Neutral Citation Number: [2008] IEHC 271

THE HIGH COURT

Record Number: 2005 No. 29 Ext.

BETWEEN

MINISTER FOR JUSTICE AND LAW REFORM

APPLICANT

AND
ISTVANNE FICZERE

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 30th day of July 2008

1. The surrender of the respondent is sought by an issuing judicial authority in the Republic of Hungary under a European arrest warrant which issued there on the 28th July 2001. Following its transmission to the Central Authority here it was endorsed for execution here by order of the High Court dated 5th July 2005, and the respondent was duly arrested on foot of same on the 26th January 2007 and brought before the High Court as required, and was remanded thereafter on bail to await the outcome of the present application for surrender under s. 16 of the European Arrest Warrant Act, 2003, as amended ("the Act").

2. Her surrender is sought so that she can serve a sentence of imprisonment of one year and ten months which was imposed in absentia on the 29th April 2004, all of which sentence remains to be served by her. The offence for which she was so convicted and sentenced was an offence of swindling, and the issuing judicial authority has marked this offence in paragraph (e) of the warrant as being an offence within the categories of offence contained in Article 2.2 of the Framework Decision, and as such, is an offence in respect of which double criminality does not require to be verified. The sentence of one year and ten months imposed upon her satisfies the minimum gravity requirement in that regard, being one for more than four months.

3. No issue is raised by the respondent as to her identity, and the Court is satisfied in any event from the affidavit evidence of the arresting Garda officer, Sgt. Anthony Linehan, that she is the person in respect of whom this European arrest warrant has been issued.

4. One issue has been pursued by the respondent, namely in relation to the requirement for an undertaking pursuant to s.45 of the Act, given that the respondent was convicted and sentenced in her absence, and I will come to the factual basis put forward and the submissions made in that regard. I am satisfied that there is no reason to refuse to order surrender under sections 21A, 22, 23 and 24 of the Act, and subject to addressing the s. 45 issue, I am satisfied that her surrender is not prohibited by any provision in Part III of the Act, or the Framework Decision.

Background facts

5. The offence for which the respondent was convicted was committed during 1998 and 1999 according to the facts contained in the warrant. The details of same do not need to be set forth, save to say perhaps that it would appear that the respondent committed same as an accomplice of her daughter and possibly others. The warrant at paragraph (d) under the heading "Decision rendered in absentia" states:

> *"Pursuant to Chapter XXIV of Act XIX on Criminal Procedure the decision was rendered in absentia, given that the defendant had not been summoned in person or otherwise informed of the date and place of hearing; however, the defendant has the following legal guarantees after surrender:*
>
> *Pursuant to Section 531, subsection (6) of Act XIX of 1998 in cases where the defendant's whereabouts becomes known after the passing of a valid judgment a retrial may be motioned on his/her behalf.*
>
> *Pursuant to Section 392, subsection (1), paragraph (e), subsection (1) of Act XIX of 1998, in the case of a validly adjudicated act (basic case) a retrial may be ordered if the judgment was passed in absentia, pursuant to Chapter XXIV of the cited Act." (my emphasis)*

6. In her Points of Objection filed on the 19th February 2007 the respondent raised a number of points including one under s. 10 of the Act on the basis that she had not "fled" from Hungary. That point is not being pursued any longer on this application, nevertheless the respondent swore an affidavit on the 8th March 2007 in support of that point and other points, and I refer to some of those averments. The respondent stated that she was "*never arrested or questioned in Hungary in respect of the alleged offence/offences set out in the European Arrest Warrant, the subject of the proceedings herein*". She states also that she appeared before the Municipal Court of Kaposvar in Hungary on one occasion only, in July 2002. She goes on to state that on the 29th April 2004 she was not present for her trial and was unaware that a trial was to take place on the 29th April 2004, that being the date on which her conviction and sentence took effect, according to paragraph (b) of the warrant. She stated also that it was always her intention to plead not guilty, and further in paragraph (17) of her affidavit as follows:

> *"I say that, by proceeding to trial, conviction and sentence in my absence in circumstances where I was not informed or otherwise aware that the trial was to take place and, in the absence of an 'undertaking in writing' from the Hungarian authorities that, if extradited, I will be afforded the right to a retrial, I have been deprived of my right to 'fair procedures' and of the right to have a trial in due course of law ……".*

7. In the immediate aftermath of the arrest of the respondent on the 5th July 2005, there was clearly correspondence between the Ministry of Justice in Hungary and the Central Authority here regarding the possibility that an undertaking under s. 45 of the Act might be forthcoming from the issuing judicial authority. By letter dated 8th July 2005 a letter was received here from the Hungarian Ministry of Justice stating such an undertaking was not possible as the Hungarian "*legal system does not provide for a legal ground for the issue of such an undertaking*". It goes on:

> *"Your authorities should take into consideration that the legal system in Ireland is generally different from the legal system of Hungary. Moreover, we could not even consider which judge shall issue such an undertaking, because the judge sentencing [the respondent] is different from the judge having issued the European arrest warrant; and the judge proceeding during the possible future retrial will be also another, different one. However, the Ministry of Justice could provide for such an undertaking, if the signature of the Head of the Department for International Criminal law of the Ministry of Justice of the Republic of Hungary is accepted."(my emphasis)*

8. A further letter dated 28th July 2008 from the Ministry of Justice stating *inter alia* that the only way to submit an undertaking is via

the Central Authority, encloses an undertaking signed by the Head of that Department, and that undertaking states that upon surrender the respondent *"will (i) be retried upon her request for the offences named in the above European Arrest Warrant, or be given the opportunity of a retrial; (ii) be notified of the time when, and place at which the retrial will take place; and (iii) be permitted to be present at the trial*."

9. The Central Authority here was also sent a copy of a letter dated 15th October 2007 from the Somogny County Court to the Hungarian Ministry of Justice which states:

> *"…… during the criminal proceedings she was defending her case at liberty but then moved to an unknown place where she remains as a fugitive. The judgment was delivered in the absence of the accused person, and the Court is totally unaware of any data regarding the timing, location and manner of her possible escape from the territory of the Republic of Hungary. Data confirming that she left the country emerged only after the final judgment was delivered."*

10. Clearly if that is correct, the averments by the respondent in her affidavit that she was "*never arrested or questioned in Hungary in respect of the alleged offence/offences set out in the European Arrest Warrant, the subject of the proceedings herein*" would be open to question. That letter was exhibited in an affidavit sworn on the applicant's behalf by Anthony Doyle of the Extradition Section of the applicant's Department on the 11th March 2008.

11. In an additional affidavit sworn by the respondent on the 30th April 2008 she states in paragraph (2) thereof:

> *"I say that when I attended at the Municipal Court of Kaposvar in Hungary in July 2002, I attended solely in respect of the proceedings against my daughter, Anita Fitzere. I was summoned to appear in court but I had not been charged with any criminal offence and was not a defendant in any criminal proceedings at that time. The statement in the letter dated 15th October 2007 from Dr.Attila Vadocz, Law Enforcement Judge to the Central Authority … that 'during the criminal proceedings she was defending her case at liberty' … is not correct. I was never questioned in Hungary in respect of the alleged offence/offences set out in the European arrest warrant and was never charged with having committed any criminal offence. I am not aware of the circumstances in which my trial took place in Hungary in April 2004. I was never informed that any criminal proceedings had been commenced nor was I informed that such proceedings were being contemplated. Consequently I have been denied the opportunity to defend myself during the course of those proceedings."*

12. Given the information and material which emanated from the Hungarian Central Authority following that averment and which is exhibited in a further affidavit sworn by Anthony Doyle sworn on the 3rd July 2008, it is not surprising that the point of objection under s. 10 of the Act was not proceeded with on this application. It calls into serious question the candour, honesty and credibility of the respondent.

13. It appears that in April 2002 some form of notification was delivered to the respondent's address and signed for by her daughter. It also appears from a transcript of a Court hearing which took place on the 11th June 2002 (not 11th July 2002 as stated by the respondent in her affidavit, though nothing turns on that error) she was indeed present at that Court on that date; but not, as stated by her in her second affidavit, simply in respect of the proceedings against her daughter. Her presence at the court is recorded and she is described in that Minute of the proceedings as "Primary accused". It is clear that this translation is intended to read "First accused" given that the words "second accused", "third accused" and "fourth accused" are used in relation to the co-accused persons. Her daughter is also recorded as being present and is described as the "Second accused". The respondent and the fourth accused were unrepresented, but the respondent's daughter was legally represented, as was the third accused. The transcript describes this occasion as "*the public hearing … in connection with the trial launched against Mrs. Istvan Fitzere and her associates due to fraud … as well as due to other criminal acts.*" The transcript then sets out what occurred including that the "*court continue[d] the proceedings with hearing the accused parties. It takes place through hearing the accused parties individually one by one, in the absence of the other accused parties who are not yet heard*". It then records, in respect of the respondent, that the judge advised her that she was not bound to make what is referred to as "the confession" but that the respondent indicated that nevertheless she wished to do so, and thereupon she informed the Court that the accusation against her was understood and that she did not regard herself as guilty as she had not committed the crime. Having thereby pleaded what we would describe as "not guilty" she made a brief statement in relation to the background to the alleged offence, and thereafter a number of questions were put to her by the Presiding Judge, which, together with her answers are contained in eleven pages of translated text. The transcript or Minute on the final page thereof states:

> *"The Presiding Judge pronounces hearing of the primary accused as finished for the time being and warns her that during the following phase of the procedure she is entitled to make comments, ask questions, submit applications and ask for information from the Court pursuant to Paragraph (5) of Section 44 of the Act on Criminal procedure."*

14. As I have stated already, this material sits, to say the least of it, very uncomfortably beside the respondent's unequivocal averments in her affidavit as to her state of knowledge of the proceedings in being against her prior to her departure from Hungary, when attempting to assert that she was not a person to whom s. 10 of the Act applies. The point was rightly abandoned on this application.

15. At any rate it appears from her affidavit and from elsewhere that the respondent first attempted to arrive in this country via Rosslare Harbour on the 11th October 2002, but was refused entry. She returned to Hungary and came back by plane from Budapest to Dublin Airport where she was permitted to enter on a one month permit on the 2nd November 2002. After her arrival here the Court in Hungary attempted unsuccessfully to notify of the further date for her case when her conviction and sentence were pronounced on the 29th April 2004. It is that element of her case that was dealt with in absentia. She had been present for the hearing of the case as such, as I have stated.

16. It would appear that following the attempted notification to the respondent of the date of her trial she did not appear and the case was put back so that enquiries could be undertaken as to where she could be located. Those enquiries proved fruitless, and on the 29th April 2004 the judge decided to proceed to conviction and sentence in her absence.

17. Robert Barron SC for the respondent first of all submits that in so far as I have in some other decisions taken the view, albeit on the basis of obiter remarks, that once a issuing judicial authority has notified an accused person of the date and place of his/her trial by whatever legal means is provided for in the applicable rules of procedure, the requirement that a person be notified is fulfilled and no undertaking under s. 45 of the Act is therefore required, even where the notification is not actually received by the person due to departure from the issuing state, is mistaken, and has referred to the fact that the point is under appeal to the Supreme Court. That submission is not really relevant to the present case since the issuing judicial authority has stated clearly in paragraph (d) of its

warrant that the respondent "*had not been summoned in person or otherwise informed of the date and place of hearing*"

18. Mr Barron has referred to the provisions of s. 45 of the Act which provide:

> *45.— A person shall not be surrendered under this Act if—*
>
> *(a) he or she was not present when he or she was tried for and convicted of the offence specified in the European arrest warrant, and*
>
> *(b) (i) he or she was not notified of the time when, and place at which, he or she would be tried for the offence,*
>
> *or*
>
> *(ii) he or she was not permitted to attend the trial in respect of the offence concerned,*
>
> *unless the issuing judicial authority gives an undertaking in writing that the person will, upon being surrendered—*
>
> *(i) be retried for that offence or be given the opportunity of a retrial in respect of that offence,*
>
> *(ii) be notified of the time when, and place at which any retrial in respect of the offence concerned will take place, and*
>
> *(iii) be permitted to be present when any such retrial takes place."*

19. That provision gives effect to Article 5.1 of the Framework Decision which states:

> *Article 5: Guarantees to be given by the issuing Member State in particular cases:*
>
> *The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:*
>
> *1. where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment."*

20. Mr Barron has submitted that s. 45 of the Act has gone further than it need have in order to give effect to Article 5.1 of the Framework Decision. The "assurance deemed adequate" by the Oireachtas is clearly an undertaking by the issuing judicial authority that the person will be retried or given the opportunity of being retried, and not, as provided in the Framework Decision, that the person "*will have an opportunity to apply for a retrial*".

21. Mr Barron then asks the Court to look to the terms of the European arrest warrant regarding the relevant Hungarian law in relation to the right to apply on surrender for a retrial. These are contained in paragraph (d) thereof and he submits that the "legal guarantees" referred to therein are insufficient to constitute an undertaking by the issuing judicial authority, as required by s. 45 of the Act. He distinguishes this case from some other cases in which this point has arisen because in those other cases, such as *Minister for Justice, Equality and Law Reform v. Gheorghie*, unreported, High Court, 9th April 2008, the respondent was regarded as having been notified whereas in the present case, as I have stated, the issuing judicial authority acknowledges that this did not occur.

22. Mr Barron refers to the fact that while certain undertakings required to be given under the 2003 Act as originally passed, were replaced by certain presumptions in the amending legislation, requirement that an undertaking be given in s. 45 remains, and he submits that this emphasises the importance which is to be attached to this particular undertaking and the right which it seeks to protect, namely the right to a fair trial/hearing. He also distinguishes the undertakings which were replaced by presumptions, since they were undertakings that had to be "provided" by the issuing judicial authority rather than, as in the case of the s. 45 undertaking, "given" by the issuing judicial authority. In so far as the Central Authority in Hungary, rather than the issuing judicial authority has sent an undertaking to the Central Authority here in the terms required by s. 45, Mr Barron states that this is not an undertaking required by s. 45 and that only an undertaking by the issuing judicial authority can suffice under the Act. He refers to the judgment of Fennelly J. in *Minister for Justice, Equality and Law Reform v. Tobin*, unreported, Supreme Court, 3rd July 2007 at paragraphs 24 et seq. regarding the interpretation of enabling legislation in the light of the objectives of the Framework Decision, but submits that to interpret s. 45 by way of a conforming interpretation as including an undertaking by the Hungarian Central Authority would be to act *'contra legem'*, and therefore impermissibly.

23. Mr Barron also submits that the fact that the wording of s. 45 produces a result which may have been unintended by the Framework Decision is neither here nor there, as I stated in another context in *Minister for Justice, Equality and Law Reform v. Gotszlik*, unreported, High Court, 2nd November 2007 at p.11 thereof, to which Mr Barron has referred. He refers also to the judgment of Keane CJ in *Grealis v. DPP* [2001] IR. 144 at pp.157-158 where the learned Chief Justice refers to the use of canons of construction being confined to cases where the meaning of a statutory provision may be ambiguous, being capable both of a literal and a strained interpretation. He submits that the meaning of s. 45 of the Act is clear and unambiguous and capable of only one meaning, namely that it is the issuing judicial authority which must give the undertaking, and since it is admitted by the Hungarian Central Authority that such is not possible under Hungarian law then the surrender of the respondent is prohibited by s. 45 of the Act.

24. For the applicant, Emily Farrell BL has sought to counter Mr Barron's submissions by referring to s.12 (2) of the Act, and also to what was stated by Denham J. in her judgment in *Minister for Justice, Equality and Law Reform v. Dundon* [2005] 1 IR.261 regarding interpretation, as well as whether undertakings required to be "given" by a judicial authority can be the undertakings of persons other than the judicial authority, provided that they are delivered here by the issuing judicial authority.

25. Section 12 (2) of the Act, as inserted by s. 73(a) of the Criminal Justice (Terrorist Offences) Act, 2005 provides:

> *"12 (2) Such undertakings as are required to be given under this Act shall be transmitted by, or on behalf of, the issuing judicial authority or the issuing state, as may be appropriate to the Central Authority in the State."*

26. Section 12 (3A) of the Act provides:

> *"(3A) An undertaking required under this Act may be set out in the European arrest warrant or in a separate document."*

27. Ms.Farrell submits that the decision in the Dundon case makes it clear that an undertaking can be *made* by the Central Authority, and that under s. 12(2) it may be transmitted here on behalf of the issuing judicial authority, and therefore the undertaking given for the purposes of s.45 of the Act by the Central Authority in Hungary, and transmitted here by it on behalf of the issuing judicial authority, is in compliance with the requirements of the Act and the Framework Decision.

28. Mr Barron disagrees that Dundon is authority for the proposition that where an undertaking is stated to be required from an issuing judicial authority, it can in fact be given by some other body or person, such as a Central Authority, and that if it were to be so, the requirement in s. 45 of the Act would be set at nought, and that any person could give the undertaking.

29. Ms. Farrell has sought also to rely upon the provision of section 4A of the Act which provides:

> 4A.— *It shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown*".

30. She submits that this Court must therefore presume that if the Framework Decision requires that a person convicted in absentia shall be retried, that such a retrial or at least the opportunity of such a retrial will be afforded to her. Mr Barron's response to that submission is that if that section could be relied upon for that purpose section 45 of the Act would be redundant. In my view this presumption cannot remove the requirement for an appropriate undertaking, since the Framework Decision does not create an entitlement to a retrial, but merely provides in Article 5(1) of the Act that surrender may be conditional on an assurance deemed adequate being given by the issuing judicial authority. The Oireachtas has decided to require such an assurance in the form of the undertaking specified in s. 45 of the Act.

Conclusion

31. First of all, there can be no doubt that an undertaking under s. 45 of the Act is required, since the European arrest warrant itself states that the respondent was not notified or otherwise informed of the date and place of the hearing which led to her conviction and sentence. That is clearly stated in the warrant. Therefore, this Court cannot simply look at the provisions of Hungarian law which are set forth in paragraph (d) of the warrant in relation to the right of the respondent to apply for a retrial upon surrender, because s. 45 of the Act requires an undertaking to be given in such circumstances, and specifies that it is an undertaking from the issuing judicial authority and not anybody else such as the Central Authority. In all other respects the undertaking which has been transmitted by the Central Authority contains everything which is required of such an undertaking for the purpose of s. 45 of the Act, and it has been properly transmitted here pursuant to the provisions of s. 12 (2) of the Act.

32. Essentially, the only issue to be determined in relation to the point of objection is whether, since under Hungarian law it is not possible for an issuing judicial authority to provide the undertaking required in this case under s. 45 of the Act, an undertaking from the Central Authority in these terms can suffice. Ms. Farrell has submitted that Dundon is authority in favour of that proposition. It is true that at p. 269 of that judgment, Denham J. states:

> *"It is appropriate that undertakings come from those who have authority to make such undertakings, rather than the issuing judicial authority personally, but that they be transferred under the certificate of the issuing judicial authority".*

33. In relation to the reference to the transmission as such of the undertaking by the judicial authority, Ms. Farrell has drawn attention to the fact that it was following this decision that s. 12 of the Act, as originally enacted, was amended so as to permit any undertakings to be transmitted here, not just by an issuing judicial authority as provided for in the original version of s.12(2) in the 2003 Act, but "by or on behalf of the issuing judicial authority or the issuing state", and she submits that in the present case, where the Hungarian Central Authority has indicated that the Hungarian Court has no power to give the undertaking under s. 45, the Central Authority there is the body having "authority to make such undertakings", and that the sending of that undertaking to the Central Authority here is in conformity with s.12(2) as amended.

34. A significant difference between the facts of the *Dundon* case and the present case is that the undertaking *given* is not one signed by the issuing judicial authority, and neither is it one which has been transmitted, provided or sent by the issuing judicial authority. In the *Dundon* case, the undertakings given by the Parliamentary Under Secretary of State, and the Director of Public Prosecutions respectively, were annexed to a Certificate provided by the issuing judicial authority. In that sense it was held in *Dundon* that the undertakings had been "given" by the issuing judicial authority as required by sections 22 and 24 of the 2003 Act, as then enacted. In the present case the undertaking for the purpose of s.45 of the Act is neither signed by the issuing judicial authority, nor sent, transmitted or otherwise provided by the issuing judicial authority.

35. In as much as s. 12(2) of the Act has been amended to permit the transmission of undertakings by "the issuing state", this would have entitled the Hungarian Central Authority to transmit an undertaking of the issuing judicial authority. Section 12(2) cannot in my view be interpreted as meaning that it does not matter whether the s.45 undertaking is given by the Central Authority or the issuing judicial authority.

36. The question remains whether the Central Authority's undertaking as to retrial can be regarded as one which fulfils the requirement for an undertaking "by the issuing judicial authority" on the basis that it is the Central Authority which has the "*authority to make such undertakings, rather than the issuing judicial authority*" as stated by Denham J. in *Dundon*.

37. It seems to me that there is a necessary distinction to be made between the undertakings which were required in the *Dundon* case and that required in the present case. In *Dundon* the undertakings were firstly, under s. 22, as then provided, that upon surrender the respondent would not be tried for any offence other than that for which surrender was ordered (i.e. specialty rule), and secondly, under s. 24 as then provided, that he would not be extradited to a third state without the consent of the Irish High Court. As found by Denham J. it is clear that it was the DPP in the United Kingdom who had to give the specialty undertaking, being the prosecuting authority, and it was the Parliamentary Under Secretary of State who, as the competent authority under s.98 of the Extradition Act 2003, could give the third state undertaking. The issuing judicial authority could have had no competency to give either of these undertakings.

38. In the present case the undertaking which is required is one that the respondent upon surrender will be retried or given the opportunity for retrial on the offence for which surrender is sought. The Hungarian Criminal Procedure rules provide a mechanism for the respondent to apply for a retrial upon her surrender, and the Court "may" order such a retrial, according to the contents of the warrant at paragraph (d) thereof. The "guarantee" referred to in the warrant is that she may apply for a retrial. Clearly the Central Authority which has given the undertaking in the terms required of s.45 of the Act cannot require the Hungarian Court to decide the respondent's motion in any particular way. In such circumstances it seems to me that the Central Authority, while it has given such an undertaking, is not the body whose undertaking is required by the express provisions of s. 45, even if the amended s.12(2) of the Act allows the Central Authority to transmit the *appropriate* undertaking. Equally, if it was in fact the case that the Hungarian Central Authority was the appropriate body to give the undertaking, that undertaking could be transmitted here by either that Authority or the issuing judicial authority "*as may be appropriate*". What is at issue is whether the undertaking signed and transmitted (i.e. given) by the Central Authority is one which it can give for the purpose of fulfilling the requirement in s. 45 as to a retrial, since it cannot have any control over the decision-making powers of the relevant Hungarian court which may hear the respondent's application for a retrial upon surrender. It has been made quite clear in the correspondence from the Central Authority that the issuing judicial authority is not permitted to give the undertaking required by the provisions of the Act here.

39. The Framework Decision provides at Article 5(1) that surrender in *'in absentia'* cases "*may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial* (my emphasis). This is an optional provision. The Framework Decision does not have direct effect. The Oireachtas has clearly taken the view that such an assurance is required, and is deemed adequate if it is one "*in writing*", and from "*the issuing judicial authority*" that "*the person will (i) be retried for that offence or be given the opportunity of a retrial in respect of that offence ……..*".

40. It is somewhat difficult to discern precisely what this means. One possibility is that it permits of a situation where the issuing judicial authority would retry the person whether or not the person seeks a retrial upon surrender, or, in the alternative that the person would be simply be afforded an opportunity to apply for a retrial. The latter would infer no guarantee of that application being granted. In relation to the latter, I do not feel that this interpretation can be correct. I think it means more properly that a retrial will be provided but that if the person is duly notified of the date and place of that retrial and fails to turn up for it, the obligation on the issuing judicial authority has been fulfilled. After all, the section speaks of "an opportunity of a retrial" and not simply the opportunity to apply for a retrial.

41. The correspondence from the Hungarian Central Authority does not indicate in any way the source of its authority to guarantee a retrial to the respondent. In the absence of such a statement, it seems to me, even allowing for the differences which may exist between the legal systems of Member States, that common-sense suggests that it is only the judicial authority which has the capacity to guarantee a retrial or the opportunity of one, and this is what has been prescribed as an adequate assurance for the respondent that she will be retried.

42. In so far as it may be considered that the principle of mutual recognition and the underpinning concepts of a high level of trust and confidence between Member States might imply that if a Central Authority, as in the present case, guarantees a retrial to the respondent such should simply be accepted without question, I would say that mutual recognition applies only in respect of judicial decisions, and that the non-existence of an undertaking from the judicial authority because it has no power to give one is not a matter intended to be covered by the undoubted trust and confidence which exists between this State and the Republic of Hungary. What is at issue in this case is simply whether a provision of Irish law is complied with or not. It does not speak at all to the trust and confidence in the Republic of Hungary.

43. The Framework Decision has been adopted by all Member States of the European Union, but it does not have direct effect. It will be given effect to in different ways by different Member States, depending on their system of law-making. Under Irish law, its implementation depends upon the passing of domestic legislation giving effect to it in whatever manner appears in that domestic legislation. The fact that the 2003 Act has appended to it the text of the Framework Decision does not serve to give it direct effect. It follows that other Member States must respect that legislation and meet its requirements when seeking the surrender of persons wanted in the requesting state. This Court cannot act *'contra legem'* in seeking to find within the provisions of s.45 and interpretation which conforms to the aims and objectives of the Framework Decision. Mutual trust and confidence cannot serve to relieve an issuing judicial authority of the requirement to make its applications for surrender in a manner required by the domestic legislation of this State.

44. As was pointed out by Denham J. in *Dundon* at p. 266, undertakings are not required by the Framework Decision, but under Irish law. Irish law requires that the issuing judicial authority *gives* an undertaking in the terms clearly set forth in s.45 of the Act. At p. 269 of her judgment in *Dundon*, the learned judge examined the meaning to be attached to the term "give" in the context of undertakings, and stated in that regard:

> *"Section 22(1)(b) requires that the undertaking be in writing. That has been done. The section then requires that the undertaking in writing 'is given to the High Court' by the issuing judicial authority. The word 'given' is the critical term of the section. 'Give' is defined in the New Shorter Oxford Dictionary as:-*
>
> > *"Hand over as a present;*
> >
> > *Transfer the possession of gratuitously;*
> >
> > *Confer ownership with or without actual delivery;*
> >
> > *Bestow allot or donate, give presents;*
> >
> > *Confer, grant, bestow;*
> >
> > *Grant …*
> >
> > *Accord to another …*
> >
> > *Deliver, hand over ….*
>
> *Bearing in mind these definitions of the ordinary meaning of the word 'give', I am satisfied that the ordinary meaning of*

the word 'give' is to hand over, to transfer, to deliver. Thus the section would read that a person shall not be surrendered under the Act unless:-

> *'An undertaking in writing is handed over (or, is transferred, or is delivered) to the High Court by the issuing judicial authority. Thus, I am satisfied that the certificate in this case, from the issuing judicial authority, with the attached undertakings from the two relevant authorities, meets the requirements of the Act'."*

45. Given the fact that the provisions of s. 45 are in the same terms as the sections requiring the undertakings referred to in this passage, it can be applied *mutatis mutandi* to that required by s. 45 of the Act.

46. I do not believe that s. 12(2) of the Act is of assistance in this case. That section provides that the undertaking required in this case could be *transmitted* by the Central Authority in Hungary. But it does not mean that instead of an undertaking from the judicial authority being transmitted, one from the Central Authority may be transmitted in its place. A different situation arose in Dundon. The undertakings in that case were to be 'given' by the issuing judicial authority, and it was deemed to meet the requirements if the issuing judicial authority signed a certificate that he had received two undertakings, and ordered that they be forwarded to the appropriate authority here. It was the judicial authority that did this. That was what was deemed to meet the requirement that the issuing judicial authority 'give' the undertakings. That has not happened in the present case. The issuing judicial authority in Hungary is silent on the matter, having no power to give the undertaking required, and instead the Central Authority has both signed the undertaking and 'given' it in the sense of transmitting it under the provisions of s. 12 (2) of the Act. That seems to me not to meet the requirements of s. 45 of the Act, and therefore the surrender of the respondent is prohibited by the section.