Neutral Citation [2015] IEHC 459

THE HIGH COURT

[2014 No. 78 EXT]

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

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

D.S.

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered the 9th day of June 2015

1. The surrender of the respondent is sought pursuant to a European Arrest Warrant ("EAW") issued by the County Court in Osijek, Republic of Croatia and dated the 11th April, 2014. The respondent is sought for prosecution for an alleged war crime of torturing and treating prisoners of war inhumanely in November 1991 during the conflict that occurred in the course of the break-up of the Socialist Federal Republic of Yugoslavia. Two central issues arise in this case, the first concerns Section 44 of the European Arrest Warrant Act, 2003 as amended ("the Act of 2003") and the second is whether the respondent's rights under Article 8 of the European Convention on Human Rights ("ECHR") to respect for his family life and private life would be violated by his surrender to Croatia. A further issue regarding fair trial rights was raised by the respondent. The final point raised was that it was patent from the EAW that his surrender was sought for the purpose of prosecution in respect of alleged offences that are contrary to statutory provisions post-dating the offence.

2. The EAW was received in this jurisdiction on the 25th April, 2014 and endorsed for execution on the 6th May, 2014. On the 3rd June, 2014, the respondent was arrested on foot of the EAW. He was subsequently granted bail and thereafter was remanded from time to time and the matter came on for hearing before me on the 25th March, 2015 and with continued hearing on the 27th April, 2015.

The background to the EAW

3. The respondent is sought for prosecution for the single offence of a war crime alleged to have been committed on the 19th November, 1991. The EAW is grounded upon an arrest warrant or judicial decision having the same effect issued in the Republic of Croatia, namely a ruling ordering detention issued on the 18th June, 2010, by the County Court in Vukovar. The respondent is sought for an offence "pursuant to Art. 122 of the Basic Criminal Code of the Republic of Croatia – 20 (twenty) years (Official Gazette Nr. 53/91, 32/92, 31/93 – consolidated version, 35/93 – correction, 108/95, 16/96, 128/96)" as set out in section (c) of the EAW. That offence is known in Croatian law as a war crime against prisoners of war.

4. Section (e) of the warrant describes the circumstances of the alleged offence as follows: *"In the Republic of Serbia, in the area of the hemp – spinning mill (Kudeljara) and the so called "Cestarska kuæa" in the vicinity of the Erdut-Bogojevo bridge in the evening of the 19th November 1991, after the members of the Yugoslav National Army, territorial defence and joined paramilitary forces had taken captive several hundreds of Croatian defenders in the area of the facilities of "Borovo-commerce" in Vukovar and organised their transport to the camps in the area of the Republic of Serbia, when one of the buses pulled over he took as a member of the reserve unit of the military police of the Yugoslav National Army, dressed in the military uniform with a white belt, together with several unidentified members of the same unit all captive persons from the bus where contrary to the provisions of Art. 3 section 1 and Art. 13 and Art. 14 of the Geneva Convention relative to the Treatment of Prisoners of War of 12th August 1949 they tortured them mentally and physically, threatened to shoot them or cut their throats, tied their hands on their backs by wire and rope, beating them with feet, hands, rifle butts, batons and laths on all parts of their bodies, fastened the so called "fixations" on the wounded body parts of the captives and then threw them randomly one over the other into the ditch, whereafter they returned them into the bus and forced some of them to clean the pools of blood on the road, whereby while taking them out of the bus he personally hit Vlado Kovaèiæ severely on his temples so that he fell through the bus door, he continued to hit him with his feet and stamping on all his body parts, tore the upper part of his clothing and threw him on the floor pointing the cutting edge of his bayonet against his chest saying "you have slit my father and my mother, now you shall see how we the Chetniks cut throats", and he was beating the neighbour Vinko Miljko with his hands and feet while wearing military boots, broke his ribs and as a consequence of which Miljko fainted."*

5. Further information was sought by the Central Authority as to the location of the places referred to at the time of the offence and at the present time. In particular, the question was asked whether Vukovar and Kudeljara were both part of Yugoslavia on the date the alleged offence was committed. The reply was as follows: "at the time when the referred offence was committed Vukovar was and had also been before 1991 within the territory of the Republic of Croatia; the Republic of Croatia was one of the federal republics within the former Yugoslavia until its break-up whereas the place called Kudeljara was and has remained within the territory of the Republic of Serbia, which was also one of the federal republics of former Yugoslavia until its break-up." The reply went on to confirm that Vukovar is today a part of the Republic of Croatia and that Kudeljara is today a part of the Republic of Serbia. The reply also confirmed that at the time of the commission of the offence, the Croatian defenders were prisoners of war in terms of the Geneva Convention Relative to the Treatment of Prisoners of War of the 12th August, 1949.

A Member State that has given effect to the Framework Decision

6. The surrender provisions of the Act of 2003 apply to those Member States of the European Union that the Minister for Foreign Affairs has designated as having, under their national law, given effect to the Framework Decision of the 13th June, 2002 on the European arrest warrant and the surrender procedures between Member States ("the Framework Decision"). By the European Arrest Warrant Act 2003 (Designated Member States) Order 2014 (S.I. 84 of 2014) the Minister for Foreign Affairs has designated the Republic of Croatia as a Member State for the purposes of the Act of 2003.

Section 16(1) of the Act of 2003

7. Under the provisions of s. 16(1) of the Act of 2003 as amended, the High Court, may make an order directing that the person be surrendered to the issuing state provided that:

a) the High Court is satisfied that the person before it is the person in respect of whom the EAW was issued,

b) the EAW, or a true copy thereof, has been endorsed in accordance with s. 13 for execution,

c) the EAW states, where appropriate, the matters required by s. 45,

d) The High Court is not required, under sections 21A, 22, 23 or 24 of the Act of 2003 as amended to refuse surrender,

e) The surrender is not prohibited by Part 3 of the Act of 2003.

Identity
8. I am satisfied having read the EAW, taking into account the affidavit of Sean Fallon and bearing in mind the affidavit of the respondent, that the respondent D.S. who appears before me is the person in respect of whom the EAW has issued.

Endorsement
9. I am satisfied, having examined the EAW, that the EAW has been endorsed for execution in accordance with s. 13 of the Act of 2003.

Section 45
10. As a warrant for prosecution of an alleged offence, this is not a matter to which the provisions of s. 45 apply.

Sections 21A, 22, 23 and 24
11. I am quite satisfied having read the warrant, the additional information and all other documentation placed before me, that surrender is not prohibited by any of the above sections of the Act of 2003.

Part 3 of the Act of 2003
12. Part 3 of the Act comprises sections 37 to 46 inclusive. The respondent only raised issues under s. 37, s. 38 and s. 44 in his points of objection. In carrying out the role of this Court as executing judicial authority to ensure that the requirements of the Act of 2003 are fulfilled, I have scrutinised the EAW, additional information, points of objection and verifying affidavits and exhibits. Subject to further consideration of sections 37, 38 and 44, I am quite satisfied on the basis of such scrutiny that I am not required to refuse the surrender of the respondent under any other section contained in Part 3 of the said Act.

Section 38 of the Act of 2003
13. In the EAW, under the section "(e) Offences," the issuing judicial authority has ticked the box marked 'crimes within the jurisdiction of the International Criminal Court' indicating that this is an offence punishable in the issuing Member State by a custodial sentence or detention order of at least three years as defined by its laws. The ticking of the box in these circumstances is usually an indication that the issuing Member State is relying on the provisions of para. 2 Article 2 of the Framework Decision and therefore it is unnecessary for double criminality or correspondence of offence to be established in the executing Member State.

14. It is submitted by the applicant, following a point of objection by the respondent, that the ticking of the box is a manifest error. The International Criminal Court has jurisdiction only with respect to crimes committed after the entry into force of the statute (the 11th April, 2002) or, in relation to a state becoming a party after the entry into force of the statute, in respect of crimes committed after the entry into force of that statute for that state. The Republic of Croatia had signed and ratified the Treaty prior to the entry into force of the statute, as indeed had the Republic of Serbia. Therefore, the International Criminal Court does not have jurisdiction in relation to the offence alleged in the EAW, being an offence allegedly committed prior to the 11th April 2002.

15. There is clearly a manifest error by the Croatian issuing judicial authority in ticking the box under the para. 2 Article 2 list. In the above circumstances, it is clear that the provisions of s. 38(1)(b) do not apply. However, this court is not prohibited from considering whether the offence outlined in the warrant corresponds with an offence in this jurisdiction as set out in section 38 (1)(a). I am quite satisfied that in line with the decision in *Minister for Justice and Equality v. Ciupe,* unreported High Court 13th of September 2013 (per Edwards J.), I am entitled to consider the issue of correspondence with an offence in this jurisdiction. Prior to so considering correspondence, I will address the issue of s. 44 of the Act of 2003.

Section 44

Extraterritoriality
16. It is usual to deal with correspondence, where required, at an early stage when considering whether the requirements under s. 16 of the Act of 2003 for surrender have been satisfied. In this case, for reasons that will become obvious, it is more appropriate to deal with the issue of extraterritoriality first. If the respondent is correct in his submission that this surrender is prohibited by the provisions of s. 44 of the Act of 2003, then the issue of correspondence will no longer be of relevance. Similarly, if the applicant can satisfy the court that s. 44 does not prohibit surrender, correspondence will also have been established.

17. Section 44 of the Act of 2003 as amended provides as follows:

> "A person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State."

18. In his written and oral submissions, the respondent made observations about what was termed the curious fact that the EAW does not make clear whether surrender is being sought for an extraterritorial offence. The respondent said that while it may appear by implication from the EAW and other extrinsic evidence that the alleged offence occurred outside of the territory of the issuing state, there had been a failure to state this explicitly. The applicant on the other hand submitted this was an offence which occurred outside the territory of the issuing state and that the question of extraterritoriality arises.

19. Another argument raised with greater force on behalf of the respondent is that this is a request for surrender for an offence that is alleged to have been committed at a time when the issuing state simply did not exist. It was submitted that this had implications for the application of section 44.

20. Counsel for the respondent submitted, in reliance upon an article by Roland Rich entitled *'Symposium: Recent Developments in the Practice of State Recognition - Recognition of States: The Collapse of Yugoslavia and the Soviet Union'* that the Republic of Croatia

did not become a recognised state until some time in 1992. Therefore, he submitted, in November of 1991 the Republic of Croatia was not a state.

21. It is important to consider the offence which is alleged to have been committed. The text of the offence refers to Article 3 s.1 and Article 13 and Article 14 of the Geneva Convention Relative to the Treatment of Prisoners of War of the 12th August, 1949. Article 3 refers to "the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties". Counsel for the respondent submitted that this was a factual circumstance and not a mere juristic qualification. It is abundantly clear from documentation that has been produced to me that the Socialist Federal Republic of Yugoslavia was a party to the Geneva Convention relative to the Treatment of Prisoners of War and was also a party to the Protocol additional to the Geneva Conventions which was adopted at Geneva in June of 1977.

22. The reference to Article 3 of the said Convention appears to me to be recognition by Croatia that there was no international conflict in being at the time of the alleged offences. Instead, this was an armed conflict within the meaning of Article 3 of the Geneva Conventions. Furthermore, in my view, the reply by the Croatian judicial authority regarding the location of Vukovar and Kudeljara is to be understood as an acceptance that at the time of the alleged offence, the country of the Socialist Federal Republic of Yugoslavia was in the process of breaking up. The locations were part of the Republic of Croatia and the Republic of Serbia respectively, in the context of those Republics being federal republics within the former Socialist Federal Republic of Yugoslavia. That is, therefore, an acceptance that the Republic of Croatia had not formally been established as a state. In all the circumstances set out in the EAW and on the basis of the information presented to the court, I am satisfied that the Republic of Croatia was not a state at the time of the alleged offence.

23. The more important issue is whether this has any bearing upon the true interpretation and application of section 44. The argument of counsel for the respondent was that "it is entirely meaningless to even attempt to consider the issue of extraterritoriality in relation to a state that was not in existence at the time." In other words, counsel questioned if the exercise mandated by s. 44 can be carried out. He referred in this regard to the high level of abstraction in terms of the reversal of facts that must take place when considering the issue of territoriality (as per O'Donnell J. in *Minister for Justice and Equality v. Bailey* [2012] 4 I.R. 1).

24. Counsel for the respondent also referred to the grammatical tense used in s. 44 highlighting the use of the past tense, *e.g.* "was committed" or "alleged to have been committed" and the present tense of the words "does not". This use of the past tense also arises in the Framework Decision. The offence must have been committed in the past and in the place in the past. Therefore, the state must have existed in the past.

25. In addition, counsel pointed to s. 5 of the Act of 2003 which provides that correspondence is to be considered from the perspective of whether or not a corresponding offence exists on the ***date of issue*** of the EAW. He said that no such provision is made in respect of the date to which regard must be had for the purpose of establishing whether this State also exercises extraterritorial jurisdiction. He refers to the authority *Minister for Justice, Equality and Law Reform v. Aamand* [2006] IEHC 382. In *Aamand*, extraterritorial jurisdiction could not be established in this jurisdiction as of the date of the alleged offence but, on a date after the EAW in that case was issued, extraterritorial jurisdiction became exercisable by Ireland over the type of offence at issue in that case. He said that *Aamand* was wrongly decided and the matter had never been considered by any appellate court. In relation to *Aamand*, counsel simply suggested that there was no reason to follow it. He said that there was no basis for the finding in *Aamand*.

26. In reply, counsel for the applicant referred to the claim by the respondent that it is meaningless to rely upon section 44. Counsel submitted that while the applicant in fact submits that this is an extraterritorial offence, it is still a matter for the respondent to show that he can rely upon s. 44 to establish that his surrender is barred. Counsel submitted that if the respondent cannot bring his situation within the terms of s. 44, then his surrender cannot be barred under that section. If the respondent insists that an attempt to seek to invoke s. 44 is rendered meaningless on the facts that actually apply, then there is simply no bar to surrender.

27. Counsel orally submitted that there is undoubtedly an argument to be made that giving Article 4 (7) (b) of the Framework Decision a purposive interpretation means that neither it nor s. 44 apply. His submission was that the said Article was simply meant to deal with a conventional situation in which one Member State wants to prosecute for an act carried out in another Member State.

28. The case on behalf of the applicant did not rest on the basis that the court did not have to consider s. 44, however. The applicant accepted that it was not meaningless to consider s. 44 in the circumstances as set out in the EAW. Counsel submitted that "place" is an ordinary word and thus has an ordinary meaning. Counsel suggested that the respondent was seeking to give "place" a meaning of "place within a territorial jurisdiction", and he said there was no basis to read that into it. He submitted that "place" simply meant a point on a map.

29. Counsel for the applicant suggested reciprocity is easily established here. It is simply whether the offence was committed outside the issuing State. If that is the answer, then that is sufficient. This was because Ireland exercises similar extraterritorial jurisdiction now and at the time of the alleged offence.

30. Counsel for the applicant pointed to s. 3 of the Geneva Conventions Act, 1962 ("the Act of 1962") as granting extraterritorial jurisdiction to this State. Section 3 (1) of the Act of 1962 as originally enacted (save for an amendment to penalty by s. 10 of the Criminal Justice Act, 1964) stated as follows:

> "Any person, whatever his nationality, who, whether in or outside the State, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the Scheduled Conventions as is referred to in the following Articles respectively of those Conventions, that is to say
>
> (a)…
>
> (b)…
>
> (c) Article 130 of the Convention set out in the Third Schedule to this Act; or
>
> (d)…
>
> shall be guilty of an offence and on conviction on indictment thereof:
>
> (i) In the case of such a grave breach as aforesaid involving the wilful killing of a person protected by the Convention in question, shall be sentenced to penal servitude for life of any less term;

(ii) in the case of any other such grave breach as is aforesaid, shall be liable to penal servitude for fourteen years or any less term of imprisonment for a term not exceeding two years."

31. Article 130 of the Geneva Convention provides as follows:

> "grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention."

32. Section 3 of the Act of 1962 was substituted by s. 3 of the Geneva Conventions (Amendment) Act, 1998 and subsequently amended by s. 66 of (and Schedule 3 to) the International Criminal Court Act, 2006. It now provides:

> "(1) Any person, whatever his nationality, who, whether in or outside the State, commits or aids, abets or procures the commission by any other person of a grave breach of any of the Scheduled Conventions…shall be guilty of an offence and on conviction.
>
> (a) shall be sentenced to imprisonment for life –
>
> (i) if the offence involves murder or, in the case of an offence committed outside the State, the killing of a person in such circumstances as would constitute murder if the offence were committed within the State or
>
> (ii) If a term of life imprisonment would be justified by the extreme gravity of the offence and the individual circumstances of the convicted person,
>
> Or,
>
> In any other case, shall be sentenced to [a maximum of 30 years]."

33. The applicant in written submissions said that the reverse hypothesis test as propounded in Bailey essentially requires the court to consider, if Ireland was in the position that Croatia is in, whether Ireland would be entitled to assert extraterritorial jurisdiction in relation to the acts underlying the offence, *i.e.* could Ireland assert extraterritorial jurisdiction in respect of acts which are alleged to have been committed outside Croatia and, specifically committed in a location that was in the former Socialist Federal Republic of Yugoslavia at the time of the offence and which is now a location in the Republic of Serbia. This is, perhaps, not the most clear expression of reciprocity – the reference should be to Ireland asserting jurisdiction over the act alleged committed outside of ***Ireland***.

34. Counsel submitted that, literally speaking, the act was committed in a place other than the issuing State. In this case, applying the reverse hypothesis test, the alleged act would constitute an offence under the law of this State because s. 3 of the Act of 1962, under both versions set out above, provides extraterritorial jurisdiction.

35. Counsel submitted that in so far as anything turns on the decision in *Aamand*, it should be followed.

36. Counsel for the respondent did not reply to the above submissions on behalf of the applicant.

The Court's analysis

37. The Supreme Court in *Minister for Justice, Equality and Law Reform v. Bailey* held that s. 44 was clear in that it required surrender to be refused if two conditions were met. The first is that the offences were committed or alleged to have been committed in a place other than the issuing state. The second condition is that the act of which the offence consisted does not constitute an offence in Ireland by virtue of having been committed in a place other than Ireland.

38. It was determined by the Supreme Court that the principle of reciprocity underlined the extradition of suspects accused of committing extraterritorial offences. As per Fennelly J. at p. 110: *"…where a state exercises the option, surrender will be prohibited where the executing state does not exercise extraterritorial jurisdiction in respect of offences of the type specified in the warrant in the same circumstances."* Denham C.J. at p. 18 held that: *"[t]he reciprocity that is required in construing s.44 is a factual reciprocity concerning the circumstances of the offences. Offences that take place outside of the territory of a state require specification of the circumstance when that state will exercise jurisdiction. The reciprocity in this case requires Ireland to examine its law as if the circumstances of the offence were reversed."*

39. Edwards J. in *Minister for Justice and Equality v. T.E. (No. 2)* [2014] IEHC 51 applied the *Bailey* principles to the case before him. He said at para. 13: *"[t]here are two conditions that the respondent must satisfy if she is to successfully invoke s.44"* and he went on to identify the two conditions set out above.

40. Section 44 is contained in Part 3 of the Act of 2003. Section 16 provides that the High Court may make an Order for surrender provided that, *inter alia*, "the surrender of the person is not prohibited by Part 3 (including the recitals thereto)." It is generally accepted that extradition proceedings are neither criminal nor civil. They are, in the words of Murray C.J. *in Attorney General v. Parke* [2004] IESC 100, *sui generis*. The task of the court has been described as "an inherently inquisitorial function." In *Minister for Justice and Equality v. Palonka* [2015] IECA 69, the Court of Appeal gave further direction as to the nature of the inquiry that the court must carry out. Peart J. stated at para. 33:

> *"The executing judicial authority must be satisfied that the requirements of the Act are fulfilled by the warrant which has been forwarded by the issuing judicial authority, and it does this independently of the parties to the application, albeit with the assistance of submissions made by one or both parties. In such circumstances, it is hard to see how the onus can be placed upon a respondent to raise a matter in relation to non-compliance with the requirements of the Act before the Court would be obliged to consider for itself whether the requirements of the Act have been met."*

41. It is in that context that the statement of Edwards J. in *T.E. (No 2)* that the onus rests on the respondent must be viewed. An issue regarding a particular prohibition on surrender may not be raised by a respondent. However, in circumstances where the warrant itself sets out the legal or factual situation which demonstrates that surrender is prohibited, the court, without the necessity for any

input from a respondent, is bound to refuse to surrender the respondent. An example of when the latter situation may arise is in the case of the issue of correspondence. If correspondence is required and the facts of the offence as set out on the warrant do not correspond to an offence in this jurisdiction, the court, subject to the exercise of any further relevant enquiry under s. 20 (1) of the Act of 2003 that may be made, is bound to refuse surrender. Indeed, this applies to a situation where a person is consenting to his or her surrender under s. 15 of the Act of 2003. Even in those circumstances, the court is bound to enquire into whether s. 38 prohibits surrender on the basis of lack of correspondence. Indeed, this Court has on occasion refused surrender for a particular offence even where a respondent has consented to surrender.

Is it meaningless to consider extraterritoriality in the circumstances of this case?
42. The respondent made the case that it is entirely meaningless to consider the issue of extraterritoriality in relation to a state that was not in existence at the time. It is important to note that no claim was made that there cannot be a criminal offence because the country did not exist at the time. Such a proposition was expressly disavowed by the respondent.

43. It is difficult to understand how it benefits the respondent to say in these circumstances it is meaningless to consider extraterritoriality. If it is entirely meaningless to consider the issue of extraterritoriality in such circumstances, then it would seem that the question of whether the surrender is prohibited by s. 44 does not arise. It is an optional bar to surrender which Ireland has incorporated into our national law by section 44. It is only if the court is satisfied that the conditions of the section are met that surrender will be prohibited. It is not for the respondent to say that because he cannot engage with the section in the particular circumstances of the case, that his surrender must be prohibited. Therefore, if the respondent is correct in his argument that extraterritoriality cannot even be considered where a state did not exist at the time of the offence, then I am of the view that s. 44 does not avail him in preventing his surrender. However, I am of the view that it is necessary for the Court to carry out its own enquiry arising from the facts that have been set out in the warrant to see if the provisions of s. 44 are applicable.

Is section 44 capable of being addressed?
44. In his written submissions, the respondent went so far as to say that the proceedings are incapable of determination resulting in surrender until the issuing state addresses the issue of extraterritoriality. Counsel for the respondent submitted that it was incumbent on an issuing state to indicate in clear terms the territorial claim to jurisdiction. It was submitted that extraterritoriality is one of the most significant and prevalent bars to surrender under the Framework Decision. This latter submission is difficult to understand as it is an optional bar to surrender and not a mandatory one. Furthermore, as is clear from the discussion concerning the travaux preparatoire of the Framework Decision, only a limited number of Member States had a concern with this issue.

45. In my view, the information that must be provided in the warrant is that which must be set out in section "(e) Offences" under the further sub-heading "[d]escription of the circumstances in which the offence(s) was (were) committed, including the time, place and degree of participation in the offence(s) by the requested person." When the EAW is filled out, the circumstances of the commission of the alleged offence will usually give the information necessary to show whether extraterritorial jurisdiction is being claimed. It is noted that within the form for the EAW as set out in the annex to the Framework Decision, under the heading "(f) other circumstances relevant to the case (optional information)", there is a further reference to "NB: This could cover remarks on extraterritoriality….". In the present EAW, this is not filled in. However, in this case the remarks on the circumstances of the offence made clear that this was an offence allegedly committed in the Republic of Serbia. Further information clarified the position to the effect that the location of the alleged offence was in the Republic of Serbia as a former federal republic with the former Socialist Federal Republic of Yugoslavia and that such place is now located within the border of the Republic of Serbia.

46. The circumstances in which that jurisdiction is being exercised by Croatia has been set out clearly – it is a prosecution for an alleged war crime committed outside the present day borders of Croatia in circumstances where the alleged perpetrator was a citizen of Croatia who took "Croatian defenders" from within present day Croatia to a place outside the present borders of Croatia. I believe that is sufficient information for this Court to be in a position to see the circumstances in which Croatia is exercising its jurisdiction over this alleged offence.

47. Moreover, in my view it is not necessary for the EAW to set out the legal basis (as distinct from the factual circumstances) of the exercise of extraterritorial jurisdiction by the issuing Member State. It is sufficient for the EAW to set out the circumstances of the alleged offence so that the High Court as executing judicial authority can examine whether Ireland "exercises extraterritorial jurisdiction in respect of offences of the type specified in the warrant in the same circumstances."

48. Indeed, if the EAW did not reveal the location of the offence, either expressly or by implication, and there was a real concern about whether extraterritorial jurisdiction was being exercised, this is a matter that may require clarification. Where the EAW sets out the circumstances of the offence, which clearly indicate that extraterritorial jurisdiction is being exercised, there will be no problem in establishing if Irish law provides for extraterritorial jurisdiction in those circumstances.

49. Finally, there is an air of unreality about the respondent's submission. In this case, it is particularly noteworthy that he has not attempted to put forward a suggestion that there may be a particular legal bar to Ireland claiming extraterritorial jurisdiction over an alleged war crime contrary to the Geneva Conventions Act, 1962 that could have any relevance to this case. In *Bailey*, Fennelly J. observed that the question "*does Ireland prosecute for murder committed outside its territory?*" was not susceptible to a yes or no answer. However, no such question arises regarding a prosecution under s. 3 of the Act of 1962. Any person, regardless of nationality, who commits a grave breach of the Geneva Conventions whether in or outside of this State can be prosecuted in this State. That is the widest possible claim of extraterritorial jurisdiction. The EAW sets out the circumstances in which this offence has allegedly been committed. It is a matter of assessing whether those circumstances amount to a claim of extraterritorial jurisdiction and whether in those circumstances as set out Ireland also claims extraterritorial jurisdiction.

The first condition
50. If surrender is to be prohibited under s. 44, the first condition is that the offence is alleged to have been committed in a place other than the issuing state. It is a matter for this Court as the executing judicial authority to consider whether the first condition is established. In accordance with well-established jurisprudence, I do so on the basis of the information contained in the EAW and additional information when considered as a whole.

51. The respondent has claimed that the reference to the past tense as in the use of "committed" or "alleged to have been committed" is indicative of the requirement for the state to have been in existence at the time of the (alleged) offence as otherwise the exercise mandated by s. 44 is meaningless. In my view, the reference to the past tense in both s. 44 and the Framework Decision, is not related to the issue of the state's existence. The use of the past tense merely recognises that by the time the question of extradition is to be considered, the offence will necessarily have either been committed or alleged to have been committed.

52. In *Bailey*, the Supreme Court held that s. 44 requires to be read in so far as possible so as to provide a conforming interpretation, not just with the objectives of the Framework Decision but also with the specific provision thereof, namely Article 4 (7) (b). The use of the word "territory" in Article 4 (7) (b) suggests that the word "place" should be read as meaning "territory". Although counsel for the applicant urged on the Court a different meaning of "place", I do not consider this makes any real difference. On a conforming interpretation, s. 44 applies to an offence committed outside the territory of the issuing Member State.

53. It does not appear necessary in this case to consider the public international law definition of the territory of a state. That is because there is no doubt that this is an offence allegedly committed outside the territory of the Republic of Croatia or, in the words of s. 44, in a place other than the issuing state, in circumstances where the Republic of Croatia is not making any claim to this location. The location was never in the Republic of Croatia, as a federal republic with the former Socialist Federal Republic of Yugoslavia or as an established independent state.

54. In light of the foregoing, is it possible to consider extraterritorial jurisdiction under the provisions of s. 44 where the Republic of Croatia was not established as a state at the time of the alleged offence?

55. The issuing state is the Republic of Croatia and it is in its context as an issuing state that the claim to extraterritoriality must be assessed. The offence was allegedly committed in a territory outside that of the issuing state of the Republic of Croatia. This is correct as of the present day, it was correct at the time of the issuing of the EAW, and it was so at the time of the alleged offence. The latter statement is correct because even accepting that the Republic of Croatia had not been established as a state at the time of the alleged offence, it is clear that the offence took place outside the present day borders of the issuing state of the Republic of Croatia. Therefore, on a literal interpretation of the first condition under s. 44, the test is met as the offence was allegedly committed in a place other than the issuing state.

56. Moreover, a conforming interpretation of s. 44 also rejects an interpretation that surrender is prohibited because of difficulties with establishing extraterritoriality in the context of a newly established state. The objective of the Framework Decision is to simplify surrender between Member States so as to remove the complexity and potential for delay inherent in the present extradition procedures. The objective of the Framework Decision is that there should be a system of free movement of judicial decisions in criminal matters, within an area of freedom, security and justice. The mechanism of the EAW is based on a high level of confidence between Member States. It would simply fly in the face of the objectives in the Framework Decision to read s. 44 as imposing a limit on surrender due to the subsequent establishment of a Member State. In so far as the question of extraterritoriality is concerned, it must therefore be the extraterritorial jurisdiction of the issuing state that is at issue.

57. The territory of the issuing state that must be considered is the territory of the issuing state at the date of issue of the EAW as that is the date when the requesting Member State can be truly described as "*the issuing state*." In those circumstances, it is possible to assess whether the alleged offence occurred in a place outside the territory of the issuing state.

58. As stated above, I am quite satisfied that the Republic of Croatia, whether as a federal republic of the Socialist Federal Republic of Yugoslavia or as an independent state, never laid claim to the place in which the alleged offence occurred. More importantly and as a matter of fact, the place of the alleged offence is outside the borders of the issuing state, namely the Republic of Croatia, and is therefore alleged to have been committed "in a place other than the issuing state". Therefore, it is clear that the Republic of Croatia is claiming extraterritorial jurisdiction.

The second condition

59. As the applicant has submitted, although the nature of this test has been identified in *Bailey* and *T.E. (No. 2)*, there is as yet no judicial determination by the Supreme Court as to whether or not the second limb of s. 44 of the Act of 2003 requires a consideration of whether or not, in applying the reverse hypothesis, one must consider whether the acts alleged to give rise to the offence by reference to the date upon which the offence is alleged to have been committed ***or*** the date of the EAW ***or*** indeed the date of the hearing for the application for surrender under section 16. The High Court in *Aamand* had set down the date of the s. 16 hearing for surrender as the appropriate date on which to consider the second limb of section 44.

60. In my view, in so far as the second condition of s. 44 is concerned, it is clear that the section operates in the present tense. The reference to the past tense when dealing with the actual offence committed or alleged to have been committed makes sense because, as a matter of fact, the acts either committed or alleged must have taken place prior to the issue of the EAW. On the other hand, Ireland, as an executing state, is concerned with the present state of affairs and therefore, the present tense applies. In so far as the High Court in *Aamand* has already ruled that the relevant date for the purpose of considering whether Ireland exercises extraterritorial jurisdiction is the date of the s. 16 hearing, I see no basis for interfering with that finding. That is the date on which the High Court becomes concerned with whether surrender should be refused and it is as of that date that the matter must be determined.

61. Looking at the matter on the day of the s. 16 hearing, it is clear that there is no issue arising with regard to any difficulty of reciprocity regarding the hypothetical scenario of Ireland prosecuting for an offence committed at a time when Ireland did not exist. This simply does not arise on the facts.

Decision on extraterritoriality

62. At the date of issue of the EAW, the Republic of Croatia, as an issuing state, is claiming extraterritorial jurisdiction over an alleged offence of a war crime, namely grave breaches of the Geneva Convention Relative to the Treatment of Prisoners of War of the 12th August, 1949. This is in circumstances where the alleged offence was committed outside the present day borders of the issuing state.

63. The allegations against the respondent, as set out in the EAW, expressly include allegations of torture, both mental and physical. In those circumstances, Ireland exercised extraterritorial jurisdiction by reasons of s. 3 of the Act of 1962 as substituted by s. 3 of the Geneva Conventions (Amendment) Act, 1998 as amended by s. 66 of (and Schedule 3 to) the International Criminal Court Act, 2006 at the time of the s. 16 hearing and continues so to do. Ireland also exercised such extraterritorial jurisdiction at the time of the alleged offence and at the time of the issue of the EAW. I have held that the appropriate date for consideration of the extraterritorial jurisdiction of Ireland is the date of the s. 16 hearing.

64. In the alternative, if I am incorrect in holding that the Republic of Croatia is exercising extraterritorial jurisdiction because such a concept cannot be applied to a state that did not exist at the time of the alleged offence, then s. 44 is not a bar to surrender as the two conditions set out therein have not been satisfied.

65. For the reasons set out above, I am satisfied that s. 44 does not prohibit the surrender of the respondent.

Section 37 of the Act of 2003

Article 8
66. The case the respondent makes under this heading is encapsulated in point of objection number 6 which reads as follows:

> "The respondent has been living openly within the jurisdiction for a period of approximately 13 years. When he first arrived with his family he made an application for asylum arising out of events in the former Yugoslavia in the 1990's. The respondent has never sought to hide nor occlude his identity nor his country of origin. The respondent has put down roots in the jurisdiction in the intervening years and is now the father of an Irish born child. The offence in respect of which surrender is sought is alleged to have occurred in excess of 22 years ago. In the absence of some explanation for the delay in proceeding against the respondent his surrender would prima facie contravene his right to family and private life contrary to Article 8 of the European Convention on Human Rights, 2003."

67. In his grounding affidavit, the respondent sets out that his date of birth was the 10th February, 1960, and that he is a Croatian national of Serbian ethnicity. He says he was conscripted into the Yugoslav National Army in 1981 and served eighteen months as a soldier. He says that he met his wife in 1984 and they married and had two children who are now in their mid or late twenties. He says he started a haulage business and it was a happy period.

68. He says that during the Croatian national elections in 1991, the HDZ (Croatian Democratic Union) came to power and the ethnic Serbian population came under severe threats of political and physical violence. During that period, he felt his family life was threatened. He says that because of fears for his family safety, he moved to Serbia leaving behind all his material and business possessions in 1991. He says that he found work in a factory on arrival but was subsequently mobilised into the Yugoslavian National Army military police branch. He says that at the time of this mobilisation, Croatia was not a recognised country and the territory affected by the conflict was that of the Socialist Federal Republic of Yugoslavia. He denies on affidavit ever ill treating or causing harm to prisoners of any type, race or creed. He says that on discharge from the army, he returned to resume family life in Serbia. He says that the political situation worsened dramatically and fearing for the safety of his family, he moved his family to Bosnia. After a couple of years, his family decided that they could no longer stay in Bosnia as there was no work and he had no income. He said they could not return to their natural home of Croatia due to the ongoing persecution of ethnic Serbs, so after a lot of consideration he decided to come to Ireland.

69. He says that on arrival in Ireland, he settled in Tralee as a family unit and subsequently moved to Dublin as a family unit. At all times, both himself and his family lived under their given names and never made an attempt to conceal their identities. He sought leave to remain in the State in February 2005 and exhibits that application. In the application, he used his own name and his family name and also referenced the fact that they had previously lived in Croatia and the difficulties they had faced there.

70. The respondent said that his children attended third level education in Ireland and they all felt that they had totally integrated into the Irish way of life and into Irish society. He says that as a result of the stress of having to flee various countries due to the conflict in Yugoslavia and the loss of their business, his marriage to his wife suffered and they eventually separated. He said they are on good terms and meet as a family unit on a regular basis.

71. Subsequently, he had a relationship with an Irish woman and their daughter was born on the 10th April, 2010. She is four years of age and while he does not co-habit with her mother, he says he is fully involved in her upbringing and development. In that regard, he says he hopes to play an active role as a parent to her and it is his wish that she can have the normal type of childhood which his eldest children never had due to the conflict in Yugoslavia and the subsequent turmoil caused to the family as a result.

72. The mother of his young child has sworn a brief affidavit in which she confirms that the respondent is the father of their daughter. She says that he sees their daughter regularly and that he pays her maintenance of €25.00 a week to help with the everyday expenses she has for their daughter. She says that her daughter loves spending time with the respondent.

The legal submissions of the respondent
73. Counsel for the respondent relied primarily upon the decision in *Minister for Justice, Equality and Law Reform v. Gorman* [2010] 3 I.R. 583. He submitted that his position is all but indistinguishable from that of the respondent in that case. In fact, he submitted that the position of the respondent in these current proceedings is considerably more stark. He highlighted some factors as follows:

> (a) This respondent is not alleged to have committed an offence in the issuing state and then fled from it as in *Gorman*. He says that he left his home in what is now the issuing state and was unable to return due to intense discrimination against his ethnic group.
>
> (b) The period of time between the alleged offence and the application for surrender is longer in this case.
>
> (c) In *Gorman*, the reason that the extradition would not have been granted earlier had it been sought related to the interpretation of legislative provisions, in particular the definition of political offence. In this case, it was submitted that what blocked the extradition was Croatia's inability to meet the most basic human rights guarantees necessary for surrender to take place.
>
> (d) As in *Gorman* the respondent had made a decision to start a family on the assumption that he would not be sought for prosecution.
>
> (e) As in *Gorman* no explanation of any sort is being proffered by the Croatian authorities.
>
> (f) Although he did not submit that this offence is a minor one, it is to be contrasted with the seriousness of the offence in *Gorman*, namely murder.

74. Counsel for the respondent relied upon the judgment of McKechnie J. in *Minister for Justice and Equality v. Ostrowski* [2013] IESC 24 and, in particular, the reference to the seriousness of the offence to be taken into account in the weighing exercise that must take place into the public interest in extradition. He also relied on the fact that the question is not one of exceptionality, but one of proportionality.

75. He went on to rely upon the decision of Edwards J. in *Minister for Justice and Equality v. R.P.G.* [2013] IEHC 54. In that case, Edwards J. set out twenty-two principles of law for application in the EAW context in cases where Article 8 is engaged. Ultimately, the respondent submitted that the question of delay is of particular relevance in the context of the present case. The respondent

said that given the extraordinary and unexplained delay in the present case, this can only have the effect of greatly reducing the public interest in surrender.

76. The Central Authority sent a letter to the Croatian judicial authority requesting an explanation for the delay in seeking the surrender of the respondent. The Croatian authorities replied by letter dated 30th December, 2014, as follows:

> "After the investigation proceedings conducted against him, the accused D.S. was charged with criminal offence against humanity and international law [as outlined]. For all criminal offences against humanity and international law, including the above mentioned offence there are no statutes of limitation of criminal prosecution [relevant Croatian law referred to].
>
> In the course of investigation proceedings, the accused was ordered detention by the ruling [number given] issued on 18th June, 2010, since it was established that the accused had left the Republic of Croatia, which made him inaccessible for the judicial authorities of the Republic of Croatia (since it was unknown where the accused was).
>
> Against the indictment issued against the accused D.S. a complaint was lodged in due time by his official defence counsel who was appointed by the court decision after the decision order in custody for the accused had been issued; the complaint was quashed as ungrounded so that the indictment entered into force on 24th March, 2011.
>
> After the address of the accused in the Republic of Ireland had become known (as the accused D.S. required to cancel his residence in Vukovar by denoting his address in the Republic of Ireland to the authorities of the Republic of Croatia through the embassy of the Republic of Croatia in Dublin, the Republic of Ireland) and after it had been established by the information received by the IP Dublin that the accused D.S. was residing at the mentioned address, we issued the European arrest warrant against him.
>
> Taking the above mentioned facts into consideration, the reason stated by the accused with a name of justification of his surrender disapproval to our European arrest warrant are ungrounded.
>
> The issued European arrest warrant by which we demand the arrest and surrender of the accused D.S. with the purpose of conducting criminal proceedings against him is not overdue and his rights pursuant to Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms relating to right to respect for private and family life have not been violated therewith.
>
> The circumstance that the issuing of the European arrest warrant refers to events dating back to 1991 is of no significance either for the nature of the criminal offence that the accused is charged with that have no statute of limitation or for the fact that the European arrest warrant against the accused D.S. was issued after his accurate address of residence had become known."

77. It is against that background that the respondent made his Article 8 case. He asserted that no explanation had been given as to the delay. Counsel submitted that all that was said in the reply was something about an investigation and that some form of proceedings had occurred in June of 2010. He referred to the answer as a "studied avoidance" of the actual question that the court might wish to know about. He characterised the Croatian authorities as saying 'mind your own business, it does not matter'.

78. He referred to the many exhibits in this case that deal with discrimination against Serbs in the intervening period including direct reference to Human Rights Watch reports in relation to the situation. In particular, he referred to a document entitled "*Croatia: A Decade of Disappointment*" which is a publication of Human Rights Watch from 2006. That lists, *inter alia*, an upsurge of violence and intimidation against members of the Serb minority in Croatia in the previous year and a half. It is of some note that 4.5 % of Croatia is of Serbian ethnicity. The report says that only 34 of Croatia's nearly 1,500 judges are ethnic Serbs. That figure amounts to 2.3% of all judges in the country. The report suggests that while that level of overall representation may not, therefore, appear especially problematic, in areas of return there are almost no Serbs sitting as judges.

79. The report set out how many Serb returnees in Croatia are elderly villagers who are unable to seek enforcement of their rights before the courts because they are often poorly educated and lack the resources to obtain professional assistance from lawyers. A further Human Rights Watch report called "*Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro*", dated October 13th, 2004, is also referred to. It should be noted that in that report, it is stated that ethnic bias on the part of judges does not figure significantly in a war crimes trial currently being conducted in courts in Federation Bosnia and Herzegovina, whereas Human Rights Watch has concluded that bias by the judiciary has influenced trials in Croatia following the 1991 to 1995 war. A further section of the report shows that Human Rights Watch's foremost concern regarding ethnic bias on the part of the prosecution relates to the limited number of war crimes prosecutions against members of the dominant ethnic group. The report says that that concern pertains particularly to Croatia and to Republika Srpska. It also says that that bias makes judges in Croatia reluctant to convict ethnic Croats charged with war crimes against Serbs and that it appears to impede the willingness of Croatian prosecutors to charge ethnic Croats with such crimes or to diligently pursue the cases against them once they have been charged.

80. In this case, the respondent had been the subject of investigation in relation to another alleged offence and was acquitted.

81. With respect to delay, the case is made that Croatia was a signatory to the European Convention on Extradition (Paris, 13.XII.1957) and that there was no legislative bar to extradition prior to Croatia joining the European Union ("EU"). However, it is quite clear in the submission of counsel for the respondent that if extradition had been sought, it would have been refused on the basis of an unfair judicial system and an unbalanced prosecution. It is the respondent's case that what has occurred is that subsequent to Croatia's admission to the EU, it has taken certain steps to remedy the defects within its judicial system. In effect, the respondent has submitted that Croatia decides when it suits it to extradite him. Counsel highlighted this as a point of similarity with *Gorman* and says that it is in favour of this respondent here.

82. Counsel for the respondent said that this is an inexcusable delay. It is inexcusable not to prosecute him for 25 years. He referred to the detail of what is set out in *Gorman* and said that you can trace year by year as to what happened in *Gorman*. He said that contrary to that, there is a silence here from the Croatian authorities as to the delay.

83. In the submission of counsel for the respondent, the twenty-two tests set out in *R.P.G.* do not go any further than the four tests set out at para. 63 p. 609 of *Gorman*. In that judgment, Peart J. said that:

> "*…this court is required to consider the following questions in arriving at a conclusion as to whether an order for the surrender of the respondent to the United Kingdom would constitute a breach of this State's obligations under the*

Convention or its protocols: (1) does surrender constitute an interference with the respondent's private/family right; (2) if so, is that interference one that is in accordance with law; (3) if further so, is the interference, by surrender of the respondent, in pursuit of a legitimate aim or objective; (4) and further if so, whether that interference is necessary in a democratic society (the latter meaning that it is justified by a pressing social need) and proportionate to the legitimate aim pursued."

84. In respect of the pressing social need, counsel for the respondent submitted that it is impossible to say that there was a greater need in this case. He suggested that, while the Geneva Conventions may add another need, how could it be a greater need than extradition in the case of an alleged terrorist murder? As Peart J. had said, the question of public interest becomes diluted with the passage of time.

85. Counsel pointed to tests number 10, 11 and 13 as set out in *R.P.G.* and said that delay must be the starting point. It is the weight to be attached to the public interest. He said that the public interest is very limited indeed where there has been a delay such as this. He said he does not know how long the Croatian authorities sat on the case and he does not know when it came to their attention. He said it was clear that the respondent was subject to their attention for other matters but that the court has a blank canvas with regard to this. He said that no attempt was made to put flesh upon it and, in effect, they declined to answer.

86. Counsel said that the manner in which public interest must be measured is the public interest in the Croatian state. In these circumstances, there is nothing to show the level of public interest as the delay has not been explained. He said that insofar as there has been a delay, there is a real basis for saying it was caused by the issuing state. He said they appeared to have decided to wait for a particular procedure.

87. Counsel also said that you must take the respondent as you find him and while there are no exceptional circumstances here, those are not required to be proven. The respondent has found himself with a second family and while it is not a conventional set up, it is a family unit nonetheless. In those circumstances, it is disproportionate to order his surrender.

Legal submissions of the applicant

88. Counsel for the applicant submitted that two different approaches to the issue of the consideration of Article 8 rights are provided by *Gorman* and *R.P.G.* Counsel for the applicant submitted that the matter was approached in *Gorman* on the basis that only in exceptional cases would it be refused. He submitted that in *R.P.G.* it was stated that it was not necessary to find an exceptional case. However, counsel submitted that whatever case one looks at, one has to have exceptional facts. It is submitted that something exceptional and beyond the norm is required.

89. The applicant submitted that the respondent has fallen well short of what is required. Having suggested that there were two different approaches in *Gorman* and *R.P.G.*, counsel did not suggest that there is any real difference between the two approaches. He said that ultimately it is only in exceptional cases that surrender will be refused. He suggested that in *R.P.G.*, Edwards J. was not suggesting an approach of taking a holistic mix and qualitatively or quantitatively adding up factors in favour of surrender. Counsel suggested that when one looks at *R.P.G.* in detail, what the court is addressing there is the consequences to family life. Where there are disproportionate consequences, surrender may be refused.

90. Counsel pointed to paras. 15, 16, 17, 18, and 19 of the principles of law set out by Edwards J. in R.P.G. In para. 15 which speaks of the interference with the liberty of the person and the prospect of facing trial in the other state, Edwards J. goes on to say that *"such factors in and of themselves would rarely be regarded as sufficient to outweigh the public interest in extradition. Accordingly, reliance on matters which could be said to typically flow from arrest, detention or surrender, without more, will little avail the effected person"*. Paragraph 16 refers to Article 8's protection of the right to respect for one's private or family life. Counsel referred to the reference to the proposed measure giving rise *"to exceptionally injurious and harmful consequences for an affected individual"* as an important indicator as to what may be considered disproportionate in the context of an examination of whether there has been a breach of rights under Article 8.

91. Counsel submitted that para. 17 and its reference to a fact specific enquiry goes on to refer to *"particularly injurious, prejudicial or harmful consequences that are to be weighed in the balance against the public interest in the extradition of the requested person".* Paragraph 18 refers to the fact that there is no predetermined approach or preset formula. Counsel referred to para. 19 which makes clear that it is not the demonstration of exceptional circumstances that is required to sustain an Article 8 objection, but that the focus of the court's enquiry should be on *"assessing the severity of the consequences of the proposed extradition measure for the potentially affected person or persons rather than on the circumstances giving rise to those consequences."*

92. In the submission of the applicant, it is not that one has to show exceptional circumstances, but relating para. 19 to what has gone before, it is incumbent to show exceptional consequences.

93. Counsel for the applicant made the point that delay does not turn a bad Article 8 point into a good Article 8 point. Counsel submitted that the fact that delay is to be considered when assessing the public interest in the extradition or surrender is an unremarkable statement because the public interest is not identical in every case. He said this is particularly so in relation to minor offences. He submitted that while it is a factor that may be taken into account, the issue is how does it diminish the public interest in surrender?

94. Counsel for the applicant said that the respondent's submissions amounted to an approach that the delay has been inexcusable and that the Croatians have avoided answering the question. He said that he rejected both of those propositions. Counsel submitted that during the period of the delay, the Croatians were putting together an adequate judicial system. He said one cannot compare peacetime with putting in place a structured system after a civil war. He said the number and types of offences that a jurisdiction must deal with in those circumstances are beyond the norm. He said there were different considerations in a peaceful civil society.

95. He said that he accepted that it was open to Croatia to give chapter and verse in its reply. Counsel challenged the submission that the delay is inexcusable, although he said that it may be unexplained. Counsel disagreed with the characterisation of the reply as "studied avoidance". He said that no such conclusion could be reached. Counsel submitted that the Croatian authorities have explained why there was a lapse of time since 2010. They also explained that there was no statute of limitations in national or international law. He said that they were entitled to take the view that no issue under Article 8 arose because of the factors that they had outlined.

96. Counsel submitted that even if the court was to draw an inference that there was an inexcusable delay, that there was no exceptional consequence for this family as a result of this. Counsel for the applicant submitted that if the facts do not satisfy the exceptional consequences test, it does not matter if there was a lengthy delay. He submitted that this necessarily follows. He said

the focus has to be on exceptional consequences because otherwise there is nothing to be put into the balance.

97. Counsel pointed to the difference in *R.P.G.* and *Gorman* where there was a clear involvement in community and in work which was separate and distinct from family life. He said there is little if anything on the evidence here of any such similar involvement. One of the things that counsel pointed to as a feature of the *Gorman* case and indeed the case of *Aamond* and the case of *Minister for Justice, Equality and Law Reform v. Tobin (No. 2)* [2012] IESC 37, is that surrender was refused in circumstances where there had been a previous attempt at surrender. He said that it is clear, however, that a withdrawn attempt is not a bar to extradition. He submitted that when one looks at the issue of exceptional circumstances, the previous attempt at surrender may on its own be capable of forming an exceptional circumstance. He pointed, *inter alia*, to the issue of the Good Friday release of the co-accused in *Gorman*. He referred to the fact that there was a belief in *Gorman* that the process had been concluded. Mr. Gorman had lived his life since then, during which time his children had been born, in the knowledge, as he believed, that he would not in the future be extradited to the United Kingdom. That belief had been strengthened when his co-accused had been arrested in the United Kingdom since it affirmed to him his belief that he could not be arrested if he was in Ireland.

98. Counsel for the applicant submitted that *Gorman* might be decided in another way as per *R.P.G.* as no exceptional consequences had been established. He said for all that, there is no getting away from the fact that the *Gorman* circumstances go beyond what is now at issue. He referred to the very short affidavit from the mother of the respondent's young child here.

99. Counsel referred to the provisions of Article 129 of the Geneva Convention which has been incorporated into domestic law. Article 129 requires the High Contracting Parties to enact any legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed any of the grave breaches of the present Convention. Each High Contracting Party is under an obligation to search for persons alleged to have committed or to have ordered to be committed such grave breaches and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers and in accordance with the provisions of its own legislation, hand over such persons for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case. Counsel submitted that whether a war crime is more heinous or less heinous than murder, it must be viewed in light of international obligations. Counsel submitted that there is a great public interest in prosecution of a war crime due to the circumstances of victims within a war zone.

100. He referred to the evidence in *R.P.G.* where the objection was not upheld. He said that in those circumstances, a psychological report had been put before the court which had shown significant adversities, but there was no such evidence in this case. He said that the rights of the child were dealt with in paras. 20 and 21 of the principles. He said that those principles had been qualified in *R.P.G.* and it was established that due regard to the best interests of the child had to be had in the context of the balancing exercise. He said there was no specific weight to be attributed to the best interests of the child. The best interests of the child were to be at the forefront of the court's consideration. He submitted that there can be severe disruption of family relationships but yet no breach of Article 8 rights will have taken place.

Reply of the respondent

101. Counsel for the respondent replied by suggesting that the submissions on behalf of the applicant in relation to delay as a constant factor went against the recent case law which identified delay as a factor to be taken into account. It was also submitted that the suggestion that where there were no exceptional consequences, there was nothing to put into the balance, was contrary to the law as set out in the various judgments. It was submitted that the exercise was one of proportionality and the consequences to family life had to be taken into account.

102. Counsel criticised the submission of the applicant concerning an excuse for the delay, namely the explanation of the difficulties of an emerging state, as amounting to the giving of evidence. He submitted that an explanation had been sought but had not been provided and it was not possible to produce one out of thin air.

103. Counsel said that he used the word "studied avoidance" in connection with the specific failure of the Croatian authorities to say when the investigation had begun. Counsel submitted that it was the view of this Court as regards delay and whether it had been excused that was determinative of the issue.

104. Counsel again referred to the differences with *Gorman* and suggested that in the current case, there had been no attempt at all to seek the respondent's extradition. He submitted that this made his own case stronger than Gorman.

105. Counsel did not disagree that in *Gorman* the family circumstances were more elaborate. However, he said the court's decision regarding surrender was not to be based on fecundity.

106. Counsel accepted that war crimes may well be in a different category but suggested that the situation in *Gorman* was similar to this. In fact, he said that the facts in *Gorman* were more stark than the present ones and again referred to the fact that that was a murder case in a terrorist incident.

107. Counsel submitted that while the facts may have been more elaborate in some cases, that was not an overriding consideration where one had a gross delay such as the delay in this case. In relation to whether psychiatric or psychological reports had to be produced, counsel asked rhetorically would one have to produce such a report in a case concerning a request for surrender to face trial for the theft of a Mars Bar after a 40-year delay.

108. Counsel submitted that there is a tension between *Gorman* and *R.P.G.* He accepted that he was relying on *Gorman*. He made reference to *Minister for Justice, Equality and Law Reform v. Gheorghe* [2009] IESC 76 which counsel for the applicant had relied upon, in which Fennelly J. in the Supreme Court had said that interference with family rights was not a bar to surrender. Counsel submitted that matters had clearly moved on since then and that the court under *Gorman* and *R.P.G.* was required to consider the issue of interference with family rights. Those cases set out a rational basis on which to approach the issue. Counsel submitted that under that approach, surrender was to be refused.

The court's analysis

109. Since the decision of the Supreme Court in *Gheorghe*, dismissing the ground of appeal relating to a breach of family rights under the Constitution and under Article 8 of the ECHR *in limine*, there have been developments in the approach of the courts to considerations of putative breaches of family and personal rights. In *Gorman,* the High Court (Peart J.) having considered the views of the European Court of Human Rights ("ECtHR") in *Slivenko v. Latvia* (App. No. 48321/99, 9 October 2003), was satisfied that Article 8 applied in extradition cases. Peart J had regard to what was said by the Supreme Court in Gheorghe but stated at para. 61:

> *"…there will be the exceptional case, with particular, exceptional and clearly established facts, where the court may*

consider that a submission under article 8 should not be dismissed in limine, as happened in Minister for Justice v. Gheorghe [2009] IESC 76, given the requirement under s.37 of the Act that surrender is prohibited if

'his or her surrender would be incompatible with the State's obligations under—

(i) the Convention, or

(ii) the protocols to the Convention' ".

110. Peart J. in *Gorman* identified the tests to be applied in considering whether there had been a breach of Article 8. Those questions accord with the general approach of the ECtHR in the assessment of whether there has been a breach of Article 8 rights. In his judgment, Peart J. tested the facts before him and reached the conclusion that the surrender of Mr. Gorman would breach his Article 8 rights.

111. No appeal was taken by the Minister in the case of *Gorman*. The next case of significance is *Ostrowski*. In that case, the High Court had certified a question to the Supreme Court on whether the issue of proportionality was solely for consideration by the issuing judicial authority or whether it was relevant in considering whether to surrender the respondent. In the High Court, the respondent had claimed that in the particular circumstances of the case, including the particular offence at issue and the fact that his entire family resided in Ireland, that his surrender was prohibited by Article 8 of the ECHR. The issue of proportionality in the High Court focused upon whether it was proportionate to surrender a person for what the Irish criminal justice system considered a very minor offence.

112. The respondent in the present case relied upon the judgment of McKechnie J. in *Ostrowski* to such an extent that only that judgment was included in the Booklet of Authorities provided to the Court. It was only at the stage of the oral submissions that any reference was made to the fact that the Supreme Court decision was actually given by Denham C.J. in that case. The judgment addresses clearly the issue of s. 37 of the Act of 2003 and the question of whether the surrender of the respondent would cause a disproportionate interference with his rights to liberty, security and family. Denham C.J. quoted from the decision of Fennelly J. in *Gheorghe* with approval. She went on to say at para. 37: *"in almost all cases of surrender, family rights, Article 8 rights, are affected. However, it is only in an exceptional case that Article 8 rights would outweigh the requirement to surrender. This is not such an exceptional case. Thus, there is no foundation upon which to find for the respondent on this ground. Therefore, the general principle of proportionality does not arise in these circumstances."*

113. In his decision in *Minister for Justice and Equality v. T.E.* [2013] IEHC 323, Edwards J. reviewed in commendable detail the jurisprudence the court considered relevant to Article 8. *T.E*. preceded the decision in *R.P.G*. In coming to his decision in *T.E*., Edwards J. said the following at para. 131:

"Before seeking to distil a series of legal principles to be applied in this case, and intended to guide its approach to these difficult cases generally, it is necessary to refer to some helpful and important remarks of McKechnie J. contained within his recently delivered judgment in the Irish Supreme Court case of Minister for Justice and Equality v. Ostrowski...

These were arguably obiter dictum in that the central issue in that case concerned whether an executing judicial authority could consider the proportionality of a proposed surrender other than in the context of fundamental rights considerations. The Supreme Court's answer in relation to that was in the negative. Nevertheless, the judgment of McKechnie J. addresses at some length his views concerning the correct way in which a court should approach issues such as a s.37 objection based upon article 8 of the ECHR, and those views are regarded by this court as being of considerable assistance."

114. No reference was made in T.E. to the judgment delivered by the Chief Justice in *Ostrowski.* If the issue of Article 8 rights was *obiter* in the judgment of McKechnie J., the corresponding statement of the Chief Justice, speaking for the majority of the Supreme Court, was also *obiter*. Arguably however, the statement regarding Article 8 rights is part of the *ratio decidendi* as the question before the Supreme Court related to proportionality and the appropriate circumstances in which proportionality came to be addressed. Ultimately, the Supreme Court found (as per Denham C.J.) at para. 38:

"Even if the principle of proportionality might arise in some circumstances, even if it could be a factor in a case, there is no basis in the principle of proportionality upon which to refuse to surrender the respondent in this case."

115. In his decision in *T.E.*, Edwards J. adopted and applied many of the observations of McKechnie J. in *Ostrowski* in formulating his twenty-two applicable principles of law. In assessing whether the consequences are disproportionate, the court considers whether the extradition is necessary in a democratic society. The public interest in the extradition is the extradition of the individual requested person. That public interest is case specific and requires a careful analysis. The gravity of the crime is relevant. Delay may be taken into account in assessing the weight to be attached to the pressing social need for such extradition.

116. As McKechnie J. stated, the standard set by Article 8 is not one of exceptionality but one of proportionality. Exceptionality is not a legal test. Unusual facts or circumstances do not require to have to be sought after, as experiences such as children living with a single parent, reliance on a sole breadwinner, or a disabled parent totally dependant on a family carer are all examples which are not unusual or uncommon experiences of life. And yet, as McKechnie J. said, a severance or disruption of any one such relationship could have devastating consequences for those affected.

117. Importantly, McKechnie J. noted that the ECtHR have in many cases used the language of exceptionality in relation to Article 8 claims. McKechnie J. said that it was clear that, however described or approached, a successful reliance on Article 8 will not be easy. He was not able to identify a single case from the ECtHR in which it was said that extradition would be an interference with Article 8 rights which were enjoyed in the requested state. He noted that that in itself was a powerful reflection of the positioning of the public interest in this process. And he said that the importance of that observation was evident from *Gheorghe*. In his view, the disposal of that argument in such a manner clearly reflects in explicit detail the difficulty which a respondent meets on any Article 8 defence.

118. In *Ostrowski*, the majority decision had stated that only in an exceptional case would Article 8 rights outweigh the requirement to surrender. In my view, that statement is entirely consistent with the observations made by McKechnie J. Reliance on Article 8 will only prohibit surrender in an exceptional case. Insofar as the judgment of McKechnie J. and subsequent decision of Edwards J. referred to the absence of a requirement to establish exceptional circumstances, neither decision moves away from the view that it will only be in the exceptional case that a respondent will be able to invoke Article 8 successfully to prevent surrender. To say that

Article 8 arguments will only succeed in an exceptional case is not to make it a requirement that exceptional circumstances be established.

119. Counsel for the applicant correctly identified that the focus of the test in *R.P.G.* (and *T.E.*) is on the consequences that the surrender will have upon the right in question. Counsel for the applicant proposed that these consequences must be exceptional. In my view, the use of the word "exceptional" in this context may give rise to the same sort of concerns that were identified by McKechnie J. in *Ostrowski*. It may result in a focus on the necessity to establish unusual or abnormal consequences when experience may show that, though disproportionate to the necessity for surrender, the particular consequences may not be abnormal.

120. The focus of the court's enquiry must be on the consequences of surrender when considering whether such surrender would be a disproportionate interference with the rights under Article 8. Nothing will be gained by insisting that such consequences must be accompanied by a description "exceptional". What will be required is that particular consequences are proven which establish a disproportionate interference with the rights under Article 8. From the case law of this court, the Supreme Court, the ECtHR and the Superior Courts of the United Kingdom, it is clear that it will only be in the exceptional case that the particular consequences of surrender will be such as to amount to a disproportionate interference with the rights of the requested person.

The Court's determination on the facts of this case

121. In this case, there is a young child whose relationship with her father will be affected if he is surrendered to the Republic of Croatia to face trial for a war crime. The best interest of this child must be and is at the forefront of this Court's mind in assessing whether surrender would amount to a disproportionate interference with the family rights of the child and of the respondent in this case.

122. In carrying out the fact specific inquiry, I must balance the public interest in the extradition of this respondent against the damage that will be done to his family and private life in the event that he is surrendered. Undoubtedly, there is a public interest generally in international co-operation in the enforcement of the criminal law and in bringing persons accused of crime to justice. However, I must also weigh the strength of that public interest in the circumstances of this particular case.

123. In this case, the respondent is sought for the prosecution of a war crime. This is a war crime alleged to be contrary to the Geneva Convention, although contained in the relevant Croatian statute. The fact that the Geneva Conventions were adopted in the aftermath of World War Two and are of widespread international applicability speaks volumes for the gravity with which these crimes are viewed. The High Contracting Parties to these Conventions agree to prosecute war crimes and also to co-operate in extradition procedures for war crimes. I do note that the requirement for co-operation as set out in Article 129 is based upon another country providing a *prima facie* case. Of course, under the EAW system, no *prima facie* case is required. However, under the Framework Decision, it is clear that the EAW system is to operate as a simplified form of extradition. I take the expressions in Article 129 as important statements of how Ireland and the international community view the gravity of alleged grave breaches of the Conventions. In those circumstances, even though the offence does not amount to murder, it is clear that an allegation of a war crime, in particular a grave breach of the Geneva Conventions, lends great weight to the public interest in the extradition of a suspect.

124. I must, however, consider the delay which has undoubtedly occurred since the alleged commission of this war crime. The Croatian judicial authority replied that in their view, the issued EAW is "not overdue" and his rights pursuant to Article 8 have not been violated. That is an expression of a view by the Croatian authorities but it is of no consequence to the task which this Court has to carry out. It is a matter for this Court to consider whether his surrender will violate Article 8.

125. What is clear from their reply is that the Croatian judicial authority takes the view that the circumstances concerning the issuing of the EAW are of no significance because there is no statute of limitations and also because the EAW was issued when his accurate address of residence had become known. Furthermore, when it was established that he had left the Republic of Croatia, his detention was ordered in Croatia. Thereafter, when his address in Ireland became known, the EAW was issued against him. Certainly, there can be no complaint about any delay since 2010 as it is clear that the Croatian authorities were seeking him for these crimes. It is unclear how long the investigation had taken prior to the 18th June, 2010. Up to that time, 18 and a half years had elapsed since the date of the alleged offence.

126. The respondent has complained that the lack of detail about the investigation itself is "studied avoidance". I am not satisfied that it should be so described. I am also not entirely sure that the question that was asked of the Croatian judicial authority which was to "request an explanation for the delay in seeking the surrender of the respondent as it is anticipated the High Court will require this information" sufficiently directed the mind of the Croatian judicial authorities to the explanation for the lapse of time since 1991. It is clear that the authority's focus on the time since the investigation required the presence of the respondent in Croatia and from their perspective that may well be an answer to a delay in surrender. In other words, the Croatians could only have sought his surrender from the moment that he was sought for the purpose of prosecution. They have given a full explanation for the time delay since then.

127. Insofar as there has been a delay which the Croatian judicial authority has not expressly explained prior to that, I am not of the view that the principles set out in *R.P.G.* require every period of time to be fully and expressly dealt with by the issuing judicial authorities. Each case must be assessed on it own facts. In this case, the Court cannot ignore the fact that Croatia was involved in an armed conflict of considerable ferocity in the early 1990s during the break up of the Socialist Federal Republic of Yugoslavia. This is a matter of which the Court would be entitled to take judicial notice. In this case, however, factual evidence and legal materials have been placed before the Court which confirm that fact. An independent Republic of Croatia emerged in due course from that armed conflict. The Court is entitled to have regard to the difficulties of nation-building in the wake of conflict. Furthermore, the Court is entitled to take into account that the prosecution of war crimes provide, in and of themselves, an indication of a pressing social need which would render interference with family life necessary. Moreover, insofar as the respondent seeks to rely upon the Republic of Croatia's inability to make a successful extradition application at an earlier stage due to the inadequacies of its own legal system, this would not, in the context of the prosecution of war crimes, make the pressing social need for those prosecutions any the less. Each party to the Conventions has undertaken solemn international obligations with regard to prosecution, and while extradition to that country may be prohibited while inadequacies exist in its legal system, the pressing social need (both from a domestic and an international perspective) for such a prosecution still remains.

128. It is acknowledged that long delays may affect a respondent's family and personal rights more severely but that is a matter to be weighed in the balance when considering if the interference will be disproportionate. The test to be applied under Article 8 is not a test that focuses on delay or even inexcusable delay for the purpose of punishing a state by refusing surrender. Delay is simply a calculation of pressing social need. In this case, the pressing social need is self-evident. This is an allegation of a grave crime, the prosecution for which the Republic of Croatia and Ireland have particular international responsibilities. Even if earlier executive, prosecutorial, legislative or judicial regimes were responsible for delays which resulted in this alleged war crime not being investigated

and prosecuted at a much earlier stage, this would not be an indication that there was no present pressing social need for such prosecution.

129. It is in light of that pressing social need that the particular circumstances of the respondent must be assessed. Those circumstances are his relationship with his daughter from whom he lives apart but with whom he has a connection and to whom he contributes maintenance. The consequences that he demonstrates of his surrender are not particularly injurious or particularly severe over and above what may be expected in any circumstance of an extradition. There has been no demonstration at all of exceptional consequences for him or even of particular or severe consequences. Insofar as it is put that it is an exceptional case, this has clearly not been demonstrated.

130. Taking into account all the circumstances set out above, I find that there has been no disproportionate interference with his personal and family rights under Article 8.

131. For the sake of completeness, I also reject that this case shows the same exceptional circumstances of the *Gorman* case and that on a *Gorman* test I should refuse surrender. This is an entirely different set of circumstances comprising in the first place a prosecution for war crimes, there has been no demonstration, as there was in the evidence in *Gorman*, that this respondent was building his ties to the community and starting his family in the belief that he would not be surrendered to Croatia. In *Gorman*, the fact that there had been a previous request for his extradition which had not been pursued and which was not pursued even in the years immediately after the EAW were matters that gave rise to the particular belief in this case. That belief does not equate in any way with the assumption that is asserted here on behalf of the respondent.

132. I therefore reject the respondent's objection to his surrender on the grounds of Article 8 of the European Convention on Human Rights.

Fair trial issue
133. The respondent has also objected to his surrender on the basis that by reason of his Serbian ethnicity he will not receive a fair trial if returned to Croatia. He submitted that there are substantial grounds for believing that prosecutions and trials in Croatia for alleged war crimes against Serbs are likely to be conducted in a partial and biased fashion. He claimed his surrender is precluded by s. 37 of the Act of 2003.

134. As will be seen from the above, part of the respondent's submissions in relation to the delay point was that Croatia could not have asked for his surrender successfully at an earlier stage as their system of justice was fundamentally defective. The primary reports that the respondent relied upon have been previously outlined. He also relied upon an Amnesty International Report entitled "*Croatia: Briefing to the European Commission on the progress made by the Republic of Croatia in prosecution of War Crimes*" of May 2011 and a U.S. State Department Country Report on Croatia on Human Rights Practices for 2013. All the reports show a marked progress which has been made by the Croatian authorities in addressing impunity for war crimes. Insofar as it appeared to have been the case that there was a disproportionate focus by the Croatian authorities on prosecuting ethnic Serbs for war crimes, it appears that the tide has turned in that regard. For example, a particular event called 'Operation Storm' which was carried out between August and November 1995 with an apparent aim of forcibly removing ethnic Serbians from the Krajina region of Croatia has resulted in a number of successful prosecutions. Furthermore, the U.S. State Department Country Report shows that in relation to other war crimes committed against ethnic Serbs, there have been successful prosecutions. Those later reports do not weigh systemic issues regarding fair trials for defendants.

135. While this may be a matter of concern to the respondent personally, it must be acknowledged that counsel raised the matter for the consideration of the Court but no specific submissions were made. For surrender to be refused on the basis that there would be an anticipated breach of a fair trial right in the requesting state, it is necessary for the respondent to establish on substantial grounds that there is a real risk that he will be subjected to a flagrant denial of justice. As can be seen from the foregoing, the respondent has simply not proven on substantial grounds that he is at real risk of a flagrant denial of justice in Croatia should he be surrendered. I therefore reject his objection to surrender on this ground.

Retrospectivity
136. Under this heading, the respondent submitted that his surrender is prohibited because he claims that it is patent from the EAW that Croatia seeks his surrender for the purpose of his prosecution in respect of alleged offences that are contrary to statutory provisions that post-date the alleged offence. He referred to part (c) of the EAW. The relevant portion is as set out above which, as can be seen, makes reference to various statutory provisions commencing in 1991 and finishing in 1996.

137. Counsel relied upon Article 15.5 of the Constitution which has an absolute prohibition on retrospective penalisation. Furthermore, he relied upon Article 7.1 of the ECHR which prohibits retrospective criminality or an increase in applicable penalty. He said in so far as the EAW cites statutory provisions that post-date the date of the alleged offence, it is for the issuing state to provide some clarity as to whether or not there is a degree of retrospectivity in relation to same.

138. In response, counsel for the applicant submitted that there is a reference to the Croatian Criminal Code namely 53/91 which is being completely ignored by the respondent. It was also submitted that the entire point is one of conjecture, i.e. the respondent has not established that he will be punished retrospectively. It was submitted that it was clear that this is an offence contrary to international law at least since the adopting of the Geneva Conventions in 1949. The Socialist Federal Republic of Yugoslavia was a party to the Conventions at the relevant time and in these circumstances, there was a breach of the relevant article. It was submitted that the reliance upon this point of objection was not established.

The Court's analysis and determination
139. The issue of retrospectivity is raised by the respondent in a stark manner. He does not engage with the principles set out in the well-established jurisprudence applicable to a claim that is made that surrender is prohibited under s. 37 of the Act of 2003 as being contrary to any provision of the Constitution or as being incompatible with the State's obligations under the ECHR and its Protocols.

140. Regarding his complaint concerning Article 15.5.1 of our Constitution, this provides: "[th]e Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission." It is clear from this that it is applicable to the legislative situation in Ireland. It does not apply to the legislative situation in Croatia.

141. In so far as it may be suggested that there is a personal right not to be prosecuted for a retrospective offence, it is clear that a prohibition on surrender would have to reach the point where it had been established that there was an egregious flaw in the system of justice in the issuing state (*Minister for Justice, Equality and Law Reform v. Brennan* [2007] 3 I.R. 732) and that he was at real risk of being subjected to same. In so far as the respondent raises a prospective breach of Article 6 rights, it is for him to establish on

substantial grounds that he was at real risk of being subjected to a flagrant denial of justice.

142. The respondent has not established that he is at such real risk. He has not raised any matter of substance in this case that causes the Court even the slightest doubt that he will be at risk of exposure to such a system that will permit punishment for retrospective offences. Merely pointing to a reference in the EAW to sections of the penal code which apparently post-date this offence is insufficient. This is particularly so where the nature and legal classification of the offence in this case is said to be "violating the rules of international law…thus committing the offence against humanity and international law.". The rules of international law must relate to the relevant provisions of the Geneva Convention Relative to the Treatment of Prisoners of War of the 12th August, 1949 which are referenced as part of the particulars of the offence. I therefore reject his point of objection under this ground.

Correspondence of offences under Section 38 (1)(a) of the Act of 2003
143. The final issue to which the Court returns is that of correspondence. From what was set out in the context of the s. 44 point, it is clear that this offence corresponds with the offence of war crimes contrary to s. 3 of the Geneva Conventions Act, 1962. Undoubtedly, it would also correspond to many other offences such as assault contrary to s. 2 of the Non-Fatal Offences Against the Person Act, 1997, assault causing harm contrary to s. 3 of the above Act or s. 5 of the same Act being a threat to kill or cause serious harm.

Conclusion
144. In all the circumstances and for the reasons set out above, I am satisfied that in accordance with the provisions of s. 16(1) of the Act of 2003, I may make an order directing his surrender to such other person as is duly authorised by the Republic of Croatia to receive him.