Neutral Citation: [2014] IEHC 251

THE HIGH COURT

Record No 2011/302 EXT

Record No 2012/325 EXT

Record No 2013/45 EXT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003 AS AMENDED

BETWEEN/

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

- AND -

ARNOŠT HERMAN

Respondent

JUDGMENT of Mr Justice Edwards delivered on the 28th day of March, 2014.

Introduction:
In this case the respondent is the subject of three separate European arrest warrants on foot of which the Czech Republic seeks his surrender.

Before considering each warrant individually, and the specific objections to surrender raised in regard to each respectively, it is appropriate to indicate that certain matters are uncontroversial. No issues arise in any of the cases as to proper endorsement for execution in this jurisdiction in accordance with s.13 of the European Arrest Warrant Act 2003 (hereinafter the Act of 2003), or as to arrest or identity.

The Court has affidavits as to arrest and identity covering each of the warrants in question from the arresting members of An Garda Síochána. In addition, oral evidence as to arrest and identity was given before the High Court by the gardaí in question in the immediate aftermath of the relevant arrests, which was not challenged. In each case the Court, being satisfied at the s. 13 (of the Act of 2003) hearing as to the execution of the warrant, and as to identity, fixed a date for the purposes of s.16 of the Act of 2003, being a date that fell not more than 21 days from the date of arrest and remanded the respondent in custody to the date in question. Thereafter each case was adjourned from time to time until ultimately a date was fixed for a substantive surrender hearing in respect of all matters.

In circumstances where no issue has been raised at the surrender hearing concerning proper endorsement, arrest or identity, and in circumstances where the Court has inspected the original warrant in each case, and has before it the affidavit evidence referred to above, the Court is again satisfied that each warrant bears this Court's endorsement, that each warrant was duly executed within the jurisdiction and that in each instance the person who is before the Court is one and the same person as the Arnošt Herman named in the relevant European arrest warrant.

In addition, the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) Order 2005 (S.I. No. 27 of 2005) (hereinafter referred to as "the Designation Order of 2005"), and duly notes that by a combination of s.3(1) of the Act of 2003, and article 2 of and the schedule to the Designation Order of 2005, "the Czech Republic" is designated for the purposes of the Act of 2003 as being a state that has under its national law given effect to the Council Framework Decision 2002/584/JHA of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States, O.J. L190/1 18.7.2002, as amended, (hereinafter referred to as "the Framework Decision").

As a single common "Points of Objection" document has been filed by the respondent in relation to all three warrants, the Court considers it sensible to outline the nature of each warrant in turn before considering the objections and to also deal with correspondence and minimum gravity before considering the substantive objections, in circumstances where no specific issues have been raised by way of objections in relation to those issues.

Warrant No. 1:
This warrant which is dated the 10th August, 2011, was endorsed for execution on the 7th September, 2011. It relates to the proceedings bearing record no 2011/302 EXT and also bears the domestic Czech reference 2T 1/2008. It is a sentence type warrant on foot of which the respondent's surrender is sought for the purposes of having him serve the balance remaining to be served of a sentence of six years imprisonment imposed upon him by the Regional Court in Hradec Králové, on the 28th June, 2010, and which came into force on 24th of February 2011, in connection with what is described as "three criminal offences (nine acts)" specified in Part (e) of the warrant. The warrant describes nine individual incidents of offending conduct that it seems can be generically classified into three types of offending behaviour. As will emerge in more detail later in this judgment the position is complicated by the existence in Czech law of the legal concepts of "partial attacks" and "independent acts", concepts with which we in this jurisdiction are not readily familiar. Incidents of partial attack are related incidents that are grouped together under Czech law and classified as a single continuing offence. Independent acts are, as the name implies, independent and discrete single acts of offending conduct. Applying this taxonomy this warrant appears to be concerned with two offences comprised of a number of partial attacks (charged either as extortion contrary to s. 235 of the Czech Criminal Code on its own, or as an aggravated form of the basic offence *i.e.*, as extortion contrary to s. 235 of the Czech Criminal Code in conjunction with causing injury to health, contrary to s. 221 of the Czech Criminal Code) and one offence comprising an independent act (a firearms offence).

The issuing judicial authority has invoked paragraph 2 of article 2 of the Framework Decision in respect of the two offences comprising

partial attacks by the ticking of the box in Part (e) I relating to "racketeering and extortion". It has been made clear in additional evidence that this is intended to cover the eight incidents of extortion conduct described, including the two involving the additional and aggravating offending conduct where injury was caused to the health of the victims concerned.

If there has been a valid invocation of paragraph 2 of article 2 of the Framework Decision in respect of those eight offences the Court need not be concerned with correspondence in respect of those offences.

In considering whether or not there has been a valid invocation of paragraph 2 of article 2 of the Framework Decision, the Court need only be concerned with whether there has been gross or manifest error, and that the required minimum gravity threshold is met.

It is clear from a consideration of the description of the circumstances in which the offences were committed set forth in Part (e) 2 that there has been no gross or manifest error in that regard and that it is to be readily appreciated how the offending conduct in the basic form described could be regarded as "racketeering and extortion", and in its aggravated form as embracing the causing of injury to health.

The third offence (the ninth incident described), which comprises an independent act, involving possession of a firearm without authorization, and correspondence must be demonstrated in respect of that offence. Counsel for the applicant has invited me to find correspondence with the offence in Irish law of possession of a firearm without a firearms certificate contrary to s.2 of the Firearms Act 1925 as amended, and I so find.

In so far as minimum gravity is concerned it is clear from the fact that a sentence of six years was imposed that minimum gravity is satisfied on every possible basis in which it is required to be considered. The threshold with respect to offences 1 and 2 (the ticked box offences) is that set out in s. 38(1)(b) of the Act of 2003, namely that a potential sentence of a least three years was available to be imposed in the issuing state, and in the case of the third offence is that set out in s. 38(1)(a)(ii) of the Act of 2003, namely that a sentence of at least four months was imposed in the issuing state.

It is also convenient at this point to state that the respondent was not tried in absentia and that no issue has been raised on his behalf in relation to s. 45 of the Act of 2003.

Warrant No 2:
This warrant which is dated the 9th October, 2012, was endorsed for execution on the 27th November, 2012. It relates to the proceedings bearing record no. 2012/325 EXT and also bears the domestic Czech reference 0 Nt 286/2012. It is a ostensibly a prosecution type warrant on foot of which the respondent's surrender is sought for the purposes of prosecuting him for the three offences specified in Part (e) of the warrant. The warrant is based upon a domestic arrest warrant of the District Court in Trutnov dated the 5th October, 2012.

The issuing judicial authority has invoked paragraph 2 of article 2 of the Framework Decision in respect of two of the offences by the ticking of the boxes in Part (e) I relating to "murder, grievous bodily injury" and "racketeering and extortion". There is a third offence concerning possession of a firearm without authorization and it was initially unclear whether the ticked box procedure was also being availed of in respect of that offence. However, it has been confirmed in additional information dated the 13th November, 2012 that the ticked box procedure is not being relied upon in respect of the firearms offence.

Once again, providing there has been a valid invocation of paragraph 2 of article 2 of the Framework Decision in respect of the two ticked box offences the Court need not be concerned with correspondence in respect of those offences.

It is clear from a consideration of the description of the circumstances in which those two offences were committed set forth in Part (e) 2 of the warrant that there has been no gross or manifest error in that regard and that it is to be readily appreciated how the offending conduct described could be characterised as involving the causing of grievous bodily injury, and racketeering and extortion.

In so far as minimum gravity is concerned the threshold in relation to ticked box offences is that set out in s. 38(1)(b) of the Act of 2003, namely that a potential sentence of a least three years should have been available to be imposed in the issuing state. It is clear from Part (c) of the warrant that a sentence of up to ten years imprisonment was available to the court in the issuing state in respect of the offence involving the causing of grievous bodily harm, and that a sentence of up to four years imprisonment (alternatively eight years with aggravating circumstances) was available to the court in the issuing state in respect of the offence involving extortion. Accordingly the requirements of the statute with respect to minimum gravity are met in so far as the two ticked box offences are concerned.

Correspondence must be demonstrated with regard to the third offence involving possession of a firearm without authorization. Counsel for the applicant has invited me to find correspondence in respect of that offence with the offence in Irish law of possession of a firearm without a firearms certificate contrary to s.2 of the Firearms Act 1925 as amended, and I so find.

The minimum gravity threshold with respect to the third offence is that set out in s. 38(1)(a)(i) of the Act of 2003, namely that a potential sentence of a least twelve months is available to be imposed in the issuing state. We are told in the warrant that under section 279 of the Czech Criminal Code the firearms offence carries up to two years imprisonment. Minimum gravity is therefore met in respect of this offence also.

Clearly, because the respondent has not yet been tried no issue as to trial *in absentia* arises.

Warrant No 3:
This warrant which is dated the 15th November, 2012, was endorsed for execution on the 11th February, 2013. It relates to the proceedings bearing record no. 2013/45 EXT and also bears the domestic Czech reference no. 10 To 48/2012.

At first glance it is not immediately clear whether the respondent is sought for prosecution purposes, or in connection with the execution of a sentence, or for both. However the position has been clarified in additional information and it is fair to say it is somewhat complicated. The warrant is now said, on foot of a document dated the 19th December, 2012 under the seal and signature of the issuing judicial authority, to be for the purposes of criminal prosecution.

If that was the beginning and end of the matter there would be little difficulty in engaging with this warrant. However, the case has further complicating features. The warrant is said to relate to "11 offences, more precisely 1 act consisting of 11 attacks". It is clear from a consideration of its terms that this warrant actually purports to embrace the eight incidents of extortion conduct that are already the subject of warrant no 1 (and in respect of which a conviction has been recorded and a sentence imposed), and three

further incidents of extortion conduct which have never been the subject of any proceedings. Moreover, it is clear that the Czech authorities consider that all eleven incidents are to be regarded as partial attacks and accordingly ought properly to be treated as a single continuing offence.

This seemingly strange situation, when it is viewed from our common law perspective, is explained at length in additional information that the Court will review in detail later in this judgment. However, the position under Czech law, as it is now understood by the Court, should be outlined in summary at this point.

In an ideal world the respondent should have faced trial for all partial attacks on day one. However, for whatever reason this did not occur. He was tried and convicted of offences comprising eight partial attacks (and, of course, one independent act, being the firearms offence). Subsequently, three more partial attacks came to light. Under Czech law, in such circumstances the initial conviction and sentence is not to be treated as final for all time. Czech law permits the defendant to be placed on trial for the additional partial attacks. If he is found guilty of committing these additional partial acts the court of trial is then required to cancel the original conviction and sentence and proceed to record a fresh conviction covering both the partial acts of which the defendant was originally convicted and also the additional partial acts of which he has now also been found guilty. Moreover, the Court must then proceed to impose a new "concurrent sentence" embracing all of the partial acts constituting the continuing offence (or offences) in question. In doing so, the court is bound by the findings of fact in the first trial in regard to the partial acts for which the defendant was originally convicted. The court can form its own view of the facts in respect of the new matters. In addition, the new concurrent sentence cannot be for a term that is less than that imposed on the first occasion.

It appears that the Czech authorities wish to invoke this procedure in respect of the respondent, and that is why warrant no. 3 covers the eight partial attacks to which warrant no. 1 already relates, plus the three new partial attacks that have since come to light; and it is also why warrant no. 3 is represented as being a warrant on foot of which the respondent is wanted for prosecution. This is a situation not previously encountered by the Court and it throws up a myriad of interesting issues.

To further complicate the picture, it appears that the respondent was previously the subject of a trial *in absentia* before the Regional Court in Hradec Králové, as regards the matters now covered by warrant no. 3 (and, it seems, also another independent act), at which he was convicted. However, the judgment rendered *in absentia* (domestic file reference no. 7T 14/2009- 2246) has since been cancelled by the High Court in Prague in a ruling under Czech domestic file reference 10T 048/2012, and the matter has been remitted back to the Regional Court in Hradec Králové for re-trial.

Before addressing the unusual features of this case and describing the objections raised by the respondent, it is convenient at this point to address correspondence and minimum gravity in so far as warrant no. 3 is concerned.

The issuing judicial authority has invoked paragraph 2 of article 2 of the Framework Decision in respect of the single offence consisting of the eleven partial acts described by the ticking of the box in Part (e)I relating to "racketeering and extortion".

It is clear from a consideration of the description of the circumstances in which that offence was committed, as set forth in Part (e) 2 of the warrant, that there has been no gross or manifest error in ticking the box in question and that it is readily to be appreciated how the offending conduct described could be regarded as "racketeering and extortion"

In so far as minimum gravity is concerned the threshold with respect to the offence is that set out in s. 38(1)(b) of the Act of 2003, namely that a potential sentence of a least three years should be available to be imposed in the issuing state. It is clear from the terms of the warrant that a potential penalty of at least three years is available, and that indeed having regard to the existence of aggravating circumstances, the potential penalty may be up to eight years. It is clear that the required minimum gravity threshold is met.

Points of objection
The respondent raises the following substantive objections to his surrender in his "Points of Objection":

> "(2) Regarding EAW No.1 and No.3, it appears that the Respondent has been prosecuted in the Issuing State in respect of two concurrent sets of criminal proceedings relating to practically identical charges, thereby infringing fundamental principles of legality and fair procedures. The subject matter of the EAW No1 and No 3 relates *inter alia* to these separate but practically identical proceedings. Accordingly, the Respondent's surrender is prohibited as it would lead to an infringement of the principles of *nemo debit bis vexari* and of *autrefois convict* and would be in breach of minimum standards of constitutional fairness.
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> (3) Regarding EAW No.1 and No.3, it appears that if returned on those warrants, the Respondent would face two separate sentences of imprisonment for practically identical convictions in circumstances where those convictions and sentences or most of them have been quashed. In this regard it appears that the first and third warrants are contradictory, inconsistent and irreconcilable with each other and in certain respects the Respondent's extradition is sought in respect of sentences which appear to have been quashed.
>
> (4) It appears that the Respondent's surrender is prohibited in respect of the first European Arrest Warrant EAW No 1 referring to judgment '2T 1/2008', as the said warrant appears to refer to a sentence of imprisonment which is no longer enforceable. The six-year sentence imposed in respect of '2T 1/2008' appears to have been was set aside and replaced by the judgment of the Regional Court of Hradci Krávlové on the 14th February 2011 (Judgment 7T 14/2009).
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> (5) The Respondent's surrender is prohibited in respect of EAW No 3, the third European Arrest Warrant referring to judgment 7T 14/2009. It appears that this judgment was in respect of proceedings which were an abuse of process and which infringed the principle of *autrefois convict*. It appears that the said warrant relates to a prosecution which ran parallel to, and was identical in subject-matter to, the criminal trial referred to the first European Arrest Warrant.
>
> (6) The Respondent wishes to make the case that the Respondent's surrender is prohibited in respect of EAW No 3 the third European Arrest Warrant as it appears that the Respondent may have been previously acquitted of the charge set out at paragraph E of the third European Arrest Warrant at 21); and the charges set out at 22) & 23) may have been previously brought against the Respondent but withdrawn by the prosecutor mid-trial and before a verdict was returned. The Respondent wishes to make the case that the surrender of the Respondent is prohibited in respect of these charges, as it would result in a prosecution or a sentence of imprisonment contrary to the rule against double jeopardy or would otherwise be in breach of minimum standards of constitutional fairness.

(7) In respect of EAW's No 1, No 2 and No 3, there are grounds upon which a reasonable observer might reasonably conclude that the manner in which the Respondent's cases have been dealt with by the Issuing State to date rebuts the presumption that it would observe its obligations under the Framework Decision in relation to speciality, and upholding minimum standards of fair procedures and certainty in the conduct of the criminal proceedings relevant to the subject matter of the three warrants. The Respondent wishes to make the case that if surrendered, there is a real and substantial risk that the Respondent will be subjected to unorthodox, irregular, and unlawful proceedings in respect of matters which are, and are not referred to the European Arrest Warrants referred to herein.

(8) It appears that the Respondent has been dealt with in the Issuing State in a manner which offended against the principles of certainty, finality and regularity in criminal proceedings. The issuing State has failed to notify this apparent highly irregular history of proceedings to this Honourable Court and has failed to explain why it occurred or how it could have been justified."

Additional Information:
The issuing judicial authority was advised by the applicant that the respondent was relying *inter alia* upon breach of the principle of double jeopardy (*nemo debet bis vexari*) and was asked to comment. In a lengthy reply dated the 10th June, 2013 the issuing judicial authority stated:

"….we advise you to the queried issues, if there would not be a breach of the principle of double jeopardy (dual conviction for a crime), as follows.

Relevant provisions of the Criminal Code are in particular Sections 11 par 1 letter f), 12 par. 12 of the Rules of Criminal Procedure, Sections 43, 45,116 of the Criminal Code.

Rules of Criminal Procedure:

Section 11

Inadmissibility of Criminal Prosecution

(1) Criminal prosecution may not be commenced, and if already commenced, may not continue, and must be stopped

….

f) if conducted against a person against whom previous prosecution for the same act ended bv final court judgment, or was finally stopped by a court decision or a decision of any other authorized body, unless the decision has been cancelled in prescribed proceedings.

Section 12

Interpretation of Certain Terms

(12) An act in accordance with this Act means also partial attack of continuing offence, unless expressly stipulated otherwise.

Criminal Code

Section 43

Cumulative rind Concurrent Sentence

(1) If the court sentences an offender for two or more offences, it shall impose an cumulative sentence upon him, according to the provision to whichever of the offences subject to the strictest punishment; if it concerns multiply [*sic*] offences (concurrence of greater number of offences), the court may impose a punishment of imprisonment within terms of sentence (sentencing guidelines) where the upper limit may be increased by one third; however the upper limit of terms of sentence of imprisonment must not after such increase exceed twenty years, and when imposing an exceptional sentence of imprisonment over twenty to thirty years, it must not exceed thirty years. In addition to the admissible punishment under such provision, another type of punishment may be imposed as part of cumulative sentence, if such imposition would be reasoned by any of the tried offences. If the minimum limits of terms of sentence of imprisonment differ, the highest of them shall form the minimum limit of the cumulative sentence in question. If the Criminal Code stipulates only imprisonment for any of such criminal offences, only imprisonment, as separate punishment, may be a cumulative sentence.

(2) The court shall impose a concurrent sentence according to the principles stipulate in paragraph (subsection) 1, when sentencing an offender for an offence which he has committed before the court of first instance declared sentencing judgment for another his offence. Along with imposition of concurrent sentence, the court shall cancel the statement determining the guilt imposed by the previous judgment, as well as other decisions content of which relates to this statement, if due to the change caused by such cancelling, it lost its grounds. The concurrent sentence must not be milder that the sentence imposed by any previous judgement. Within a concurrent sentence, the court must pronounce also punishment consisting of deprivation of titles of honours or awards, deprivation of military rank, forfeiture of property or forfeiture of a thing or other property value, if such punishment has been already pronounced by any previous judgment.

(3) Sentencing judgment pursuant to Section 2 means also a judgment of conditional discharge under supervision under conditions of Section 48 par. 1. Along with the imposition of concurrent sentence the court shall cancel the statement on conditional discharge under supervision, as well as all other decisions relevant by their content to such statement, if due to the change caused by such cancelling it lost its grounds.

(4) The provision on concurrent sentence shall not be applied if the previous conviction is of such nature that the offender is regarded as not having been sentenced, or if the previous sentencing judgment has been issued by a court of another member state of the European Union.

Section 45

Imposition or joint punishment for continuing offence

(1) If the court sentences an offender for a partial attack in case of continuing criminal offence (Section 116), for the other attacks of which he was sentenced by a judgment which already became final, the court shall revoke in this previous judgment the statement determining guilt with respect to the continuing offence and offences committed with it as joinder of offences, the entire statement determining guilt, as well as other statements of the court that have in the said statement determining guilt their basis (grounds), and again, being bound by the ascertained facts in the cancelled judgment shall decide on guilt with respect to the continuing offence, including new partial attack, as the case may be offences committed with it as joinder of offences, on joint punishment (sentence) for continuing offence, which must not be milder than the punishment imposed by the previous judgment, and as the case may be also relevant statements which have their grounds in the statement of the court determining guilt. Within joint sentence for continuing offence, the court must pronounce also punishment consisting of deprivation of titles of honours or awards, deprivation of military rank, forfeiture of property or forfeiture of a thing or other property value, it such punishment has been already pronounced by any previous judgment.

(2) Provisions of Sections 43 and 44 shall be applied accordingly in the event when concurrently is imposed punishment for more (multiply) [*sic*] offences.

(3) The provisions concerning joint sentence for continuing in offence shall also be applied if any previous conviction is of such nature that the offender is regarded as if he had not been convicted.

(4) The provision concerning joint sentence for continuing in offence shall not apply if the previous sentencing judgment was issued by a court of another member country of the European Union.

Section 116

Continuing Offence

Continuing offence means such conduct when single partial attacks led by single intention fulfil, even if in summary, the merits of the same offence, are combined in the same, or similar manner of conduct, and in close time relation and subject matter of an attack

From the citations of the stated provisions it is evident that the legal order of the Czech Republic respects the principle queried by you.

At the same time from these provisions result the reason why are some of the partial attacks identically described in the European Arrest Warrant issued for the purposes of serving unconditional sentence of imprisonment from the final sentencing judgment of the Regional Court in Hradec Králové with ref. No. 2T 1/2008, as well as in the European Arrest Warrant issued for the purposes of criminal proceedings now conducted by the Regional Court in Hradec Králové under ref. No. 7 T14/2009, which are not closed with final judgment. There has been issued a judgement but is not final, not coming into legal force, because it was cancelled in the appellate proceedings at the High Court in Prague under ref. No. 10 To 48/2012.

Firstly, it is necessary to stress, as is also evident from the above cited statutory provisions, that the legal order of the Czech Republic does not use for example the principle of summing the sentences ("consecutive sentence"), when for each offence would be imposed one punishment and the total terms of punishment then would be sum of all these single punishments. The Criminal Code is based on absorption principle (with element of cumulative principle, and as the case may be more severe punishment). To put it simply it is based on principle when for all the offences committed concurrently is imposed so called cumulative punishment (sentence), that means one punishment within the terms of punishment (sentencing guidelines) which is the most severe one from all the terms of punishment stipulated for offences which the offender committed concurrently.

But in practice there occur such situations, when for example no sooner than after a judgment is declared, the police finds and clarifies other offences of the same person. If guilt is proven before a court, and if it is concurrence of offences, then, it is necessary to preserve the same principle as applied for cumulative sentence. This is reached by imposition of concurrent sentence which is a sentence not only for the offences of which the defendant has been adjudged guilty by any previous judgement, but also for offences for which the defendant has been adjudged guilty by new judgment. Of course at the same time being cancelled the original sentence. If the original sentence has been already served, or its part has been served, it shall be credited for the serving of the concurrent sentence.

Cumulative and concurrent sentences are for the offender more advantageous because is taken into account the fact that the offender committed another offence without being warned by the sentencing judgment relating to the previous offence. The possibility of imposition of a cumulative or concurrent sentence is bound to the relation of concurrence. The cumulative as well as the concurrent sentence have the nature of uniform punishment, because outward in essence they do not differ from punishment imposed for single offence, while for single concurrent offences are not stipulated partial punishments.

The described principle of concurrent sentence is in modified form applied where it concerns not different independent acts, but an act consisting of more partial attacks. It is a statutory institute of joint sentence.

If the reason of inadmissibility of criminal prosecution, as stated in Section 11 par. 1 of the Rules of Criminal Prosecution, concerns only some of the partial attacks of a continuing offence, it does not hinder criminal prosecution for the remaining parts of such offence. Therefore, the obstacle is not that on some of the partial attacks of the continuing offence, within the meaning of Section 116 of the Criminal Code, has been already made final decision.

Joint sentence is a special manner of imposition of sentence for offences committed in form of continuation in cases when all the partial attacks of such offences will not be tried together in one proceeding, or if the court will decide on some of the partial attacks of other reasons later.

An abstract case can be given as an example of an offence of robbery where the offenders decide to acquire funds via armed robberies of bank branches. During, for example one month, they will rob ten such branches. In the last case they are seized on the crime scene and subsequently sentenced. Later, evidence is acquired to the detriment of the same persons for the remaining nine attacks, and for these nine attacks is filed indictment. If the court finds these persons guilty of these nine attacks, and considers that they relate to the tenth one, for which the same offenders were already sentenced, as continuing partial attacks (that means that the act consists in total of ten attacks), the court shall be obliged to proceed as follows. The court shall cancel in the original judgment not only the statement determining the punishment, but also the statement determining the guilt. In this case, the statement of the court determining the guilt is as an example stated as the tenth attack. At the same time, the court will take over this statement into its statement of the judgment including also the other nine attacks with respect of which was filed the new indictment. While the original judgment included only one attack, the new judgment also includes the complete act consisting of ten attacks. Again it is necessary to stress that the court will cancel the statement of the court determining the guilt and punishment (sentence) from the previous judgment. If the previous sentence is served, or its part is served, it shall be credited with the concurrent sentence. Further, it is necessary to stress that to the (for example stated) tenth attack the court does not repeat the evidence producing, but is fully bound by the ascertained facts of the case from the previous judgment, and thus this statement in principle without others takes over.

In practice, there exist more complicated cases, when for example some of the prosecuted acts are in concurrence and other not, when there are some independent acts and some partial attacks, etc. In such cases it is necessary to combine the single, simply described hereinbefore, institutes of cumulative, concurrent and joint sentences within one and the same judgment.

Such complicated situation was also in the case of the judgment of the Regional Court in Hradec Králové in the said case with ref. No. 7 T 14/2009. In this case, the court beside other proceeded in accordance with Section 37a of the Criminal Code by cancelling the part of statement of the court determining the guilt. Thereafter, the Regional Court imposed a sentence, which was also a joint sentence, though it was not in the statement of the court determining punishment expressly stated, neither there was not stated the number of the provision of Section 37a or the Criminal Code in this part of the judgment. The Regional Court was notified about this defect of form in the reasoning of the decision which cancelled the judgment.

Essential for the queried issue is that in no case, not even in the case of the joint sentence, it is a situation when the defendant would be sentenced at the same time by two final and enforceable judgments for identical act and should serve two sentences for the same. As has been stated, integral part of the decision, either when imposing concurrent or joint sentence, is always the cancelling of the statement of the court determining punishment (in case or joint sentence also cancelling the statement of the court determining the guilt) from the previous judgment. As soon as the new judgment becomes final (comes into legal force), the original judgment will be cancelled in this sense. If already has been served the sentence of imprisonment, or its part, it shall be credited in full term with the serving of the concurrent or joint sentence. Thus in the given moment, there can exist always solely only one final statement of the judgment describing the same acting of the defendant.

It is the valid legislation and according to the opinion of this Court there has been no breach of the principle of double jeopardy.

From the point of view of the institute of the European Arrest Warrant and its essentials, it was necessary to describe the acts that are subject matter of the proceedings. In the first European Arrest Warrant it was necessary to describe the acts (partial attacks) for which the convict Arnošt Herman should serve the punishment on the basic of the final and enforceable judgment. In the second European Arrest Warrant it was necessary to describe not only those acts (partial attacks), for which another indictment was filed, and is with respect to them conducted evidence taking in other proceedings, but also those acts (partial attacks) which would, in case that the guilt would be in the prescribed proceedings proved also by other prosecuted attacks, which would represent resulting content of the new statement of the court determining the guilt, and thus they can be considered as the subject matter of the proceedings within the said sense. They would be also the grounds for imposition of punishment in the proceedings conducted under ref. No. 7 T 14 /2009, with regard to the above described institutes, or institute of joint sentence, respectively, and procedural steps when it is imposed. It is necessary to stress that the principle of presumption of innocence is respected, and in case of situation where there is no final decision, in this advice is outlined only theoretically possible result of the proceedings, in the light of valid legislation.

Just the circumstance that into the both European Arrest Warrant were included also these partial attacks, of reasons explained in details hereinbefore, this probably then raised doubts as concern the observance of the principle nemo debet bis vexario.

The undersigned court is convinced that there is no breach of this principle.

We hope that the above stated explanation is sufficient for assessment which is of course fully in your competence."

The Central Authority also sought further information by letter dated the 15th July, 2013 in relation to a number of other issues that had been raised by the respondent. The issuing judicial authority was asked (*inter alia*):

" (ii) At Section (c), under the heading "*Nature and Legal Classification of offences...*" the warrant states that the

Criminal Acts cited are "*in force until the 31st December, 2009* ." Please advise how the Respondent can be tried for these offences in circumstances where this Act is no longer in force. Alternatively, please confirm that this Act is in fact in force and that the reference in the warrant is merely intended to confirm that this Act was in force at the date of commission of the offences.

(iii) The Respondent's legal advisors in this jurisdiction have stated in sworn testimony that the six year sentence referred to in the Warrant dated the 10th August, 2011, has been replaced with a seven year sentence. The Central Authority understands that this is in fact incorrect, and that sentence has been set aside for the purposes of the criminal prosecution for which the third Warrant dated the 15th November, 2012, was issued. Please confirm that this understanding is correct.

(iv) The Respondent's lawyer has furthermore stated that the Respondent has been convicted in more than one set of proceedings. The Central Authority understands that the Respondent has only been convicted in respect of the offences the subject of the Warrant dated the 10th August, 2011 (Ref No. 2T 1/2008). Please confirm that this understanding is correct.

(v) With regard to the narrative of offences numbered (21) (22) (23) [the three new partial attacks] at section (e) of the warrant, the Respondent's legal adviser has given sworn testimony to the effect that the Respondent has been acquitted or already had these charges dropped. Please outline the procedural history of these offences."

The issuing judicial authority replied by letter dated 21st July stating (*inter alia*):

"ad (ii)

Relevant provisions of the Criminal Code and Criminal Act, which clarify the questioned issues, are:

Criminal Code (effective/operative from 1st January 2010):

Section 2

Punishability of an act and time it has been committed

(1) Punishability (punishableness/criminality) of an act (liability to punishment for an act shall be considered according to the Act (law) in force (effective/operative) at the time when the act was committed; it shall be considered under a subsequent Act (law) only if consideration under such law is more favourable to the offender.

Section 3

Use (application) of law (act) effective at the time of decision making

(1) An offender may be always imposed only such sentence (type of punishment) which is admissible by a law effective at the time of trying and deciding on a criminal offence.

Criminal Act (effective/operative till 31st December, 2009):

Section 16

(1) The liability to punishment for an act shall be considered according to the Act (law) in force at the time when the act was committed: it shall be considered under subsequent Act (law) only if consideration under such law is more favourable to the offender.

(2) Only such punishment can be imposed upon an offender as may be imposed under the Act in effect when a verdict on the crime is reached.

ad (iii)

According tu the knowledge of this High Court in Prague, the respondent, and convict, Arnošt Herman has been imposed unconditional sentence of imprisonment for a term of six years by a final and conclusive judgement in the proceedings conducted at the Regional Court in Hradec Králové under ref No. 2 T 1/2008.

In the proceedings conducted at the Regional Court in Hradec Králové under ref No. 7T 14/2009 has been declared (pronounced/rendered) the not final judgement imposing to the respondent Arnošt Herman the cumulative (and concurrent) unconditional sentence of imprisonment for a term of seven years. Although according to the wording declared in the judgement, this joint sentence replaced (substituted; the above stated six year sentence, but this judgement (the seven year sentence) has not come into legal force (has not become final and conclusive), because it has been cancelled within the appellate proceedings at the High Court in Prague conducted under ref. No. 10 To 48/2012. Thus, in this case the proceedings are still conducted, and for the purpose of these proceedings has been issued on the day of 15th November 2012 the European Arrest Warrant as amended by the above mentioned amendments

According to the knowledge of this High Court in Prague, the six year sentence (unconditional sentence of imprisonment for a term of six years) is final and conclusive and enforceable.

The judgement imposing joint unconditional sentence of imprisonment for a term of seven years was cancelled, and in this case the criminal proceedings still continue; it is a case in which the High Court in Prague issued the European Arrest Warrant.

ad (iv)

As results already from the answer under ad (iii), the respondent Arnošt Herman has been finally and conclusively sentenced by the judgement of the Regional Court in Hradec Králové under ref. No. 2 T 1/2008 while the judgement of the Regional Court in Hradec Králové with ref. No.7T 14/2009 has not become final, it has been cancelled in the appellate proceedings. Therefore, this (second) conviction is not final, and the punishment (sentence) on the basis of the judgement in case under ref. No. 7T 14/2009 cannot be served. The Regional Court in Hradec Králové will be deciding again in this (second) case.

The High Court in Prague did not issued [*sic*] the European Arrest Warrant dated 10" August 2011, however reasonably can be expected that it contains only those offences for which the convicted Aleš Herman has been finally and conclusively sentenced in case under ref. No 2T 12/2008 at the Regional Court in Hradec Králové.

ad (v)

The High Court in Prague knows nothing about the respondent Arnošt Herman being acquitted or released from charges with respect to numbers 21), 22) a 23) part e) of the European Arrest Warrant issued on 15th November 2012, or the criminal prosecution being discontinued. It is not evident from what arises affirmations that this respondent has been in these numbers (points) acquitted or released (discharged) from accusation, or that these charges had "dropped".

The procedural history is as follows: The judgement (not yet final) of the Regional Court in Hradec Králové of 26th April 2011 ref No 7T 14/2009 found the respondent Arnošt Herman guilty, beside other, of offences under the said numbers 21), 22), 23) The judgement contains also some exculpatory statements, however not as concerns the attacks described under the said numbers 21), 22), 23).

The High Court in Prague by its decision of 4th December 2012 ref. No. 10 To 48/2012 decided to cancel the judgement, beside other, with respect to the respondent Arnošt Herman in the whole sentencing part, and returned the case in the extent of the cancelling to the Regional Court to try and consider the case again in necessary extent, and to make new decision and new judgement in this case.

Therefore, in no event (by no means/in no way) from the part of the Regional Court in Hradec Králové under ref No. 7T 14/2009 in the said judgement, neither from the part of the High Court in Prague under ref. No. 10 To 48/2012 in the said decision, is not meant acquittal and release from charges, or the criminal prosecution being stopped.

Now, the proceedings are further on conducted at the Regional Court in Hradec Králové under ref No. 7T 14/2009.

According to the written statement from the Regional Court in Hradec Králové dated 21st July 2013, which the High Court received to the request, on the offences under numbers 21), 22) and 23, there has not again been decided meritoriously yet, the respondent has not been acquitted, the criminal prosecution has not been stopped."

The Court's Analysis and Decision:
The Court has had the benefit of written submissions from both sides and is grateful to the parties for the assistance that these provided.

It may be stated immediately that the Court is satisfied on foot of the information contained in these warrants, and in the additional information supplied (not all of which the Court has considered it necessary to rehearse in this judgment) that it is in order to surrender the respondent in respect of all matters covered by warrant no. 1 and also warrant no 2. In particular it should be stated that the Court is satisfied that at the present time the sentence of six years imposed in respect of the offences the subject matter of warrant no. 1 is immediately enforceable. The Court accepts the representation of the issuing judicial authority that the seven year sentence that was purportedly substituted in the course of a later review has been quashed by the High Court of Prague and that the six year sentence originally imposed still stands. The Court is not obliged to refuse surrender in respect of these warrants under s. 21A, 22, 23 or 24 of the Act of 2003. Moreover, the Court considers that there are no Part 3 issues that would justify the Court in regarding the surrender of the respondent as being prohibited on foot of these warrants.

Warrant no. 3 requires to be addressed separately and in a more detail. At the outset it should be stated that the Court is satisfied on the basis of the additional information dated the 21st July, 2013 that the respondent has not been acquitted or discharged in respect of the further partial attacks (the incidents bearing the numbers 22, 24 and 24 in the description of circumstances set forth in Part (e) of the warrant) which are included on this warrant.

In regard to the most substantial point in the case, namely the double jeopardy/ *ne bis in idem* point, and the objection based upon s. 41 of the Act of 2003, the Court is satisfied that the respondent does not face double jeopardy and that the s.41 objection ought not to be upheld.

S. 41 of the Act of 2003 provides:

"41.—(1) A person shall not be surrendered under this Act for the purpose of his or her being proceeded against in the issuing state for an offence consisting of an act or omission that constitutes in whole or in part an offence in respect of which final judgment has been given in the State or a Member State.

(2) A person shall not be surrendered under this Act for the purpose of his or her being proceeded against in the issuing state for an offence consisting of the act or omission that constitutes an offence in respect of which final judgment has been given in a third country, provided that where a sentence of imprisonment or detention was imposed on the person in the third country in respect of the second-mentioned offence—

(a) the person has completed serving the sentence, or

(b) the person is otherwise no longer liable under the law of the third country to serve any period of imprisonment or detention in respect of the offence."

This provision must of course be given a conforming interpretation in accordance with *Criminal Proceedings against Pupino Case (C-105/03.)* [2005] E.C.R. I – 5285. The analogue in the Framework Decision is Article 3.2 which provides:

> "Article 3
>
> Grounds for Mandatory Non-Execution of the European arrest warrant.
>
> The judicial authority of the Member State of execution (hereinafter "executing judicial authority") shall refuse to execute the European arrest warrant in the following cases:
>
> […]
>
> 2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;"

It has been held by the Supreme Court in *Minister for Justice, Equality and Law Reform v. Renner-Dillon* [2011] IESC 5 (Unreported, Supreme Court, Finnegan J. *nem diss*, 2nd November, 2011) that that "finally judged" in the Framework Decision has an autonomous meaning in the law of the European Union. Where under the law of the issuing Member State a judgment does not definitively bar further prosecution or as stated by the European Court of Justice in *Mantello* (Case C-261/09) (16th November, 2010), "constitute a procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts against that person", then that person has not been finally judged. A judgment which does not definitively bar further prosecution does not constitute a ground for mandatory non-execution of a European arrest warrant.

I am satisfied that by virtue of the process by means of which under Czech Law the existing conviction and sentence can be re-opened to take account of further partial acts that were not taken into consideration by the court of first instance, the existing conviction or convictions do not represent a final judgment within the autonomous meaning of that expression as it is used in the Framework Decision.

Of course, the Czech authorities are right in characterising the existing conviction as being final in terms of their law as things stand. It will only fall to be reopened if and when the respondent has been tried and convicted in respect of the further partial attacks. However, it is clear that that contingency may well arise in the present case and in those circumstances the existing conviction is not to be regarded as a final judgment within the autonomous meaning of that phrase as it is used in the Framework Decision (and in accordance with a conforming interpretation, by the Oireachtas in s. 41 of the Act of 2003). In circumstances where a final judgment has not been rendered s. 41 is simply not engaged, and the objection based on s. 41 cannot succeed.

The Court's conclusion that surrender is appropriate in this case is heavily influenced by the very clear express assurances from the issuing judicial authority that are contained within the additional information dated the 10th June, 2013 that:

> " … in no case ….it is a situation when the defendant would be sentenced at the same time by two final and enforceable judgments for identical act and should serve two sentences for the same. As has been stated, integral part of the decision, either when imposing concurrent or joint sentence, is always the cancelling of the statement of the court determining punishment (in case or joint sentence also cancelling the statement of the court determining the guilt) from the previous judgment. As soon as the new judgment becomes final (comes into legal force), the original judgment will be cancelled in this sense. If already has been served the sentence of imprisonment, or its part, it shall be credited in full term with the serving of the concurrent or joint sentence. Thus in the given moment, there can exist always solely only one final statement of the judgment describing the same acting of the defendant."

Further reassurance is provided by the information that in respect of the partial attacks which are the subject matter of the existing conviction, even if that conviction is set aside the court will be bound by the findings of the first court as to the facts concerning those partial attacks.

The Court is further satisfied that the purpose for which the surrender of the respondent is sought on foot of warrant no. 3 is not one that is outside of those provided for in s. 10 of the Act of 2003, as was urged upon the court on the respondent's behalf. On the contrary, ss. 10(a) and (b) of the Act of 2003 require surrender on foot of a warrant issued in respect of a person:

> "(*a*) against whom that state intends to bring proceedings for the offence to which the European arrest warrant relates, or
>
> (*b*) who is the subject of proceedings in that state for an offence to which the European arrest warrant relates."

In the Courts view the present case is embraced by one or other or, possibly both, of these categories.

The Court was initially considering partial surrender only on this warrant in respect of the three new matters. However, I am now satisfied that that would not be appropriate in circumstances where the warrant concerns a single continuous offence under Czech law comprised of a number of partial attacks. It is more appropriate to surrender the respondent for everything.

In addition, the Court considers that it is not obliged to refuse surrender on foot of this warrant in under s. 21A. No issue was raised in regard to s. 21A and the s.21A(2) presumption is not rebutted.

Further, I have concluded that it need have no concerns in respect of speciality in the circumstances of this case. There is simply no suggestion that the respondent will be proceeded against for any matter other than that for which he has been surrendered. Accordingly the Court is not obliged to refuse surrender under s. 22, 23 or 24 of the Act of 2004.

Finally, the Court considers that there are no Part 3 issues that would justify the Court in regarding the surrender of the respondent as being prohibited on foot of this warrant.

In conclusion, the Court is satisfied that it is appropriate to surrender the respondent on foot of warrant no. 3.