Neutral Citation Number: [2011] IEHC 72

THE HIGH COURT

2009 259 EXT

BETWEEN:

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND

FRANCIS CIARÁN TOBIN

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 11th day of February 2011:

This is the second application which is made for the surrender of the respondent to Hungary so that he can serve a sentence of imprisonment which was imposed upon him in his absence in Budapest on the 7th May 2002. The first application was refused by this Court on the 12th January 2007, and affirmed by the Supreme Court on 25th February 2008, on the ground that the respondent had not 'fled' from Hungary within the meaning of that word in Section 10 of the European Act, 2003 ("the Act of 2003"), as by then amended, and was therefore not a person in respect of which surrender could be ordered.

Other grounds of objection were rejected by this Court, and since the Supreme Court affirmed the 'fled' conclusion on appeal, and determined the appeal only by reference to that issue, the remaining grounds of appeal were not addressed in the Supreme Court's judgment, and the respondent again argues those points of objection on the present application even though they were the subject of argument and findings in the High Court on the previous application. Those issues arise again on the present application, as well as new points of objection which arise because of events and circumstances arising subsequent to the conclusion of the first application. I will come to those in due course.

The most significant event which has occurred since the said refusal of surrender is that the Oireachtas enacted an amendment to section 10 of the Act of 2003 which has removed in respect of European arrest warrants issuing after 29th August 2009 the requirement that the applicant must satisfy the High Court that the respondent has 'fled' from the issuing state before serving the sentence which was imposed. These amendments were effected by Part 2 of the Criminal Justice (Miscellaneous provisions) Act, 2009 ("the Act of 2009") which was signed into law on the 21st July 2010, which was commenced on the 29th August 2010 by the Criminal Justice (Miscellaneous Provisions) Act, 2009 (Commencement) (No.3) Order 2009 (S.I. 330/2009).

It is in these circumstances that the issuing judicial authority has on the 17th September 2010 issued a new warrant, essentially in precisely the same terms as the previous one, again seeking the respondent's surrender, now that it is no longer a requirement of the Act of 2003 that the respondent be a person who has 'fled' from the issuing state before serving the sentence imposed upon him. Arguments are now made by him on the present application, *inter alia*, that this amendment cannot apply retrospectively in respect of the respondent, and that the renewed attempt to have him surrendered amounts to an abuse of process. Many other issues also arise, and I will come to these issues in due course. But the applicant submits that following the amendment effected to section 10 by the Act of 2009, the respondent is a person to whom section 10 now applies.

Surrender is sought so that the respondent can serve the sentence of imprisonment which was imposed upon him. An issue arises as to precisely what that sentence was, following its adjustment by an appeal court in Hungary. As originally passed at first instance the sentence was one of three years. A question arises on this application whether it is still a three year sentence with the possibility only of some sort of parole after eighteen months, or whether it is in fact a three year sentence with the final eighteen months suspended, the latter being the basis upon which the matter was argued by the Applicant on the previous application. There is further information available now which suggests that it is not a three year sentence with eighteen months suspended but I will come to that issue. However, whatever be the true nature of the sentence or how long the respondent will be required to serve in prison if surrendered, minimum gravity is satisfied one way or another, since there is no doubt that a sentence of more than four months has been imposed. Different issues arise relating to this issue and I will come to those.

The new warrant is one which issued in Hungary on the 17th September 2010. It was duly transmitted to the Central Authority here and thereafter was endorsed for execution by the High Court on the 14th October 2010. Thereafter, the respondent was duly arrested on foot of same on the 10th November 2010 and, as required, was immediately brought before the High Court. He was remanded on bail thereafter pending the determination of the application for his surrender.

No issue arises as to the respondent's identity, and it is clear that he is the person in respect of whom this warrant has been issued.

No undertaking for a retrial upon surrender is required to be provided, since it is clear also that the respondent had been notified of the date, time and place of his trial in Hungary, and chose not to attend his trial in 2002, though he was legally represented.

Correspondence:
Paragraph (e) of the warrant discloses that the Hungarian court found the respondent guilty "of the misdemeanour of violation of the rules of public road traffic by negligence causing death, an act contravening Section 187, subsection (1) of the Criminal Code and qualified by subsection (2), paragraph (b) of said section".

The warrant further discloses that the offence under Section 187 (1) of the Criminal Code is committed by a "person who causes grievous bodily harm to another person or persons by the violation of the rules of public road traffic by negligence commits a misdemeanour, and shall be punishable with imprisonment of up to one year, labour in the public interest or fine. According to subsection (2), paragraph (b), the punishment shall be imprisonment of up to five years if the crime causes death" (my emphasis)

Paragraph (e) also sets forth as follows a description of the circumstances in which the particular offence in this case was committed by the respondent:

> "At around the time of 3.45 pm on 9th April 2000 [the respondent] was driving Volvo S40 car with licence plate number GZJ – 500 with four passengers along Moricz Zsigmond Street within the city limits of Leanyfalu (Hungary), in an inhabited area, at a speed of 75-80 kilometres per hour proceeding from the direction of Visegrad to Szentendre. The accused steered to the right for unknown reasons, and due to the sudden movement of the steering wheel, and to the speed, being excessive compared to the traffic conditions, the vehicle went up on the sidewalk which was separated from the road by a raised stone edge, at a speed of 71-80 kph, and hit Márton ZOLTAI, aged 5, who was waiting on the sidewalk, and Petra ZOLTAI, aged 2, who was sitting in a pram. Both Márton Zoltai and Petra Zoltai died on the spot as a result of the accident."

In so far as the Hungarian offence created by Section 187 (1) of the Code refers to causing grievous bodily harm by negligence, it is submitted by the respondent there is no offence in this State of negligent driving.

The applicant has put forward a number of possible offences here for the purposes of establishing correspondence under Section 50 of the Act of 2003. Those put forward are dangerous driving causing death or simple dangerous driving, contrary to section 53 of the Road Traffic Act 1961, as amended; manslaughter by criminal negligence contrary to Common Law; careless driving contrary to section 52 of the Road Traffic Act, 1961, as amended; driving without reasonable consideration contrary to section 51A of the Road Traffic Act, 1961, as amended; and lastly, exceeding a speed limit contrary to section 47 of the Road Traffic Act, 1961, as amended.

Each party made submissions in relation to correspondence, and these are admirably and helpfully set forth in written submissions filed and to which Counsel spoke. Having heard those submissions, and even though references are made to some decisions in relation to correspondence which post-date the earlier judgment of mine on the first warrant, I do not consider it necessary to revisit my earlier finding in relation to correspondence. While it is true that the Hungarian offence is one of negligent driving causing death, and while it is also true that in earlier versions of this warrant the term "reckless" was used, these features do not alter or affect the Court's task as required by section 38 or section 5 of the Act of 2003. This Court must look at the facts contained in the description of the offence in the warrant and be satisfied that if those acts were done here an offence would be committed. That is the basis on which the Court proceeded on the last occasion, and there is no reason to take any different approach on this occasion, or to reach any different conclusion. Accordingly I am satisfied that the offence corresponds to an offence here of dangerous driving/dangerous driving causing death contrary to section 53 of the Road Traffic Act, 1961, but would correspond also for the purposes of section 5 of the Act of 2003 to a number of lesser offences identified in my earlier judgment.

The applicant has submitted that there is no reason to refuse to order surrender under Sections 21A, 22, 23 or 24 of the Act of 2003, and it is further submitted that subject to the Court reaching conclusions in relation to the issues raised by the respondent, there is no reason why surrender is prohibited by any provision of Part III of the Act of 2003 or the Framework Decision.

Objections other than correspondence:

Abuse of Process:
Brian Murray SC of the respondent has pointed to five events which have occurred since this Court and the Supreme Court reached their conclusions on the first application for the respondent's surrender, and which he submits are significant, and support the submission that the present application for surrender represents an abuse of process.

Firstly, he has referred to the fact that this State has, by enacting Part 2 of the Act of 2009, changed the law since the previous refusal of surrender by removing the need for the applicant to establish that the respondent 'fled' from the issuing state before serving the sentence imposed upon him - the point on which the respondent succeeded on the first application. It is submitted that the Oireachtas has effectively set at nought the Court's previous decision by this amendment, thus enabling the issue to be re-litigated by reference to a changed statutory regime, and that this constitutes an unacceptable breach of the separation of powers, and must be seen as an unlawful interference with the independence of the judiciary.

Another point is made by reference to this legislative amendment by reference to the insertion into section 10 (d) of the Act of 2003 by the Act of 2009 of three words, namely "in that state". It is submitted that this provision now means that in a conviction case the Court may surrender only in respect of a sentence imposed in a Member State, and that while Hungary has been a Member State of the European Union since a date in May 2004 it was not a Member State at the time that a sentence was imposed on the respondent, and that accordingly it is not a sentence imposed by a Member State, and therefore is one not encompassed by section 10 (d) as amended. It is submitted that it was never the intention that the Framework Decision would apply to pre-accession sentences.

Secondly, he refers to the fact that the present warrant was issued in Hungary and was later endorsed here for execution before the Act of 2009 had been published, that publication taking place only on the 3rd November 2010 even though the amending Act was commenced by statutory instrument on the 25th August 2010.

Thirdly, he refers to the fact that the warrant in the first application referred to a sentence of three years with a suspension of the final eighteen months, and that this was the stated basis for surrender both in the High Court and in the Supreme Court as appears from those judgments, whereas the issuing state now contends on the present application that the sentence to be served is a three year sentence and that there is a discretion only to release him on some sort of parole after eighteen months. Mr Murray characterises this as an effective doubling of the sentence to be served since the time of the first application.

Fourthly, he refers to the fact, as evidenced in the respondent's grounding affidavit filed in support of his Points of Objection, that the respondent has received a death threat and has been the subject of adverse publicity in Hungary in which, *inter alia*, he has been characterised as a murderer and child killer. This is a feature that has occurred only since the Court's refusal to surrender him on foot of the first application, and it is submitted that it is a new matter to which importance must now be attached as the respondent is concerned as to what steps would be taken to protect his right to life and bodily integrity if he is surrendered.

Fifthly, he refers to the fact that it is by now over five years since the previous warrant was issued, four years since the judgment of this Court on the 12th January 2007, and almost three years since that judgment was upheld by the Supreme Court on the 'fled' issue, the remaining issues on the appeal remaining undecided by the Supreme Court. Mr Murray refers to the fact that another amendment to the Act of 2003 effected by the Act of 2009 now requires any party wishing to appeal against a decision of this Court on an application for surrender to make an application for leave to appeal, and that before such leave can be granted the Court must be satisfied that the decision involves a point of law of exceptional public importance and that it is the public interest that an appeal be brought to the Supreme Court. It is submitted that this curtailment of the respondent's right to appeal could result in the respondent being prevented from pursuing those grounds of appeal in so far as the same issues are the subject of objection again on the present application, and the respondent is thereby prejudiced unfairly by the change wrought in that regard since the conclusion of the previous application.

These are the factual matters which the respondent submits render the renewed effort to seek the respondent's surrender an abuse of process.

Referring to the well-established principle of the finality of proceedings Mr Murray in his oral submissions characterises the abuse of process/ estoppel issue arising on the present second application for the respondent's surrender by asking is it possible for the applicant to bring a second application for surrender against a person who has already been the subject of an earlier application for surrender and on foot of substantively the same warrant, which application was fully heard and determined on the merits, and who prevailed on those merits, and in circumstances where the applicant is in a position to bring such a second application only because this State has subsequently effected a change in the law.

He submits that the applicant is now trying to re-litigate an issue already determined not only by the High Court but also the Supreme Court, those Courts already having determined that the circumstances in which the respondent left Hungary before he was convicted and sentenced were such as to not render him liable to be surrendered. He submits that this is the precise issue which the applicant now seeks to have determined for a second time, and that this is impermissible, and that what the applicant now seeks to do is to deprive the respondent of the benefit which he derived lawfully from the previous decision of this Court and the Supreme Court because the Oireachtas has seen fit to change the law to enable this to happen.

He accepts that there have been cases where a second application for surrender has been made successfully, but in any such cases the second application has been on foot of a substantially different warrant in contradistinction to the present application which is on foot of a new warrant which is substantially the same as the earlier warrant.

He of course referred to one such case where a second application was made on foot of effectively the same warrant, namely *Minister for Justice, Equality and Law Reform v. McG* [2007] IEHC 47, where on the first application the High Court (Macken J.) was not satisfied that the identity of the respondent had been properly established, and therefore surrender was refused. The second warrant in that case was supported by facts found to be sufficient to establish that the respondent was in fact the person in respect of whom the warrant had been issued, but he submits that that is an entirely different issue, and that the merits of the application had not been determined at all on the first application, other than the single issue of identity, and that the principle of *res judicata* did not therefore apply either in relation to the question of identity or otherwise.

Similarly, Mr Murray accepts that there have been cases where an application for surrender was refused on the ground that the warrant did not set forth sufficient facts to establish correspondence with an offence in this State, and where a second warrant was subsequently issued which contained a more expansive recitation of facts which were found to be sufficient to establish such correspondence. But he submits that such a situation is very different to the present case where it is a change in the law in this State and not simply a more detailed warrant which has enabled another attempt to surrender the respondent to be made.

But in the present case it is submitted that to re-litigate the same issue already determined on an earlier unsuccessful application, namely whether the respondent is somebody who is liable to be surrendered to serve this sentence of imprisonment is to offend against the principles enunciated in *Henderson v. Henderson* [1843] 3 Hare 100, and that even if the respondent is unsuccessful on that point, the invocation by the applicant of a subsequent change in the law in this State is a violation of the separation of powers, and that there could be no question, if the law had not been amended, of the applicant coming back to court to seek to have determined once again the same issue on which surrender has already been refused. He rejects the suggestion being made by the applicant that the issue for determination on this present warrant is a different issue since the issue now is whether under the amended section 10 (d) of the Act of 2003 the respondent is a person whom the Court may surrender. He submits that the law could easily have been altered in this respect prior to the previous warrant being issued, should the Oireachtas have chosen to do so, but it did not, even though by the time that application was made the Oireachtas had in 2005 already made other amendments to the Act of 2003.

It is of course accepted by the respondent that the Oireachtas is perfectly entitled to amend the Act of 2003 at any time in whatever way it chooses in order to improve it or give further effect to the Framework Decision, but it is submitted that it may not do so as to affect a person who has already had an application on foot of substantially the same warrant determined in his/her favour, and that the Act of 2003 as now amended should be interpreted in a manner which precludes its retrospective application to this respondent or in a manner which enables this issue to be re-determined.

Mr Murray has urged that even though this issue of abuse of process arises in an extradition context, and even though it is accepted that extradition proceedings are what has many times described as 'sui generis', there is no reason why the normal rule in relation to re-litigating an issue already decided should not apply. He refers to and relies upon the judgment of Denham J. in *Vantive Holdings* [2009] IESC 69. It is urged upon the court that a parallel can be drawn between *Vantive* and the present case in as much as the former was a case not strictly *inter partes* as, it is submitted, is the present application for surrender given the Court's inquisitorial role in extradition matters, and it is submitted that the principles relating to abuse of process are equally applicable.

The facts in *Vantive* are of course necessarily and completely different in nature to the present case. In *Vantive* a petition to allow the company enter examinership had been refused both in the High Court, and on appeal by the Supreme Court, those Courts not being satisfied that sufficient evidence had been adduced by the petitioner as to the reasonable prospects of the company surviving as a going concern. A second petition was presented, grounded upon, *inter alia*, new evidence not before the Court on the first petition. It would appear that this new evidence could have been made available on the first petition but a strategic decision had been made by the petitioner, contrary to legal advice given to him, not to do so. The High Court allowed the second petition to go to hearing. However, for the reasons given by Denham J. in her judgment, this petition was considered to amount to an abuse of process. A number of factors were identified by the learned judge as relevant to the consideration of whether an abuse of process occurred. Those factors were said to include the actions and explanations of the petitioner, the effect on persons of multiple petitions, and the fact that a second petition inevitably impacts on the scarce resources of court time and court staff. In the event, the learned judge reached her conclusions in *Vantive* on the basis of the first of these factors, and concluded that the actions of the petitioner in deciding to withhold evidence which he could have adduced prohibited him from proceeding with a second petition "which is fundamentally the same" and constituted an abuse of process.

Mr Murray refers to a passage of the judgment of Denham J. at paragraph 39 et seq. where she addresses the principle of finality of proceedings as follows:

> "39. Fundamental principles apply to the issue raised in this case. There is a constitutional right of access to the courts. This encompasses a right to apply to court, a right to legal representation, a right to a hearing, and a right to a decision with reasons. Thereafter there is a right to an appeal. There are exceptional circumstances, in the interests of justice, when a matter may be revisited. But the fundamental principle is that it is in the public interest and for the common good

that there should be finality in litigation. An aspect of this principle is that parties should not be exposed to multiple litigation and should have closure on an issue. Also, there is the public interest that the limited resources of the courts should be used justly and with economy.

40. In this case the petitioner exercised his right of access to the courts, and to have legal representation. He applied for an examiner to be appointed. The case was heard in detail before the High Court and a written judgment given expressing the reasons for the refusal of the application. Thereafter the petitioner exercised his right of appeal. There was no application to bring further documents before this Court. The appeal proceeded on the same basis as the hearing before the High Court. There was a full hearing on the appeal and a written judgment given of the reasons for dismissing the appeal.

41. Within days of that decision the petitioner brought the second petition to the High Court, which gave rise to the issue before Cooke J..

42. The interests of justice require that there be finality of litigation. If a petitioner were entitled to make a second or further petition on the general "overriding consideration" of legislative policy, as referred to previously, it would commence an era where multiple petitions would become the norm. A petitioner could then regard a primary petition as a stalking ground for advice on proofs from the court. Clearly, this was not envisaged by the legislation, nor is it consistent with fundamental principles of law."

Mr Murray urges that these observations apply equally in this case even though the facts are very different. He points to the fact that the respondent herein on the first warrant was arrested, was made the subject of a surrender application in the High Court where he successfully defended same, had to endure an appeal by the Minister and again prevailed, and had to endure along with his family all the anxiety, expense and uncertainty to be expected in such a situation, and now has to endure all of that once again simply because the State, albeit through the Oireachtas, has decided to change the law by removing the obstacle to surrender encountered by the Minister on the first application. He submits that there would have been nothing to prevent the Act being amended prior to the first application had the Minister chosen to do so, but he did not do so. It is submitted that even though in *Vantive Holdings* the abuse of process arose because of a strategic decision not to put before the Court certain evidence which was available, nevertheless the principle should apply equally in the present case where a legislative amendment should not result in the respondent being put to the hazard for a second time on essentially the same warrant though issued again subsequent to the 25th August 2009, and that if such were to be found to be acceptable, there would be no reason why, if unsuccessful yet again, the Act could not again be amended in an attempt to remedy the situation, and the respondent arrested again on yet another warrant and face a third application for his surrender, and so on until surrender was eventually ordered. Such a situation, it is submitted, would offend against the principle of finality.

Mr Murray has referred also to the judgment of Murray CJ in *Vantive* where he refers to a statement of Lord Bingham in *Johnson v. Gore Wood & Co* [2002] 2 AC 1 at p. 31 – a statement which has received approval here also as referred to by the Chief Justice. This statement appears as follows:

"*Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is however wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the pubic and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

In his judgment in *Vantive*, the Chief Justice stated:

"Again, to permit a party to make the same application on foot of withheld evidence by way of petition, without excusing exceptional circumstances, would undermine the principle of finality which the Courts have always considered essential to the integrity of the administration of justice. As Hamilton C.J. observed in *Greendale Developments Limited (in liquidation)* (No.3) [2002] I.R. 514 ' the finality of proceedings both at the level of trail and possibly more particularly at the level of ultimate appeal is of fundamental importance to the certainty of the administration of law, and should not be lightly breached'. To permit the petition to proceed, unless there are exceptional excusing circumstances, would undermine the integrity of the proper and efficient administration of justice and the principle of finality."

In support of his submission that the principle of finality should apply with equal force and effect in extradition proceedings, Mr Murray has referred to a judgment of Sir Anthony May in *Hungary v. Fenyvesi* [2009] EWHC 231 (Admin). Hungary had sought the extradition of the respondents. The respondents had adduced unchallenged evidence on the application for surrender to the effect that there was a real risk that if surrendered they would suffer inhuman and degrading treatment and would receive an unfair trial on the basis of their Roma ethnicity. Their surrender was refused and Hungary appealed and in doing so sought to adduce evidence to contradict the evidence of the respondents at first instance. That application to adduce fresh evidence was refused for the reasons given by Sir Anthony May in his judgment. There was no explanation given as to why this fresh evidence was not made available at first instance, and having had an opportunity to consider it the High Court formed the view that it might well afford a ground for allowing the appeal. The United Kingdom's Extradition Act, 2003 permits on an appeal the admission of evidence that was not available at the extradition hearing and which "would have resulted in the judge deciding the relevant question differently …". However, it was concluded that this provision should not be liberally interpreted and that the Court would have to be persuaded that there was some good reason why the evidence was not made available at first instance, and secondly, that it was decisive. In the circumstances these tests were met and the application was refused. The test was said to be a strict one "consonant with the parliamentary intent and that of the Framework Decision, that extradition cases should be dealt with speedily and should not generally be held up by an attempt to

introduce equivocal fresh evidence which was available to a diligent party at the extradition hearing". At the commencement of his judgment, Sir Anthony May had referred to the rule in *Henderson v. Henderson* and stated:

> "Litigation should normally be conducted and adjudicated on once only. It is generally neither fair nor just that the expense and worry of litigation should be prolonged into an appeal because a party failed to adduce all the evidence they needed at first instance."

Mr Murray submits that the facts of the present case, while very different, nevertheless require that Hungary should not be permitted to return to Court some five years after surrender has already been refused, in a renewed attempt on foot of a new but identical warrant to achieve the surrender of the respondent, simply because the Act of 2003 has been amended to remove the obstacle previously encountered. It is submitted that the respondent was entitled following the disposal of the appeal to presume that the matter was finally disposed of and that he thereafter enjoyed the benefit of the principle of finality. He appreciates that the principle of finality has not previously been considered in the context of an amendment to the Act in an extradition context, but submits that the principle should equally apply.

Mr Murray, anticipating a submission to be made by the applicant that the issue on the present application is not one which has yet been determined by the Court on the previous application since the application is now brought in the context of the amended section 10, Mr Murray has referred to the judgment of O'Higgins C.J. in *Costello v. Director of Public Prosecutions* [1984] I.R. 436 in support of a submission that the amendment to section 10 in so far as the present respondent is concerned represents a breach of the separation of powers since its effect as far as the respondent is concerned is to render nugatory the previous decision of this Court, as affirmed on appeal, namely that the respondent is not a person whose surrender may be ordered by this Court. In *Costello*, the plaintiff had been arrested on certain charges and brought before the District Court where he was charged. The District Judge pursuant to powers in section 5 of the Criminal Procedure Act, 1965 conducted a preliminary examination, following which he concluded that there was insufficient evidence to put the plaintiff on trial on those charges and discharged him. Thereafter the DPP, exercising powers under section 62 of the Courts of Justice Act, 1936 directed that the plaintiff be sent forward to the Circuit Court on indictment on the same charges. Thereafter the plaintiff sought a declaration that the relevant provisions of section 62 of the Act of 1936 were repugnant to the Constitution and had no legal effect.

The Supreme Court held that a District Justice when conducting a preliminary examination pursuant to section 5 of the Act of 1967 and determining whether an accused person should be sent forward for trial on indictment or be discharged was exercising the judicial power of the State as conferred on the District Court by law in accordance with the Constitution, and that "when, in the exercise of such judicial power, there is a determination of these justiciable issues, that determination cannot be set aside or reversed by any other authority".

The Supreme Court was of the view also that the only, and intended, effect of a direction by the Director of Public Prosecutions given pursuant to section 62 of the Act of 1936 was to render a judicial determination made by a District Justice nugatory, and, therefore, to frustrate an order of the District Court, was an interference with the judicial domain, and constituted an attempt to exercise the judicial power of government otherwise than by the organ of State established for this purpose by the Constitution, and was therefore invalid having regard to the provisions of the Constitution. In so deciding O'Higgins C.J. stated at p.456 as follows:

> "… the Court does not accept that a direction under the section is not an intervention 'in the particular controversy before the District Court which has, in the event, already been brought to an end by the refusal of informations'. The controversy which was before the District Court was one between the people and the plaintiff as to whether there was sufficient evidence to put him on trial. A power given to a non-judicial authority to come to a conclusion different from that of the District Court and to enforce that conclusion by compelling the person accused to stand trial is, in the view of the Court, an impermissible intervention in the controversy between the people and that person.
>
> Finally, the Court does not agree that the direction under s. 62 is merely 'the initiation of a different justiciable controversy, namely the trial upon indictment'. At all times the controversy which the law committed to judicial determination by the District court was whether the plaintiff should stand trial upon indictment. If standing trial can be described as the initiation of a different justiciable controversy 'whose object is to determine the guilt or innocence of the accused person', then it was precisely whether such controversy should be initiated that the District Court was required by law to determine."

Mr Murray submits accordingly that the action by the Oireachtas in enacting the amendment to section 10 of the Act of 2003 is an attempt to interfere with and set at nought the previous determination of this Court and the Supreme Court that the respondent is not a person who may be surrendered to Hungary, and is equally impermissible. He characterises the amendment to section 10 as directing this Court now to enter upon the same justiciable controversy once more, and to reach a different conclusion.

In further support for his submission in relation to the separation of powers, Mr Murray has referred to the judgment of Lynch J. in *Howard v. Commissioners for Public Works (No.3)* [1994] 3 I.R. 394. The background to this judgment is that in October 1992 the Commissioners for Public Works had commenced the construction of a visitor centre in the Burren, County Clare, following which the plaintiffs sought, *inter alia*, certain declarations that the development was *ultra vires* the powers of the Commissioners and was illegal by reason of the fact that no planning permission had been obtained, as well as an injunction. Those declarations and injunction were granted by Costello J. (as he then was), he being satisfied that there was no general power or power otherwise to be implied, whereby such planning permission was not required.

Some six days later the Oireachtas enacted the State Authorities (Development and Management) Act, 1993, section 2 (1) of which provided, *inter alia*, that "a State authority shall have, and be deemed always to have had, power to carry out, or procure the carrying out, of development …" (emphasis added), and subsection (3) provided that "if, because of any or all of its provisions, subsections (1) and (2) of this section would, but for the provisions of this subsection, conflict with the constitutional rights of any person, the provisions of those subsections shall be subject to such limitations as are necessary to secure that they do not so conflict but shall otherwise be of full force and effect".

The plaintiff commenced further proceedings, and among the reliefs sought were a declaration that by virtue of the judgment and order of Costello J. the Commissioners had no power, whether by virtue of the Act of 1993 or otherwise, to proceed with the construction of the visitors' centre; injunctions restraining the Commissioners from proceeding with the construction thereof, and to restore the site to its prior condition, and also a declaration that the provisions of section 2 (1) and (2) of the Act of 1993 were invalid having regard to the provisions of the Constitution. In the event, these reliefs were refused by Lynch J. for reasons which are not particularly relevant to Mr Murray's submissions herein. But Lynch J. held, *inter alia*, that for the Oireachtas to purport to alter or reverse the determination by the High Court that the Commissioners had acted *ultra vires* in carrying out the development would

constitute an impermissible interference by the legislature with the judicial power, and accordingly, a contravention of the constitutional separation of powers of the organs of the State. In so holding, Lynch J. stated at pp. 406-407:

> "As is clearly stated in the judgment of Costello J. …… the first defendant is a creature of statute and therefore only has the powers given to it by statute. Having comprehensively reviewed the various statutes creating and relating to the first defendant, including pre-Union Irish statutes dealing with the precursors of the first defendant and right down to An Blascaod Mór National Park Act, 1989, Costello J. found that none of the statutes creating or relating to the first defendant conferred power on it to carry out the development at Mullaghmore. The Oireachtas cannot alter or reverse that finding or the declaration and injunction made on foot of the same. To attempt to do so would contravene the constitutional separation of powers of government given between the various organs of State established by the Constitution in that the legislature (the Oireachtas) would be trespassing on and into the judicial domain. Hence it is clear that by virtue of s. 2, sub-s. 3 of the Act of 1993, both sub-s. 1 and sub-s.2 must be read, in so far as the development of the visitors' centre at Mullaghmore by the first defendant is concerned, as if the words 'and be deemed always to have had' were omitted therefrom."

In other words, in so far as the statutory provision in question purported to invest the power retrospectively by deeming the first defendant to always have had the power, and thereby setting at nought the order of Costello J., this was impermissible as being a contravention of the separation of powers. Mr Murray characterises the amendment to section 10 of the Act of 2003 by the Act of 2009 as a similar setting at nought of this Court's and the Supreme Court's decision that the respondent is not a person whose surrender can be ordered by removing the need to establish that he 'fled', and submits that while that amendment can clearly apply to respondents to warrants issued after the amendment was commenced and who have not derived a benefit from a previous decision under the section, it must not be interpreted in such a way as to permit its application to this respondent whose surrender has already been refused under section 10 prior to its amendment, since that very issue has already been decided.

I have already referred to the fact that Mr Murray has referred to a number of cases where a second warrant was issued following a refusal of surrender on foot of a previous one, but in circumstances different from those in the present case. I will not set forth all those cases in detail at this point, but Mr Murray did refer to one such in particular, namely *Bolger v. O'Toole*, (Unreported, Supreme Court, 2nd December 2002). These were judicial review proceedings arising following the arrest of Mr Bolger on foot of backed warrants under Part III of the Extradition Act, 1965. However, the applicant had previously been arrested on foot of earlier warrants and had been discharged by the District Judge, he not being satisfied that the warrants were valid. The new warrants did not contain the defects found to exist in the earlier warrants. The applicant contended in the judicial review proceedings that the issue before the District Court on the earlier application was whether an order should be made under section 47 of the Act of 1965 directing that the applicant should be delivered up to the authorities in London in order to serve the sentence imposed upon him there, and that this issue had already been determined in the District Court, and that the issue had not been simply whether or not the applicant had been lawfully arrested on foot of those warrants. It was contended that the principle of *res judicata* applied, and that the authorities could not again re-litigate the issue already decided in the District Court. In the High Court, O'Neill J. refused to grant the reliefs sought being satisfied that the defects which were apparent in the earlier warrants did not exist in the new warrants, and that the issues to be determined on foot of the new warrants were not the same as those previously decided in the District Court, and that no estoppel applied. The applicant appealed and that appeal was the subject of an ex tempore judgment of Denham J. Having addressed the submissions of the parties and having referred to the relevant statutory provisions concluded that the issues on the new warrants were different issues yet to be determined. Mr Murray seeks support for his submissions from the following passage of her judgment commencing at page 11 thereof:

> "The issues before the District Court on these warrants will be different. No broad issue has been determined as to the extradition of the applicant to England. Technical issues were raised successfully in relation to the original set of warrants…….
>
> The warrants are new and any issues which may be raised will be different. The fact that the applicant was discharged by the District Court on foot of the previous set of warrants where there were two errors does not exclude a fresh set of warrants being produced and being endorsed. New warrants which have been endorsed now arise to be considered by the District Court. It is for the District Court to exercise its jurisdiction under the Extradition Act, 1965 as amended. The fact that a previous set of warrants existed and on which the applicant was discharged does not prima facie exclude the production and endorsement of a second set of warrants. <u>It may well be that for good reason, in the circumstances of the case, a court may determine that an application for rendition may be refused. Thus, if it were an abuse of process the application may fail.</u> In this case the applicant has been refused leave to make a specific application grounded on specified issues of abuse of process. However, that would not be a bar to any subsequent application for habeas corpus on different issues ……". (emphasis added)

Mr Murray relies on the emphasised passage in support of his general submission that a fresh attempt to seek surrender may in particular circumstances, which he submits exist in the present case, constitute an abuse of process on the basis of issue estoppel, those circumstances being that one of the issues to be determined on the present application is the very issue on which surrender has been already been refused. In his oral submissions, Mr Murray summarised this submission by stating that "the legislature cannot give itself the ability to re-litigate that issue by changing the law if it would not have had the ability to re-litigate that issue without changing the law, having regard to the determination of the Supreme Court and the judgment I have obtained."

Mr Murray also relied upon a judgment of Keane C.J. in *The Attorney General v. Gibson*, (Unreported, Supreme Court, 10th June 2004) – a case also relied upon by the applicant. That was a case where in the District Court an application for extradition was refused on the basis of certain defects in the warrant, but fresh warrants were issued which did not contain those defects. Kearns J. (as he then was) in the High Court did not consider that the doctrine of *res judicata*/abuse of process applied so as to prohibit the Court from adjudicating upon the fresh warrants. Keane C.J. on appeal on this point only, agreed. In doing so, he affirmed the statement of the law as found by Denham J. in *Bolger* was correct and that it is permissible for there to be an adjudication by the Court on a new warrant for the same matters as were the subject of a decision on a previous warrant. However, in so stating the then Chief Justice went on:

> "Of course, there may be cases in which, if he seeks to rely on the existing warrants, he would certainly be met by a defence of *res judicata* or abuse of process. But where they are different warrants, the law is as stated in the Bolger case that it is then a matter for the court which is asked to extradite the person concerned to consider whether the statutory requirements are met ……. The issue arriving before the High Court was, in law, a different issue and a significantly different issue from the issue which the District judge resolved on the first application……. <u>I am satisfied that… the High Court judge was not in any way precluded from embarking on an adjudication of the matter given that the warrant was in a significantly different form</u>……. It is also necessary to say that, in my view, sometimes in extradition

> cases it may not be altogether helpful to attempt to draw distinctions between technical points and points of substance and points on the merits because that is to disregard the nature of the extradition procedure which while unquestionably a judicial procedure, it is not simply an administrative procedure, but it is a judicial procedure of a very specific character which does not, of course, result in any adjudication on the merits of the particular charge with which the person is confronted.
>
> …… Points may be taken on an earlier hearing which are technical in nature…… but it is of no relevance at the end of the day because what is relevant is that the District judge can be said to have arrived at an adjudication which is final and binding between the parties and their privies and which relates to the same issue. If it does not relate to the same issue then it does not really matter whether one describes it as a decision on a technical point, a decision on a substantive point, a decision on the merits or whatever, if it was a final adjudication made within his jurisdiction as between the parties or their privies then, of course, the doctrine of *res judicata* can well arise in subsequent cases. If it is a different issue, then it does not matter, again, whether it is a technical issue or an issue on the merits.". (Emphasis added)

Mr Murray refers to, *inter alia*, the emphasised passage above, and submits that it is clear that the issue already decided as to whether the respondent is a person within section 10 of the Act of 2003 is not merely a technical issue on that application but a substantive decision on the merits of that application, and an issue again sought to be decided on the present application, albeit by reference to an amendment enacted to that section which removes the need to establish that the respondent 'fled'. It is submitted, as already referred to, that the applicant cannot seek to try and obviate the consequence of the Courts' earlier decisions by effecting an amendment to the legislation to avoid the obstacle therein encountered. It is submitted also that the present warrant is in all material respects the same warrant upon which the Courts have already decided in a substantive way and not merely a technical way, and not a different warrant in any material respect, so that any further application amounts to an abuse of process.

A further question arises as to whether or not the provisions of section 27 of the Interpretation Act, 2005 have a bearing on whether or not the surrender of the respondent can again be sought following the previous refusal. I will come to the submissions made in relation to that section in due course.

Maurice Collins SC for the applicant has responded to these submissions first of all by drawing attention to the undoubted fact that the respondent is not simply facing a trial for the offence but rather is sought so that he can serve a lawfully imposed sentence in Hungary, having availed of his right to appeal that conviction and sentence having at all times been fully represented by lawyers. He points to the obligation upon this Court to give effect to the European arrest warrant unless there is some ground within those provided for in the Framework Decision which provides a basis for not doing so. He submits that there can be no question of any abuse of process involved in the Hungarian authority seeking to have the respondent serve this sentence, even by again seeking his surrender now that the fleeing requirement has been removed from the Act of 2003, and he submits also, as concluded by Fennelly J. in his judgment in the Supreme Court on the appeal against the earlier refusal, that the insertion of that fleeing requirement in the Act of 2003 was not something required in order to give effect to the Framework Decision. It is submitted that in such circumstances there can be no abuse of process by the Oireachtas in amending the Act of 2003 in order to give proper effect to the Framework Decision, and that it cannot be said that in the present instance the amendment to section was enacted to override the decision of this Court and the Supreme Court on the earlier application, and in so submitting Mr Collins seeks to distinguish the present case from the Howard decision referred to by Mr Murray.

In such circumstances, and where it is clear from other cases referred to that a second application for surrender may be brought, it is submitted that no improper motive or abuse of process can be found to exist in relation to the present application such that an abuse of process could be found to exist.

It is submitted that all the Court is now being asked to do is reach a decision, based on the law as it now stands, as to whether there is any reason under the Act of 2003 and the Framework Decision not to make an order for surrender on foot of the present warrant, now that the fleeing requirement, which was never something which should have been included in section 10, has been removed. In such circumstances, it is submitted that the fleeing issue is not before the Court now for determination, and the issue now before the Court for determination is an entirely different issue to that which was already decided on the first application, and that the principle of *res judicata* is not therefore operable.

Mr Collins has referred to a judgment of the Court of Justice in IB (Case C-306/09) which refers at paragraph 42 to the fact that the Framework Decision provides in Article 32 thereof that it applies to requests for execution of an arrest warrant received after 1st January 2004 provided that the executing Member State has not made a statement indicating that it will continue to deal with requests relating to acts committed before 7th August 2002 in accordance with the extradition system applicable before 1st January 2004. Ireland has made no such declaration, and it is submitted that the present request is one to which the Framework Decision applies, and that there is nothing in the Framework Decision to indicate any intention that it should apply only in respect of post-accession judicial decisions. In fact, it is relevant to refer to section 4 of the Act of 2003 which now provides, following amendment:

> "4.— This Act shall apply in relation to an offence, whether committed or alleged to have been committed before or after the commencement of this Act."

There is no reference therein or any direct reference in the Framework Decision which indicates that the arrest warrant does not apply to offences or decisions which predate a state's accession to the European Union.

As regards the abuse of process argument, Mr Collins firstly refers to the undoubted fact that there is no general rule that a second application for surrender cannot be made, and has referred to a number of decisions which have affirmed this. Some of those cases have already been referred to.

Mr Collins acknowledges of course that if a second application is brought where it is sought to argue again an issue that was previously the subject of a court's determination, issue estoppel would apply, but that the 'fled' issue is not an issue in the present application since that issue is not required to be determined, given the change to section 10 (d) the Act of 2003.

It has been submitted that the case of *DPP v. Costello* to which Mr Murray referred in his submissions where a decision of the DPP to send forward an accused person on indictment in the face of a decision by a District judge on a preliminary examination that there was insufficient evidence to send the accused forward for trial was found to be an impermissible invasion of the judicial domain, is an entirely different situation to the present case since there has been no decision by any non-judicial authority which flies in the face of this Court's earlier decision. It would be different of course, in his submission, and perhaps a better analogy however fanciful, to draw if after the Supreme Court's decision on the previous application, the Minister had made some sort of order directing the

surrender.

In answer to the suggestion that while *Costello* was on different facts, the effect of the amendment to section 10 of the Act of 2003 has the same effect as that in Costello, Mr Collins has submitted that it cannot be said that this amendment was targeted at this respondent, but rather is one of a number of amendments made by the Act of 2009 in order to better give effect to the Framework Decision, and that all the applicant is seeking to achieve is an order which under the new statutory regime this Court is required to make unless there is any reason why surrender must be refused under the terms of the Act of 2003 and the Framework Decision. Again, Mr Collins refers to the absence of any fleeing requirement in the Framework Decision itself.

Mr Collins accepts that under Howard principles, the Oireachtas cannot legislate in a way which, in spite of the Court's conclusion that this respondent had not fled, deemed him to have fled. He submits that this would be a correct analogy to draw with Howard in the context of this respondent, since the legislature would be clearly seen to be directly interfering with a finding of the Court.

But in the present case, Mr Collins emphasises that all that has happened is that the Oireachtas has passed amending legislation which more accurately reflects and gives effect to the Framework Decision by removing the reference to fleeing in section 10 of the Act, which should not have been there in the first place, and had the Framework Decision been correctly given effect to in the Act of 2003 as first amended by the Act of 2005, the respondent would have been a person coming within the terms of section 10 and therefore a person in respect of whom an order for surrender could be made. It is submitted that the respondent was always a person whose surrender was within the terms of the Framework Decision, and that there can be nothing objectionable either by way of abuse of process or separation of powers by the applicant processing a European arrest warrant for a second time against the respondent where on the previous occasion the only reason why the application failed was because the Act of 2003 failed to properly give effect to the provisions of the Framework Decision.

Again, referring to the number of cases where a second or even third application for surrender have been made, Mr Collins submits that no citizen or other person is immune from changes in the law from time to time, and has in an extradition context given the example of a person who was at one time immune from extradition under the Act of 1965 on the basis of the political exception, but who following the removal of that exception became liable to extradition under a new legislative regime. He submits that there is nothing inherently objectionable in such a situation, and that in effect that is all that has happened in the case of this respondent.

Another point made by Mr Collins is that there is nothing within the Framework Decision itself which precludes in any way the bringing of more than one application for surrender. In fact, it is submitted, the contrary is the case since if surrender is refused for some reason in one particular Member State, and the respondent takes up residence in another Member State, a fresh warrant can be transmitted to that other Member State to once again seek the surrender of the person under the legal regime of that Member State, thus indicating considerable flexibility in the concept of finality in the context of the Framework Decision.

In his response to the submissions made by Mr Collins, Mr Murray emphasised the objective or purpose of the general principle of the finality of litigation, and submits that this purpose is to protect a person from repeated or multiple litigation in relation to issues which have already been determined by the Courts. It prevents a person such as the respondent who has prevailed previously from being once again agitated or vexed by an application which has already been refused, so that he can get on with his life in the knowledge that he will not again have to face the same litigation. It also prevents the Court's being burdened with such repeated litigation which would otherwise burden the administration of justice and the Courts with issues which have already been determined between the same parties, this being a public policy consideration behind the principle of finality.

Mr Murray accepts of course that there can be exceptions to this rule. But he submits that what is contended for by the applicant as a justification for re-litigating the present issues, namely a change in the law to address a deficiency found to have existed under the old law, cannot justify the retrospective application of that change to the respondent so as to again seek his surrender.

He accepts that where a different warrant is issued, having been preceded by a warrant in which there were technical deficiencies or an absence of sufficient detail leading to a refusal of surrender, there is no bar to such a second application, such as in the cases to which this Court has been referred, but where as in this case precisely the same warrant is again before the Court, the only reason put forward by way of justification is because the State has changed the law to address a deficiency found to exist in the law, then this is insufficient to oust the common law principle of finality underpinning the doctrines of abuse of process, *res judicata* and issue estoppel. He submits that there is nothing in the Act, as now amended, which gives any indication that it was the intention of the Oireachtas to disapply the existing common law principles abuse of process, *res judicata* and issue estoppel, even if that were permissible. Neither in his submission, has the Oireachtas attempted to do what it did for example arising from the Howard decision, namely enacted a provision to the effect that any person who has left another jurisdiction voluntarily and with the permission of the authorities in that state and in circumstances not amounting to fleeing shall be deemed to have 'fled'. It is submitted that such a provision would be possible, but there could be no question, per *Howard*, of such a provision applying retrospectively to this respondent, as this would be a direct violation of the separation of powers.

He submits therefore that the State cannot, by the use of different language in the Act, by simply removing the requirement to establish that a person fled, enable the State to achieve the same result as would have derived from such a deeming provision, and that if one looks at the substance of what has occurred, there is no distinction of substance as far as the respondent is concerned, and the Court should consider this to amount in substance to a breach of the separation of powers as far as this respondent is concerned, even if there is no objection to the amendment in question applying to other respondents who have not already prevailed in relation to this particular issue.

Mr Murray submits that if the Court were to be satisfied that on the basis of authority the bringing of this second application does not amount to an abuse of process a such, then the Court should conclude that to permit its existing determination to be set at nought by a legislative change is constitutionally impermissible, and therefore make no order for surrender on foot of this further warrant. Finally, if this latter submission is not accepted, then it is submitted that section 10 in its amended form is unconstitutional and should be struck down in so far as it has retrospective application to the respondent.

Mr Murray has characterised the State's submission on finality as being one to the effect that in extradition matters the State can continue to bring successive applications for the surrender of a person where the State makes changes in the law from time to time in order to give proper effect to the Framework Decision and which overcome the obstacle encountered on any previous application on foot of the same warrant – in other words that the objectives of the Framework Decision must always trump the principle of finality.

In so far as Mr Collins has submitted that there could be no abuse of process found to exist by the State deciding to change its laws since that could never amount to an improper motive, Mr Murray responds by submitting that an improper motive is not a pre-requisite to a finding of abuse of process, and that it is simply the exposure of a person such as this respondent to multiple suits, regardless of

any improper motive, which brings into play the doctrine of abuse of process, particularly where in this case it was open to the State prior to the first application for surrender to enact its laws so as to give proper effect to the Framework Decision, and the fact that it failed to do so should not be laid at the door of the respondent. If that were to be permitted, it is submitted, it would lead to a situation where a person could be faced with any number of applications for his surrender, dependent only on how many changes were made to the law, thereby negating completely the principle of finality.

During his responses, Mr Murray drew attention to a judgement of Moses LJ in a case *Office of the Prosecutor General of Turin v. Barone* [2010] All ER (D) 219 (Nov) to which reference had not by then been made. Surrender was sought on foot of a European arrest warrant, and this was refused on abuse of process grounds. The respondent had been the subject of a previous unsuccessful for his extradition to Italy under Part II of the Extradition Act, 1989 so that he could serve a lengthy sentence for offences of aggravated murder, attempted robbery and illegal possession and carrying of firearms, committed in 1976, and following a conviction in absentia after he had fled from Italy and arrived in the United Kingdom. On the Part II application, the Divisional Court had concluded that it would not be in the interests of justice to extradite the respondent firstly because of certain evidential frailties in the prosecution's case against him, and secondly because the court was not satisfied that there was any possibility of any adequate review of the case after he was returned to Italy, given the relevant procedural rules in that regard under Italian law. The extradition regime in place under the Act of 1989 permitted the Divisional Court to analyse certain evidence which had not been before the Italian Court when it convicted the respondent in absentia, and the strength of the case against him.

The Divisional Court in its judgment stated that an important change following the adoption of the Framework Decision and the implementation of same by means of Part I of the Extradition Act, 2003 is that the requesting judicial authority is not, on the basis of mutual recognition and in the light of the mutual trust and confidence between Member States underpinning the arrangements, required now to adduce evidence to show a case to answer, but that nevertheless there exists an implied power in domestic courts to protect the integrity of the statutory extradition regime, and that an abuse of process jurisdiction was to be implied, the rationale for same being "to protect the court from manipulation by invoking procedures which might oppress or unfairly prejudice a requested person", and authority was cited in that regard.

It had been submitted in the District Court on behalf of the respondent that issue estoppel arose given the decision of the Divisional Court in 1997, but that if that were not so found surrender must be refused on the basis that a judicial authority should not be permitted to mount a collateral attack on the final decision of the Divisional Court in the previous proceedings, and that to do so is impermissible and abusive.

Moses LJ considered that issue estoppel did not apply since the issue before the court in 1997 was different to the issue now raised as to whether the Court should exercise its implied power to conclude that it must protect the integrity of the statutory regime by refusing extradition. He was clearly of the view also that, questions of abuse of process apart, there was no impediment to a requesting state making another attempt to achieve a person's surrender on another warrant. He concluded that the application now for surrender on foot of a European arrest warrant, being a response to the Divisional Court's ruling which amounts to ignoring it on the basis of the Framework Decision, amounted to an abuse of process, Moses LJ stated, *inter alia*, the following:

> "26. There is nothing within the Framework Directive or the 2003 Act which suggests that the new regime cannot be invoked because the circumstances which could have been governed by the 1989 Act. Accordingly, the judicial authority in Italy contends that the Divisional court proceedings are irrelevant. Under the regime of the Framework directive it is no longer for the court of the requested State to consider the strength of the evidence. Unless it shows an absence of good faith by the prosecutor that evidence is irrelevant. The essence of the Framework Decision is to trust the courts and judicial officers of the requesting State and their assessment of the strength of the case.
>
> 27. .....
>
> 28. .....
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> 29. I quite accept that the mere fact that a previous request for extradition under the old regime had failed is not of itself a basis for refusing a fresh request for surrender, as it might more accurately be described, under the new regime. It is possible to envisage just the same circumstances as occurred in *Kashamu*, in which a request failed for non-disclosure but was repeated under the new regime. But it does not follow that the previous consideration of the court of the requested state is irrelevant.
>
> 30. The Divisional Court did not say that the conviction was unsafe (contrary to District Judge Purdy's comment) but it did conclude, in the light of its views as to the strength of the evidence and the unfairness of the procedure, that the conviction needed to be reviewed and refused extradition because that was not possible. The basis upon which the Divisional Court reached its conclusion was founded upon the unfairness of the 1930 Code. I have already identified the procedure which precluded cross-examination by the respondent of the accomplice, Manco. The Divisional Court records, without any evidence to contradict it and without any apparent dissent, the evidence of Professor Iorio:-
>
> > "What Manco (the accomplice) was alleged to have said was admissible in evidence without the possibility of there being any proper challenge by the applicant or by his lawyer, and that, Professor Iorio contends, contravened Article 6(3)(d) of the European Convention. Manco did not have to be called to give evidence, and if he was called, he could not be directly cross-examined." (judgment, paragraph 29)
>
> 31. .....
>
> 32. In my judgement, the essence of Mr Barone's resistance to the European Arrest warrant is that under the 1930 Italian Code there was no possibility of a fair trial compliant with Article 6. Furthermore, there is now no possibility of reviewing the trial on that basis unless there is fresh evidence. No one suggests that any such fresh evidence is available. To constitute fresh evidence it would have to be "subsequently uncovered" (see letter from the Deputy Prosecutor General dated 30 March 2010).
>
> 33. The Deputy Prosecutor General knew full well the nature of the criticism made by the Divisional Court as to the procedure in the 1930 Code and as to the evidence. Yet he has not chosen to meet either the evidential or the procedural defects which the Divisional Court identified. He merely contends that he does not have to do so.
>
> 34. I do not agree. It is true that the new regime depends upon trust in the integrity and fairness "of each other's judicial

institutions". But not even the expert Italian witnesses, in their uncontradicted evidence, seem to have placed any trust in the Italian criminal procedure introduced in 1930. The Deputy Prosecutor has not sought to advance any fresh evidence under the new regime as to why the courts in the United Kingdom should do so now. Moreover, the Framework Decision depends upon mutual respect and the stance adopted by the Italian judicial authority pays no respect, indeed, seeks to ignore the decision of the Divisional Court and of the Judicial Committee of the House of Lords, solely on the basis that under the 2003 Act courts would now not be able to adopt the approach to the evidence which the Divisional court previously adopted. No attempt has been made to meet the views of the Divisional court as to the defects in the evidence.

35. ……

36. ……

37. ……

38. But the circumstances of this case are unusual. The Italian authorities have had every opportunity to demonstrate that the conviction was compliant with Article 6. It is clear that the requesting State took no steps in the Divisional Court in 1997 to adduce expert evidence of Italian Law and Procedure to contradict that proffered on behalf of Mr Barone. Nor did it seek to do so before the District Judge. Even if the case were sent back pursuant to s.29(5)(b) and (c), I was not told of any material to contradict the assertions as to the unfairness of the procedure. The judicial authority condescended to no particulars in support of his assertion that there was irrefutable probative material. In those circumstances, a decision refusing to order extradition under s.21 would be inevitable.

39. I conclude that the response to the ruling of the Divisional Court, which amounts to an attempt to ignore it merely on the basis of the Framework Decision, does amount to an abuse of process and I uphold the decision of the District Judge on that basis."

Mr Murray accepts that the facts are completely different to the present case, but submits that it is clear that abuse of process can apply in extradition matters depending on all the circumstances of the particular case, and that in considering the question this Court should focus on the prejudice or oppression affecting the particular respondent, rather than on whether any intention to abuse process is evident or shown to exist on the part of the State or the requesting judicial authority. He urges also that this Court should not take account of factors pointed to by Mr Collins such as the seriousness of the offence, the fact that he has been convicted or the fact that the respondent voluntarily left Hungary before his trial took place.

Section 27 of the Interpretation Act, 2005:
The question of whether or not the provisions of section 27 of the Interpretation Act, 2005 could have relevance to the issue of whether the amendment to section 10 of the Act of 2003 should be interpreted as permitting a renewed application for the respondent's surrender came up for discussion during Mr Murray's submissions.

Section 2 of the Act of 2005 defines an "enactment" as "an Act or a statutory instrument or any portion of an Act or statutory instrument" (emphasis added), and provides also that "repeal includes revoke, rescind, abrogate or cancel" (emphasis added).

Section 4 (1) provides that "a provision of this Act applies to an enactment except in so far as the contrary intention appears in this Act, in the enactment itself or, where relevant, in the Act under which the enactment is made."

Section 27, sub-s.(1) provides:

"(1) Where an enactment is repealed, the repeal does not –

(a) revive anything not in force or not existing immediately before the repeal,

(b) affect the previous operation of the enactment or anything duly done or suffered under the enactment,

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment,

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence against or contravention of the enactment which was committed before the repeal, or

(e) prejudice or affect any legal proceedings (civil or criminal) pending at the time of the repeal in respect of any such right, privilege, obligation, liability, offence or contravention." (emphasis added)

Mr Murray submits that the since paragraph (b) above provides in effect that the repeal of the 'fled' requirement does not affect "anything duly done or suffered under the enactment", it is clear that the amended section 10 cannot be interpreted in a way that permits the applicant to undo what has already been decided under the previous provision by way of re-litigation under the amended section

He submits that paragraph (c) is relevant also since the respondent had acquired the right/privilege to finality of the application for his surrender and the certainty that the attempt to have him surrendered was at an end, and that the repeal of the 'fled' requirement cannot affect that right or privilege retrospectively. The right acquired by the respondent is also characterised by Mr Murray as being the right not to be surrendered to Hungary, a right which continues intact in spite of the later repeal of the 'fled' requirement.

Mr Murray seeks support from section 27 of the Interpretation Act, 2005 for his submission that if the amended section 10 of the Act of 2003 can be applied to the respondent, it amounts to a breach of the separation of powers because in effect, if not intentionally, the Oireachtas is interfering with a judicial determination already made.

Mr Collins for the applicant has submitted that the change to section 10 effected by the Act of 2009 is not a repeal but rather an amendment to the section, but that in so far as section 27 (1) (b) of the Interpretation Act, 2005 provides that a repeal "does not affect the previous operation of the enactment or anything duly done or suffered under the enactment", this simply means that where anything has been done under the previous enactment it is not adversely affected or undone retrospectively, and he submits that it is not relevant to the question of whether a second attempt can be brought for the respondent's surrender.

In relation to the provision in section 27 (1)(d) "does not affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment", Mr Collins submits that this could possibly have some application but only on the basis that by virtue of the Courts' previous decision the respondent had acquired a right or privilege never to be surrendered to Hungary, and he submits that the jurisprudence to which he has referred makes it clear that second and even third applications for surrender may be made without infringing the principle of finality in extradition matters, and that it cannot reasonably be said by the respondent that in those circumstances he had acquired any right or entitlement not to be surrendered.

Conclusions in relation to abuse of process/separation of powers:

Abuse of Process:
The right to finality in litigation of any kind, including extradition, is an important and long-recognised right to which a party to such litigation is entitled following its final determination. The principles of *res judicata* and issue estoppel, as they have developed over many years, enable the Courts to prevent a breach of that right to finality where the re-litigation is of an issue already determined, or indeed where the litigation of an issue which could have been raised in earlier proceedings but wasn't, is considered by the Court to amount to an abuse of process.

There are several reasons why such a right to finality should exist and be protected by the Courts. The most obvious reason is simply that if an issue has once been determined by a court between two parties, that court should not be asked to determine the same issue for a second time. It is, quite simply put, a waste of valuable court time and an unnecessary burden on the resources of the administration of justice is various respects. But it is also an oppression on the previously successful party to the litigation both in terms of the stress and anxiety of litigation on that party and perhaps his/her family and associates, as well as in terms of the sheer financial cost of having to defend the issue for a second time. It is clearly in the public interest that such a situation should not be permitted. None of this is controversial in any way.

But the right to finality is not an absolute right in the sense that there can be cases, such as those in an extradition context, where a Court for a particular reason has refused to make an order of surrender for a particular reason, perhaps due to a technical defect in the proofs required, and where thereafter, that defect having been addressed, a second application has been successfully made without any infringement of the right to finality and therefore without that second application being considered to be an abuse of process, even though the respondent has had to endure the stressful litigation process for a second time, and even though it has imposed an additional burden on the administration of justice. There have been many such examples of this occurrence, several of which have been referred to in these proceedings. It can be presumed, I think, that in each such case the respondent in question found the second application to be an oppressive experience. But that alone is not always sufficient to trump the right of the requesting state to 'come again' to seek an order.

The respondent has reason to feel oppressed by this second application for his surrender made possible only because of an amendment to section 10 of the Act of 2003 which became operative on the 25th August 2009. Having successfully defended the previous application for his surrender, I have no doubt that he felt that this matter was then behind him and that he would not be required to return to Hungary to serve the sentence imposed on him, and that he could get on with his life in the knowledge that his victory would endure. He is married with a young family, and is fortunate to be in good employment, but is now faced once again with the possibility that he will be returned to Hungary thereby interrupting his family life and his employment. No doubt the first application in the High Court and the appeal in the Supreme Court imposed a considerable burden of expense, stress and anxiety on him and his family. Those impositions are once again visited upon him, and in circumstances where the legislation has been amended in a way which deprives him of succeeding on this application on the same ground as that on which he prevailed previously. In addition, in the event of his surrender being ordered, the automatic right to appeal against such an order has been curtailed so that in such an event he must seek the leave of the Court to appeal. All of these matters are matters which could reasonably give rise to a feeling of oppression. But oppression of itself is not something which this Court can regard as decisive in concluding that surrender is prohibited under Part III of the Act of 2003. But the respondent has urged it as a factor to be considered in the context of the argument that this second application for his surrender is an abuse of process.

Set against the oppression felt by the respondent is the right of the issuing state to seek to have sentences imposed by a judicial authority in that state enforced under the terms of the Framework Decision. Set against it also is the sad and tragic event whereby two young children lost their lives in the traffic incident which gave rise to the respondent's conviction – an event which will have devastated the lives of their family. That must never be forgotten.

However, when considering whether the surrender of the respondent should be ordered on foot of the present application, the Court must detach itself from these features of the case, and concentrate on the applicable laws and principles.

As I have said already, there is no bar to an issuing state issuing a fresh warrant to seek surrender after a previous application failed. It happens not infrequently where for some reason the first warrant was found not to contain sufficient information to, for example, show correspondence. Other examples of such cases have been referred to. But the present case is different. The previous application for surrender was refused because the respondent was found by the Court not to be a person to whom section 10 of the Act of 2003, as then amended, applied. That was the issue which was determined, and it was a substantive issue which resulted in the failure of the application. Were it not for the fact that the Act of 2003 has since been amended further by the Act of 2009, there is no question but that the principle of finality would mean that that issue could not be revisited by the issue of a second warrant, and any attempt to do so would be considered an abuse of process.

What has happened in this case is to be distinguished from *Re Vantive Holdings*. In that case material available on the first application was deliberately withheld, and the later attempt to revisit the issue by bringing forward that material was found to constitute an abuse of process. That is not the situation here. Nothing was withheld on the first application. There has simply been a change in the applicable law subsequently, whereby the issue on the present application is a different issue arising in a changed legislative structure.

This case can be distinguished also from *Hungary v. Fenyvesi*, since in that case, like *Vantive*, evidence which might have been brought forward on the first application was not adduced.

The case of *Office of the Prosecutor General of Turin v. Barone* to which Mr Murray referred is an interesting one, but, as stated by Mr Murray, its use is really confined for present purposes to confirming in so far as that is necessary at all, that the Court's abuse of process jurisdiction can be invoked in extradition proceedings. The facts are far from those of the present case.

It must be borne in mind, leaving aside for the moment the pre-accession argument put forward by the respondent, that the Framework Decision always contemplated that a person such as the respondent was a person whose surrender is to be ordered for

the purpose of serving the sentence imposed upon him. The 'fled' requirement in section 10 of the Act of 2003 was not a requirement mandated by any provision of the Framework Decision. The section inserted an unnecessary limitation on the classes of persons whose surrender could be ordered. It is probably true that it was the Court's conclusion on the previous application for the respondent's surrender which brought this feature to attention, and caused the Oireachtas to amend the section so as to give better effect to the Framework Decision. Once the section was amended, I see no reason why this second application should be considered to be an abuse of process, once one accepts, as one must, that in extradition matters a refusal of surrender does not mean that a second warrant may be issued, provided that the same issue already determined is not sought to be determined again.

I am satisfied that on the present application the issue for determination is now not whether the respondent fled from Hungary, but rather whether he is a person in respect of whom this Court now has jurisdiction to order surrender. That jurisdiction flows from section 10 as it now exists, and it is clear that the issue is different, and that under the terms of section 10 as amended the respondent is "a person … on whom a sentence of imprisonment or detention has been imposed in that state in respect of an offence to which the European arrest warrant relates". I am not required, as I was on the previous application, to decide if he had fled from Hungary.

It was argued that if such an amendment could be made resulting in a further application for surrender, there could be no end to how many attempts could be made to seek a person's surrender, dependent only on amendments which might be made to the Act to address lacunae or defects found to exist with the legislation on successive attempts to achieve an order for surrender. For the present case it must be borne in mind that the present application is only the second such application. If it were to be the case that this respondent was met by yet more applications in the future were the present application also unsuccessful, the arguments which might be made could be weightier in relation to oppression, finality, and perhaps even under Article 8 of the Convention. But in spite of the fact that the respondent is vexed again with another application, it is the case that it is just the second such application, and that is a situation with a number of other respondents have been faced albeit for very different reasons, and it is not a feature which in my view can prevail on the present application in relation to abuse of process.

It is also undoubtedly the case that the Framework Decision itself foresees a situation where a respondent could potentially face multiple applications for surrender since a European arrest warrant can be enforced in any Member State where a respondent may be located at any particular time. If for example after his successful defence against the first warrant this respondent had for any reason decided to emigrate to another Member State, it would be no defence to a European arrest warrant transmitted to that other Member State for the respondent to rely on the fact that surrender had already been refused in this State.

Separation of Powers:
It is contended by the applicant that the removal of the fled requirement in section 10 of the Act of 2003 is an interference with the judicial arm of government in that it seeks to overcome or circumvent a decision of this Court, and set it at nought. I accept that the respondent makes this submission only to the extent that a further application for this respondent's surrender is facilitated – in other words that that there is no objection to the section being amended generally, but only prospectively so that a person such as a respondent who has already the benefit of a decision should not be pursued under the amended section.

The present case, while similar to the Howard case, is fundamentally different. The statutory provision enacted following the Howard decision was directly intended to overcome the difficulty arising from the Court's conclusion that the Commissioners had no power to carry out the development in question by deeming the Commissioners always to have had such a power. It was this 'deeming' that was found to be a breach of the separation of powers. I accept Mr Collins's submission that if by its amendment to the Act of 2003 the Oireachtas had sought to deem a person in the position of the respondent to have fled it would be a breach of the separation of powers. But that is not what occurred here, even though the effect is to allow the issuing state to come again. The Oireachtas is always entitled to amend its legislation, but must of course do so in a way which does not interfere with the judicial arm of government. In the present case, the Oireachtas has amended the Act of 2003 in order to give proper or better effect to the Framework Decision. This State upon the adoption of the Framework Decision was obliged under its obligations as a Member State of the European Union to give effect to it. Once it became obvious that the Act of 2003 as originally enacted failed to do so adequately in so far as it included an unnecessary restriction to the class of persons whose surrender could be sought, it was reasonable and permissible for it to do so in the manner achieved by the Act of 2009.

In my view, even if this amendment has resulted in the issuing state being able to once again seek the respondent's surrender, this must not be seen as an attempt by the Oireachtas to set aside the Court's previous decision. It has not deemed the respondent to have fled, thereby flying in the face of the Court' decision in that regard. Neither is it to be equated to what occurred in *Costello v. DPP* where a decision of the DPP to send an accused forward for trial on indictment served to directly set at nought or overcome the decision of a District Judge on a preliminary examination. There is no such direct interference with an order of this Court. The Oireachtas has not entered upon the judicial domain. The amendment has simply enabled a second warrant to be issued to again seek an order from this Court under a different statutory regime which more properly gives effect to the Framework Decision. The amendment cannot be considered to be directed specifically at this respondent for the purpose of interfering with this Court's decision.

Neither can it be considered that the facts of this case are the same or even similar to those in *Buckley v. The Attorney General & others* [1950] I.R. 67 (Sinn Féin Funds Case) where during the course of certain court proceedings the Oireachtas passed an enactment designed to put an end to the controversy before the court, including by directing how the Court should dispose of the matter in controversy. This resulted in the Supreme Court's conclusion that in so doing the Oireachtas had impermissibly interfered with the judicial domain. That case does not avail the respondent.

The fact that the Oireachtas could have amended the Act of 2003 at any time prior to the issue of the first warrant in respect of the respondent is neither here nor there in my view.

For the sake of completeness I should add that in so far as I have concluded that the provisions of section 10, as they now are, can be applied to this respondent, and permit this second application for surrender, and do not constitute a breach of the separation of powers, I am satisfied the provision is not unconstitutional.

Section 27 of the Interpretation Act, 2005:
I have considered whether there is anything in section 27 of this Act which could assist the respondent in his argument against the retrospective effect of the amendment to section 10 of the Act of 2003 in so far as this respondent is concerned. Mr Collins has submitted that what occurred was an amendment to the section and not a repeal and that section 27 therefore has no application. But "repeal" is defined in section 2 as I have already set forth and this definition means that it includes "revoke, rescind, abrogate or cancel" and an "enactment" includes "any portion of an Act". It seems to me to mean therefore that an amendment to a provision of an Act by the deletion of part of that provision is captured by the definition of "repeal".

But I am not satisfied that the finding of the Court in the previous proceedings that the respondent did not flee from Hungary is within the meaning of something done under "the previous operation of the enactment or anything duly done or suffered under the enactment" as provided in paragraph (b). What occurred was simply that the Court reached a conclusion in relation to the interpretation of section 10(d) of the Act of 2003 as it then existed.

I am satisfied also that for the purposes of paragraph (c) of section 27 the respondent cannot be said to have acquired any right or privilege as such, described by Mr Murray as "a right not to be surrendered to Hungary", arising from the Court's previous decision, especially where the Framework Decision itself contemplates the surrender of this respondent, and it was simply a failure by the Oireachtas to reflect its provisions in the 2003 Act which led to the application for his surrender to be refused.

Insertion of words "in that state" into section 10 amendment:
As I mentioned previously, the respondent makes another submission arising from the manner in which section 10 of the Act of 2003 was amended by the Act of 2009.

As it existed prior to that amendment, section 10 (d) of the Act of 2003 provided:

> 10.— Where a judicial authority in an issuing state duly issues a European arrest warrant in respect of a person—
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) on whom a sentence of imprisonment or detention has been imposed in respect of an offence to which the European arrest warrant relates, and who fled from the issuing state before he or she—
>
> (i) commenced serving that sentence, or
>
> (ii) completed serving that sentence,
>
> that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision, be arrested and surrendered to the issuing state."

The amendment to which Mr Murray refers is the insertion in paragraph (d) of the words "in that state" after the word "imposed", so that this paragraph now reads "on whom a sentence of imprisonment or detention has been imposed in that state in respect of an offence to which the European arrest warrant relates". (emphasis added).

He submits that because section 10 refers to a judicial authority in an issuing state i.e. a Member State of the European Union, the insertion of the words "in that state" means that the sentence in question must now since this amendment be interpreted as one imposed by such a Member State, and therefore since the sentence in imposed on the respondent was imposed before Hungary acceded to the European Union, the sentence is not one imposed by a Member State, and therefore this respondent cannot, since the amendment to section 10 in this respect be the subject of arrest and an order for surrender.

For completion I should refer to the fact that "issuing state" is defined in section 2 of the Act of 2003 as "… in relation to a European arrest warrant, a Member State designated under section 3, a judicial authority of which has issued that European arrest warrant".

Mr Murray submits that it ought not to be considered that the Framework Decision is intended to operate in respect of all pre-accession convictions, no matter how far back they date, given the fact that some at least of those states had less than democratic regimes during their pre-accession history, and that it would be surprising that the European Union would have agreed on the automatic enforcement of judicial decisions made during a time in their history when the trust and confidence which now exists in the judicial decisions of Member States could not have existed. He submits that unless there be strong evidence to the contrary the Framework Decision should be seen as applying only to decisions made by a judicial authority after the state in question has acceded to the European Union and been designated under section 3 of the Act of 2003.

In support of that proposition, Mr Murray has referred to a judgment of the Court of Justice in *Ynos kft v. Varga* (Case C-302/04). The Court was asked to give a preliminary ruling on three questions arising from proceedings in a Hungarian court which concerned the performance of an agency contract for the sale of immovable property. The Hungarian court took the view that an issue in relation to the fairness of a clause in a contract had to be resolved in the light of Council Directive (EEC) 93/12. Two of the questions referred for a preliminary ruling involved the interpretation of the directive, and a third question was whether it was relevant that the main dispute in the case had arisen prior to Hungary's accession to the European Union, but after the adaptation of its domestic law to the directive.

The Court ruled:

> "In circumstances such as those of the dispute in the instant case, the facts of which occurred prior to the accession of a state to the European Union, the Court did not have jurisdiction to answer the questions referred for preliminary ruling.
>
> The Court had jurisdiction to interpret a directive only as regards its application in a new member state with effect from the date of that state's accession to the European Union. In the instant case, as the facts of the dispute in the main proceedings occurred prior to the accession of Hungary to the European Union, the Court did not have jurisdiction to interpret the directive."

The Court's judgment in *Varga* referred to an earlier case, namely *Andersson and another v. Sweden* (Case C-321/97) to like effect, and that case also was referred to by Mr Murray.

Mr Murray submits that the Framework Decision itself suggests that only decisions of national courts which postdate the accession of a particular state to the Union were intended to be the subject of surrender applications on foot of a European arrest warrant. In that regard he refers to Recital 2 to the Framework Decision which provides:

> "(2) The programme of measures to implement the principle of mutual recognition of criminal decisions envisaged in point

> 37 of the Tampere European Council Conclusions and adopted by the Council on 30 November 2000, addresses the matter of mutual enforcement of arrest warrants." (emphasis added)

It is submitted that this principle of mutual recognition of criminal decisions could never have been intended by Member States to apply to decisions made prior to any state's accession. Mr Murray refers also to the reference in Recital 10 which refers to the mechanism of the European arrest warrant is based on a high level of confidence between Member States and submits that this confidence cannot be seen as extending back to judicial decisions which predated a state's accession to the European Union, and submits that in the light of this, the Act of 2003 must be interpreted in the light of this, so that surrender may not be ordered in respect of a judicial decision made prior to that state's accession to the Union, and particularly in view of the manner in which the Oireachtas has most recently amended section 10 by the insertion of the words "in that state", making it clear, in case it was not clear in the section as originally enacted, that it was only a decision of a judicial authority in a state which is a Member State (i.e. post-accession) that could form the basis for a European arrest warrant, and that this is further confirmed by the fact that before a Member State may seek surrender on foot such a warrant, the State in question must have been designated by the Minister for Foreign Affairs under section 3 of the Act of 2003. Mr Murray submits that this construction is open from the plain meaning of the words of the Act of 2003 and the Framework Decision. He is not saying that the Framework Decision may not apply retrospectively in respect of judicial decisions which predate the Framework Decision, but simply that it cannot apply retrospectively to a point in time before the issuing state became a Member State of the European Union.

In so far as I concluded a similar argument in my earlier judgment against the respondent, Mr Murray submits that the insertion of the words "*in that state*" is a significant alteration to the section, such that the argument now made is a different argument in the light of the amendment, and that the principle of *res judicata* therefore does not apply, and this Court must now consider the issue afresh.

It is undoubtedly true that in my earlier judgment I concluded that there was nothing in either the Framework Decision or the Act of 2003 which indicated that an arrest warrant was confined to judicial decisions which post-dated the accession of the issuing state to the European Union. The question arises now whether the insertion of the words "*in that state*" into section 10 makes that position any different now.

Mr Collins submits that this insertion changes nothing as far as this Court's powers are concerned, and refers to the provisions of section 4 of the Act of 2003 which now provide, following an amendment by the Act of 2005:

> "This Act shall apply in relation to an offence, whether committed or alleged to have been committed before or after the commencement of this Act".

When section 4 was originally enacted subsections (2) and (3) of section 4 contained provisions in relation to Austria, Italy and France so that the Act applied only to offences committed after certain dates therein specified, and this reflected certain reservations by those countries. But with those exceptions the Act was applicable to offences committed before or after 1st January 2004. There was never any suggestion that offences committed prior to any Member State's accession were to be excluded, and there was no amendment to the Framework Decision or otherwise to indicate that following the accession of other states to the Union in 2004 or later this situation was to be different. The only relevant provision in the Framework Decision is Article 32 thereof which provided that any extradition requests received prior to the 1st January 2004 would continue to be dealt with under the existing treaty instruments, and that is reflected in the transitional provision contained in the Act of 2003 in section 50 thereof. When addressing this issue on the previous application the Court, and indeed the parties proceeded on the basis that before the accession of Hungary to the European Union there were no treaty arrangements between this State and Hungary. That in fact is not quite correct. Hungary was at all relevant times a state which had acceded to the Convention on Extradition. However, it is also the case that at that time Hungary would not extradite its own nationals, and for that reason of lack of reciprocity, the surrender of this respondent on foot of a Part II request would not have been successful.

However, Mr Collins refers to the fact that there were previous treaty arrangements which applied, with that reservation, to Hungary in order to indicate that it cannot be said, as submitted by the respondent herein, that a judicial decision by a Court in Hungary which predates that country's accession to the European Union must be looked at without the trust and confidence which even prior to the Framework Decision reflected the comity of nations and of courts in relation to applications for extradition, and that there is no reason in principle why a European arrest warrant could not be issued to enforce a judicial decision made by a competent court in Hungary, albeit at a date before that state acceded to the Union.

Mr Collins has referred to conclusions of MacMenamin J. in *Minister for Justice, Equality and Law Reform v. Altaravicius (No. 2)* [2007] 2 I.R. 265 in relation to whether a European arrest warrant could be issued for offences predating the accession of Lithuania to the European Union to the effect that neither the Act of 2003 nor the Framework Decision contained any such restriction. Mr Collins submits that although that decision related to a prosecution warrant, the fact that this respondent has already been convicted prior to Hungary's accession does not alter the force of that conclusion.

Referring to the Court of Justice's decisions in *Varga* and in *Andersson* to which Mr Murray has referred, Mr Collins submits that these are of no relevance to the question of whether a European arrest warrant can be issued in respect of an offence or a conviction which predates a state's accession to the European Union. He submits that whereas a state's obligations under a Directive arise only following that state's accession to the Treaty on European Union, the Framework Decision on the European arrest warrant itself makes it clear that it is not limited to offences which are committed prior to accession, and that the same must be the case in respect of convictions for such an offence. He further submits that it could not be the case that, since Part II of the Act of 1965 is no longer applicable to Hungary following its adoption of the Framework Decision upon accession, the sentence imposed upon the respondent is one which cannot be enforced by seeking his surrender, and that in fact the Framework Decision makes the contrary clear.

Mr Collins has submitted that the insertion of the words "*in that state*" simply means Hungary in the context of the present case, and does not have the effect contended for by the respondent, namely that it is limited to Hungary after it acceded to the European Union. Such a limited meaning would, it is submitted, have the effect of altering the section in such a serious or stark manner as would require a specific and clear intention to do so, since it would take a significant number of persons outside the scope of the Act as it was originally enacted. He submits that this could not have been the intention of the Oireachtas, and is nowhere reflected in the Framework Decision.

I agree with Mr Collins's submissions in this regard. Firstly there is no obvious basis from within the Framework Decision requiring that only sentences of imprisonment imposed by an issuing state after its accession to the European Union can be the subject of a European arrest warrant. In my view the insertion of the words "in that state" was part of a tidying up exercise being carried out by the Oireachtas, just as the removal of the word "duly" from section 10 was. Without the insertion of the words "in that state" it may

have been possible to construe the Act in a way so as to capture a sentence imposed in a state other than the issuing state, and that would have been contrary to the provisions of the Framework Decision. It is in my view too strained an interpretation to limit the section to post-accession sentences simply because the words "in that state" refer back to "an issuing state", it in turn defined in section 2 as "a Member State". My conclusion is in my view consistent with a conforming interpretation, and to do so is not *'contra legem'*.

Non-compliance with section 11 of the Act – as to length of sentence:
The respondent submits that the issuing state has failed to complete the warrant in accordance with the mandatory requirements in that regard contained in the Framework Decision and as set forth in section 11 of the Act of 2003. The basis for this submission is the manner in which the sentence which the respondent is sought to serve has been described in the warrant. In addition, it is submitted that the precise nature of the sentence has been further confused by the manner in which it was described in the first warrant and the way in which it was described to this Court and the Supreme Court by Counsel for the applicant at that time. It is submitted in the circumstances firstly that section 11 has not been complied with, but also that the manner in which the sentence is described on the present application has in effect meant that the respondent is to serve a sentence which is double the length of that which he understood was to be served when the application on foot of the first warrant was dealt with. This enlargement of the sentence is said to feed into the respondent's submissions as to abuse of process generally.

In the first warrant on foot of which surrender was refused, the sentence was set forth in the warrant as being a sentence of three years in a low security prison. When that application came before the Court here a clarification was made in letters from the issuing judicial authority stating that following the respondent's appeal against his conviction and sentence the appeal court taking into account the fact that the respondent is not a Hungarian national altered the sentence to three years with effectively eighteen months being suspended. The case certainly proceeded on the basis that the respondent was sought on the basis that he would serve eighteen months in prison with the final eighteen months suspended.

On the present application the issuing state has made it clear that the sentence is still one of three years, and that after serving eighteen months the respondent would have the possibility to apply for what we would call parole but is some form of temporary release or release on ticket of leave. Referring to the fact that the respondent has only the possibility of applying for early release, Mr Murray submits that in effect the respondent is required now to serve a three year sentence, but may get out earlier than that after eighteen months, but that this is not certain since the appropriate decision-maker has a discretion in that regard.

Apart from making the submission that this confusion or lack of clarity arising from how the sentence has been variously described amounts to a failure to properly observe the requirements of section 11 of the Act of 2003, Mr Murray submits that it constitutes a fundamental unfairness to the respondent and an abuse of process in as much as the respondent could reasonably have expected following the previous application that the sentence he is to serve is one of eighteen months, whereas now it has become a sentence of three years with only a possibility of release after eighteen months.

It has also been submitted that the fact the sentence has now been confirmed as being one still of three years with the possibility of parole after eighteen months, rather than as previously stated, a three year sentence with the final eighteen months suspended, there is a prejudice to the respondent in the context of the impact of the family rights of the respondent given the possible length of time during which he will be separated from his family. The family rights issue is one which I will come to in due course, but Mr Keane for the respondent has submitted that the impact on family rights also is an aspect which the Court should have regard to in the context of the importance attached to strict compliance with the provisions of the Framework Decision and section 11 of the Act of 2003.

Mr Keane has also sought to distinguish the facts of this case and the lack of clarity to which he refers, from the facts of *Minister for Justice, Equality and Law Reform v. Rodnov*, (Unreported, Supreme Court, 1st June 2006) where the frailty in the warrant was simply that the opening paragraph of the prescribed form of warrant had been omitted. That paragraph states the purpose of the warrant, namely either for the prosecution of the respondent or so that the respondent can serve a sentence. It had been accidentally omitted from the original warrant. The Supreme Court held that this error was not such as to invalidate the warrant since such a want of strict adherence to the prescribed form of warrant was not one which was likely to mislead the respondent. He submits that the lack of clarity, ambiguity or confusion generally about the precise length and nature of the sentence appearing from the various warrants and other material is a more substantive error or frailty in the warrant than that in Rodnov, and the warrant should be therefore found to be defective.

On this application the Central Authority has produced letters from the Ministry of Public Administration and Justice in Hungary which make it clear that the question of whether the respondent will be released after eighteen months is a matter to be decided by a penitentiary judge. It is stated also that this official is not "a judicial officer" but a judge "responsible for penitentiary affairs". This person decides issues of early release. It is clarified also that effectively the penitentiary judge may release a person on parole if there is reason to believe in view of the person's good conduct displayed while serving the sentence that he will lead a good life and that further incarceration is not required.

The applicant submits that the position is clear, and that at all times it was clear that the sentence imposed was and still is three year sentence. That is what appeared in the first warrant. It is submitted that following the appeal hearing in Hungary at which the respondent was legally represented it was at all times known to the respondent that the appeal court had altered the sentence to permit release on ticket of leave after eighteen months. It is submitted that the position has been clarified further by the letters now received, but that there has not been any failure to describe the length of the sentence actually imposed, and that no unfairness has been visited on the respondent in this regard, and that certainly it cannot be said, as is submitted by the respondent, that between the time that the first application was determined and the present date the sentence has in effect been doubled.

A similar issue arose on the first application in the context of the facts then before the Court and arising from the fact that the warrant had made no reference to what was stated by the applicant at the time to be a three month sentence with eighteen months suspended. I held that this feature of the warrant was not such as to cause any fundamental unfairness to the respondent and not such as to invalidate the warrant.

Even in the light of the further information contained in the two letters which have received which describe the role of the penitentiary judge in deciding the question of early release, I am not satisfied that the sentence has been in any way altered from that which was imposed and as varied on appeal. Clearly the warrant on the last occasion and indeed the warrant on the present application could have been more expansive in describing all the features of the sentence in more detail, but the requirement under section 11 is to set forth the sentence. The sentence imposed was one of three years, even if there is an opportunity of release after eighteen months was allowed on appeal. The respondent was legally represented when this sentence was passed and on the appeal when the appeal modified the sentence. It can be presumed that those lawyers informed the respondent of the result of the appeal.

It is hard to imagine that the respondent was not aware of the nature and length of sentence which has been imposed. I do not believe that he has been mislead by the warrants which have emanated from the issuing state such that the warrant should be found not to comply with section 11 of the Act of 2003.

I do not believe that this feature constitutes such a failure to comply with the requirements of the Framework Decision or section 11 of the Act of 2003 and is not such as to have caused any fundamental unfairness to the respondent such that surrender should be refused or such that the warrant is invalid. I have had regard also to the submission by the respondent that this apparent confusion has an impact also on the question of family rights, but in my view that does not alter my conclusion that section 11 has been complied with sufficiently.

Publication of the Act of 2009:
David Keane SC who appears with Mr Murray for the respondent, made submissions on the issue of abuse of process arising from the fact that at the time that the warrant issued and also at the date on which the applicant made its application to this Court for the endorsement of the warrant, the Act of 2009, though commenced by Statutory Instrument, had not been published. This is said to amount to an abuse of process.

The Act of 2009 was signed by the President on the 21st July 2009, and the relevant notice in that regard appeared in Iris Oifigiúil on the 24th July 2009. On the 25th August 2009 the Act of 2009 was commenced by Statutory Instrument 330 of 2009 signed by the Minister for Justice, Equality and Law Reform. It is said that this commencement was *ultra vires* the Minister.

The warrant in this case was issued on the 17th September 2009 and was endorsed for execution here on the 14th October 2009. The respondent was arrested on the 10th November 2009.

It is common case that the Act of 2009 was not published on the Oireachtas website until 4th November 2009 as found in the judgment of Hardiman J. in *Minister for Justice, Equality and Law Reform v. Adach*, (Unreported, Supreme Court, 13th May 2010).

Mr Keane seeks to distinguish *Adach* from the present as because the issue in *Adach* was simply whether the respondent was caught by the new requirement to seek leave to appeal before lodging a Notice of Appeal with the Supreme Court. It had been submitted that he should not be so caught since at the time that he filed his appeal the Act, while commenced, had not been published on the Oireachtas website. By contrast, the present respondent was subjected to an arrest and deprivation of liberty on foot of a warrant which was issued and endorsed for execution prior to such publication. It is submitted that a person such as the respondent may not be deprived of his liberty on foot of an Act which was not published prior to that arrest.

It is submitted that the Minister was not entitled to commence the Act of 2009 in circumstances where the Act had not by that date been published, and that the Minister ought not to have brought an application for the endorsement of the warrant at a time when he ought to have been aware that the Act had not been published.

Mr Keane has submitted that it does not matter for the purpose of his argument that the amendments enacted by the Act of 2009 did not touch upon section 13 of the Act of 2003 which is the section under which an application for endorsement of a warrant is made. He suggests that if the 2009 Act had not been enacted at all before the application for endorsement was made, the Minister would have had to inform the Court on such an application that this warrant related to a person whose surrender had already been refused by the Court, and that upon hearing that fact the Court could well have exercised a discretion not to endorse the warrant on the basis of futility or at least on the basis that it would constitute an abuse of process whereby a person would be arrested and deprived of his liberty in circumstances where surrender could never be ordered on foot of the endorsed warrant. If that be the case, then it is submitted that even if as a matter of fact the Act of 2009 had been enacted and commenced by the date of the application to endorse the warrant, the Court ought to have been appraised of the fact that the Act had not by that date been published. He submits that if the Court had been so appraised the Court may have decided that the warrant should not be endorsed until such time as the Act was published.

Mr Keane accepted of course quite correctly that by the time the respondent was arrested on the 10th November 2009 the Act had been published and that he was not therefore deprived of his liberty prior to the publication of the Act of 2009. Mr Keane quite properly also informed the Court that his enquiries had revealed that when the application for endorsement was made to Irvine J. the Court was informed by Counsel for the Minister that the warrant was one for the arrest of a person in respect of whom surrender had already been refused and also that the application then being made was following the enactment of the Act of 2009.

Mr Keane has relied upon a judgment of the European Court of Human Rights in *Nolan and K. v. Russia* (Application No. 2512/04), Decision of the 12th February 2009. That was a case where the applicant had been detained pursuant to certain cross-border guidelines which had not been published or made accessible to the public. It was held that where a national authority authorises the deprivation of liberty the law must be sufficiently accessible, precise and foreseeable in its application in order to avoid the risk of arbitrariness. In his judgment in *Adach*, as I have said, Hardiman J. distinguished that situation of deprivation of liberty on foot of an unpublished law from the facts in *Adach* where at issue was simply the right of appeal, stating "there does not appear to be any direct comparison with the procedural law, regulating the right of appeal, which is in question in the present case." He went on to state:

> "It thus appears to me that the two European cases relied upon do not assist the appellant, the respondent to the motion, in any way. The law in question here, the amendment of the 2003 Act effected by the 2009 Act, as set out above, is a procedural law regulating the right of access to the Supreme Court by way of appeal. It is not a law providing for or permitting the deprivation of liberty. I entirely agree with the observations of the European Court of Human Rights about the importance of accessibility, clarity and forseeability when considering laws mandating the deprivation of a person's liberty, but this is not a law of that sort."

Mr Keane submits that these remarks support his submission that in circumstances where the endorsement of the warrant directly leads to the arrest of the respondent, the fact that the Act of 2009 was not at that time published is of critical importance, and demonstrates an abuse of process.

Mr Keane has relied also upon a passage from the judgment of McCloskey J. in a case of *Chaos v. Kingdom of Spain* [2010] NIQB 68 in the High Court of Justice in Northern Ireland where that Court was considering the question of whether a power to revoke bail from within the Court's inherent jurisdiction was a sufficiently published source of law in order to satisfy the requirements of Article 5 of the Convention. The facts of the case do not matter for present purposes, but Mr Keane relies on a number of statements within that judgment, and by reference to Convention case-law, to the effect that the requirement of accessibility of a law entails the availability of a published text, which is sufficiently clear and precise so that a person can reasonably understand its scope and consequences.

Mr Collins for the applicant has submitted firstly that there is no constitutional or statutory requirement that an Act be published before it comes into effect, and submits that this is apparent from the judgment of Hardiman J. in *Adach*. He submits that the judgment of the European Court of Human Rights in Nolan to which Mr Keane has referred does not speak to or affect the question of when under Irish law the Act of 2009 comes into force – again as appearing from the said judgment of Hardiman J.

Mr Collins submits also that the position with the Act of 2009 is that the terms of the amending provisions were accessible even though it was not officially published on the Oireachtas website, since as the Bill passed through the Oireachtas its provisions were known. He submits that this is an important distinction to bear in mind when considering the remarks of Hardiman J. which have been referred to, and in that regard lays some emphasis on the fact that Hardiman J. used the words "*accessible at all*". He submits that even though the Act had not appeared on the website, it was accessible and its contents could have been easily ascertained even by the time the warrant was issued or by the time the application for endorsement was made. But, in any event he submits that certainly by the date on which the respondent was actually arrested and therefore by the time he was deprived of his liberty on foot of the warrant the Act had been fully published on the Oireachtas website, and that the respondent cannot be heard in those circumstances to say that he was deprived of his liberty on foot of an unpublished or inaccessible law.

In my view the fact that on the date on which the respondent was deprived of his liberty this Act of 2009 was enacted, signed by the President, commenced by Statutory Instrument, and published is sufficient to dispose of this point of objection.

In so far as the Act had not been published by the date on which the application for endorsement of the warrant was made, I am satisfied that the application to so endorse is a procedural step mandated in fact under the unamended Act by section 13 of the Act. That is the provision under which an application for endorsement is made and it was unaffected by any provision of the Act of 2009. But the fact that the application is a procedural step only and not one which directly deprives the respondent of his liberty is sufficient to bring the situation within the comments of Hardiman J. in *Adach*. I do not believe that the cases to which Mr Keane has referred in support of this point of objection sustain the argument, especially given that the arrest of the respondent occurred after publication.

Section 37: Family rights – lack of reciprocity – Transfer of sentenced prisoners:
The respondent has sworn an affidavit in this application setting out his family and personal circumstances since the refusal of surrender in 2007. He avers that his wife and children all reside here. They moved house from Ratoath, Co. Meath to Sutton, Dublin 13 following the refusal of surrender thinking it would be a good idea to make a fresh start. His children attend school in Sutton and he is clearly closely involved in their upbringing and in their education and hobby activities. He has also completed an MBA at Dublin City University and has achieved significant promotion within the same Irish company with which he was employed during the three years he spent in Hungary. He states that he was dismayed when he was arrested in November 2009 on foot of the present warrant, since he had believed that once the Court had refused the application for his surrender, the matter was over and he could get on with his life in the knowledge that he would not be required to serve the sentence in Hungary. He makes the point also that the offence for which he was convicted in Hungary occurred in the year 2000, more than ten years ago.

The respondent's submission is that in all the circumstances the surrender of the respondent is an unwarranted and disproportionate interference with his family rights under Article 8 of the Convention and under the Constitution.

A significant plank of this argument made by Mr Keane is Article 4.6 of the Framework Decision which provides for an optional ground for refusal of an order for surrender, namely where the executing state undertakes to execute the sentence or detention order in accordance with its domestic law. That optional ground for refusal is not provided for in the Act of 2003. Mr Keane is not contending that the State was obliged to make provision for this optional ground of refusal. It appears that this State may be the only Member State which has not made such provision in its domestic law giving effect to the Framework Decision. However, accepting that it is a choice that this State was entitled to make, Mr Keane submits that it does nevertheless have consequences in the context of the proportionality, because it is clear that there can be no prospect of the respondent being permitted to serve the Hungarian sentence in an Irish prison.

Some correspondence from the Hungarian authorities to the Central Authority has been produced which indicates that the Hungarian authorities in fact asked whether the sentence could be served in this State. The Court has not been informed of any particular response to that request.

Mr Keane has however referred the Court to section 7 of the Transfer of Execution of Sentences Act, 2005 which provides that the Minister may, upon a request in writing from a sentencing country to consent to the execution in the State of a sentence imposed in the sentencing country "on a person who fled to the State before he or she (a) commenced serving that sentence, or (b) completed serving that sentence", give that consent. That Act is one to give effect, *inter alia*, to Article 2 of an Additional Protocol to the Convention on the Transfer of Sentenced Persons, done at Strasbourg on 18th December 1997. Mr Keane has referred to some of the recitals to that Convention which the desirability of such arrangements for the social rehabilitation of sentenced persons, and of foreigners who are deprived of their liberty should be able to serve a sentence within their own society. Article 2 makes reference its application to a sentenced person who has fled from the sentencing state before serving a sentence.

Mr Keane refers also to a European Commission Report on the operation of the Framework Decision which notes that Hungary is a state which does not order surrender in respect of its own nationals, but on the basis that it will provide an undertaking that the sentenced person will serve the sentence in Hungary. Presumably it was because of this that the Hungarian authorities asked whether the Minister here would give such an undertaking in respect of the respondent. I am presuming that there was no reply to such request, but it can be anticipated perhaps that the reason why such an undertaking was not given was because the respondent does not, by reason of the fleeing requirement come within the provisions of section 7 of that Act.

Mr Keane makes the point that the respondent cannot gain the benefit of this provision since it is clear from the Supreme Court's judgment on the first application for surrender that the respondent does not fulfil the requirement that must have "fled" from the sentencing state.

This is a disadvantaged position for the respondent, and Mr Keane submits that it is an important factor for this Court to take into account when considering the issue of proportionality. It is submitted that if the respondent could avail of this provision the impact on his relationship with his family would be considerably reduced since they would be able to have regular contact with him, whereas if he is required to serve the sentence in Hungary, they would not, for obvious reasons, be able to maintain regular contact with him.

Mr Keane has referred to case-law from the Court of Justice. I will not set those out in detail but Mr Keane seeks support from them for his submission that Article 4.6 clearly intended that persons sentenced in a country other than their own should be permitted to serve that sentence in their own country. The cases referred to are *Kozowski* (C-66/08) and *Wolzenburg* (Case C-123/08).

In so far as the respondent is excluded from the provisions of section 7 of the Transfer of Execution of Sentences Act, 2005 Mr Keane submits that this amounts to an unconstitutional discrimination against an arbitrarily or capriciously group of persons, being one of a small group of persons who did not 'flee' from a sentencing state and who by reason of that fact cannot avail of the facility provided for in section 7 thereof, whereas all other persons so sentenced can serve their sentences in this State. This is an unfairness which, it is submitted, provides considerable support to the proportionality argument which the respondent makes under Article 8 of the Convention.

Mr Keane refers to a judgment of this Court in *Minister for Justice, Equality and Law Reform v. Gorman,* (Unreported, High Court, 22nd April 2010), and relies heavily on the principles stated therein and the Court's reasoning when it concluded that that respondent's surrender should be prohibited on family rights grounds. The facts of that case are of course stronger and very different from the present case, and quite unique. But the principles are clear. But without weighty facts to support the Article 8 objection, really the principles are of little importance. In my view there is nothing exceptional in the respondent's family circumstances. They are features which apply in the case of the majority of respondents who may have moved to this jurisdiction with their family before their surrender is sought, and also in respect of Irish citizens who have lived their lives in this State and where their families are settled and embedded. In all such cases a surrender of a family member, be it father or mother in particular, will case great distress and disruption to family life. It will for a period of time separate that family member from the family unit. While that is in all cases regrettable, it is nevertheless an inevitable consequence, just as the imprisonment of any person to a domestic sentence does.

The obligation to surrender persons for either prosecution or for the service of a sentence will in most cases outweigh any objections on the disruption which that surrender will cause to both the respondent and his family. It requires exceptionally strong, and indeed exceptional, facts for a respondent to succeed in defeating a surrender application based on Article 8 of the Convention and/or under the Constitution. Those facts are absent from this case. It is for that reason only, and not out of any lack of respect for the very extensive and able submissions made by both parties, that I do not feel it necessary to discuss at any length at all the arguments made by reference to the case-law which was opened to the Court by Counsel. Without the necessarily exceptional facts, this argument does not get off the ground.

But I will address the submissions made by Mr Keane in relation to the anomalous position in which the respondent finds himself by reference to section 7 the *Transfer of Execution of Sentences Act, 2005* following his success in establishing that he did not flee from Hungary. It was argued not so much as a free-standing ground of objection, but rather in so far as it feeds into or supports his objection on Article 8 grounds. It is undoubtedly true that the respondent has succeeded in establishing that he did not flee. The Court has so concluded. By reference to section 7 of the Act it would appear that this has taken him outside the scope of the Act. He cannot presumably benefit from what was intended to confer a benefit to persons sentenced by a country other than their country of nationality or permanent residence. The Hungarian authorities made enquiries as to whether an undertaking could be given in this regard, but that request appears to have lain fallow. But it would appear to be the case that there is no prospect of that section being available to the respondent in order to ameliorate his situation.

The State has given effect to the Convention on the *Transfer of Sentenced Persons* as it was obliged to do. It is a free-standing Convention not directly linked to the extradition arrangements which are in place including the Framework Decision, which makes the availability of an undertaking to permit the respondent to serve a sentence domestically an optional ground for refusing to order surrender. It is an optional ground. This State has not given effect to that optional ground. The fact that this State may be the only Member State which has not given effect to this provision does not alter the fact that it is an optional ground for refusal. That would not prevent the State from dealing with the respondent under the provisions of the Transfer of Execution of Sentences Act, 2005. The problem for this respondent is that he does not come within its provisions.

I cannot agree that this unfortunate position is such as to amount to a discrimination, even if the respondent feels that he is being discriminated against in this regard. Those feelings can of course be added to the balance when considering the effect of surrender in the context of family rights but would not be sufficient alone to lead to a refusal of surrender. It adds little to the other facts grounding the Article 8 ground.

Mr Collins has referred to my decision in *Minister for Justice, Equality and Law Reform v. Doran,* (Unreported, 5th November 2010), where a similar argument was made in respect of a respondent whose surrender was sought by France, but who had not fled from France. I rejected the argument put forward in relation to the Transfer of Execution of Sentences Act, 2005 and I have no reason to depart from that decision.

Adverse publicity and threats:
There is no doubt from the evidence which is contained in the respondent's grounding affidavit that following the refusal of the Court to surrender the respondent on foot of the previous application considerable publicity was engendered against the respondent arising from the tragic accident which led to his conviction in Hungary. Newspaper articles have among other things branded him as a child killer. He has also received in his place of work communications of a threatening nature, including one explicit death threat. He fears that he will if surrendered and imprisoned in Hungary be the subject of adverse and hostile attention in such a prison, and that his right to life and right to bodily integrity will be put at risk. From his point of view those concerns are completely understandable, exacerbated no doubt by the fact that he will be serving the sentence in a foreign country.

There is no evidence that any of this publicity or adverse attention is generated or emanating from any agent or organ of the Republic of Hungary.

The respondent is fearful that the prison authorities in Hungary will not have protections in place or a regime of supervision in order to protect him from any adverse attention to which he might be subjected while in prison. But he has not adduced any evidence to support his fear that such protection as may be necessary will be afforded or available to him. He makes the point that no replying affidavit has been filed by the applicant which might otherwise assuage his fears, and submits therefore that his own evidence should be accepted since it has not been controverted.

I am not satisfied that there is any evidence sufficient to demonstrate a reasonable apprehension that if surrendered his right to life and to bodily integrity will be put at risk. His fears, albeit based on the publicity and correspondence which he has been subjected to, are not sufficient in that regard, particularly since there is no evidence adduced as to the lack of available protection while in prison, and particularly also in view of the fact that there is no suggestion made that prison staff or other agents of the Republic of Hungary have had any involvement in such communications and publicity. This Court must presume that such protection as may be necessary will be made available, and the fact that no replying affidavit has been filed in response to the respondent's averments does not add weight to these arguments. In my view there is no basis for prohibiting surrender under section 37 of the Act of 2003.

No fair trial:

On the previous application the respondent made arguments to the effect that his trial in absentia was an unfair trial, especially because certain statements by his witnesses were deemed inadmissible because of the fact that they had not been translated by an appropriate translator, and also because he had been denied an opportunity to have his vehicle independently examined after the accident. I dealt with these arguments in my earlier judgment at paragraphs 62-64, and reached conclusions from which I have no reason to depart on the present application.

Delay:
In so far as this ground was argued on this application, I cannot be satisfied that on delay grounds alone this application for surrender should be refused. The delay issue was not pursued on the first application, but MR Keane points to the obvious fact that since that time further time has passed since the Supreme Court's decision and the present date adding further delay upon delay. Mr Keane submits that none of the delay in question can be attributed to the respondent. That is correct of course. But it is also true that prior to the coming into force of the Act of 2003 the surrender of the respondent would not have been possible. Thereafter the first application was brought in the High Court, following which there was an appeal to the Supreme Court. There was some delay then before the Act of 2009 enabled the present application to be mounted. But there is n question of culpable delay on the part of the Hungarian authorities, such that surrender should be refused.

For all these reasons, I am satisfied that the Court is required to order the surrender of the respondent to the authorities in Hungary, and I will so order.