Neutral Citation Number: [2007] IEHC 15

THE HIGH COURT

Record Number: 2005 No. 69 Ext

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
CIARAN TOBIN

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 12th day of January 2007

The Republic of Hungary acceded to membership of the European Union on the 1st May 2004. The European Arrest Warrant Act, 2003 came into law in this country on the 1st January 2004. By S.I. 206 of 2004, European Arrest Warrant Act 2003 (Designated Member States) (No.3) Order 2004, the Minister for Foreign Affairs designated, *inter alios*, Hungary for the purpose of section 3 of the Act, it being a country "that has, under its national law, given effect to the Framework Decision." Section 4 of the Act provides that the Act shall apply in relation to an offence "whether committed or alleged to have been committed before or after the commencement of this Act". Prior to its accession to EU membership, there were no extradition arrangements in place between Ireland and Hungary.

In relation to Hungary there is no delimitation in the Act or S.I. 206 of 2004 as to the starting date for offences which can be the subject to a European arrest warrant. The offence in the present case was committed on the 9th April 2000, and he was convicted in absentia on the 7th May 2002. One of the points of objection raised by the respondent arises in relation to retrospectivity and I will return to that matter in due course.

The present application is one for the surrender of the respondent the Republic of Hungary pursuant to a European arrest warrant which bears the date 12th October 2004, although it is clear for the reasons which will be explained in due course that it was issued sometime in April 2005.

That warrant was transmitted to the Central Authority here (the applicant) on the 15th June 2005, and was received on the 16th June 2005. Thereafter some time passed while certain clarifications were sought and provided, but on the 20th December 2005, an application was made to this Court for the endorsement of that warrant under s. 13 of the European Arrest Warrant Act, 2003, as amended. That order was made, whereupon the respondent was arrested in Dublin at his home on the 12th January 2006 and brought before the High Court as required. The Court made an order fixing the date for hearing, and remanding him on bail until the determination of the present application for an order of surrender. That hearing eventually took place on the 19th and 20th December 2006.

Thomas O'Connell SC, (with him Emily Farrell BL) appeared for the applicant, and Brian Murray SC (with him David Kean BL) for the respondent.

The offence and background facts

According to the endorsed warrant on foot of which the respondent was arrested and brought before the Court, the charge against him in Hungary and in respect of which he was convicted and sentenced in absentia was one of "the misdemeanour of violation of the rules of public road by negligence causing death".

The section of the Hungarian Criminal Code which provides for this offence is stated to provide that "*the person who causes grievous bodily harm* to another person or persons by the violation of the rules of public road traffic *by negligence* commits a misdemeanour, and shall be punishable with imprisonment of up to one year, labour in the public interest, or fine", but that "if the crime causes death" the punishment shall be up to five years' imprisonment.

A second version of the warrant subsequently transmitted (a so-called 'amended warrant', but one which was never endorsed pursuant to s. 13 of the Act) states that an offence is committed under the section where any person *recklessly causes serious harm/death* to another person by breaking the rules of the road.

According to a third version of this warrant (again never endorsed as a warrant for execution) a person is guilty of the offence under section 187 of the Hungarian Criminal Code if the person *by negligence causes grievous bodily harm/death* to a person by a violation of the rules of the road.

I refer to these different documents since they refer, relevant to this particular case, to the offence as deriving alternately from *negligence causing death*, and *recklessness causing death*.

It is worth noting that in all three documents in the Hungarian language, the wording in the second part of paragraph (e) as to the nature and classification of the offences under Hungarian law is identical. It is only in the translations thereof into English which that any differences are evident. The first portion of paragraph (e) giving the description of the accident contains the same text in the Hungarian language in the second and third documents, although the translation is slightly different though not in any way that is material. The first document (the warrant on foot of which the respondent was arrested) contains a first section of paragraph (e) which is different in the Hungarian text from that which appears in the later two versions, and the translation is therefore different. The first document is the only one of the translations which refers to the steering movement to the right occurring "after overtaking".

These matters assume some relevance to the arguments made by the respondent as to correspondence of the offence for which he was convicted, with any offence in this jurisdiction.

Very tragically, in the present case, two young children died when struck by the respondent's vehicle, and the respondent received a sentence of three years' imprisonment, later adjusted on appeal to three years', only eighteen months of which is to be served, the respondent to be released on parole in respect of the balance of the term imposed.

The facts of the accident

The warrant which was first transmitted and which was endorsed for execution gives a description of the circumstances in which the offence was committed as follows:

> "On 9 April 2000, around 3.45pm [the respondent] was driving the Volvo S 40 vehicle of licence plate number GZJ 500 with four passengers along Móricz Zsigmund Street within the city limits of Léanyfalu (Hungary), in an inhabited area at a speed of 75-80 kilometres per hour proceeding from the direction of Visegrád to Szentendre. *After overtaking due to an*

excessive steering movement and the vehicle's high speed he drove at a speed 71-80 kph on the sidewalk, which was separated from the road by a raised stone edge, and he hit Márton ZOLTAI, aged 5, who was waiting on the sidewalk, and Petra ZOLTAI, aged 2, who was sitting in a pram. Both Márton Zoltai and Petra Zoltai died on the spot as a result of the accident." (my emphasis)

As I have mentioned, two further documents were received, and which Mr O'Connell has stated to be amended warrants rather than new warrants, and it is the description of the accident contained in the 3rd such document which, he states, contains the description of the acts of the respondent from which correspondence should be considered. The third document makes a change in respect of the portion highlighted in the above paragraph and states instead:

"…The accused steered to the right for unknown reasons, and due to this sudden movement of the steering wheel, and to the speed, being excessive compared to the traffic conditions, the vehicle went up on the sidewalk…

There is information about how this accident happened by reference to the judgment of the Hungarian Court, and I will refer to that later when dealing with correspondence. There is also some evidence in the form of statements from the respondent and his passengers in the form of sworn statements, and which, under rules of procedure in Hungary, were submitted to the Court as evidence, but which were ruled inadmissible since the translator of the statements was the daughter of one of the lawyers representing the respondent at trial.

By the provisions of s. 16 of the European Arrest Warrant Act, 2003, as amended, the Court must be satisfied of the following matters before making an order for surrender:

(a) that the person before the High Court is the person in respect of whom the European arrest warrant was issued,

(b) the European arrest warrant, or a facsimile or true copy thereof, has been endorsed in accordance with *section 13* for execution of the warrant,

(c) where appropriate, an undertaking under section 45 or a facsimile or true copy thereof is provided to the court.

(d) the High Court is not required, under sections 21A, 22, 23 or 24 (inserted by sections 79, 80, 81, and 82 of the Criminal Justice (Terrorist Offences) Act 2005), to refuse to surrender the person under this Act, and

(e) the surrender of the person is not prohibited by Part 3 or the Framework Decision (including the recitals thereto).

No issue arises as to (a). Neither is there any issue as to (b) since the warrant on foot of which the respondent was arrested has been duly endorsed in accordance with section 13 of the Act. That matter is not affected by an issue raised in the case arising from the fact that in this case the requesting state, subsequent to the transmission of that warrant, sent two further warrants in respect of the respondent and which each contain some differences in text from the warrant on foot of which the respondent was arrested to which I have referred.

As to (c) above, it is the case that the respondent was sentenced in absentia. But the Hungarian authorities have indicated in writing that it would be contrary to Hungarian law to offer a re-trial of the offences to the respondent, and accordingly no undertaking will be given. But it is a fact is that the respondent was aware of the date of the trial, was represented at it through Hungarian lawyers, and in addition he lodged an appeal which was successful only to the extent that the sentence of three years imposed at first instance was varied so as to suspend the final eighteen months thereof. I am satisfied in those circumstances that no undertaking would be required under section 16 (1)(c) of the Act before surrender could be ordered..

As to (d) there is nothing to require that surrender be refused under any of the sections referred to.

As to (e) a delay point was raised in Points of Objection, and there is a submission in relation to delay in written submissions provided to the Court, but this argument, quite correctly in my view, was not pursued in oral argument,. It is not an issue with which the Court would find favour in any event in this case.

If the requirements of s. 16 of the Act were the only matters about which the Court has to be satisfied before making the order sought, the determination of this application would be simply achieved. But, of course, there are other requirements to be met by the requesting state, such as correspondence, minimum gravity of offence, the provisions of s. 10 of the Act as amended which sets out the categories of persons who "shall be arrested and surrendered to the issuing state" on foot of a European arrest warrant. These are but some additional matters and in respect of which issues have been raised in this case, as well as others which I shall come to.

The issues for determination

1. Lack of jurisdiction to surrender under section 10 of the Act
Section 10, as substituted for the original section 10 by s. 71 of the 2005 Act, provides As follows:

10.— Where a judicial authority in an issuing state duly issues a European arrest warrant in respect of a person—

(a) against whom that state intends to bring proceedings for an 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,

(c) who has been convicted of, but not yet sentenced in respect of, an offence to which the European arrest warrant relates, or

(d) on whom a sentence of imprisonment or detention has been imposed in respect of an offence to which the European arrest warrant relates, and who *fled* from the issuing state before he or she—

(i) commenced serving that sentence, or

(ii) completed serving that sentence,

> that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision, be arrested and surrendered to the issuing state." (my emphasis)

The original section 10 in the 2003 Act provided only for the circumstances set forth in (a) and (d) above. The Oireachtas in its amending provision can be seen to have extended the grasp of a European arrest warrant to additional circumstances in which the High Court can make an order for surrender on foot of such a warrant, but the respondent submits that the circumstances in which he left Hungary ahead of his trial and sentence do not come within paragraph (d) above, it being conceded by Mr O'Connell on the applicant's behalf that paragraph (d) is the only paragraph applicable to this case. Mr Murray on the respondent's behalf has submitted that it would have been open to the Oireachtas to extend the ambit of the Court's jurisdiction under s. 10 if it had so wished, but that it has clearly decided not to do so, and that the Court therefore lacks any jurisdiction to make the order sought for his surrender.

I will set out the circumstances in which the respondent left Hungary prior to his trial, and will then consider the meaning of the word "fled" used in the section.

The respondent has sworn that at the time of this offence for which he was convicted he and his wife and young son were lawfully residing in Hungary, having gone to that country for a three year period at the request of his employer (Irish Life and Permanent Plc.) so that he could develop a business which Irish Life had acquired there. He went there in 1997. On the 9th April 2000, the date of accident, he was driving a company car.

On the day following this accident, he and his wife and two Irish friends who were passengers in the car with him at the time of the accident, attended at the police station in order to make statements. They were assisted by a Hungarian lawyer. He appears to have been required to surrender his passport at that time, since he states that on the 28th August 2000, while the police investigation was still ongoing, he wrote to the authorities seeking the return of his passport so that he could return to Ireland with his family between the 14th September 2000 and 2nd October 2000. He gave two reasons for that visit to Ireland, the first being that his wife had been asked to be a bridesmaid at her sister's wedding, and for which many family members would be returning from abroad. He made the point that some of these family members had not met his children. He was anxious that his own parents who were getting on in years should have the opportunity to meet his children since they could not easily come to Hungary. In fact by the time he swore an affidavit in January 2006 in connection with a bail application, his father had passed away.

This request was granted by the Hungarian authorities, even though he was due to be charged with the offence on the 11th September 2000. having been charged on the 14th September 2000, the respondent came to Ireland for the requested period and duly returned to Hungary on the 9th October 2000 as arranged.

On the 30th November 2000 the respondent and his wife left Hungary and returned to Ireland on a permanent basis since his three year contract with his employer came to its natural end. He states "there was nothing remotely surreptitious or improper about my departure from Hungary, which simply occurred in the ordinary course of business". He states also that he never at any time fled from Hungary before the commencement of any sentence imposed upon him. The European arrest warrant in this case states the following in relation to the in absentia trial and conviction:

> "Pursuant to Section 586, subsection (1) of Act XIX of 1998 on the Hungarian Criminal Procedure Code, 'in cases where the accused lives abroad bail may be deposited upon his request, with the permission of the prosecutor prior to submission of the indictment, and after it, with the permission of the court. In such a case the proceedings may take place in absentia'. According to subsection (3), 'In the application for permission to deposit bail the accused shall authorise the defence counsel to receive all official documents addressed to the accused (registered agent). According top subsection (4), once the bail has been deposited documents addressed to the accused shall be delivered to the registered agent. The registered agent shall, without delay, notify the accused of the summons delivered. If the accused has left the territory of the Republic of Hungary and fails to appear in court despite the summons duly delivered to the registered agent, a) issuing an order of compulsory attendance, b) suspension of proceedings, and c) summons by public notice shall not be applicable and the trial shall be held in absentia. According to subsection (5), 'in cases where the prosecutor or the court has granted permission to deposit bail and the accused has left the territory of the Republic of Hungary, the provisions of Chapter XXIV shall not be applicable in the proceedings.' (Chapter XXIV provides for procedure against the absent accused.) According to Section 587, subsection (1) of the Act cited, 'in cases where the court finds the accused guilty the bail shall revert to the State when the judgment becomes final and absolute'. According to subsection (3), 'in the event of an enforceable custodial sentence the bail shall be repaid to the convict once the sentence is fully served."

The respondent appears to have availed of this section, because there is a reference in the Hungarian Court's decision of the 7th May 2002 to the payment by the respondent of bail money of HUF 500,000 and the return to him of his passport, and it is stated also by Dr Németh-Bokor, an official in the Hungarian Ministry of Justice that the respondent availed of the Section 568 procedure. The decision of the Appeal Court did not agree with the decision of the Court of First Instance that the respondent's failure to attend must be taken as an aggravating factor for sentencing purposes, and stated in that regard in its decision as translated into English:

> "This circumstance is a possibility within Accused's scope of defence, which must not be taken into consideration either to Accused's debit or benefit."

I read that sentence as meaning that the respondent was permitted to leave once the Section 568 procedure was availed of, and that by so doing he was not acting in breach of any law.

The respondent in his affidavit has sworn that his trial was scheduled to take place in June 2001 but that he wrote to his Hungarian lawyer that he would be un able to attend, and that in so doing he was conscious that he and his witnesses had made statements to the police and that these would be before the Court in any trial. However he later learned that there was a question raised as to the admissibility of these statements since they had been translated into the Hungarian language by a daughter of his lawyer. In order to meet that objection he arranged to make a declaration in the Hungarian Consulate in Dublin to the effect that this relationship did not in any way affect the nature and content of the statements. His trial was fixed again for 7th May 2002, and he states that on the basis that these statements would be admitted into evidence on his behalf he did not attend for the trial. For reasons which I do not need to refer to in detail, both the Court of First Instance and the Appeal Court held that these statements were not admissible. He was convicted and sentenced as I have already outlined.

It is against that background that the respondent submits that the circumstances in which he left Hungary before his trial had taken place and before sentence was passed are not within the circumstances set forth in s. 10 of the Act as amended, since he has not

"fled" in the ordinary and plain meaning of that term, but rather left in a manner permitted by the laws of the issuing state.

As I have already mentioned, Mr O'Connell has conceded that paragraph (d) of that section is the only basis on which this Court could be required to order surrender. That paragraph speaks specifically of "a person… (d) on whom a sentence of imprisonment or detention has been imposed in respect of an offence … and who has fled…before he or she (i) commenced serving that sentence, or (ii) completed serving that sentence.."

I am satisfied that by the plain and ordinary meaning of these words, the fleeing must occur following the imposition of sentence, and not as in this case, where the respondent left before his trial. If the Hungarian authorities had postponed his trial and were now seeking the respondent's surrender so that he could face trial, the matter may be different, subject of course to other argument about retrospection and so forth, but the entire of section 10 appears to follow as logical time sequence. Paragraph (a) refers to a situation where the person sought may not even have been charged but is wanted to face prosecution, and where a decision has been made to prosecute. Paragraph (b) refers to a time after indictment where a person is subject to proceedings and where a trial has not yet taken place. Paragraph (c) refers to a case where the trial has taken place, but sentence has not yet been passed. Paragraph (d) then covers a situation where both conviction and sentencing has taken place and the person has "fled" before that sentence was served. None of those situations fit the circumstances in which the respondent left the country with the blessing of the Hungarian authorities having availed of the Section 568 procedures, and complied with the conditions imposed thereunder. It must be recalled also that the Hungarian authorities in the year 2000 would have been aware that if such a person were not to return for trial and sentence, there were no extradition treaty arrangements in place by virtue of which such a person could be returned to Hungary.

M r O'Connell has sought to have the word "fled" given a meaning akin to "left", and that paragraph (d) should not be given the very restricted meaning contended for by Mr Murray. I do not agree with this submission. There is no need to set out the numerous authority for the proposition that in discerning the intention of the Oireachtas in legislation which it has passed the Court should do so by means of attaching the plain and ordinary meaning to the words chosen by the Oireachtas to given expression to that intention. Only in the event of any ambiguity arising in that regard should the Court have resort to any of the so-called canons of construction. In my view the plain and ordinary meaning of 'fled' cannot be regarded as the same as the plain and ordinary meaning of 'left'. The former has within it an intention to escape from or to evade something, such as in this case, justice. It is not so neutral as the word "left". One can leave for any or no reason whatsoever, but in ordinary usage, the word "fled" is used when there is a particular purpose in leaving, namely to avoid some consequence not desired. It is uncontradicted in this case that the respondent left Hungary because his three year contract with his employer, which he commenced in 1997 came to a natural end towards the end of the year 2000. No attempt has been made to dispute this.

In my view the word "fled" has been chosen deliberately by the Oireachtas. If reference is made to the Recitals to the Framework Decision given effect to by the Act, one sees in the very first Recital the following objective in mind:

> "(1) According to the Conclusions of the Tampere European Council of 15 and 16 October 1999, and in particular point 35 thereof, the formal extradition procedure should be abolished among the Member States in respect of *persons who are fleeing from justice after having been finally sentenced* and extradition procedures should be speeded up in respect of persons suspected of having committed an offence." (my emphasis)

It seems quite clear that paragraph (b) of the original section 10, as enacted in 2003, and which re-appears in identical terms in paragraph (d) of the substituted section 10, can be related back to this objective. There is no other reference to fleeing or persons who have fled to be found in the Act or the Framework Decision. The persons in respect of whom the former extradition arrangements are to be abolished and replaced by the new surrender procedures under the European arrest warrant are those "fleeing from justice". That is the meaning to be given to "fled" in s. 10 of the Act.

Lest it might be considered that something has been added in translation into English of the Framework Decision, it is worth looking at the Irish version (also appended to the Act itself) where in recital (1) the words used are "daoine atá ar a dteidheadh ón gceartas tar éis …..". According to Dineen's Irish – English Dictionary of 1927 the phrase "ar a teicheadh" means "on the run " and "avoiding arrest". According to the same work, the words "teitim" or "teichim" means "I flee, escape, retreat, shun or avoid".

The text of the same recital in other languages with which I have some familiarity such as German, Italian and French reveal the same meaning by the words used. The Italian version speaks of "le persone che si sottraggono all giustizia dopo essere state condannate…..". The verb "sottrarsi" according to the Sansoni Dictionary, 3rd ed. means "to escape".

The German text speaks of "…personen, die sich nach einer rechtskraftigen Verteilung der Justiz zu entziehen suchen …". The verb "entziehen" means to evade or elude, and "suchen" means to attempt, to seek to, or strive, and reference is clearly made to an attempt to evade justice.

Finally, if one looks to the French text, often regarded as the mother text from which all translations are later made, one sees reference to ""les personnes qui tentent d'échapper a la justice après avoir fait l'objet d'une condemnation ...". Clearly it is a person attempting to escape justice who is being targeted in this recital.

In none of the languages to which I have referred is there any possibility that the words used would be used to describe a person who simply leaves the country in a permitted way. Each language has a particular verb for "to leave" and it appears in none of the Italian, German, French or Irish texts. The intended meaning is clear in my view.

It seems to me to do obvious and serious violence to the stated objective, as given effect to by section 10 of the 2003 Act as amended, if the section giving effect to this objective is extended to cover persons such as the respondent who did not "flee" within the meaning normally attributed to that word, and who left legitimately having availed of a procedure in place to deal with just such a departure, and on the basis that he could be represented by his lawyers and that his statements and those of his witnesses could be available to the Court.

Mr O'Connell urges the Court that to construe the word "flee" so as to exclude the concept of leaving the country as the respondent did would be an absurdity. He submits that paragraph (d) does not provide that the person sought must have left the country after the sentence has been imposed, but rather that the only requirement is that the person left the country before the commencement or completion of the sentence, and that the respondent is such a person since a sentence has been passed and the respondent has left the country before serving that sentence.

I cannot accept that. It seems to me firstly that it is not absurd that there could be a situation where a country has as part of its Criminal Procedure, and at a time when it does not have in place any extradition treaty arrangements, a procedure where a person

charged with an offence is permitted to leave the country on condition that he/she pays into Court a specified sum of money, which is returnable to that person only after the completion of any sentence which may be imposed. It seems to me also that such an interpretation is straining the sense and meaning of the words used, since as I have already referred to the legislature have clearly provided for four different periods in the prosecution process in the way in which paragraphs (a), (b), (c) and (d) have been set out. Nowhere is there any paragraph referring to someone who simply left (not fled) the country before his trial took place, and who was subsequently convicted and sentenced in his absence.

If there is a lacuna in the legislation in this respect, and that is not necessarily the case given the provision of recital (1) of the Framework Decision, it is not for this Court to make good that lacuna by some activist and imaginative interpretation of the common word "fled". It is for the legislature to again revisit the manner in which it has chosen to express its intention. This is not a case, it seems to me, in which there is some divergence between the Framework Decision and the Act giving effect to it, and where in such circumstances the interpretation which gives effect to the objectives of the European Union instrument must be favoured unless to do so would be to act '*contra legem'*, as referred to by, among several, the Chief Justice in *Minister for Justice, Equality and Law Reform v. Altaravicius*, Supreme Court, 5th April 2006. In that regard he stated:

> "When applying and interpreting national provisions giving effect to a Framework Decision the Courts "… must do so as far as possible in this light of the wording and purpose of the Framework Decision in order to attain the result which it pursues …" (C-105/*03 Pupino ECJ* 16th June, 2005). The principle of conforming interpretation is limited, as the Court of Justice has pointed out in *Pupino* and other cases, to the extent that it is possible to give such an interpretation. It does not require a national court to interpret national legislation *contra legem*. If national legislation, having been interpreted as far as possible in conformity with community legislation to which it purports to give effect, but still falls short of what is required by the latter, a national Court must, as a general principle, apply that legislation as interpreted although there may be other consequences for a Member State which has failed to fully implement a Directive or Framework Decision."

In fact in the present case there is in any event no conflict of interpretation created by the use of the word "fled" in s. 10.

This conclusion is sufficient to decide this application. The respondent is not a person who comes within s. 10 of the Act. Hence the judicial authority in the issuing state has not issued a European arrest warrant in respect of a person who had "fled" following conviction and/or sentence and before that sentence has been commenced to be served or completed, and is not a person who must be arrested and surrendered. I therefore direct his release as required by s. 16(8) of the Act.

A number of other issues were raised and argued, but in my view unsuccessfully. I will for the sake of completeness deal with them.

Invalidity of warrant under s. 11 of the Act
It was submitted that because the so-called first warrant and on foot of which the respondent was arrested and brought before the Court failed to contain within it the additional information that the three year sentence imposed by the Court of first instance had been varied by the appeal court so as to effectively suspend the final eighteen months of the sentence imposed, that it was not a warrant which complies with the provisions of s. 11 of the Act. This detail was supplied in the two later warrants which were received and which Mr O'Connell categorizes as amended warrants rather than new warrants. Section 11(1)(g)(iii) of the Act provides that where the person has been convicted of the offence specified in the European arrest warrant and a sentence has been imposed in respect thereof, the European arrest warrant shall contain the penalties of which that sentence consists. Mr Murray places emphasis on the use of the word "shall" and submits that there has not been strict compliance with the words of the section. The fact is that later documents whatever they may be called contain the information. It is also a fact that at all stages of the process following sentence and appeal the respondent was represented by his lawyers and was aware of exactly what sentence was imposed. Mr O'Connell makes the point also that in fact the sentence imposed remained three years after the appeal, and that the appeal simply had the effect, in ease of the respondent, that the final eighteen months were suspended. The judgment of the Murray C.J. in *Minister for Justice, Equality and Law Reform v. Rodnov*, Supreme Court, 1st June 2006 makes it clear that where there has been a failure to adhere strictly and slavishly to the precise terms of the Framework Decision and the Act it would only be where the substance and effect of the warrant were affected that the Court would refuse to act upon it. As in that case, the want of form in this case does not in any way mislead the respondent. Of course, it would have been a better course not to have omitted to include the detail of the suspension of the final eighteen months but that omission cannot be sufficient to invalidate the warrant, issued as it is under arrangements between states who have come together in a spirit of confidence, co-operation and mutual trust in each other's judicial systems, so as to enable surrender of wanted persons to take place without in the words of the Framework Decision "the complexity and potential for delay inherent in the present extradition procedures". The Court has been referred by Mr Murray to the judgment of Carney J. in *Director of Public Prosecutions v. Dunne* [1994] 2 I.R. 537 where a search warrant was found to be incorrectly prepared and was found to be thereby invalidated. He has referred also to the judgment of McCarthy J. in *McMahon v. Leahy* [1984] I.R. 525 where the learned judge expressed trenchant criticism about the manner in which a warrant had been prepared by the authorities in Northern Ireland and backed in this State for execution under Part III of the Extradition Act, 1965. The facts grounding the present submission are nowhere near the level of seriousness present in those cases.

To insist on a slavish adherence to form divorced from any question or risk of confusion or prejudice thereby to the respondent, would be to run counter to the very purpose of the Framework Decision and the Act by which it is given effect. A sensible, realistic and workable approach must be adopted in relation to the mechanisms put in place; but at the same time however, never permitting any lacuna, shortcut or sloppy inattention to detail to undermine a respondent's fundamental rights, thereby creating a real risk of injustice being done. This is not such a case, and this ground of objection must fail.

The failure to have the second and third warrants endorsed under s. 13 of the Act
I have already referred to the fact that the Hungarian authorities transmitted two later warrants which differed in some ways from the first such document. It was only in respect of the first such warrant that an application was made to the Court for endorsement under s. 13 of the Act. The two later documents were not acted upon. The respondent complains that this is another failure to comply with the obligations under the Act, and refers to the mandatory nature of the obligation to make an application to endorse a warrant as soon as may be after it is received by the Central Authority here. It is a fact that the first warrant was endorsed and acted upon. Given the facts of this case, it was perfectly reasonable for the Central Authority to regard the later document as being merely amended versions of the first document, and to act only upon the first document. Mr Murray submits that the applicant might have chosen to seek an order withdrawing or canceling the first warrant, and proceeded afresh on foot of the second, and later do the same in respect of the third perhaps.

Clearly the transmission of further documents in the manner which happened was likely to offer the respondent a ground of complaint, but can it, I ask rhetorically, be sensible to decide that all three warrants should be endorsed, and thereupon that the respondent should be arrested a second and a third time, as warrants arrived, brought before the Court as then required and processed on foot of all three. Of course it is not. Again, a sensible and workable approach must be adopted consistent with justice. In any event, even

if the Central Authority was acting impermissibly by failing to make the application to endorse the latter two documents, it is a matter which the requesting state might be entitled to make some complaint about if it saw any purpose in so doing, but it is not something which would entitle the respondent to plead in aid of his release. There is no right of the respondent which one can identify as having been in any way affected by the failure to apply for endorsement. No possible prejudice arises to him. This ground must fail.

Correspondence
Section 5 of the Act defines what is meant by correspondence for the purpose of s. 38 of the Act, since the latter section provides that a requested person shall not be surrendered in respect of an offence unless "the offence corresponds to an offence under the law of the State."

Section 5 provides:

> 5.— For the purposes of this Act, an offence specified in a European arrest warrant corresponds to an offence under the law of the State, where the act or omission that constitutes the offence so specified would, if committed in the State on the date on which the European arrest warrant is issued, constitute an offence under the law of the State."

It will be immediately noted that correspondence is made out if the act of the respondent as alleged would be *an offence*. It can therefore be any offence in this State, even one regarded as being of less gravity that the offence charged in the requesting state, or carrying a lesser penalty here than the offence charged in the issuing state. It must be noted also that the provisions of s. 5 of this Act constitute a different definition of correspondence than that which was provided for in s. 10 of the Extradition Act, 1965, ands which endures still in relation to applications under Part II of that Act.. That section provides:

> "10. – (1) Subject to subsection (2), extradition shall be granted only in respect of an offence which is punishable under the laws of the requesting country *and of the State* by imprisonment for a maximum period of at least one year or by a more severe penalty and for which, if there has been a conviction and sentence in the requesting country, imprisonment for a period of at least four months or a more severe penalty has been imposed." (my emphasis)

Certain amendments have been made to s. 10 by way of insertion of sub sections 1A, 2A, 3, and 4. Section 4 is relevant in that it defines what is meant for the purposes of s. 10 by the words "offence punishable by the laws of the State". That phrase means "(a) an act that, if committed in the State on the day on which the request for extradition is made, would constitute an offence, or (b) in the case of an offence under the law of a requesting country consisting of the commission of one or more acts including any act committed in the State….., such one or more acts, being acts that, if committed in the State on the day on which the act concerned was committed or alleged to have been committed would constitute an offence….".

What must be noted for the purposes of the present case is that minimum gravity is considered only in respect of the offence in the requesting state, and not in relation to the corresponding offence in this State. This is a clear change, and cannot be regarded as accidental or unimportant. It follows that even if the offence charged in Hungary is one carrying the required minimum punishment, it matters not at all that the offence in this State with which it is found to correspond carries a much lighter penalty, even one involving no term of imprisonment. Under s. 10 of the 1965 Act that would not be so.

In the present case the warrant on foot of which the respondent was arrested describes the driving of the respondent on the occasion of this tragic accident. The statements of the witnesses for the prosecution as contained in the papers supplied to the respondent reveal more detail. The findings of the Court are based on certain of these facts. Mr O'Connell for the applicant is content to rely upon the facts as found in the third version of the warrant received here. I have already adverted to the fact that the description of the accident involving the overtaking of a car by the respondent appears only in the first warrant, and not in the second or third warrants. I will not set out again the facts as disclosed by the third warrant upon which Mr O'Connell is prepared to rely and which he says is in any event in ease of the respondent, since I have already done so earlier in this judgment.

Mr Murray has gone to great pains to submit that the facts as known fall far short of the sort of recklessness which would be required in this country for a successful prosecution for the offence of dangerous driving causing death under s. 53 of the road Traffic Act, 1961, as amended. He refers to the description of the offence in the warrant as being the "misdemeanour of violation of the rules of public road traffic by negligence causing death…" and that there is no such offence under Irish law. He refers to the fact that the respondent has put forward the theory that he sustained a puncture and that this caused his car to hit the children who died, and that there is no evidence adduced by the applicant that such a defence is open to the respondent under Hungarian law as it would be here, and that in the absence of such a possible defence there, the offence could not correspond to the offence of dangerous driving here.

The Court cannot look at the merits of the case which the Hungarian authorities mount against the respondent and decide on that basis whether an identical offence would be committed here as there. Laws differ in nature and degree from state to state. It is not the label attached to a particular offence in the requesting state that the Court must look to, but rather consider what is act of the respondent which has given rise to the foreign offence. The purpose of the requirement that an offence correspond must be to ensure that a person in this country is not sent back to another country to face trial, or sentence on conviction, for something which does not constitute an offence here. One can readily think of extreme examples of offences of activity which would be an offence under the laws of some state whose culture is fundamentally different to the culture and traditions of this country, and it has always been the case under extradition arrangements between states that one country will not be required to extradite a person from that state to face trial in another state for some act which in the requested state is not an offence. That principle is encompassed by the notion of comity between nations and respect for each other's legal systems, culture and social and other traditions.

But in the present case the respondent is alleged to have driven his car at approximately double the permitted speed limit in a built-up area, and that his car veered over to the right, hit the kerb, mounted the pavement, thereby hitting and, very sadly, killing two young children. It is true that his passengers in their police statements have stated that they noticed nothing untoward about his driving on the occasion in question. It is true also that his wife who was in the car with their young son, was eight months pregnant as far as I recall. The respondent says that these facts alone must mean that he would not have been driving dangerously. The evidence of some of the witnesses who were standing on the pavement give facts which if true suggest some lack of care.

Mr O'Connell submits that for the purpose of the Act it does not matter whether the acts alleged against the respondent would result in a successful conviction here for dangerous driving causing death, and that even if they were found to give rise to the lesser charge under section 52 of the Act, namely of careless driving, this would be sufficient to make out the necessary correspondence.

In my view, the Court cannot get into the business of trying to establish an identical offence here based on the facts. There are a variety of road traffic offences which the act alleged against the respondent could give rise to based on the known undisputed facts.

It is not disputed that the respondent was driving far in excess of the permitted speed limit, even if the speed itself was only between 70-80 kph. There was a low speed limit applicable and it was greatly exceeded. There is no doubt that for whatever reason this car veered to the right and mounted the pavement and hit the two children. Mr Murray quite correctly points out that the outcome of the accident should not necessarily determine the question of dangerous or reckless or negligent driving. In other words, it must be the act of driving rather than how serious persons were injured which must be looked at for correspondence, and he submits that driving at 70 kph in what the respondent described as a careful manner given the presence in the car of both his young son and his heavily pregnant wife is not an inherently dangerous act even if it was in contravention of the speed limit, and that there is no evidence of any dangerous driving as such, and which would be sufficient to lay a charge of dangerous driving in this country.

Under s. 53 (1) of the Road Traffic Act, 1961 as amended, it is an offence to drive a vehicle in a manner (including speed) which is dangerous to the public. In this country a person in the position of this respondent might easily be charged with this offence under s.53 and face a penalty based on the fact that driving in question caused death. Section 53 (2) provides for the applicable penalties, including in a case where the dangerous driving causes death, a term of imprisonment. But having been charged with that offence, it is quite possible that the facts as we know them would not amount to dangerous driving under Irish law. However that does not mean that he could not be convicted of any offence. Subsection (4) provides that where a person has been charged with dangerous driving under s. 53(1) he may be found guilty of a lesser offence of careless driving under s. 52. Section 51A, as inserted, also provides for a lesser offence again of driving without reasonable consideration. There is also the summary offence of exceeding the speed limit, which is not excluded from the consideration of correspondence by the definition contained in s. 5 of the Act.

I am satisfied that on the facts alleged, even excluding any which may be in controversy, the acts alleged against the respondent would give rise to a number of possible offences in this country as indicated. This ground must fail accordingly.

Trial in absentia- breach of right to due process
This point is based on the fact that the respondent chose not to attend his trial in the knowledge that his statements ands those of his passengers, all of which formed the basis of his defence to the charge, would be admissible and before the Court, but that as things turned out they were all deemed inadmissible by the Court. That finding of inadmissibility was upheld by the appeal court. He also complains that he was denied any opportunity to have the vehicle examined by his own technical expert for the purpose of the trial, and that it was examined only by the court appointed expert. In both of these ways, the respondent submits that his fundamental rights under Article 38 and 40.3 of the Constitution have been violated as well as his rights under Article 6 of the European Convention on Human Rights and Fundamental Freedoms. These breaches, it is submitted, are compounded by the refusal by the Hungarian authorities to undertake to offer the respondent a re-trial if he is surrendered to Hungary on this application. The affidavit of Dr Neméth – Bokor already referred to has explained how it is against Hungarian law to undertake to offer a new trial to the respondent.

It has been stated on many occasions by now that the arrangements for surrender on foot of a European arrest warrant as provided for in the Framework Decision is based on a high level of confidence and mutual respect for the laws and procedures in the member states who have been designated for the purposes of the Act. Hungary has been so designated by the Minister for Foreign Affairs as already referred to. Each member state will inevitably have its own rules and law in relation to the admissibility of evidence. The respondent was legally represented at all stages of the prosecution process, including the trial and the appeal. He was at all times made aware of the date of his trial, and could have chosen to be present had he so wished.

No doubt that lawyer made arguments to the Court as to why the statements of the respondent and his witnesses should be admitted. This Court must respect the decision of the Hungarian Court to refuse to admit the statements. The comity of courts requires this. It is not for this Court to consider whether in this country the same would have occurred. Hungary is a country whose legal system must be assumed to surpass a certain minimum standard of fairness, in view of its membership of the European Union, and its designation by the Minister for Foreign Affairs following accession in May 2004. There are many ways in which criminal matters are dealt with in other member states which differ fundamentally from procedures and laws in this State. One obvious example is the right in all cases on indictment here to trial by jury. Jury trials occur in some other member states, but the composition of the jury would not accord with that here. That is not to say that a person who is tried and convicted under such a system has been convicted in breach of his or her fundamental rights. The conviction of the respondent, albeit in absentia, comes with an assurance of quality to be implied by the participation by Hungary in the Framework Decision following that country's accession to the European Union. There is no basis for a finding in the respondent's favour under this heading of objection.

Delay
This ground was not pursued. In any event I could find no basis for the contention that the respondent's surrender would be prohibited on account of delay since the date of the offence on April 2000.

Pre-accession offence and conviction
This objection arises because of the undisputable fact that the offence occurred some four years prior to the accession of Hungary to the European Union, and that prior to that there were no extradition arrangements in place between Hungary and this State. It is submitted that while it is clear that the Act applies to offences which were committed prior to the accession of the requesting state to the European Union, this case is different since not only was the offence committed prior to such accession, but the respondent was tried and convicted prior to that accession and the designation of Hungary by the Minister for Foreign Affairs in May 2004. Emphasis is placed on the fact that prior to that date there was no extradition treaty in place between Ireland and Hungary. It is submitted that in such circumstances the mutual trust and confidence which exists between Member States was absent at the time of trial and conviction and that in such circumstances the trial process must not be presumed to be fair in all respects, and complaint is again made about the nature of the trial in absentia which occurred.

This is certainly a very interesting question, and if it arose for discussion in any other forum than a court dealing with an application under s. 16 for surrender, it would undoubtedly generate considerable academic and interesting debate. But this Court's power comes from the Act and the Framework Decision. Section 4 of the Act is very clear as to its application to offences, whether they are committed before or after the commencement of the Act. This is not in conflict with anything in the Framework Decision. Certain countries (France, Italy and Austria) made certain specific statements regarding the date of offences which would be dealt with under the new arrangements, but Ireland did not. There is no legal basis for this Court to disapply the Framework Decision from the offence in this case even though the offence and the trial and conviction all pre-date the designation of Hungary by the Minister for Foreign Affairs. This ground must also fail.

Unconstitutional infringement of personal rights or Unconstitutional retrospection
This issue was raised on the basis that the Court would decide the previous ground as it has done. It is submitted that if the Act applies to pre-accession cases then this constitutes a breach of such a respondent's right to personal liberty and to a trial in due course of law. I prefer not to deal with these submissions in the detail with which they were argued. It may occur again in another

case where its relevance may be greater. I say that because there is nothing shown to this Court by evidence that the trial to which the respondent was subjected and at which he was fully represented was anything but fair, even if the law as to admissibility of the statements referred to may appear idiosyncratic. The Court has seen the translation of the decisions of the Court of First Instance and the Appeal Court and there is nothing which leaps from the page as constituting any fundamental breach.

Proportionality:
In making the submission that the amendments to the 2003 Act which were made by the Criminal Justice (Terrorist Offences) Acct 2005 are such as to breach the principle of proportionality in as much as they are said to go beyond what was necessary to achieve the objective desired of the Framework Decision, Mr Murray accepts that there is already a judgment of this Court in *Minister for Justice, Equality and Law Reform v. Stapleton*, unreported, High Court, 21st February 2006 which rejected such a proposition, and that in accordance with the principles in *Irish Trust Bank Ltd v. Central Bank of Ireland* [1976-77] I.L.R.M. 50, that decision is likely to be followed, at least until the determination of the appeal against it. He however wishes to reserve the respondent's position in relation to it, if necessary, and makes the argument on that basis. There is no need to deal with the issue further in this Court.