

Approved
No redactions required



THE COURT OF APPEAL

Record No 2021/8

Neutral Citation: [2021] IECA 210

Birmingham P

Edwards J

Collins J

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003

(AS AMENDED)

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant/Respondent

AND

ZSOLT SIKLÓSI

Respondent/Appellant

JUDGMENT of the Court delivered by Mr Justice Maurice Collins on 21 July 2021

PRELIMINARY

1. The issues in this appeal overlap to a significant degree with the issues arising in another appeal in which this Court gives judgment today, *Minister for Justice and Equality v Szamota* [2021] IECA 209. This judgment should be read with the Court's judgment in *Szamota*.
2. In *Szamota*, the Court has concluded that, having regard to the importance and complexity of the questions raised by the points of law certified by the High Court pursuant to section 16(11) of the European Arrest Warrant Act 2003 (as amended) (*"the 2003 Act"*), it is appropriate to exercise this Court's power to make a reference to the Court of Justice of the European Union (CJEU) pursuant to Article 267 of the Treaty on the Functioning of the European Union.
3. Materially identical points of law were certified by the High Court in these proceedings and in the circumstances the Court also considers it appropriate to make a reference to the CJEU. The questions which the Court proposes to refer are set out at the conclusion of this judgment.
4. Other grounds of appeal, falling outside the scope of the certified points of law, were also advanced on Mr Siklósi's behalf. These grounds are addressed in this judgment and, for the reasons which will be set out, I would reject Mr Siklósi's appeal on those grounds.

5. In the circumstances, this appeal will be stayed pending the CJEU's ruling on the questions to be referred.

FACTS

6. The Appellant, Mr Siklósi, appeals from an Order made by the High Court (Binchy J) on 18 December 2020 directing his surrender to Hungary on foot of a European Arrest Warrant issued by the Tarabánya Court of Appeal on 27 July 2017 (*“the EAW”*). That Order was made consequent on the Judgment of the High Court given on 15 December 2020.
7. The relevant facts are set out in that Judgment. Briefly, Hungary seeks the surrender of Mr Siklósi for the purpose of his serving the remaining 11 months of a one year term of imprisonment imposed on him following his conviction for four offences arising from incidents of domestic violence directed at his former spouse, his child and mother-in-law, including assaulting his former spouse and false imprisonment of her and their child. These offences were committed in August 2005 and I shall refer to them as the *“2005 Offences”*.
8. Section (b) of the EAW identifies the relevant enforceable judgments as a judgment of Encsi Municipal Court (as the court of first instance) of 10 October 2006 and a judgment of the Borsod-Abaúj Zemplén Court (as the court of second instance) of 19 April 2007. Section (d) of the EAW indicates that Mr Siklósi *“had appeared in person at the trial resulting in the decision”*. As will become apparent, while Mr Siklósi was present at the proceedings before the Encsi Municipal Court, he was not present at the Borsod-Abaúj Zemplén Court but he was represented by his chosen defence counsel.

9. Section (f) of the EAW refers to a later decision of the Encsi Municipal Court (of 13 December 2011) and a judgment of the Miskolc Court of Appeal as a court of second instance which, it is said, became final on 12 June 2012 and it is stated that an earlier EAW had been withdrawn as a retrial had been ordered. The EAW then states that retrial had subsequently been denied and the EAW then refers to further judgments of the Encsi Municipal Court (of 24 October 2016) and of the Miskolc Court of Appeal (which became final on 29 March 2017). At that point (so the EAW recites) “*the sentence became enforceable again*”. The EAW does not give any information about the subject-matter of those later judgments.
10. Unsurprisingly, the terms of the EAW prompted a request for further information and that further information in turn prompted a further request for information and so on. Ultimately, seven requests for further information were made and replied to. The picture that emerges from the further information may be summarised as follows:
- On 10 October 2006, the Appellant was convicted of the 2005 Offences by the Encsi Municipal Court, following a trial held on 23 May 2006 and 10 October 2006. The Appellant was present at this trial.
 - On 19 April 2007, the Appellant was convicted at second instance of the 2005 Offences by the County Court of Borsod-Abaúj Zemplén. The Appellant was duly summoned to appear at this hearing. While he did not appear personally, he was represented by his chosen defence counsel.

- As a result of these convictions, the Appellant was sentenced to one year's imprisonment. However, execution of that sentence was suspended for a two year probation period which was due to expire in April 2009.
- The Appellant had spent a month in custody in April/May 2006, leaving a maximum of 11 months to be served (that balance being suspended as per above).
- In December 2010, the Appellant was convicted at first instance by the Encsi Municipal Court of an offence of failing to pay child support. I shall refer to that offence (which is said to have been committed in 2008) as the "*Child Support Offence*". The Appellant was present at the hearings held on 15 November and 13 December 2010 but was not present when the Court gave its decision on 16 December 2010. The Encsi Municipal Court imposed a fine on the Appellant. It did not make any order in respect of the sentence imposed on the Appellant for the 2005 Offences.
- The decision of the Encsi Municipal Court was appealed, though it is unclear whether that appeal was brought by Mr Siklósi or by the prosecuting authorities. In any event, in June 2012, the Miskolc Court of Appeal varied the sentence and in lieu of a fine sentenced the Appellant to 5 months imprisonment, banned him from public affairs for 1 year *and* ordered the enforcement of the sentence imposed on him for the 2005 Offences. The Appellant was summoned to attend the hearing before the Miskolc Court of Appeal but the summons was not

collected. That was considered due service under Hungarian law. The Appellant was not present at the hearing but the Court appointed a defence attorney who attended at the trial and subsequently filed a motion for a re-trial and submitted an appeal for clemency on the Appellant's behalf.

- The information available to the Court does not disclose the exact legal basis for the enforcement order made by the Miskolc Court of Appeal and, in particular, whether that order was mandatory or discretionary. Given that the Encsi Municipal Court (the court of first instance) did not make such an order, it would appear not to be the case that the Appellant's conviction for the Child Support Offence, of itself, was sufficient to trigger the enforcement of the suspended sentence. It may be that enforcement was mandated when a sentence of imprisonment was imposed on the Appellant for the subsequent offence or it may be that the order was a discretionary one and that the Miskolc Court of Appeal simply exercised its discretion differently to the Encsi Municipal Court. It is also unclear whether it was open to the Miskolc Court of Appeal to order the enforcement of part only of the suspended sentence. In light of the view taken by him as to the effect of the decision of the CJEU in Case C-571 PPU *Samet Ardic*, the Judge clearly did not think it necessary to pursue these issues.
- In September 2012 a European Arrest Warrant was issued by Hungary seeking the Appellant's surrender for the purpose of serving the sentences imposed on him in respect of both the 2005 Offences and the Child Support Offence.

- The Appellant opposed his surrender and, for the reasons set out in the judgment of the High Court (Donnelly J) of 19 May 2015 (*sub nom Minister for Justice and Equality v AB* [2015] IEHC 338), the High Court refused to order his surrender. Surrender was refused in respect of the Child Support Offence on the basis of lack of correspondence. As regards the 2005 Offences, it appeared to the High Court that, while the EAW sought the Appellant's surrender for the purpose of enforcing his sentence, he was in fact being sought for the purposes of prosecution, in circumstances where it appeared to the court that it had been accepted that the Appellant was to be retried in the event that he was surrendered. In those circumstances, Donnelly J held, there was a fundamental defect in the EAW in that it did not accurately reflect the purpose for which the surrender of the Appellant was actually being sought.
- On 28 October 2015, the Miskolc Court of Appeal directed that the Encsi Municipal Court consider whether a retrial should be ordered in relation to the 2005 offences. The procedure seeking a retrial had been initiated by the Appellant but he was not present at the hearing before the Miskolc Court of Appeal.
- On 24 October 2016, the Encsi Municipal Court rejected the application for a retrial for the 2005 offences. The Appellant did not appear before the Encsi Municipal Court but he was represented by a defence counsel appointed by him.

- The Appellant appealed the decision of the Encsi Municipal Court. That appeal was heard by the Miskolc Court of Appeal on 20 March 2017. The Appellant did not appear but he was represented by a defence counsel appointed by him. The proceedings were adjourned to 29 March 2017 when the Court of Appeal announced its decision to dismiss the motion for a retrial.
- As a result of that decision, the sentence of imprisonment imposed on the Appellant following his conviction for the 2005 Offences – which had been ordered to be enforced by the Miskolc Court of Appeal in June 2012 – was again enforceable as a matter of Hungarian law.
- The EAW at issue in these proceedings then issued on 27 July 2017.
- Finally, on 2 July 2020 (made final on 4 August 2020) the Penal Enforcement Unit of the Regional Court of Tarabánya determined that enforcement of the five month prison sentence imposed on the Appellant for the Child Support Offence was no longer possible as a result of the expiry of the applicable limitation period. According to the Regional Court of Tarabánya (and this is not disputed), the unenforceability of this sentence does not affect the order made by the Miskolc Court of Appeal in June 2012 and does not impact on the EAW.

11. In his Judgment, Binchy J observed – with conspicuous understatement – that the number of requests for further information here was “*far from ideal*”, noting correctly that “*one led to the need for another*” (at para 33). Of course, allowances must be made

for language differences and the requirement for requests and responses to be translated and the risk that meaning may be lost in translation. Even making every such allowance, however, a prolonged cycle of request and response such as occurred here ought not to be necessary. If comprehensive and accurate information had been set out in the EAW in the first instance, significant confusion and delay could have been avoided. That would also have been the case had the very clear and specific requests for information made by the High Court been addressed properly.

HIGH COURT HEARING AND DECISION

12. Mr Siklósi objected to his surrender on a range of grounds.
13. A number of these grounds relied on the fact that Mr Siklósi's surrender was sought to serve a sentence of imprisonment that had become enforceable by reason only of an order made *in absentia* by the Miskolc Court of Appeal, following his trial and conviction in *absentia* in respect of the Child Support Offence. It was said that in these circumstances the surrender of Mr Siklósi would violate Article 4a of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States ("*the Framework Decision*"). Article 4a of the Framework Decision (inserted by Council Framework Decision 2009/299/JHA of 26 February 2009) and Section 45 of the European Arrest Warrant Act 2003 (as amended) ("*the 2013 Act*") which gives effect to it in Irish law are discussed in detail in the Court's judgment in *Szamota*. It was also said that the Appellant's surrender would be in breach of section 37 of the 2003 Act. While it appears from the Judgment that this point was not pressed, it does form the basis of one of the points of law subsequently certified by the Judge and was debated fully before this Court on appeal. Section 37 is also discussed in the Court's judgment in *Szamota*. A further (and related) objection relied on the fact that the "*triggering conviction*" here was in respect of an offence for which Mr Siklósi's surrender had previously been requested but refused on the basis of absence of correspondence.

14. Each of these objections were rejected, the Judge taking the view that the objections were completely answered by the decision in *Ardic*. He explained that he had considered similar objections in *Minister for Justice and Equality v Szamota* [2020] IEHC 606 and had concluded that, for the reasons identified by the Court of Justice in *Ardic*, the High Court was not bound to inquire into the circumstances in which the suspension of a sentence was revoked. Such proceedings were not “*the trial resulting in the decision*” for the purpose of Article 4a/section 45; the trial for that purpose was the trial before the County Court of Borsod-Abaúj Zemplén resulting in the decision of 19 April 2007. The requirements of Article 4a/section 45 had been fully met as regards that decision (Judgment, para 26). In light of *Ardic*, it was *nihil ad rem* that the matter that had triggered the revocation of the suspension of sentence was not an offence in Irish law: it could be viewed “*simply as a violation of the conditions under which the sentence was suspended*” (Judgment, para 27).
15. A number of other objections to surrender were made which the Judge considered and also rejected. One was that the surrender of Mr Siklósi would be an abuse of process having regard to the previous decision of the High Court (Donnelly J) to refuse his surrender in respect of the same offences. The Judge rejected that objection. He was satisfied that the issue of a second EAW in respect of the same offences was not in itself an abuse of process. He surmised that there may have been a degree of confusion leading to the previous refusal – Donnelly J had been under the impression that a retrial had been ordered when in fact the conviction was being reviewed and ultimately that review had not resulted in a retrial being directed. It followed that Mr Siklósi was required to serve the sentence that had been imposed on him and his surrender for that

purpose would not amount to an abuse of process (Judgment, paras 28 and 29). The Judge also rejected an argument that the IJA's failure to provide any information (when advancing the EAW) regarding the previous unsuccessful application for surrender was an abuse. The decision of Donnelly J had been sufficiently brought to the notice of the High Court and was not in any event a bar to surrender in light of changed circumstances (Judgement, para 30).

16. A further objection was that the lapse of time since the 2005 Offences had occurred, taken together with the other factors just referred to, meant that surrender would be an abuse of process. Rejecting that argument, the Judge distinguished the decision of the Supreme Court in *Minister for Equality and Law Reform v JAT (No 2)* [2016] IESC 17, [2016] 2 ILRM 262) (Judgment, para 31). That decision is considered further below.
17. Next, it was argued that the EAW was insufficient and did not comply with section 11 of the 2003 Act and a related argument was advanced that surrender should be dismissed on grounds of lack of clarity, by analogy with the decision of the Supreme Court in *Minister for Justice and Equality v Herman* [2015] IESC 49. These arguments were rejected by the Judge on the basis that, whatever the position initially, there was sufficient clarity as to all matters necessary to determine the application for surrender (Judgment, paras 32 – 34).
18. Finally, the Judge rejected an objection by reference to the civil rights position in Hungary on the basis that the evidence before the Court was not capable of sustaining

any such objection (Judgment, para 35). This objection was not pursued on appeal and no more will be said about it.

APPEAL

The Certified Points of Law

19. Subsequently, Binchy J was persuaded to give a certificate pursuant to section 16(11) of the 2003 Act permitting Mr Siklósi to pursue an appeal to this Court. The following three points of law of exceptional public interest are identified in the High Court's Order of 18 December 2020:

“1. If the requested person has been found guilty in final proceedings conducted in his absence but in the presence of his lawyer and has had imposed on him a custodial sentence, the execution of which has been suspended subject to certain conditions, do either the

(a) subsequent revocation proceedings, conducted in absentia, in which the court, in the absence of the requested person, orders that suspension to be revoked on the ground of being convicted of another “second” offence in absentia,

or

(b) the trial for the second offence

constitute a ‘trial resulting in the decision’ as referred to in Article 4a of Framework Decision [2002.584]

2 Where the surrender of a person is being sought for service of a sentence of imprisonment which was previously suspended, and the revocation of suspension was based solely on a conviction for a second offence, is the executing authority obliged to inquire as to whether there was a violation of fair trial rights in obtaining the conviction for the second offence, when deciding whether the surrender is prohibited by section 37 of the European Arrest Warrant Act 2003, in circumstances where the conviction for the second offence is not subject to an automatic right of appeal in the issuing state?

3 Is it acte clair whether the decision in [Ardic] applies to the revocation hearing of the 16th May 2017 in circumstances where the revocation of the suspension of sentence, was due to a conviction imposed in absentia?"

These certified points of law are materially identical to the points certified in *Szamota*.

20. In addition to the parties' written submissions, the Court heard detailed argument from counsel for both parties directed to these points. Subsequent to the hearing of this appeal, the Court heard the appeal in *Szamota* and heard further arguments addressed to those points. Unsurprisingly, there was a significant degree of overlap between the submissions made in the two appeals.
21. The fundamental point made by Counsel for the Appellant, Mr Paul Carroll SC, was that there was a "*qualitative difference*" between the position considered by the CJEU in *Ardic* and the position where (as here) a suspended sentence was activated as a result

of a further criminal conviction. Where that further conviction followed from a trial conducted *in absentia*, Article 6 of the European Convention on Human Rights (ECHR) was clearly engaged and, at least in the absence of any evidence of waiver (and, the Appellant said, there was no evidence of waiver here) it would be a breach of Article 6 (and therefore of section 37 of the 2003 Act) to surrender the person concerned in such circumstances. Articles 47 and 48 of the Charter of Fundamental Rights of the European Union (“*the Charter*”) were also relied on by the Appellant in this context. The Appellant cited *Othman v UK* (2012) EHRR 4389 as authority for the proposition that a “*flagrant denial of justice*” would occur if he was surrendered and thus, exceptionally, surrender could be refused on that basis. As regards Article 4a, the Appellant stressed that the distinction between a measure that constitutes a “*penalty*” and a measure that concerns “*the execution or enforcement of a penalty*” is not always clear (citing Advocate General Bobek’s Opinion in *Ardic*, at para 45). Here, it was submitted, the order made by the Miskolc Court of Appeal in June 2012, which (*inter alia*) ordered the enforcement of the sentence imposed on the Appellant for the 2005 Offences was properly to be regarded as a penalty imposed on him and it followed (so it was said) that the proceedings before that court were properly to be regarded as an essential element of the “*trial resulting in the decision*” for the purposes of Article 4a. Counsel submitted that, in the circumstances, a reference to the CJEU was appropriate.

22. Counsel for the Minister Mr Ronan Kennedy SC (who also appeared for the Minister in *Szamota*) steadfastly maintained that none of these arguments availed the Appellant having regard to the CJEU’s decision in *Ardic*. In light of that decision, no useful purpose would be served by a reference. He fairly accepted that, if the proceedings

before the Miskolc Court of Appeal that resulted in the enforcement order of June 2012 were to be regarded as the “*trial resulting in the decision*”, the evidence before the Court did not demonstrate that any of the conditions in Article 4a(1) were satisfied though he left open the possibility of arguing that there had nonetheless been an effective waiver of the Appellant’s right to be present at the proceedings. As regards the section 37 argument made by the Appellant, the Minister’s position here (as in *Szamota*) was that the threshold for a refusal of surrender under section 37 was a very high one and the Appellant had failed to discharge the burden on him in that respect.

23. For the purposes of this appeal, it appears to me that the Court is entitled to reach a provisional view that the proceedings before the Miskolc Court of Appeal that resulted in his conviction for the Child Welfare Offence, his sentencing for that offence and the making of the enforcement order, which took in the absence of the Appellant, did not comply with Article 6 ECHR. Similarly, the Court is in my view entitled to proceed on the basis of a provisional view that, if the proceedings before the Miskolc Court of Appeal are properly to be regarded as “*the trial resulting in the decision*” for the purposes of surrender here, the requirements of Article 4a/section 45 would not be satisfied. The real issue on the appeal is whether, as a matter of principle, such matters are relevant to the surrender decision at all. If determined to be relevant, further inquiry may then be necessary before making a definitive assessment as to whether surrender should actually be refused on the facts.

The Non-Certified Grounds

24. As well as pursuing the certified points, the Appellant also sought to agitate the grounds relating to issue estoppel, abuse of process and lack of clarity. In her written submissions, the Minister suggested that this was “*in blatant disregard*” of section 16(11) of the 2003 Act and submitted that the Appellant should be “*prevented*” from pursuing these additional grounds. Sensibly, that objection was not pressed at the hearing of the appeal. There is a consistent line of authority – going back to the Supreme Court’s decision in *People (Attorney General) v Giles* [1974] IR 422 – to the effect that the statutory formula employed in section 16(11) does not preclude additional grounds being pursued once a certificate has been granted. Section 16(11) itself was considered by the Supreme Court in *Minister for Justice v Connolly* [2014] IESC 34, [2014] 1 IR 720 and it is clear from the judgment of Hardiman J (with which the other members of the court agreed) that “*it is open to this court in the present appeal to consider any point which arises, and not simply the particular [points] which [were] certified.*”
25. On the non-certified grounds the parties largely rehearsed their respective arguments before the High Court. Mr Carroll laid some emphasis on the recent decision of this Court in *Minister for Justice and Equality v Leopold* (*Ex tempore*, 22 January 2021) in support of the issue estoppel point.

DECISION

The Certified Points

26. For the reasons that I have set out in the judgment which I have given today in *Szamota*, I consider that the questions raised by the certified points are such that a decision on those questions from the CJEU is necessary to enable this Court to give judgment on those points and that it is therefore appropriate to exercise this Court's power to make a reference to the Court of Justice under Article 267 TFEU.
27. The Court has had the benefit of submissions from the parties as to the form of questions to be referred in the event that the Court concluded that such a reference was appropriate. The Court has had regard to those submissions in formulating the draft questions set out at the end of this judgment. A draft Order for Reference is being provided to the parties along with this judgment and the parties will have a further brief opportunity to make observations on that order (including the questions).
28. As already noted, the Appellant also relied on the fact that the “*triggering conviction*” here was in respect of an offence – the Second Offence – that is not an offence in Irish law (and in respect of which the surrender of the Appellant had previously been refused by the High Court (Donnelly J) on that basis). I agree with the Judge that this is *nihil ad rem*. In certain circumstances, the Framework Decision permits (though does not require) Member States to refuse surrender on the basis that the offence set out in the

EAW is not an offence in the executing State (Article 4(1)). In respect of other offences, these give rise to surrender “*without verification of the double criminality of the act*” (Article 2(2)). In each case, the court of the executing State is concerned only with the offence(s) set out in the EAW. There is nothing in the Framework Decision – whether in Article 4a(1) or elsewhere – that entitles the courts of the executing State to impose any broader requirement for correspondence/dual criminality. Nor is there any basis for doing so in Article 6 ECHR. Article 6 ECHR does not require Contracting States to have identical criminal codes. The only Article 6 issue arising here is that the Appellant was convicted for the Second Offence *in absentia*. If he had been present for his trial (or it was demonstrated that he had effectively waived his right to be present), there would be no basis for any Article 6 objection to surrender.

29. It follows that I would reject this ground of objection, which explains why no reference to it is made in the draft order for reference or the proposed questions to be referred.

The Non-Certified grounds

30. Notwithstanding the fact the Court is making a reference, there is no reason why the non-certified grounds should not be determined at this stage.
31. In the first place, I am not persuaded that the doctrine of issue estoppel is any assistance to the Appellant here. As Mr Kennedy observed in argument, the Appellant has not identified any issue of fact or law that was determined by Donnelly J which is capable of presenting a barrier to surrender here. The position is quite different to that in

Leopold where there was an earlier determination that certain of the offences for which Mr Leopold's surrender was again sought did not correspond to any offences in Irish law. That determination had not been appealed by the Minister. In the absence of correspondence, surrender could not be ordered so the application of the doctrine of issue estoppel was fatal to the application for surrender in respect of those offences. No equivalent finding was made by Donnelly J here. On the basis of the evidence before her and the terms of a different EAW, she determined that there appeared to be a mismatch between the purpose stated in the EAW (service of a sentence) and what the evidence disclosed as what was to happen in the event that surrender was ordered (retrial). Her conclusion, based on the material before her, that the Appellant was facing a retrial is not a finding capable of binding the courts dealing with a later EAW, supported by different evidence which makes it clear that no retrial has in fact been directed at any stage and that the purpose for which Mr Siklósi's surrender is sought is indeed the service of a sentence of imprisonment.

32. As part of the issue estoppel ground, the Appellant also argued that the *outcome* of the earlier proceedings – namely the refusal by the High Court to direct the Appellant's surrender – in itself precluded the making of an order for surrender in these proceedings. That is clearly not so. *Res judicata* has no application in this context: see the decisions of the Supreme Court of *Minister for Justice v Tobin* [2012] IESC 37, [2012] 4 IR 147 and *JAT (No 2)*, as well as the decision of the CJEU in Case C-268/17 *AY*, which was considered in *Leopold*. The fact that there were previous surrender proceedings which were unsuccessful may, of course, be relevant to the abuse of process ground but it does not, of itself, preclude surrender here.

33. The Appellant cites *JAT (No 2)* as support for the abuse of process argument. It is suggested that, in all the circumstances, including the failure of the IJA to provide full information initially about the earlier proceedings, the retrial issue and the circumstances in which the suspended sentence had been activated, as well as the fact of the previous proceedings and their outcome, “*the cumulative result .. is that surrender would not alone be disproportionate but the request is oppressive*” and, when considered in conjunction with the “*sheer lapse of time*”, there was an abuse of process mandating the refusal of surrender.
34. I do not agree. Having regard to the fundamental principles of mutual trust and confidence that underpin the EAW regime and the emphasis repeatedly placed by the CJEU in its jurisprudence on the principle that “*the execution of the European arrest warrant constitutes the rule, the refusal to execute is intended to be an exception which must be interpreted strictly*” (*Tupikas* Case C-270/17, para 50), the threshold is a high one. That is particularly so given that abuse of process is not a ground for refusal listed in the Framework Directive. A refusal of surrender on a ground not listed requires “*exceptional circumstances*” (*ibid*).
35. The circumstances here are remote from the circumstances held to justify the refusal of surrender in *JAT (No 2)*. *JAT (No 2)* was “*a rare, and indeed exceptional case*” (per O’Donnell J). The impact of surrender on the appellant’s son, who had particular medical needs, was a significant factor which has no parallel here. The appellant himself also had medical issues. Again, it is not suggested that there is any parallel here. In fact, it

is a striking feature of these proceedings that there is *no* evidence from Mr Siklósi about his situation in the State, whether he has any close family or other ties here or the impact on his personal and family life in the event that he was to be surrendered to Hungary. While a significant period of time has elapsed since Mr Siklósi was finally convicted of the 2005 Offences, and since the sentence of imprisonment imposed on him for those Offences was ordered to be enforced, Mr Siklósi has undoubtedly contributed to that lapse of time by his own actions in leaving Hungary. Furthermore, the procedural history set out above does not disclose any obvious avoidable delay on the part of the Hungarian authorities. Even if there was any significant delay on the part of the issuing State, “*it is well settled that delay in and of itself does not constitute a basis for refusal of surrender*”: *Minister for Justice v Palonka* [2020] IESC 40, per Charleton J at para 21.

36. It is of course true that the level of information provided by the IJA in support of the application – both in the EAW itself and in its subsequent responses to successive requests for further information from the High Court – left much to be desired. It is also clear, however, that Mr Siklósi was at all times well aware of what had occurred in Hungary in relation to the question of a retrial. He has been represented by his own legal representative at all times in the hearings which ultimately led to the refusal of a retrial. The sequence of events as ultimately clarified by the IJA has not been contradicted either by him or by his Hungarian lawyer, Mr Fahidi (who provided a sworn statement on other issues but did not offer any evidence in support of this complaint).

37. In these circumstances, I would uphold the Judge's rejection of this ground of objection.
38. Lack of clear information is relied on as a separate ground of objection. The decision of the Supreme Court in *Minister for Justice and Equality v Herman* [2015] IESC 49 is cited in support of that objection but, once again, there is a significant difference between the facts here and the facts in *Herman*. There was a fundamental lack of clarity in the two warrants at issue in *Herman* as to the purpose for which the surrender of the appellant was being sought (whether for prosecution or sentence), and what sentence(s) he might have to serve if surrendered. It thus resembled the position in *AB*. Here, in contrast, the Judge was satisfied that the material before him identified all matters that were required to be identified, including the purpose for which surrender was sought and the sentence involved. The Framework Decision clearly envisages that it may be necessary for the courts of the executing State to seek further information and, ultimately, the information provided to the Judge was, in his judgment, sufficient to adjudicate properly on the application. It is said that this Court should look at documents and form its own view. I do not think that is correct. The Judge – who has very considerable experience in EAW matters – was satisfied that the picture disclosed by material before him was sufficient clear to allow him to reach a determination. It appears to me that this Court ought to be slow to go behind such a conclusion and ought not to do so unless some clear error on the part of the Judge has been demonstrated. No such error has been identified here. I would therefore reject this ground also
39. It follows that all of the non-certified grounds fail.

CONCLUSION AND ORDER

40. I would dismiss the appeal based on the non-certified grounds.
41. As regards the remaining grounds of the appeal, I would refer the following questions to the CJEU pursuant to Article 267 TFEU:

1. (a) Where the surrender of the requested person is sought for the purpose of serving a custodial sentence which was suspended ab initio but which was subsequently ordered to be enforced as a result of the conviction of the requested person for a further criminal offence, and where that enforcement order was made by the court that convicted and sentenced the requested person for that further criminal offence, do the proceedings leading to that subsequent conviction and enforcement order constitute the 'trial resulting in the decision' for the purposes of Article 4a(1) of Council Framework Decision 2002/584/JHA?

(b) Is it relevant to the answer 1(a) above whether the court that made the enforcement order was obliged to make that order as a matter of law or whether it had a discretion to make such an order?

2. In the circumstances set out in question 1 above, is the court of the executing State entitled to inquire into whether the proceedings leading to the subsequent

conviction and enforcement order, which took place in the absence of the requested person, were conducted in compliance with Article 6 of the European Convention on Human Rights and Fundamental Freedoms and, in particular, whether the absence of the requested person involved a violation of the rights of the defence and the requested person's right to a fair trial?

3. In the circumstances set out in question 1 above, if the court of the executing State is satisfied that the proceedings leading to the subsequent conviction and enforcement order were not conducted in compliance with Article 6 of the European Convention on Human Rights and Fundamental Freedoms and, in particular, that the absence of the requested person involved a violation of the rights of the defence and/or of the requested person's right to a fair trial, is that court and/or obliged (a) to refuse surrender of the requested person on the basis that such surrender would be contrary to Article 6 of the Convention and/or Articles 47 and 48(2) of the Charter of Fundamental Rights of the European Union and/or (b) to require the issuing judicial authority as a condition of surrender to provide a guarantee that the requested person will, upon surrender, be entitled to a retrial or appeal, in which they will have a right to participate and which allows for the merits of the case, including fresh evidence, to be re-examined which may lead to the original decision being reversed, in respect of the conviction leading to the enforcement order?

42. The appeal will be stayed pending the ruling of the CJEU on those questions.