

THE HIGH COURT

Record Number: 2006 No. 113 Ext.

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
ATTILA HOGYI

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 24th day of November 2006

1. The Hungarian authorities seek the surrender of the respondent pursuant to a European arrest warrant issued on the 19th May 2006. This warrant was endorsed here for execution on the 7th September 2006, and the respondent was duly arrested on foot of same on the 11th September 2006, and on the 12th September 2006 he was brought before the High Court as required by s. 13 of the European Arrest Warrant Act, 2003 as amended. He was remanded from time to time in order to await the hearing of this application under s. 16 of the Act.

2. No issue arises in relation to the manner of his arrest, and the formalities thereafter such as the issue of a caution and explanation of rights. Neither is there any issue raised as to identification.

3. The offences for which the respondent's surrender is sought are described in the warrant as "62 counts of the delict of infringing copyright", "24 counts of the delict of infringing rights related to copyright", and finally one count of "the felony of drug abuse".

4. A brief recitation of the acts said to give rise to the copyright offences is set forth in the warrant as follows:

"An investigation with number (criminal case) 15010-597/2005 is being conducted by the Criminal Department of the Police Department of Nyiregyháza against HOGYI Attila because, in the course of a house search which was undertaken on the 24th June 2004 at his apartment, situated at..... Computer programmes (software) and films which had been illegally copied were found on his personal computer and on CD and DVD discs which were seized from him. These had been illegally copied (reproduced) by HOGYI Attila, in breach of the provisions of Section 16(1) and (4) of Act LXXVI of 1999 (the Copyright Act).

By the illegal copying (reproduction of the software and films found on the seized data carriers, HOGYI Attila caused pecuniary injury to the following injured parties....."

5. The names of some eighty six entities are set forth who are said to have suffered loss.

6. There is also a brief narrative of facts said to give rise to the drug charge, but it is unnecessary to set that out in detail since the issue arising for consideration is related to the correspondence of the copyright offences with any offence in this jurisdiction. The drug charge is one of the offences which has been marked on the warrant as being one of the offences set forth in Article 2.2 of the Framework Decision and in respect of which double criminality does not have to be verified.

7. The warrant sets out the legal definition of the copyright offences under Hungarian law. Section 329/A(1) of the Criminal Code provides:

"A person who infringes a right of the author of a literary, scientific or artistic creation, a right of a performing artist attached to his performance, a right of a producer of a sound recording attached to his sound recording, a right of a radio or television organisation attached to its programme, or a right of the maker of motion picture or database attached to such work, for the purpose of financial gain or advantage and/or thereby causing financial injury, is guilty of a misdemeanour punishable by imprisonment for up to two years, community service work, or a fine." (my emphasis)

8. Remy Farrell BL for the applicant submits that the corresponding offence in this jurisdiction to that shown above can be found in s. 140(1) of the Copyright and Related Rights Act, 2000 which provides:

"140.—(1) *A person who, without the consent of the copyright owner –*

(a) makes for sale, rental or loan

(b) ...

(c) ...

(d) in the course of a business, trade or profession, has in his or her possession, custody or control, or makes available to the public, or

(e) otherwise than in the course of a business, trade or profession, makes available to the public to such an extent as to prejudice the interests of the owner of the copyright, a copy of a work which is, and which he or she knows or has reason to believe is an infringing copy of the work, shall be guilty of an offence."

9. Mr Farrell submits that even though the facts in the warrant do not allege that the respondent was engaged in "sale, rental or loan" or that he was engaged in a business for profit related to such sale, rental or loan, or otherwise than in the course of business to such an extent as to prejudice the interests of the owner of the copyright, this Court should be satisfied as to correspondence by reason of the scale or volume of the material found in the respondent's apartment, since an inference can be drawn that such a volume of material illegally copied could not be regarded as being just for his own private use, and that it must mean that he was engaged in the business of sale, rental or loan of some kind. In effect, he urges for a presumption that the respondent was engaged for profit in making for sale, rental or loan the material in question.

10. On the other hand, Patrick McCarthy SC for the respondent submits the contrary. He submits that under the 2003 Act the method of determining whether correspondence is made out in respect of an offence is clear, and that the exercise which the Court must engage upon is to look at the facts as alleged in the warrant to have been done by the respondent, and then to inquire whether if

the same acts were done here, they would give rise to an offence under Irish law. In his submission, the warrant states simply that the respondent was found to have in his possession a large number of CDs, DVDs, as well as some being stored on his personal computer, and that there is no allegation or narrative of facts which say that he was engaged in business of any kind in relation to the material. He suggests that financial gain cannot arise from the mere possession of the material, and that there is no suggestion, much less an allegation that material was found in the apartment or elsewhere showing that the respondent was engaged in any kind of business or selling, renting or loan for gain. He submits that this Court cannot simply make an inference from the volume of material found. He makes the point also that the Court is engaged upon the interpretation of a penal statute and as such, a strict interpretation must be adopted. This must be correct.

11. I am not satisfied that correspondence is made out by reference to the offence set forth in s. 140 above. There is nothing in the recitation of the acts alleged in the warrant which relate to his engagement in this activity for financial gain. It cannot not be presumed here, simply from the volume of material found, that he was so engaged for profit. I notice that s. 139 of the 2000 Act there is an entire section setting forth various presumptions, yet there is no presumption set forth in relation to a presumption of making for sale etc. by reference to quantity of material found.

12. This is to be contrasted to, for example, the presumption in a drugs context, to the presumption contained in section 15A of the Misuse of Drugs Act, 1977, as inserted by s. 4 of the Criminal Justice Act, 1999. That section provides that where the Court is satisfied having regard to the quantity of the controlled drug which the person possessed that it is reasonable to assume that it was not intended for his immediate personal use, the person shall be presumed, until the contrary is proved, to be in possession for the purpose of sale or supply. No equivalent or similar presumption is contained in the Act under consideration in this case.

13. Section 5 of the 2003 Act provides that an offences corresponds "*where the act or omission that constitutes the offence so specified would, if committed in the State..... constitute an offence under the law of the State.*"

14. The act constituting the offence as appearing in the present warrant is simply that a large quantity of material illegally copied was found in the respondent's apartment and on his personal computer. While it is stated also that as a result he caused financial injury to the listed commercial entities, that is not the same as stating that he was engaged in a business or that he made illegal copies for sale, rental or loan. In my view there is insufficient factual material alleged in the warrant to go further than to say that he had possession of illegally copied material. No presumption can be imported to the facts set forth in the warrant.

15. I am satisfied that the European arrest warrant was duly indorsed by the High Court prior to execution, and that the person before the Court is the person in respect of whom that warrant has been issued. This is not a case in which any undertaking is required under s. 45 of the Act, and I am satisfied that his surrender is not required to be refused under any of sections 21A, 22, 23 or 24 of the Act, and also that his surrender is not prohibited by Part 3 of the Act or the Framework Decision. I am satisfied that by virtue of the drug offence being designated as one of the Article 2.2 of the Framework Decision, that double criminality need not be verified, and that accordingly the Court must order the respondent's surrender so that he can be prosecuted for that offence in respect of which the minimum gravity requirement is made out.

16. Subject to hearing the parties on the question of specialty, given the refusal of surrender in respect of the copyright offences, I will make the order sought under section 16(1) of the Act.