

UNAPPROVED.



THE COURT OF APPEAL

Birmingham P.

Edwards J.

Donnelly J.

Neutral Citation Number [2021] IECA 92

Record No: 2020/15

**IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003, AS
AMENDED, AND IN THE MATTER OF AN APPLICATION**

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

-v-

MICHAL KUBÁLEK.

Appellant

JUDGMENT of the Court delivered by Mr Justice Edwards on the 25th of March, 2021.

Background to the appeal

1. The appellant is the subject of a European arrest warrant (“EAW”) dated the 10th of October 2016 and issued by the Czech Republic. The EAW in question seeks the surrender of the appellant to serve the outstanding balance of an aggregate or composite sentence of imprisonment for a term of 4 years and 3 months imposed on him, in respect of which, 4 years, 1 month and 27 days remains to be served.

2. The said sentence was imposed by the District Court in Nový Jičín on the 15th of December 2015, and which was later confirmed by the Regional Court in Ostrava on the 8th of April 2016, following the appellant's trial and conviction *in absentia* for four offences comprising:

- *Theft*, contrary to s. 205 of the Czech Criminal Code;
- *Causing damage to a thing of another*, contrary to s. 228 of the Czech Criminal Code;
- *Negligence of mandatory support*, contrary to s. 196 of the Czech Criminal Code;
- *Obstruction of justice and obstruction of a sentence of banishment*, contrary to s. 337 of the Czech Criminal Code.

3. In circumstances where the appellant had been tried *in absentia* the issuing judicial authority had certified by ticking the box at (d)3.4 in the EAW that

“ 3.4. *the person was not personally served with the decision, but*

— the person will be personally served with this decision without delay after the surrender, and

— when served with the decision, the person will be expressly informed of his or her right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and

— the person will be informed of the time frame within which he or she has to request a retrial or appeal, which will be 8 days.”

4. Accordingly, the appellant in this case was assured of the possibility, should he opt to avail of it, of a re-trial which might potentially lead to his acquittal in respect of some or all the offences for which he was surrendered. It has not been indicated specifically whether, if he opted to be re-tried but was not acquitted of anything at re-trial, he would nevertheless have the opportunity of being re-sentenced in respect of only those offences for which he was

convicted at re-trial. However, the respondent has contended in written submissions to this Court that such a re-sentencing will certainly occur in order to comply with the rule of specialty.

5. The warrant in question was endorsed by the High Court on the 13th of May 2018 and the appellant was arrested on foot of his and brought before the High Court on the 13th of September 2019. The appellant did not consent to being surrendered and accordingly a surrender hearing for the purposes of s. 16 of the European Arrest Warrant Act 2003 as amended (“the Act of 2003, as amended”) proceeded on 27th of November 2019.

6. During the surrender hearing the High Court considered certain additional information provided the issuing judicial authority in a letter dated the 29th of November 2018, stating that pursuant to s.83(3) of Act No 104/2013 Coll., (of the Czech Republic):

“If the person was extradited for execution of an unsuspended sentence of imprisonment only in relation to some of the criminal offences, for which accumulative or aggregated sentence has been imposed, or in relation to only some of the component attacks of a continuing criminal offence, the court that tried the case in the first instance will proportionately decrease the sentence in a public session. A complaint is admissible against this decision, which has a dilatory effect.

Should the sentenced individual not be surrendered for the criminal offence of failing to pay child maintenance, his sentence would be proportionately decreased after his surrender”

7. Yet further information was sought in a subsequent letter dated the 19th of September 2019 sent to the issuing judicial authority by the Irish Central Authority. The issuing judicial authority was asked, *inter alia*: -

“Please indicate the exact period of the sentence imposed which refers to the offence of failing to pay child maintenance or in the alternative, please indicate the exact

reduction of the sentence which will be applied if the respondent is surrendered for the other offences on the European arrest warrant?

8. In a reply dated the 3rd of October 2019 the issuing judicial authority responded to that question in these terms:

“[M.K] was not separately sentenced for the offence of negligence of mandatory support/failing to pay child maintenance/under sec 196 sub-sec 1 of the Criminal Code, he was sentenced only to an aggregate sentence together with the already imposed sentence of imprisonment for 1 year, he was sentenced to the total punishment of 1 year and 3 months. In the case of [M.K]’s surrender for the other offences it is therefore possible to consider the sentence reduction by 3 months.”

9. The High Court gave judgment on the 5th December 2019 and ordered the surrender of the appellant on just two of the four offences to which the warrant related, namely the offences of theft and of causing damage, respectively. For reasons to which reference will be made later in this judgment, the High Court judge refused to surrender him for the remaining offences involving negligence of mandatory support, and obstruction of justice and of a sentence of banishment, respectively. The Order was perfected on the 20th of December 2019.

10. The appellant now appeals against the High Court’s judgment and Order. Although the Notice of Appeal indicates that the appeal is against the entire decision, it is to be inferred that, in reality, the appellant’s objection is to so much of the High Court’s judgment and Order as required him to be surrendered for the offences of theft and causing damage.

11. The framework within which the appeal is brought is the granting of a certificate by the High Court judge pursuant to s. 16 (11) of the Act of 2003, as amended, that the High Court’s decision of the 5th of December 2019, and reflected in the Order of the 20th of December 2019, involved a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Court of Appeal.

12. The point of law certified comprised the following questions:
- a) Where pursuant to a European arrest warrant ('the warrant'), surrender of a person is sought in order that he might serve his sentence that was imposed following a trial and sentenced in absentia, and the warrant states that the person will be afforded the right to an appeal or retrial (as mandated by section 45 of the European Arrest Warrant Act 2003), is the need for specificity with respect to the sentence required to be served (as mandated by section 11(1A)(g)(iii)) negated?
 - b) Where a proportionate reduction of the sentence is guaranteed on the surrender of respondent if he is not surrendered on all offences to which the sentence relates, does this meet the requirement as set out under by section 11(1A)(g)(iii) of the 2003 Act?
13. The appeal is opposed by the respondent.

Relevant legislative provisions

14. As the issues on this appeal concern a number of provisions of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between member states, as amended (where relevant) by Council Framework Decision 2009/299/JHA of the 26th of February 2009 ("the Framework Decision"), and of the Act of 2003, as amended, it may be convenient at this point to set out the relevant provisions.

15. Article 2 of the Framework Decision deals with the scope of the European arrest warrant and (to the extent relevant) provides:

- 1. A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum

period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

2. The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant:

(It is not necessary for the purposes of this judgment to reproduce the ensuing list.)

16. In transposing the Framework Decision Ireland has availed of the optional ground for non-execution of a European arrest warrant specified in Article 4.1 of that instrument which reflects in turn the statement in Article 2.4 that for offences other than those covered by Article 2.2, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described. Transposition of this optional ground for non-execution is effected by s. 38(1)(a) of the Act of 2003

17. S.38 of the Act of 2003 (to the extent relevant) provides:

“38.—(1) Subject to subsection (2), a person shall not be surrendered to an issuing state under this Act in respect of an offence unless—

(a) the offence corresponds to an offence under the law of the State, and—

(i) under the law of the issuing state the offence is punishable by imprisonment or detention for a maximum period of not less than 12 months, or

(ii) a term of imprisonment or detention of not less than 4 months has been imposed on the person in respect of the offence in the issuing state, and the

person is required under the law of the issuing state to serve all or part of that term of imprisonment,

or

(b) the offence is an offence to which paragraph 2 of Article 2 of the Framework Decision applies, and under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than 3 years.”

18. Article 8 of the Framework Decision deals with the form and content of the European arrest warrant. It provides (to the extent relevant):

“1. The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex:

- (a) the identity and nationality of the requested person;
- (b) the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority;
- (c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2;
- (d) the nature and legal classification of the offence, particularly in respect of Article 2;
- (e) a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;
- (f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;
- (g) if possible, other consequences of the offence.”

19. Article 8 of the Framework Decision has been transposed into Irish law by means of s. 11(1) and (1A) of the Act of 2003, which (to the extent relevant) provide:

“11.— (1) A European arrest warrant shall, in so far as is practicable, be in the form set out in the Annex to the Framework Decision as amended by Council Framework Decision 2009/299/JHA.

(1A) ..., a European arrest warrant shall specify —

- (a) the name and the nationality of the person in respect of whom it is issued,
- (b) the name of the judicial authority that issued the European arrest warrant, and the address of its principal office,
- (c) the telephone number, fax number and email address (if any) of that judicial authority,
- (d) the offence to which the European arrest warrant relates, including the nature and classification under the law of the issuing state of the offence concerned,
- (e) that a conviction, sentence or detention order is immediately enforceable against the person, or that a warrant for his or her arrest, or other order of a judicial authority in the issuing state having the same effect, has been issued in respect of one of the offences to which the European arrest warrant relates,
- (f) the circumstances in which the offence was committed or is alleged to have been committed, including the time and place of its commission or alleged commission, and the degree of involvement or alleged degree of involvement of the person in the commission of the offence, and
- (g) (i) the penalties to which that person would, if convicted of the offence specified in the European arrest warrant, be liable,

(ii) where that person has been convicted of the offence specified in the European arrest warrant but has not yet been sentenced, the penalties to which he or she is liable in respect of the offence, or

(iii) where that person has been convicted of the offence specified in the European arrest warrant and a sentence has been imposed in respect thereof, the penalties of which that sentence consists.”

The issues in controversy before the High Court and how they were resolved

20. The appellant had maintained several substantive objections to his surrender at the s.16 hearing the High Court. To the extent relevant to this appeal, these included a claim of non-correspondence in respect of certain of the offences; and a related claim that in so far as the warrant contained non- corresponding offences these could not be effectively severed in circumstances where a single aggregate or composite sentence had been imposed in respect of all of them. In the latter regard, reliance was placed on the decision of the Supreme Court in the case of *Minister for Justice, Equality and Law Reform v. Ferenca* [2008] 4 I.R. 480. There was also a contention that the EAW was bad on its face as not specifying the information required by s.11(1A)(g) of the Act of 2003 as amended.

21. The High Court judge agreed with counsel for the requested person, i.e., the appellant, that correspondence or double criminality could not be demonstrated in respect of either the offence of negligence of mandatory support (i.e., failure to pay child maintenance) or the offence of obstruction of justice and of a sentence of banishment (which the High Court judge was satisfied related, in the appellant’s case, to a failure to present himself at the nominated place and time to be taken into custody to serve a sentence of 18 months for another theft offence imposed on him by the District Court in Karviná on the 20th of July 2012). However, the High Court concluded that, unlike in the case of *Ferenca*, the non-

corresponding offences were in fact capable of being severed in the circumstances of the present case.

22. The *Ferenca* case had involved a successful appeal to the Irish Supreme Court from a decision of the High Court, acting in its capacity as an executing judicial authority, to surrender the respondent (Mr. Ferenca) to Lithuania on foot of an EAW issued by that state so that he could serve a sentence of imprisonment in relation to three offences. The appeal was successful in the following circumstances. A single aggregate or composite sentence had been imposed on the respondent for the three offences. No box had been ticked within Part (e)I of the EAW to signify the invocation of Article 2.2 of the Framework Decision in respect of any of those offences. While both the High Court, and the Supreme Court, were satisfied that correspondence could be demonstrated in respect of two of the three offences, the same could not be said of the third offence. Accordingly, since that offence neither corresponded with an offence under Irish law, nor had Article 2.2 of the Framework Decision been invoked in respect of it, surrender was not legally possible that offence. Further, in circumstances where it was not possible to determine how much of the aggregate or composite sentence was attributable to the offence for which surrender was not legally possible, it followed that if the requested person were to be surrendered solely for the two offences for which there was correspondence it would mean that he would be required to serve a sentence that was at least partly imposed for an offence for which he could not be surrendered, and that was considered to be fundamentally objectionable.

23. The Supreme Court's views on this are encapsulated in the following passages from the judgment of Murray C.J.:

“79. As I pointed out at the outset, and which is clear from the terms of the European arrest warrant, the sentence imposed is a single sentence, what one might call a composite sentence, imposed for the three offences collectively. If the

respondent were to be surrendered to serve that sentence he would be surrendered to serve a sentence which was in part imposed for the first offence. I have already concluded above that the first offence is an offence for which s. 38(1) says the respondent should not be surrendered. There is obviously no basis on which this court can apportion part of the sentence of two years and nine months among the three offences so that he could be surrendered for the purpose of serving the amount of the sentence which related to the second and third offence.

80. *Since that cannot be done, and he cannot be surrendered to serve any sentence in respect of the first offence, the request for his surrender must be refused.*

81. *Section 17 of the Act of 2003 does make provision for surrendering in respect of some offences while refusing surrender for another offence or offences when there are multiple offences mentioned in the European arrest warrant. That section is clearly only intended to apply where the request in relation to each offence in the warrant is distinct and separate. Then the request in respect of each offence would be severable. Thus in this case if the return of the respondent had been sought in respect of three offences and he had been sentenced separately for each of those offences then s. 17 would have permitted the court to make an order for his return to serve each of the separate sentences imposed for the second and third offence and refuse to surrender to serve the sentence in respect of the first offence. However, as I say, that is not the case here. The sentence for which his return is sought is not severable from the first offence and therefore he cannot be surrendered for the purpose of serving that sentence.*

82. *For the foregoing reasons I would allow the appeal and set aside the order of the High Court.”*

24. In the present case, the High Court judge was prepared to distinguish the *Ferenca* case, and the basis on which he did so, and the *ratio decidendi* for his ultimate decision, is to be found in the following passages from his judgment:

“21. *These proceedings introduce an issue that was not considered by the court in Ferenca and that is that the issuing judicial authority has indicated that there will be a reduction in sentence in respect of the conviction for failing to pay child maintenance, if the respondent is not surrendered for that offence. This arises by reason of the express provision in the law of the Czech Republic which the issuing judicial authority drew to the attention of the applicant in its letter of 29 November, 2018, and which I have set out in full at para. 10 above.*

22. *Of course since it is only by this decision that I have held that the offence of failing to present oneself to serve a prison sentence does not correspond to any offence in this jurisdiction. However, the same provision of the legislation providing for a proportionate reduction in sentence will apply to this offence also. The question that I have to consider is whether the surrender of the respondent in respect of two offences out of four only is prohibited because he has received a single, composite, sentence of imprisonment in respect of all four offences, in circumstances where there is express statutory provision to apply for a reduction in sentence proportionate to the offences for which he is surrendered?*

23. *In considering this issue, it is, I think, important to remember that the EAW states that, because he was not present at the trial that resulted in his conviction and sentence, he will, after his surrender, be personally served with the decision and be afforded the opportunity to appeal against the same. It is made clear that that opportunity includes the opportunity to a retrial on the merits of the case.*

Accordingly, therefore, if surrendered in relation to the theft and damage to property

offences only, it is open to the respondent to request a retrial in relation to those matters only so that there will be then a new decision resulting in sentences in respect of those offences only.

24. *It is apparent from the above that the respondent has available to him two remedies to address the problems associated with the fact that the sentence imposed on him includes periods of detention relating to matters for which he will not be surrendered. The first is that he may apply to the court for a proportionate reduction in his sentence, pursuant to the provision of the law of the Czech Republic referred to above, so that it is reduced proportionately to reflect that he has not been surrendered to serve a sentence in relation to specific matters. The second is that he may elect to appeal his conviction, and if again convicted, this will result in a definitive sentence of imprisonment in relation to the matters for which he is surrendered. While therefore it is not possible for the issuing judicial authority to comply exactly with s. 11(1) (G) (III) of the Act of 2003, which requires that the EAW provides particulars of a sentence imposed on an individual by reference to the offence of which he or she was convicted, that difficulty is negated by the options available to the respondent in this case, and should not operate as bar to his surrender for offences which correspond to offences in this jurisdiction.”*

The basis of the appeal

25. At the opening of the oral hearing of the appeal in this matter, counsel for the appellant described the issues as being very net. She made it clear that her position was that the *Ferenca* difficulty persisted in this case, and that the present case was not legitimately distinguishable on the basis on which the High Court judge had sought to do so. This was because to approach it in that way required disregarding the intermeshing requirements of s. 11(1A) (g) of the Act of 2003. That this was necessary was indeed expressly recognised by

the High Court judge when he observed “[w]hile therefore it is not possible for the issuing judicial authority to comply exactly with s. 11(1) (G) (III) of the Act of 2003, which requires that the EAW provides particulars of a sentence imposed on an individual by reference to the offence of which he or she was convicted, that difficulty is negated by the options available to the respondent in this case ...”. Nothing turns on it, but the intended reference was presumably to s. 11(1A) (g)(iii) as the Act of 2003, as amended, does not contain a s. 11(1) (G) (III). Counsel for the appellant maintains that it was not open to the High Court judge to disregard non-compliance with the s. 11(1A) (g)(iii) requirement, as to be lawful the warrant had to comply with all the requirements of s.11(1A) which in turn reflects the requirements of Article 8(1) of the Framework Decision. It was urged upon us that the fact that there were “options” available to the appellant upon his return could not “negate” the non-existence of what amounted to a pre-condition to lawfulness.

26. Reliance was placed on the case of *Bob Dogi*, C-241/15 in which the CJEU had held, at paragraph 64 of that Court’s judgment, that Article 8(1) lays down requirements as to lawfulness “*which must be observed if the European arrest warrant is to be valid*” and that failure to comply with such requirements “*must, in principle, result in the executing judicial authority refusing to give effect to that warrant*”.

27. It was accepted that the requirement at issue in the *Bob Dogi* case was the requirement in Article 8(1)(c), namely, that the EAW should provide “*evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2*”; whereas the requirement at issue in this case is that contained in Article 8(1)(f), namely that the EAW should state “*the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State*”; but counsel for the appellant maintains that the principle identified in paragraph 64 of the judgment in that case is an overarching one

that must logically apply *mutatis mutandis* to all of the requirements listed in Article 8(1)(a) to (f) inclusive, and not just to the requirement in Article 8(1)(c).

28. It is for this reason that the two certified questions focus on s. 11(1A) (g)(iii) of the Act of 2003.

29. Counsel for the appellant draws further support for her position that the matters required to be stated by s.11 of the Act of 2003 are fundamental to lawfulness from the approach of Hardiman J in *Minister for Justice, Equality and Law Reform v Michael Martin Connolly* [2014] IESC 34. *Connolly* was admittedly a case in which the surrender of the requested person was sought to put him on trial in the requesting state, and not for the purpose of executing a sentence. However, the Supreme Court had taken a strict view in that case of the need for the EAW to state essential information with specificity, with Hardiman J observing “[i]t is a mandatory requirement of the European Arrest Warrant procedure that there be unambiguous clarity about the number and nature of the offences for which the person sought is so sought.” By analogy, it is argued that in a case where an EAW seeks the requested person’s surrender for the purpose of executing a sentence it is essential that it should be readily ascertainable from the warrant what was the penalty imposed for the offence or offences to which the warrant relates. Counsel for the appellant therefore maintains that the first certified question should be answered in the negative.

30. As to the second certified question counsel for the appellant argues that the guarantee of a proportionate reduction does not and cannot meet the requirement under s. 11(1A) (g)(iii) of the Act of 2003. It is suggested that the guarantee of a “proportionate reduction” is not measured in any way that is clear. It seems that the proportionate reduction is one which will be made on application by the respondent on his surrender to the issuing state. However, any such reduction will only be calculated after the surrender and therefore there has been a failure to specify “*the penalties of which that sentence consists*” as required by s. 11(1A)

(g)(iii) of the Act of 2003 and “*the penalty imposed, if there is a final judgment, or the prescribed scale penalties for the offence under the law of the issuing Member State*”, as required by Article 8 (f) of the Framework Decision.

31. Further, we are asked to note that it is possible in any given case any such reduction could potentially affect whether the minimum gravity threshold as set out in s. 38 of the Act of 2003 could have been met, but by that stage the appellant would already have been surrendered and it would be too late to raise that issue. It was submitted that in circumstances where the proportionate reduction is not, and cannot be, known until surrender has occurred, reliance cannot be placed on any such mechanism as meeting the requirement under s. 11(1A) (g)(iii) of the Act of 2003.

32. In response, counsel for the respondent maintains that the High Court judge was legitimately entitled to distinguish the *Ferenca* case on the basis that he did. He says that a purposive interpretation may be given to s. 11(1A) (g)(iii) of the Act of 2003 and that a rigid, literal interpretation of that provision requiring a precise indication of the sentence remaining to be served by the appellant for the corresponding offences is not necessarily required by law. He says that the High Court judge’s focus on the protection of the appellant’s rights of defence upon surrender was appropriate and in accordance with the purpose of the Act of 2003 and the Framework Decision.

33. We were referred by counsel for the respondent to the case of *IK*, Case C-551/18PPU. That case was concerned with Article 8(1)(f) and involved a preliminary reference by the Belgian Court of Cassation, in respect of an EAW issued by a court in Belgium with a view to the enforcement in that Member State of a custodial sentence already imposed and “*an additional sentence of release conditional to placement at the disposal of the strafuitvoeringsrechtbank (Court for the enforcement of custodial sentences, Belgium)*”.

34. The latter measure was, it seems, an artefact of Belgian sentencing law involving a “top-up” or “add-on” to the main sentence, intended for public protection purposes, and which might or might not involve further deprivation of liberty - a matter to be decided upon by the *strafuitvoeringsrechtbank* during the currency of the main sentence but before its expiry. The CJEU’s judgment sets out the provisions of the relevant Belgian Law in these terms:

“§ 1 *Release conditional to placement at the disposal of the court for the enforcement of custodial sentences pronounced against the person convicted ... shall commence on the expiry of the main sentence.*

§ 2. *The court for the enforcement of custodial sentences shall decide, before the expiry of the main sentence pursuant to Part 2, either in favour of deprivation of liberty or in favour of conditional release under supervision of the convicted person released.*

...

§ 3. *The person subject to conditional release shall be deprived of his liberty if there is a risk of him committing serious offences that undermine the physical or psychological integrity of third parties which, in the context of release under supervision, cannot be offset through the imposition of special conditions.”*

35. The context in which the request for a preliminary reference was made was slightly unusual because the EAW had already been executed by a court in the Netherlands, and the requested person had already been surrendered to the Kingdom of Belgium. However, following being surrendered, he challenged before the Belgian Courts the entitlement of the authorities there to enforce the “*additional sentence of release*”, in circumstances where the EAW on foot of which he had been surrendered had only mentioned the custodial sentence already imposed, i.e., the principal or main sentence, in part(c) thereof and did not mention

anything about an *additional sentence of release*. The CJEU was asked (by means of three questions):

“ ...,in essence, whether Article 8(1)(f) of Framework Decision 2002/584 must be interpreted as meaning that failure to indicate, in the European arrest warrant pursuant to which the person concerned has been surrendered, an additional sentence of conditional release which was imposed on that person for the same offence in the same judicial decision as that relating to the main custodial sentence precludes the enforcement of that additional sentence, on the expiry of the main sentence after an express decision to that effect is taken by the national court with jurisdiction for the enforcement of sentences, from resulting in deprivation of liberty.”

36. The CJEU noted that the Framework Decision explicitly sets out the grounds for mandatory non-execution of the European arrest warrant in Article 3 thereof, the grounds for optional non-execution of the European arrest warrant in Articles 4 and 4a thereof and the guarantees to be given by the issuing Member State in particular cases in Article 5 thereof. It further noted that it had previously held in *Bob Dogi* that those provisions:

“are based on the premise that the European arrest warrant concerned will satisfy the requirements as to the lawfulness laid down in Article 8(1) of the framework decision and that failure to comply with one of those requirements as to lawfulness, which must be observed if the European arrest warrant is to be valid, must, in principle, result in the executing judicial authority refusing to give effect to that warrant”

It followed, said the CJEU, that it cannot be ruled out from the outset that the imposition of an additional sentence which has not been indicated in a European arrest warrant may, in certain circumstances, amount to one of the grounds capable of justifying refusal to execute such a warrant.

37. Turning then to consider the circumstances of the particular case before them, the CJEU observed:

- “50 *The requirement as to lawfulness set out in Article 8(1)(f) of Framework Decision 2002/584 is intended to inform the executing judicial authorities of the length of the custodial sentence for which surrender of the requested person is sought on the basis of indications providing the minimum official information required to enable those authorities to give effect to the European arrest warrant swiftly by adopting their decision on the surrender as a matter of urgency (see, to that effect, judgment of 23 January 2018, Piotrowski, C-367/16, EU:C:2018:27, paragraphs 58 and 59).*
- 51 *That requirement is intended to enable the executing judicial authority, as the Advocate General observed in point 66 of her Opinion, to satisfy itself that the European arrest warrant falls within the scope of that framework decision and, in particular, to ascertain whether it has been issued for the execution of a custodial sentence or detention order the length of which exceeds the threshold of four months set out in Article 2(1) of the framework decision.*
- 52 *In the present case, the main sentence of three years’ imprisonment to which IK was sentenced exceeds that threshold. Accordingly, an indication of that sentence was sufficient for the purposes of ensuring that the European arrest warrant satisfied the requirement as to lawfulness referred to in Article 8(1)(f) of the framework decision.*
- 53 *In those circumstances, the executing judicial authority was required to surrender the person identified by the European arrest warrant so that the offence committed did not go unpunished and that the sentence imposed on that person was served.*

54 *Therefore, in circumstances such as those at issue in the main proceedings, the fact that the European arrest warrant did not indicate the additional sentence cannot affect the execution of that sentence in the issuing Member State following surrender.”*

38. In the present case, counsel for the respondent says that the significance of the *IK* decision rests on its emphasis that the requirement to know the length of the sentence was to “provide the minimum official information” such that the issuing state can “satisfy itself that the European arrest warrant falls within the scope of that framework decision and, in particular, to ascertain whether it has been issued for the execution of a custodial sentence or detention order the length of which exceeds the threshold of four months”. It was submitted that in this case when one eliminates the apparent three-month sentence for failure to pay maintenance and looking at the long series of offences for theft and damage to property, it is hard to see how the gravity threshold of four months for the theft and damage to property offences is not exceeded. It is said that as a matter of logic and inference the threshold must have been exceeded in circumstances where the overall sentence was one of four years and three months. Curiously, in making this argument, the respondent’s submissions do not expressly reference, or seemingly take into account, that the sentence of four years and three months also included the further offence of obstruction of justice and obstruction of a sentence of banishment. At any rate, we understand the point that was being advanced to be that such were the gravity of the multiple instances particularised in the EAW of the offending conduct ultimately charged as offences of theft and causing damage, respectively, that it is simply inconceivable that the sentence imposed for them would not have exceeded the four months threshold.

39. Accordingly, the respondent maintains that the first certified question should be answered in the affirmative.

40. As to the second certified question the respondent contends that it should also be answered in the affirmative. The respondent says that s. 11(1A) (g)(iii) specificity as to penalty is met where the issuing state sets out that a composite sentence will be reduced to discount the part of the composite sentence related to offences for which a person is not to be surrendered. While this does not provide the person with the precise figure, it provides the formula by which the final penalty will be calculated. This still specifies the penalties of which the sentence consists. The respondent's written submission states in terms:

“In *Ferenca*, Murray CJ refused surrender because the “*sentence for which his return is sought is not severable from the first offence and therefore he cannot be surrendered for the purpose of serving that sentence.*” Here, the sentences are severable by operation of Czech law and this provides sufficient specificity to surrender a person in the position of the appellant. Specificity of penalty is to allow the issuing state to check if the gravity threshold exists and as stated herein, logic and inference dictates that for the theft and damage to property offences and minimum gravity of four months per offence applies.”

41. The respondent makes one further point. It is suggested that the appellant, though sentenced, is in fact in the position of a person who has been convicted but not yet sentenced. He must be resentenced upon surrender to comply with rule of specialty and undoubtedly will be resentenced in accordance with law and will receive a proportionate reduction or deduction from his existing sentence for those offences for which he is not been surrendered. Counsel for the respondent argues that for all intents and purposes the appellant, if surrendered, would be in the same position as a person who has been convicted but who has not yet been sentenced. He submits that it would be incongruous and illogical that surrender should be possible in those circumstances, but not possible in the circumstances of the instant

case even though the issuing state has given assurances that were deemed satisfactory and adequate by the High Court judge.

Discussion and Decision

42. The basis of the decision in *Ferenca* is sometimes misunderstood. It is sometimes thought that surrender was refused because the Minister could not show that minimum gravity was satisfied in respect of the two offences for which correspondence could be demonstrated, in circumstances where it was not possible to determine how much of the aggregate or composite sentence was attributable to those offences and how much was attributable to the offence for which surrender was not legally possible. In fact, although several of the judgments of the Supreme Court in *Ferenca* did discuss a possible difficulty in that regard (which has since been discounted, as we will explain below), the true *ratio* of *Ferenca* did not centre on an inability to demonstrate minimum gravity, but rather on the proposition that if the requested person were to be surrendered solely for the offences for which there was correspondence it would mean that he would be required to serve a sentence that was at least partly imposed for an offence for which he could not be surrendered, and that was considered to be fundamentally objectionable.

43. The position has since been clarified in subsequent decisions of the Supreme Court: see *Minister for Justice Equality and Law Reform v Dus* [2009] IESC 67, *Minister for Justice, Equality and Law Reform v Kizelavicius* [2009] IESC 47 and particularly *Minister for Justice, Equality and Law Reform v. SAS* [2010] IESC 16.

44. In the SAS case, Geoghegan J said:

“The second ground of appeal is, in my view, clearly misconceived. It arises from a misunderstanding of the judgment of Murray C.J. in Minister for Justice, Equality and Law Reform v. Ferenca delivered in the Supreme Court on the 31st July 2008. The Chief Justice never suggested that where there was a European Arrest Warrant in

respect of two separate offences for which a composite sentence had been imposed there could not be a surrender because the Irish courts would have no way of knowing whether either offence failed to comply with the so called “minimum gravity” test provided for in section 38 of the European Arrest Warrant Act, 2003 as amended. The difficulty in the Ferenca case was that in relation to two offences, for which there was a composite sentence, the court was acceding to the request for surrender only in respect of one of them. ...

Nothing essential turns on it, but Geoghegan J is slightly incorrect here. In fact, there were three offences at issue in *Ferenca*, two of which corresponded and one of which did not.

Clearly, a problem did arise in that instance, as succinctly pointed out in the fourth last paragraph of the Chief Justice’s judgment. The relevant passage reads as follows:

‘As I pointed out at the outset and which is clear from the terms of the European Arrest Warrant, the sentence imposed is a single sentence, which one might call a composite sentence, imposed for the three offences collectively. If the appellant were to be surrendered to serve that sentence he would be surrendered to serve a sentence which was in part imposed for the first offence. I have already concluded above that the first offence is an offence for which section 38(1) says the appellant should not be surrendered. There is obviously no basis on which this court can apportion part of the sentence of two years and nine months among the three offences so that he could be surrendered for the purpose of serving the amount of the sentence which related to the second and third offence.’

...

It would seem to me to have been implicit in that passage from the Chief Justice's judgment in Ferenca that he would have seen no problem with the composite sentence if surrender was being effected in respect of each of the offences the subject matter of the sentence, provided of course, that the composite sentence exceeded the threshold or "minimum gravity". The minimum gravity test as provided for in the Framework Document and enacted in the European Arrest Warrant Act, 2003 was concerned with the length of a particular sentence the offender was called upon to serve. Provided there was the necessary correspondence, it is immaterial that the sentence related to more than one offence.

Although the view which I have expressed seems to me to be implicit, for the reasons indicated, in the judgment of the Chief Justice in Ferenca, it is true that the precise point did not directly arise in Ferenca and in that sense the implicit view might be regarded as obiter dicta. But it is difficult to see how such a view could be challenged.

As pointed out in the written and oral submissions on behalf of the Minister, the point did directly arise in a House of Lords appeal, Pilecki v. Circuit Court of Legnica, Poland [2008] 1 WLR 325. Lord Hope of Craighead in an opinion with which the other members of the appellate committee concurred, held that where a Polish court had aggregated a number of sentences for the purposes of its final judgment, the aggregated sentence exceeding four months and where it was not possible to say how much of the aggregated sentence was attributable to each offence, it was the length of the sentence alone that determined whether or not it fell within the scope of a European Arrest Warrant. If there was a composite sentence in respect of two offences for which otherwise surrender should lawfully be made, there was no

necessity to make any further enquiry into the sentence. That opinion was primarily based on the Framework Document. I am satisfied, for the reasons which I have indicated, that Irish law is no different”

45. In this case counsel for the appellant correctly understands the basis of the decision in *Ferenca*. Her case is that in the circumstances here the essential difficulty that resulted in non-surrender in Mr. Ferenca’s case is again replicated. She says that if the appellant were to be surrendered solely for the two offences for which there is correspondence it would mean that he would be required to serve a sentence that was at least partly imposed for the two offences for which he could not be surrendered, and that that represents a spectre that always has been, and continues to be, regarded in EAW law as fundamentally objectionable. It is further suggested that the fact that on the evidence there are “options” open to this appellant upon his return, namely to avail of his right to a re-trial in circumstances where he was convicted *in absentia*, alternatively to seek a proportionate reduction in the aggregate or composite sentence to take account of the fact that he was only being surrendered for two of the four offences to which that sentence related, is immaterial. She says, in effect, that the High Court ought not to have taken account of what are no more than uncertain and contingent possibilities because neither of them, as the respondent concedes, provided either that court, or the appellant, with any certainty as to the sentence he would be required to serve upon being returned.

46. I consider that there is a degree of conflation in the appellant’s case between the fundamental objectionability of a requested person being returned to serve a sentence that was at least partly imposed for an offence or offences for which he/she could not be surrendered, and the separate issue as to whether, and the extent to which, a requested person is entitled to certainty as to the sentence he/she would be required to serve upon being returned.

47. It is my view that in consequence of the “options” available to the appellant it cannot be said that, if he is surrendered, he will be returned to serve a sentence that was at least partly imposed for the two offences for which he could not be surrendered. Regardless of which option he avails of, he will be re-sentenced in a procedure that will advantage him by excluding the offences for which he was not surrendered from consideration. He will therefore only be required to serve a sentence or sentences for the two offences for which correspondence could be demonstrated. Accordingly, that which in *Ferenca* terms would be fundamentally objectionable does not obtain in his case.

48. On the issue of as to whether, and the extent to which, a requested person is entitled to certainty as to the sentence he/she would be required to serve upon being returned I am inclined to agree with counsel for the respondent that, leaving aside for a moment any possible implications arising under s. 11(1A) (g)(iii) of the Act of 2003 and the provision it transposes, i.e., Article 8(1)(f) of the Framework Decision, precise certainty as to the sentence to be actually served is not required in the circumstances of this case. We think there is force in the argument that in circumstances where a re-sentencing is all but inevitable the appellant is, at worst, in an analogous situation to that of a requested person who stands convicted but has not yet been sentenced. We say “at worst” because he has been guaranteed the option, should he choose to avail of it, of a full re-trial on the merits in circumstances where he was convicted *in absentia* at first instance, and there is therefore a possibility that he could be acquitted. In circumstances where a person who stands convicted and is yet to be sentenced may be surrendered to face sentencing and then to serve his/her sentence, I see no reason in principle why this appellant should not face surrender to the same end.

49. This brings me to the potential impact of s. 11(1A) (g)(iii) of the Act of 2003 and the provision it transposes, i.e., Article 8(1)(f) of the Framework Decision. It seems to me that the importance of the judgments in *Bob Dogi* and in *IK*, (and indeed of the *Piotrowski*

decision referred to in the quotation cited earlier from *IK*, which I consider it unnecessary to specifically review for the purposes of this judgment), in terms of the case before us lies in the CJEU's emphasis on the Article 8(1)(a) to (f) requirements as being requirements "*as to lawfulness*". Although the *Bob Dogi* case was specifically concerned with Article 8(1)(c), and the *IK* case was specifically concerned Article 8(1)(f), as is the present case, I am satisfied from the jurisprudence of the CJEU that the requirements of each sub-article of Article 8(1) are all to be regarded as being requirements as to lawfulness. If the mandated information is not provided in the warrant (or a separate accompanying document, which is allowed) with the required level of specificity the request will not meet minimum requirements for validity, such that the executing judicial authority may have no option but to refuse surrender on that basis.

50. Returning to the present case, the starting point must be that Article 8(1)(f) of the Framework Decision, requires that a European arrest warrant should state:

"the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State",

and that this is a requirement as to lawfulness.

51. The standard form of EAW provided for in the Annex to the Framework Decision makes provision for this information to be provided in part (c).

52. Article 8(1)(f) has been transposed into Irish law by s.11(1A)(g) of the Act of 2003, which provides:

- "(i) the penalties to which that person would, if convicted of the offence specified in the European arrest warrant, be liable,
- (ii) where that person has been convicted of the offence specified in the European arrest warrant but has not yet been sentenced, the penalties to which he or she is liable in respect of the offence, or

(iii) where that person has been convicted of the offence specified in the European arrest warrant and a sentence has been imposed in respect thereof, the penalties of which that sentence consists.”

53. In circumstances, as in this instance, where the wording of the transposing legislation is not identical to that used in the Framework Decision, s.11(1A)(g) must be given a conforming interpretation in so far as is possible and providing that it does not lead to an interpretation that is *contra legem* (see *Criminal Proceedings against Pupino*, Case C-105/03 [2005] E.C.R. I -5285). One important difference between Article 8(1)(f) of the Framework Decision and our transposing provision relating to the case of a person who has already been sentenced, namely s.11(1A)(g)(iii) of the Act of 2003, is that the former only requires specification of the penalty imposed “*if there is a final judgment*”, whereas the domestic provision does not qualify it’s requirement in that way. The question then arises whether s.11(1A)(g)(iii) of the Act of 2003, as amended, could, and should, be afforded a conforming interpretation that aligns with the provision it was ostensibly intended to transpose. I consider that it should, in circumstances where I can find nothing in s.11 of the Act of 2003, as amended, or indeed in the Act as a whole, to indicate a specific intention by the Oireachtas to impose a stricter requirement as to lawfulness, than does the Framework Decision, in terms of what must be specified within an EAW in respect of the penalty imposed where a sentence has already been passed.

54. Accordingly, it seems to me that in conformance with Article 8(1)(f) of the Framework Decision, s.11(1A)(g)(iii) of the Act of 2003, as amended, should be interpreted as only requiring specification of the penalty imposed where there has been “*a final judgment*”.

55. It was held by the Supreme Court in *Minister for Justice v Renner-Dillon* [2011] IESC 5, albeit in the different context of a *ne bis in idem* issue, that the concept of a final

judgment has an autonomous meaning in EU law and references to it in the Framework Decision bear than autonomous meaning. Referencing the case of *Mantello* C-261/09, Finnegan J giving judgment for the Supreme Court stated:

“From the judgment in Mantello it is clear that “finally judged” in the Framework Decision has an autonomous meaning in the law of the European Union. Where under the law of the issuing Member State a judgment, in this case a judgment of acquittal, does not definitively bar further prosecution or as stated in Mantello “constitute a procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts against that person”, then that person has not been finally judged.”

56. Applying the autonomous meaning of what it means to be finally judged or to be subject to a final judgment to the circumstances of the appellant’s case, it does not seem to me that there has been a final judgment in the appellant’s case. The possibility exists of a re-opening of criminal proceedings in the Czech Republic, both in respect of liability and sentence, based on the guarantee of a re-trial, alternatively the possibility of applying for a proportionate reduction of sentence, at the appellant’s option, relating to the two offences for which correspondence can be demonstrated. In such circumstances it was not a requirement “as to lawfulness” that the EAW in this case should state the penalty imposed. It sufficed if it stated, “*the prescribed scale of penalties for the offence under the law of the issuing Member State*”, which it did.

57. In terms of minimum gravity, the thresholds in Article 2(1) in the Framework Decision would appear to be disjunctive. Article 2(1) was transposed by s.38(1)(a) of the Act of 2003. The provisions of s. s.38(1)(a) were also interpreted as being disjunctive by the Supreme Court in *Minister for Justice Equality and Law Reform v Dus* [2009] IESC 67. Giving judgment for the Supreme Court in that case, Macken J said:

“The Framework Decision is clearly intended to and is accepted as having been intended to be capable of being applied readily in a wide variety of different jurisdictions and in relation to different and varying methods of imposing sentence. Interpreting the provisions of the act of 2003 by reference to the intention and purpose of the Framework Decision including the Annex is an obligation imposed on each member state as is also clear from the jurisprudence. Since the provisions of section 38(1)(a) are disjunctive, the appellant can be surrendered provided that the minimum gravity thresholds under either (a)(i) or (a)(ii) is met.”

And she later added:

“I am satisfied that there is no legal reason for interpreting s.38 in any manner other than disjunctively.”

58. In those circumstances it is clear that in a case such as the present, where the appellant has not been finally judged according to EU law, and is in effect in the position of a requested person who, at worst, has been convicted and is yet to be sentenced, the appropriate threshold for minimum gravity purposes is that in s. 38(1)(a)(i), namely that under the law of the issuing state the offence is punishable by imprisonment or detention for a maximum period of not less than 12 months. That threshold was clearly met in this case.

59. The adoption of this approach clearly renders nugatory the further claim by the appellant that any proportionate reduction of the aggregate or composite sentence post surrender by a court in the Czech Republic could potentially affect whether the minimum gravity threshold as set out in s. 38 of the Act of 2003 could have been met.

60. Had I not been of the view that the threshold in s. 38(1)(a)(i) was the appropriate one in the circumstances of this case, it requires to be stated that I would have regarded the position advanced by the respondent on minimum gravity as untenable, namely that it is

inconceivable that a minimum gravity threshold of four months for the theft and damage to property offences would not have been exceeded having regard to the series of offences for theft and damage to property that is set out in the EAW. Despite what was urged, such a conclusion does not seem to me to follow either as a matter of logic or inference. It is, however, now academic.

How to answer the questions certified:

61. For the reasons I have outlined I would answer question (i) in the affirmative.
62. Question (ii) does not require to be answered in circumstances where it was not a requirement "*as to lawfulness*" that the EAW in this case should state the penalty imposed and it was sufficient that the EAW stated "*the prescribed scale of penalties for the offence under the law of the issuing Member State*".

Conclusion and decision:

63. I am of the view, for the reasons stated above, that the appeal should be dismissed.