being Act C of the Criminal Code of 2012.

47. In its answer dated 13th December, 2018, the issuing judicial authority stated as follows:

"(1) The European Arrest Warrant issued by the Rákeve District Court under no. 18.BNY.71/2012/2 contains 109 counts of the offence and it covers the indicated 168 counts of the action.

The only reason for the difference between the counts is that the qualification of the actions has changed due to legislative changes, but the arrest warrants apply to the same action.

(2) In its judgment no. 9.B.686/2013/10 of 22nd January, 2014, becoming final and absolute on 01st December, 2014, the Rákeve District Court found Zoltan Huba Henn, accused, guilty in his absence of 164 counts of the misdemeanour of fraud (s.373/1/BC/of act C of 2012) and of the felony of fraud committed by a repetition of acts of the same kind (s.373/1/,/3/B of act C of 2012).

(3) Having regard to the fact that the Rakeve District Court has closed the cases of the above numbers with final rulings, the conditions based on which the European Arrest Warrant and the International Arrest Warrant have been issued have ceased to exist, therefore the arrest warrants have been withdrawn".

48. Counsel for the respondent submitted that this was a clear indication by the issuing judicial authority that he was being punished retrospectively for acts which were not offences at the time. He submitted that the interpretation was that the 109 were offences but not the 168. He submitted that it was a statement from the issuing judicial authority as to how they had prosecuted based on the previous legislation. He referred to the case of *Enright v. Ireland* [2003] 4 I.R. 321 which had dealt with the issue of retrospectivity.

49. In the case of *Minister for Justice and Equality v. D.S.* [2015] 3 IR 1 this Court dealt with a claim that the reference to a later criminal code had demonstrated that there was a breach of retrospectivity. In that case the respondent had relied upon Article 15 of the Constitution as well as Article 7 (1) of the ECHR which prohibits retrospective criminality or an increase in applicable penalty. This Court dealt with the issue as follows:

"[139] The issue of retrospectivity is raised by the respondent in a stark manner. He does not engage with the principles set out in the well-established jurisprudence applicable to a claim that is made that surrender is prohibited under s. 37 of the Act of 2003 as being contrary to any provision of the Constitution or as being incompatible with the State's obligations under the ECHR and its Protocols.

[140] Regarding his complaint concerning Article 15.5.1° of our Constitution, this provides "[t]he Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission". It is clear from this that it is applicable to the legislative situation in Ireland. It does not apply to the legislative situation in Croatia.

[141] In so far as it may be suggested that there is a personal right not to be prosecuted for a retrospective offence, it is clear that a prohibition on surrender would have to reach the point where it had been established that there was an egregious flaw in the system of justice in the issuing state (Minister for Justice v. Brennan [2007] IESC 21 , [2007] 3 I.R. 732) and that he was at real risk of being subjected to same. In so far as the respondent raises a prospective breach of article 6 rights, it is for him to establish on substantial grounds that he was at real risk of being subjected to a flagrant denial of justice.

[142] The respondent has not established that he is at such real risk. He has not raised any matter of substance in this case that causes the court even the slightest doubt that he will be at risk of exposure to such a system that will permit punishment for retrospective offences. Merely pointing to a reference in the EAW to sections of the penal code which apparently postdate this offence is insufficient. This is particularly so where the nature and legal classification of the offence in this case is said to be "violating the rules of international law...thus committing the offence against humanity and international law". The rules of international law must relate to the relevant provisions of the Geneva Convention which are referenced as part of the particulars of the offence. I therefore reject his point of objection under this ground."

50. Counsel for the respondent submitted that he has overcome the hurdle in the *DS* decision because he can point to the reply of the issuing judicial state. He said that this reply is an express reference to the difference between the counts being as a result of legislative changes.

51. Counsel for the minister has submitted that the Court must consider the information provided by the issuing judicial authority carefully. In part A of point (e) of the EAW, there are 165 named persons. In the earlier warrant, although they were not named the warrant said it related specifically to 109 persons. Counsel submitted that it may be a matter of translation but that what was being said in the present case that the previous warrant contained 109 counts of the offence and that these were covered in the indicated 168 counts of the action. It was submitted that this meant that the 109 were being subsumed into the 168. In other words, there were now more individuals at issue in these proceedings.

52. Counsel also submitted that the respondent had not demonstrated that there was a real risk that he was being prosecuted for offences that were not offences at the time or that he would be exposed to a more serious penalty. In reality counsel submitted this

was a similar situation to *DS* where there was an update to the criminal code but that that was insufficient to prove that rights would be violated.

53. This Court must apply the principle of mutual trust and mutual recognition of judgments in an issuing state. Section 4(a) of the Act of 2003 provides for a presumption that a member state will abide by the provisions of the Framework Decision. There is also in effect a presumption (non-statutory), that they have abided by the principles of the Framework Decision and in particular that they will have respected fundamental rights in their dealings with requested persons. It was those principles that were at the heart of the decision by this Court in *DS*.

54. In those circumstances, I am satisfied that it has not been established by the respondent that there is a real risk that he has been prosecuted for offences that were not offences at the time. Indeed, the totality of the information provided by the issuing judicial authority demonstrates conclusively that the offences were offences under the Criminal Code of 1978 and are also offences under the Criminal Code of 2012. It has not been demonstrated that the penalties applicable are now in fact higher.

55. The height of the respondent's case appears in fact to be that there was a reorganisation of the charges because of the new legislative code. In my view, that is not the correct interpretation of what has been submitted by the issuing judicial authority. It seems to me that the 109 charges are part of the 168 charges, but are not to be considered the totality of the offences. It must be recalled that there was a slight change in the date. It must further be recalled that the Rákave District Court never in fact dealt with 168 charges in relation to the 2010/2011 charges, instead, those related only to 165 charges. The other three charges were quite separate and related to the Paks District Court. It is therefore clear that the 168 charges were never fully part of the earlier offence. At least three of those had to have been different. The reference therefore to the 168 offences must be viewed in that light. The conviction therefore is in respect of the 109 offences but also others.

56. Furthermore, I am quite satisfied that even if the 109 charges had now become 165 charges due to the change in the legislation, this was merely a procedural matter. A procedural reorganisation of charges is not a matter which reaches the level that a person is being subjected to punishment for an act that was not an act previously.

57. In those circumstances I reject the respondent's claim that his surrender is prohibited under s.37 of the Act of 2003 on the basis that he is being surrendered for acts that were not acts at the time of the alleged commission of those offences or that the penalty to which he is being subject is greater than the penalty to which he would otherwise have been liable.

Point of Objection No. 9 - Abuse of Process

58. Counsel for the respondent submitted that it was an abuse of process to surrender this respondent on this European Arrest Warrant. His claim was not based merely on the fact there was a second warrant but he submitted that brought it into the parameter of abuse of process. In particular, he submitted that there was delay, an issue with communication between the issuing judicial authority and the High Court in particular concerning the manner in which the Rákave District Court had dealt with the previous European Arrest Warrant. He also submitted that there was a delay in these proceedings.

59. This argument is not required to be finalised at present in light of the above findings.

Point of Objection No. 10 – Prison Conditions

60. The Court recalls that counsel expressed some concern at whether the assurances applied to imprisonment on the offences under this European Arrest Warrant. The request made to the Hungarian authorities included this warrant. The Court will seek further submission on this aspect of the case.

Section 20: Request for further information

61. This Court has made a determination that further information is required before it could be satisfied that his surrender should be permitted on this European Arrest Warrant. In those circumstances, the Court has to decide whether it should seek that further information. I have decided to so seek that information, despite the delays in the case that have existed to date because these are offences of a repetitive nature and where some of the lack of information may be down to either translation issues or the lack of a precise request on the part of this state. The respondent has also been on bail in respect of the original matter and his surrender on this EAW has not or will not be delayed to any significant extent pending the receipt of further information.

Addendum

62. The following questions were sent by the central authority on behalf of this Court's request for further information:

"(i) At paragraph (b)(2) of the EAW it states that the enforceable judgment is "imprisonment of two (2) years + imprisonment of one (1) year", and there is a reference to a judgment of Rackeve (sic) District Court and a judgment of Paks Town Court. However, at paragraph (c)(2) of the EAW, under the heading "Length of custodial sentence imposed" it states "Imprisonment of two (2) years" and under the heading "Remaining sentence to be served" it states "Imprisonment of one (1) year". The information at paragraph (f) of the EAW also states that the Hungarian arrest warrant was issued regarding the two years and the one year imprisonment.

In the circumstances, the High Court believes there is a lack of clarity as to what sentence or sentences his surrender is sought by this European arrest warrant.

Please confirm the exact period of imprisonment Mr Henn will be required to serve in relation to each of the sentences imposed on him and whether he is required to serve these sentences concurrently or consecutively.

Please explain why the EAW says he only has one year remaining to serve when his surrender appears to be also sought in respect of a sentence of two years duration.

(ii) The Issuing Judicial Authority has indicated that all of the offences are offences to which Article 2(2) of the Framework Decision applies. In order for Article 2(2) to be applicable, each of the offences must be punishable by a custodial sentence for a maximum period of at least three years. The EAW states refers to all of the offences as being "felonies". However, the additional information provided on 1st October 2018 refers to some of the offences as "misdemeanours".

The High Court notes the information given in the EAW regarding the "Nature and legal classification of the offence(s) and the applicable statutory provision/code" regarding cumulation of sentence. It is not clear to the High Court that the provisions regarding cumulation of sentence apply to all of the offences contained in the EAW.

Please confirm which of these offences are felonies and which are misdemeanours. Please confirm, by pointing to the relevant section of the criminal code, that regardless of whether they are felonies or misdemeanours that each offence carries a period of imprisonment of at least three years. If relevant, please explain how this may be affected, if at all, by the cumulative penalty provisions.

(iii) The High Court notes that the Issuing Judicial Authority has indicated at paragraph (d) of the EAW that Mr Henn would be entitled to a retrial or appeal. Please confirm that this guarantee of a retrial or appeal applies to both the trial which occurred at Paks Town Court and the trial which occurred in Rackeve (sic) District Court."