Neutral Citation: [2013] IEHC 290

**THE HIGH COURT**

**Record No.: 2011/310 Ext.**

**IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003**

**Between/**

**THE MINISTER FOR JUSTICE & EQUALITY**

**Applicant**

**-AND-**

**ANGELINA JOČIENĖ**

**Respondent**

**JUDGMENT of Mr Justice Edwards delivered on the 31st day of May, 2013.**

**Introduction:**
The respondent is the subject of a European arrest warrant issued by the Republic of Lithuania on the 13th July, 2011. The warrant was endorsed by the High Court for execution in this jurisdiction on the 14th September, 2011, and it was duly executed on the 9th November, 2011. The respondent was arrested by Garda Donal O'Donovan on that date, following which she was brought before the High Court later on the same day pursuant to s.13 of the European Arrest Warrant Act 2003 (hereinafter "the Act of 2003"). In the course of the s.13 hearing a notional date was fixed for the purposes of s.16 of the Act of 2003 and the respondent was remanded on bail to the date fixed. Thereafter the matter was adjourned from time to time, ultimately coming before the Court for the purposes of a surrender hearing.

The respondent does not consent to her surrender to the Republic of Lithuania. Accordingly, this Court is now being asked by the applicant to make an Order pursuant to s.16 of the Act of 2003 directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive her. The Court must consider whether the requirements of s.16 of the Act of 2003, both controversial and uncontroversial, have been satisfied and this Court's jurisdiction to make an order directing that the respondent be surrendered is dependant upon a judicial finding that they have been so satisfied.

Uncontroversial s.16 issues

The Court has received an affidavit of Garda Donal O'Donovan sworn on the 29th November, 2011, testifying as to his arrest of the respondent and as to the questions he asked of the respondent to establish the respondent's identity. In addition, counsel for the respondent has confirmed that no issue arises as to either the arrest or identity.

The Court has also received and has scrutinised a true copy of the European arrest warrant in this case. Further, the Court has taken the opportunity to inspect the original European arrest warrant which is on the Court's file and which bears this Court's endorsement.

I am satisfied following my consideration of these matters that:

(a) The European arrest warrant was endorsed for execution in this state in accordance with s.13 of the Act of 2003;

(b) The warrant was duly executed;

(c) The person who has been brought before the Court is the person in respect of whom the European arrest warrant was issued;

(d) The warrant is in the correct form;

(e) The warrant purports to be a prosecution type warrant and the respondent is wanted in Lithuania for trial in respect of the four offences particularised in Part E of the warrant.

(f) It is conceded by counsel for the applicant that correspondence cannot be established with respect to the second offence listed in Part E. Moreover, the said second offence is charged contrary to the version of Article 277 § 1 of the Criminal Code of the Republic of Lithuania that was in force at the material time, and in regard to which the penalty provided for was a period of up to two years "corrective labour", rather than any term of detention or imprisonment. The decidedly Soviet era concept of "corrective labour" was described in additional information dated the 4th May, 2012, as meaning that any person subject to this penalty was appointed to work in his/her previous workplace and a particular percentage of his/her wage was deducted for the state budget. The current version of the Criminal Code of Lithuania no longer provides for corrective labour but if the respondent were to be convicted of the second offence she would be sentenced in accordance with the provisions of the old version of the said Code. Accordingly the Court is not being asked to surrender the respondent to be prosecuted for the second offence.

(g) It is further conceded by counsel for the applicant that there is no immediate intention to prosecute the respondent for the third and fourth offences because the additional information dated the 4th May, 2012, makes it clear, at paragraph (h) thereof, that the ability of the prosecuting authorities to try her for those offences is contingent upon a conviction being first recorded against her for the crimes allegedly committed in 1998 (i.e., the first and second offences listed in Part E). In the circumstances, the applicant is not asking the Court to surrender the respondent to be prosecuted for the third and fourth offences listed in Part E.

(h) The sole remaining offence with which the Court is concerned is the first offence listed in Part E. For the avoidance of doubt this is the offence which is the subject of Lithuanian Criminal Case No. 20-1-683-98.

(i) The underlying domestic decision on which the warrant is based is an Order of Kaunas City District Court of the 6th December,

2007, imposing a provisional measure of arrest.

(j) The issuing judicial authority has invoked paragraph 2 of article 2 of Council Framework Decision the 13th June 2002 on the European arrest warrant and the surrender procedures between Member States, (2002/584/J.H.A.) O.J. L190/1 18.7.2002 (hereinafter referred to as "the Framework Decision") in respect of the first offence listed in Part E by the ticking of the box in Part E.I of the warrant relating to "fraud". There was some initial uncertainty due to an imprecise translation in one part of the warrant which used the word "swindling" rather than "fraud" as to what offence or offences were in fact intended to be covered by the ticking of this box, but the position has been clarified by additional information dated the 15th December, 2011. It is now beyond doubt that paragraph 2 of article 2 of the Framework Decision is being invoked in respect of the first offence. Accordingly, subject to the Court being satisfied that the invocation of paragraph 2 of article 2 is valid (*i.e.* that the minimum gravity threshold is met, and that there is no basis for believing that there has been some gross or manifest error), it need not concern itself with correspondence;

(k) The minimum gravity threshold in a case in which paragraph 2 of article 2 of the Framework Decision is relied upon is that which now finds transposition into Irish domestic law within s. 38(1)(b) of the Act of 2003, as amended, namely that under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than three years. The first offence listed in Part E, i.e., an offence contrary to Article 182 § 2 of the Criminal Code of the Republic of Lithuania carries a term of imprisonment of up to eight years. Accordingly, the minimum gravity threshold is comfortably met;

(l) The sole offence with which the Court is now concerned is particularised within the warrant as follows:

> "While being the owner and manager of a private limited liability company (hereinafter referred to as the "UAB") "Holiday Bourse" and UAB "Turizmo patariamoji grupė", having the aim to seize another's property and knowing in advance that she would not be able to perform the obligations undertaken by the agreements and having no intention to perform such obligations, at the premises of the company situated in Kęstučio g. 78 in Kaunas, Angelina Jočienė (Juknelienė) concluded a trip arrangement agreement for the amount of 14000 LTL with R. Urbštas on 4 March 1998, promised N. Lekečinskaite to arrange a trip abroad for the amount of 14800 LTL on 15 May 1998, concluded a trip arrangement agreement for the amount of 16000 LTL with D. Brazdžius on 16 May 1998, concluded a trip arrangement agreement for the amount of 9499 LTL with J. Fokienė on 10 June 1998, promised Z. Roževičius to arrange a trip abroad for the amount of 9975 LTL on 22 June 1998, concluded a trip arrangement agreement for the amount of 10800 LTL with A. Poškus on 30 June 1998, concluded a trip arrangement agreement for the amount of 15920 LTL with E. Daknienė on 2 July 1998, concluded a trip arrangement agreement for the amount of 10000 LTL with R. Kuprytė on 21 July 1998, concluded a trip arrangement agreement for the amount of 9499 LTL with E. L. Eimontienė on 23 July 1998 and repaid 5200 LTL for failure to arrange the trip, concluded a trip arrangement agreement for the amount of 600 LTL with L Mosteikytė on 28 July 1998, concluded a trip arrangement agreement for the amount of 1200 LTL with D. Radzevičius on 29 July 1998 with the latter paying 400 LTL, promised V. Antuchas to arrange a trip for the amount of 8000 LTL on 15 September 1998, promised A. Katkauskas to arrange a trip for the amount of 8644 LTL on 18 September 1998, concluded a trip arrangement agreement for the amount of 10000 LTL with A. Muzikevičius on 18 September 1998 and promised S. Šimkevičius to arrange a trip for the amount of 2800 LTL on 2 November 1998, but failed to perform the condition of the agreements and did not repay the money and thus acquired by deceit and for her own benefit another's property of a high value, i.e, 135737 LTL. Angelina Jočienė is suspected in the commission of the criminal act defined by Article 182 paragraph 2 of the Criminal Code of the Republic of Lithuania."

There is no reason, upon a consideration of the underlying facts as set out above, to believe that the ticking of the box relating to fraud was in error;

(m) No issue as to trial *in absentia* arises in the circumstances of this case and so no undertaking is required under s. 45 of the Act of 2003;

(n) There are no circumstances that would cause the Court to refuse to surrender the respondent under s.22, s.23 or s.24 of the Act of 2003, as amended.

In addition, the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) (No. 3) Order 2004 (S.I. No. 206 of 2004) (hereinafter "the 2004 Designation Order"), and duly notes that by a combination of s. 3(1) of the Act of 2003, and Article 2 and the Schedule to the 2004 Designation Order, "Lithuania" (or more correctly the Republic of Lithuania) is designated for the purposes of the Act of 2003 as being a state that has under its national law given effect to the Framework Decision.

**The Points of Objection**
Points of Objection were filed pleading eight different grounds of objection. However, only two were ultimately relied upon, namely points three and seven, respectively.

Point number three raises a s.21A objection and pleads that no decision has been made in the issuing state to charge and try the respondent in respect of the offence with which we are concerned.

Point number seven raises a s.37(1) objection and in substance pleads that the respondent's surrender would constitute a disproportionate interference with her right to respect for family life under Article 8 of the European Convention on Human Rights (hereafter "E.C.H.R.).

**The Respondent's Evidence**
The Court has before it an affidavit of the respondent sworn on the 22nd May, 2012, in which she states:

> "2. I say that I was arrested on foot of a European Arrest Warrant issued in Lithuania on the 13th day of July 2011 (hereinafter referred to as "the Warrant") by Garda Donal Donovan on behalf of the Applicant on the 9th day of November, 2011 at Cobh Garda Station and I say that I confirmed that the name, personal details and photograph set out in the said warrant were mine.
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> 3. I say that Garda Donovan drew my attention to a number of offences of alleged fraud from 1991 to 1998 in respect of which the Warrant had issued and that I responded "yes they are trying to put this on me, I only worked for them. It is a limited company not owned by me". I say that, as my reply suggests, I am familiar with the companies named in the Warrant but I say that the only one I owned was Merilina. I say that I had initially set up a catering business in this name before later expanding into manufacturing windows and doors, and importing machinery from abroad. I say that this was

not a limited company but a business name which I operated as a sole trader. As regards the other companies referred to in the Warrant, Holiday Bourse and Turizmo, I say that I was not the owner of either company nor had I any involvement in their management or accounting practices generally, or any knowledge of the matters the subject of the allegations in the Warrant. I say that Holiday Bourse was an English owned company selling timeshares in the issuing State and that I was employed by it to seek customers there. I say that Turizmo was a Lithuanian company arranging holiday accommodation abroad, particularly in Spain and that my role was again as an employee arranging this accommodation. I say that I was never aware of any fraudulent activity by either company or of any allegation thereof until my arrest on foot of the Warrant in these proceedings.

4. I say that the only investigation I was previously aware of was a bankruptcy investigation into the activities of Merilina in the course of which I was questioned by the police in the issuing State and subsequently charged with offences of fraud and false accounting which I say and believe are the same as, or very similar to, Criminal Case No. 1-400/2000 as set out at paragraph E of the European Arrest Warrant. I say, however, that during a trial before a judge with no jury which took place over 6 months in 1993 in the city of Kaunas in the issuing State the charges against me relating to fraud and false accounting were dropped.

5. I say that following the same trial I was convicted of an offence of possession of foreign currency. I say that in 1993 when the new Lithuanian currency, the Litas, was introduced a law was enacted making it a criminal offence to possess foreign currency. I say, however, that I had engaged in transactions in US Dollars and Russian roubles prior to the enactment of this law and that during the bankruptcy investigation a quantity of dollars and roubles was found in the office of Merilina. I say that my assets including my house, lands, apartments, a meat factory, a bread factory, a doors and windows factory and a design studio were expropriated by the authorities in the issuing State and I was disqualified from holding the office of company director. I say accordingly I had to live in rented accommodation and it was then that I obtained employment with Holiday Bourse and Turizmo. I say that I also received a 5 year term of imprisonment but that I never was required to serve any portion of this term as an amnesty law was subsequently passed in 1996 in respect of foreign currency offences.

6. I say therefore that when I left the issuing State in 1998 I did not believe there was any allegation of wrongdoing outstanding against me and I was given no indication either at this time or later that I was suspected of involvement in any criminal activity or that any such investigation was ongoing which might later result in criminal proceedings against me. I say, on the contrary, that I was never questioned again by the police in relation to this or any other matter but that I lived and worked openly in the issuing State until my departure. I say further that I lived at the same address in Kaunas as referred to in the Warrant and, furthermore, that my husband worked in the Special Forces Unit of the Kaunas Police Department. I say also that in the course of my business activities during this period I was requested to bribe public officials in the issuing State on a number of occasions which I duly reported to the police there.

7. I say, therefore, that for the five years following the Merilina trial as referred to above and prior to my departure from the issuing State I was readily available to the authorities there and, indeed, brought myself to their attention for the reasons set out above.

8. I say therefore that I left the issuing State in 1998 and travelled initially to Baltimore in the United States in order to raise my family in an environment which was free from the corruption I had witnessed in the issuing State, and where I believed better opportunities might be available for them. I say that I worked there as a homemaker and spiritual healer and that in 1999 I moved to Montreal before returning to Baltimore in 2000 to work as a home care agent. I say that in 2007 we moved to New York where I worked as a massage therapist until 2009. I say that during all this time my husband lived with me and worked as a truck driver and taxi driver and that in April 2009 I applied to the embassy of the issuing State in New York for a new passport.

9. I say that in September 2009 my husband wished to travel to this jurisdiction in search of work and that he is now working here as a truck driver for Walton Transportation in Cork. I say that I am currently studying English, commerce and computers in the Cork College of Commerce, a Diploma in FETAC level 5 which will conclude in June 2012, following which I hope to pursue a course in psychotherapy as I have worked with psychiatric patients in the past as set out above. I say further that I am the mother of three children between the ages of 21 and 16 and that my daughters (aged 17 and 21) are both studying business in Cork Institute of Technology and my son (aged 16) is in fifth year in secondary school. I say that I have another daughter (aged 29) from my first marriage who arrived in Ireland from the United States 2 months ago and I say that I am supporting her until she can find work. I say further, however, that I have been having difficulties in my relationship with my husband and that, on the basis of allegations of drunkenness and violence, I obtained a Protection Order against him before Cork District Court on the 17th day of May 2012. I say and believe for the foregoing reasons that if I am surrendered to the issuing State my husband will not be in a position to look after our children.

10. I say, therefore, that the Warrant relates to allegations of fraud some of which date back more than 20 years. I say that I was acquitted of the only such allegation of which I was previously aware and did not believe that I was suspected of any further criminal activity when I was arrested in this jurisdiction on foot of the Warrant in November 2011. I say that there is no explanation in the Warrant for this delay but I say that I have not in any way contributed to it or sought to evade or conceal my identity from the authorities in any jurisdiction. I say further that during this period I have made a new life in this country with my family and that we have engaged in education and employment with a view to contributing positively to Irish society. I say that we have not come to adverse Garda attention but have formed ties both professional and personal with our local community. I say and believe, therefore, that given the considerable delay in the prosecution of these matters against me and the changes to my life and that of my family in the meantime it would in all the circumstances be unjust and disproportionate to order my surrender to the issuing State on foot of the European Arrest Warrant."

**Relevant Additional Information**

A lot of additional information was sought and provided in this case. However, only some of it is relevant to the s.21A issue. To place the information provided in its proper context it may be helpful in respect of each piece of relevant additional information to set out both the query/queries raised by the Irish Central Authority and the answer(s) provided by the issuing judicial authority.

By letter of the 25th April, 2012, the Irish Central Authority asked:

"(b) Please confirm what, if any, distinction exists between being "charged with the commission" of the two offences comprising case number 1-400/2000 and being "suspected in the commission" of the offences comprising case number 20-1-683-98."

The issuing judicial authority replied by letter of the 4th May, 2012, that:

"(b) In accordance with the provisions of **Article 21** of the Republic of Lithuania Code of Criminal Procedure (hereinafter RL CCP) the status of a suspect is applied with regard to any person who has been detained on suspicion of committing a criminal offence or any person who is being interviewed about an act which he is suspected of having committed or any person who is being summonsed to an interview and against whom a Notice of Suspicion specified in Article 187 of this Code has been formally drawn up. Furthermore, in accordance with the provisions of Article 22 of RL CCP the defendant, or the accused, shall be a party to judicial proceedings and the status of a defendant shall be applied with regard to any person against whom a Bill of Indictment has been brought by the prosecutor in accordance with the procedure prescribed by RL CCP or against whom an application for sentencing a person on the grounds of a court's penal order has been filed by the prosecutor in accordance with the procedure prescribed by R CCP or any person against whom a case is handled by the court in accordance with the procedures of either private prosecution or expedited proceedings. Thus pursuant to these legal norms the suspect becomes a defendant after the case is referred to the court for consideration."

On the 17th May, 2012, the issuing judicial authority forwarded to the Irish Central Authority by fax a letter that it had received from the District Prosecutor's Office of Kaunas City elaborating further. The said letter stated (*inter alia*):

"(b) The differences between the phrases 'is accused of committing' and 'is suspected of committing': A suspect - a participant of the pre-trial investigation; a person who has been detained on suspicions that he committed a criminal act, or a person who is questioned about a criminal act that he is suspected of, or a person who is summoned to questioning and to whom a notice of suspicion has been drawn up which is provided in Article 187 of the Code of Criminal Procedure of the Republic of Lithuania.

When a person goes into hiding or his whereabouts are unknown, such person is recognized a suspect upon a decision of a prosecutor or by a ruling of a pre-trial investigation judge, whereas in urgent cases - by a decision of a pre-trial investigation officer,

**Article 21 of the Code of Criminal Procedure of the Republic of Lithuania. The Suspect.**

1. A suspect shall be a party to a pre-trial investigation.

2. A person who has been detained on suspicion of committing a criminal act, or a person who is being subject to questioning about an act which he is suspected of having committed, or a person summoned to questioning to whom a notice of suspicion has been drawn up as provided in Article 187 of this Code, shall be regarded as suspect.

3. When a person goes into hiding or his whereabouts are unknown, he shall be recognized a suspect upon a decision of the prosecutor or by a ruling of the pre-trial investigation judge, whereas in urgent cases - by a decision of the pre-trial investigation officer.

4. A suspect shall be entitled to be informed of the suspicions against him, to have a defence counsel from the moment of his detention or his first questioning; to testify, to present documents and items which are significant to the investigation, to present requests, make challenges, to introduce himself with pre-trial investigation material; appeal against the actions and decisions of an officer of the pre-trial investigation a prosecutor or a pre-trial judge.

**Article 187 of the Code of Criminal Procedure of the Republic of Lithuania. Notice of Suspicion.**

1. Prior to the first questioning, a suspect may be served upon his signature a notice on suspicion or a prosecutor's decision to recognize him a suspect. When a citizen of a foreign state, who is suspected of a crime for which liability is provided on the grounds of international agreements of the Republic of Lithuania and Article 7 of the Criminal Code liability, is not within the territory of the Republic of Lithuania and cannot be surrendered or transferred to the Republic of Lithuania in cases provided in international agreements of the Republic of Lithuania, upon request of the prosecutor such person is recognized a suspect upon a ruling of the pre-trial investigation judge. The notice of suspicion, prosecutor's decision or a ruling of the pre-trial investigation judge has to indicate a criminal act (place of the commission of crime, time, other circumstances) and criminal law which foresees the said criminal act; the notice of suspicion shall also list the rights of the suspect.

2. Prior to other questionings, new notice of suspicion has to be served only in cases when contents of the suspicion have changed.

3. The pre-trial investigation judge's ruling to recognize a citizen of a foreign state a suspect due to a crime for which liability is provided on the grounds of international agreements of the Republic of Lithuania and Article 7 of the Criminal Code, shall be sent to central contact authorities in foreign states which are provided in the international agreements of the Republic of Lithuania.

**Defendant** - a person in respect of whom the prosecutor passed an indictment or submitted an application to punish the person in accordance with the procedure of penal order, also, a person against whom there is a pending case at court pursuant to the order of private prosecution or expedited procedure. In Lithuania, pursuant to the Code of Criminal Procedure - participant of the trial proceedings.

**Article 22 of the Code of Criminal Procedure. The Accused**

1. The accused shall be a party to judicial proceedings.

2. The accused shall be a person against whom an indictment has been brought by the prosecutor in the procedure specified in this Code or there is a prosecutor's application to punish the person pursuant to a penal order, also a person against whom a case is heard on the basis of a private accusation or in an accelerated procedure.

> 3. The accused shall be entitled: to be notified of the charges brought against him and to be provided a transcript of the indictment; to examine in court the materials of the case; to make extracts from or copies of the necessary documents in accordance with the established procedure; to have a counsel for the defence; to make motions; to make challenges; to present the evidence and to be present during the examination of the evidence; to ask questions during the hearing; to provide explanations about the circumstances of the case which is being heard and express his opinion about the motions made by the other parties to the proceedings; to take part in the arguments where there is no counsel for the defence; to address the court with the last plea; to appeal the judgement and court orders.
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> 4. The accused against whom a conviction has been rendered shall become the convicted person, and the person against whom an acquittal has been brought shall become the acquitted person."

On the 13th June, 2012, the Irish Central Authority wrote again to the issuing judicial authority stating:

> "You are asked for the purposes of clarity to confirm whether a decision has been taken to put the respondent on trial in respect of the offences listed at 1 and 2 in the European Arrest Warrant and to prefer a bill of indictment against her for that purpose if she is surrendered. She is referred to as a suspect for these offences in the warrant which implies that the matters are at the pretrial stage. Clarification will be sought by the Irish court because this is a precondition for surrender under Irish law of a person who has not been convicted of the offences in a European arrest warrant."

The issuing judicial authority replied by letter dated the 18th June, 2012, as follows:

> "In reply to the above mentioned letter, hereby we inform you that on 4th December 2007 a Decision to recognise Ms. Angelina Jočienė as a suspect for the commission of the criminal acts specified under Art. 182 Part 2 of the Criminal Code of the Republic of Lithuania, and Art. 277 Part I of the Criminal Code of the Republic of Lithuanian the wording of 1961 was made in the pre-trial investigation case No. 20-1-683-98, i.e. for the criminal acts that have been indicated in the Parts 1 and 2 of Section e) of the European Arrest Warrant. These suspicions shall be brought against Ms. Angelina Jočienė, if she is surrendered to Lithuania."

On the 19th June, 2012, the Irish Central Authority wrote again to the issuing judicial authority stating:

> "….Your response is most appreciated but unfortunately it does not clarify the matter under Irish Law. Following consultation with our legal advisors, we wish to advise you that further clarification will be required as follows;
>
> It might be helpful for the purposes of avoiding confusion if I set out the position under Irish Law as determined by the Irish Supreme Court.
>
> The Irish Courts will only surrender a person sought for the purposes of prosecution if the appropriate authority in the issuing state intends to put the person on trial for the offences and surrender is sought to realise that intention. This does not mean that the investigation phase must be closed, it can continue. What is not permissible is for the realisation of the intention to put the person on trial to be dependent on such further investigation producing sufficient evidence for that purpose.
>
> I am to ask therefore whether in this case that is the position in respect of Ms. Jočienė."

The issuing judicial authority purported to reply to that further request in a letter dated the 20th June, 2012, which stated:

> "The Prosecutor General's Office of the Republic of Lithuania, being the authorised institution to issue the European Arrest Warrants in the Republic of Lithuania, hereby guarantees that without the consent of Ireland Ms. Angelina Jočienė shall not be prosecuted and sentenced for the criminal acts committed prior to her surrender and for which she has not been surrendered."

The reply received suggests that the issuing judicial authority had failed to appreciate the nature of the Irish Central Authority's concern. It appears to have been under the impression that the Irish Central Authority's concern was in relation to whether Lithuania would respect the rule of specialty in the event of the respondent being surrendered. In the circumstances the Irish Central Authority tried yet again to obtain the required clarification, stating in a further letter dated the 11th July, 2012:

> "Unfortunately your response does not address our concerns. You are asked for the purposes of clarity to guarantee that if surrendered Ms. Angelina Jočienė will be tried for the offences in the EAW."

The issuing judicial authority reverted on the 13th July, 2012, and stated in a letter bearing that date that:

> "The Prosecutor General's Office of the Republic of Lithuania pays its due respect to you and in reply to Your letter of 12 July 2012, hereby confirms that we seek the surrender of Angelina Jočienė for the purposes of conducting a criminal prosecution for the criminal acts indicated in the European Arrest Warrant concerned. And according to the criminal laws of the Republic of Lithuania the aim of the criminal prosecution is to properly apply the law in order to ensure that any person who has committed a criminal act is given a fair punishment and that no one who is innocent is convicted. Thus, with regard to this we guarantee that our aim is that, if surrendered, Ms. Angelina Jočienė will be tried for the offences indicated in the EAW."

That purported clarification being anything but clear, this Court then made an Order on the 17th July, 2012, in exercise of its power under s.20(1) of the Act of 2003, requesting that the issuing judicial authority provide additional information by answering the following questions:

> "1. At what point does a suspect become an accused under the Lithuanian Code of Criminal Procedure?;
>
> 2. Who decides whether a suspect becomes an accused?;
>
> 3. Has the person who decides whether or not a suspect becomes an accused decided to formally accuse Ms. Angelina Jočienė of the offence specified at paragraph (e) I. 1 of the European arrest warrant and concerning 135737 LTL ('the first offence') and put her on trial for the first offence if she is surrendered to Lithuania?;

4. Unless answered by one of the previous questions, please explain how a person is '*charged with the commission of"* an offence, as appears to have occurred in respect of the Respondent in relation to Criminal Case No. 1-400/2000 (i.e. the third and fourth offences set out in the warrant). Furthermore, please explain whether or not it is intended to charge the Respondent with the first offence, in the way that she was charged with the commission of the third and fourth offences comprising Criminal Case No. 1-400/2000. How is this charging process conducted?

5. Please confirm that it is intended to charge the Respondent with the first offence in the event of her surrender to Lithuania;

6. Please describe the procedural steps under the Lithuanian Code of Criminal Procedure that follow from 'pre-trial investigation'."

The letter from the Irish Central Authority conveying the Court's request added a seventh question, namely:

"7. Is 'pre-trial investigation' the same as trial for the offence?"

The issuing judicial authority replied to these questions by letter dated the 2nd October, 2012, and stated:

"In reply to the above mentioned letter, hereby we provide you with the replies to your questions in relation to the execution of the European Arrest Warrant issued by the competent judicial institution - the Prosecutor General's Office of the Republic of Lithuania - in respect of Angelina Jočienė.

1-2. For the purpose of clarification we would like to provide you with a short outline of the criminal procedure stages in Lithuania. In the Republic of Lithuania the criminal procedure is defined by the Criminal Procedure Code (hereinafter referred as "CPC"). It was approved by the 14 March 2002 Law No. IX-785 and went into force on I May 2003. Said Code specifies the following procedural stages of the criminal procedure: I) pre-trial investigation; 2) trial procedure at the courts of first instance; 3) procedure of appeal; 4) enforcement of rulings and judgments; 5) procedure of cassation. In the course of the first stage of criminal procedure, i.e. in the pre-trial investigation the prosecutor and the pre-trial officer, within the limits of their competence, shall take all measures provided by the law in the shortest possible time to disclose thoroughly the criminal act, to prosecute the perpetrators and properly apply the law. The data relevant to the case is collected, checked and assessed in this stage, thus, all steps are taken in order to prepare the case for the second stage of the criminal procedure - the trial procedure at the courts of first instance.

The status of the accused is regulated by the CPC. Please find the extract on Accused of the CPC below:

*Article 21(sic) The Accused"*

(It is accepted by both sides that there is a typographical error in this heading and that the intended reference is to Article 22.)

The document continues:

" '1. The accused shall be a party to judicial proceedings.

2. The accused shall be a person against whom an indictment has been brought by the prosecutor following the order established in this Code, or there is a prosecutor's application to punish the person pursuant to a penal order, also a person against whom a case is heard on the basis of a private accusation or in an accelerated procedure.

3. The accused shall be entitled: to know of the charges brought against him and to be provided with a transcript of the indictment; to examine in court the materials of the case; to make copies and take transcripts of the necessary documents following the order established; to have a counsel for the defence; to make motions; to make challenges; to provide evidence and be present during the examination of the evidence; to ask questions during the hearing; to provide explanations about the circumstances of the case which is being heard and express his opinion about the motions made by the other parties to the proceedings; to take part in the arguments where there is no counsel for the defence; to address the court with the last plea: to appeal the judgement, and court orders.

4. The accused against whom a conviction has been rendered shall become the convicted person, and the person against whom an acquittal has been brought shall become the acquitted person.'

Where the prosecutor is satisfied that sufficient information has been gathered during the pre-trial investigation in evidence of the culpability of the suspect for committing a criminal act, he shall draft the indictment. Thus, by adopting the indictment, which concludes the pre-trial investigation stage and describes the criminal act and invokes a criminal law providing tor such an act, a prosecutor is the one who decides whether a suspect becomes an accused.

3. If A. Jočienė was surrendered to Lithuania on the grounds of the EAW and there was sufficient information gathered in evidence of her committing the crime specified in Section e) of the EAW, then she would be put on trial (for the first offence) and recognised as an accused.

4. The charging process is comprised of many procedural steps. In broadest sense the trial is commenced by the bill of indictment being read out. Then begins the so-called stage of the examination of evidence that were gathered during the pre-trial investigation. After the indictment is read, the presiding judge asks the accused whether he understood the charge, as necessary, shall explain the accused the substance of the charge and inquire whether he pleads guilty. The accused shall have the right to substantiate his answer. Then starts the examination of the accused, where the presiding judge proposes to give testimony about the charge and the known circumstances of the case. Then the witnesses, specialists, experts, victims, exhibits, documents and etc. are examined. After the examination of the evidence, the court hears the arguments. The arguments shall comprise the statements made by the prosecutor, the victim or his representative, the plaintiff and the defendant in a civil action or their representatives, the counsel or the accused, if he has waived his right to counsel. After the closure of the arguments the presiding judge allows the accused the final statement. After the final statement of the accused, the court shall forthwith retire to the conference room to deliberate, where the court decision is made. It is the very basics of the court hearing; some alterations are possible depending on the process itself.

5. We confirm that Ms. Jočienė is sought for the purposes of criminal prosecution, and it is intended to charge her with the crimes specified under section e) of the EAW.

We believe that the answers to your questions 6-7 have been answered by the previous questions."

This additional information was immediately responded to by the Irish Central Authority who wrote to the issuing judicial authority on the 3rd October, 2012, stating:

"Your response appears to suggest that there may not yet be sufficient evidence to indict Ms Jočienė on surrender and the decision to indict depends on further evidence being gathered. For the purpose of clarity please confirm unequivocally that there is sufficient evidence existing against Ms Jočienė to indict her for the offence at section e of the warrant."

A response was received on the same day by fax, stating:

"The Prosecutor General's Office of the Republic of Lithuania pays its due respect to you and in reply to Your letter of 3 October 2012, hereby firmly confirms that there are sufficient evidence in the case No. 20-1-683-98 to recognise Ms. Jočienė as a suspect and conduct a criminal prosecution against her."

The Court then directed that one final attempt be made to obtain clarity as to the position, and this was communicated by the Irish Central Authority by letter to the issuing judicial authority dated the 9th October, 2012. This letter stated:

"I refer to the European arrest warrant transmitted by you in respect of the above named individual. The High Court has directed that the following additional information be sought in advance of the resumed hearing date of 17 October 2012.

- Has a decision been taken to indict Ms. Jočienė in respect of the first offence (i.e. that specified at paragraph (e) I. 1 of the warrant and concerning 135737 ('the first offence') and, if so, when exactly was that decision taken.

Your urgent attention to this matter would be appreciated …"

The issuing judicial authority replied by letter dated the 16th October, 2012, and stated:

"The Prosecutor General's Office of the Republic of Lithuania pays its due respect to you and in reply to Your letter of 9 October 2012, hereby forwards you the procedural decision adopted by the prosecutor of District Prosecutor's Office of Kaunas City in the criminal case No. 20-1-683-98 against Angelina Jočienė."

The accompanying document was in the following terms:

**"KAUNAS CITY DISTRICT PROSECUTOR'S OFFICE**

**DECISION**

TO RECOGNIZE ANGELINA JOČIENĖ AS A SUSPECT

4 December 2007

Kaunas

Živile Muliuolytė, Prosecutor of the 3rd Division of Crimes Against Public Order of Kaunas City District Prosecutor's Office, examined the material of the pre-trial investigation No. 20-1-683-98

and established the following:

The Centro Police Unit of Kaunas city Police Headquarters is conducting a pre-trial investigation in the criminal case No. 20-1-683-98 instituted on the basis of the elements of crimes defined by Article 274 paragraph 3 and Article 277 paragraph 1 of the Criminal Code of the Republic of Lithuania (wording of the Criminal Code, dated 1961).

The following was established during the pre-trial investigation: while being the owner and manager of a private limited liability company (hereinafter referred to as the "UAB") "Holiday Bourse" and UAB "Turizmo patariamoji grupe", having the aim to seize another's property and knowing in advance that she would not be able to perform the obligations undertaken by the agreements and having no intention to perform such obligations, at the premises of the company situated in Kęstučio g. 78 in Kaunas, Angelina Jočienė concluded a trip arrangement agreement for the amount of 14000 LTL with R. Urbštas on 4 March 1998, promised N. Lekečinskaite to arrange a trip abroad for the amount of 14800 LTL on 15 May 1998, concluded a trip arrangement agreement for the amount of 16000 LTL with D. Brazdžius on 16 May 1998, concluded a trip arrangement agreement for the amount of 9499 LTL with J. Fokienė on 10 June 1998, promised Z. Roževičius to arrange a trip abroad for the amount of 9975 LTL on 22 June 1998, concluded a trip arrangement agreement for the amount of 10800 LTL with A. Poškus on 30 June 1998, concluded a trip arrangement agreement for the amount of 15920 LTL with E. Daknienė on 2 July 1998, concluded a trip arrangement agreement for the amount of 10000 LTL with R. Kuprytė on 21 July 1998, concluded a trip arrangement agreement for the amount of 9499 LTL with E. L. Eimontienė on 23 July 1998 and repaid 5200 LTL for failure to arrange the trip, concluded a trip arrangement agreement for the amount of 600 LTL with I. Mosteikytė on 28 July 1998, concluded a trip arrangement agreement for the amount of 1200 LTL with D. Radzevičius on 29 July 1998 with the latter paying 400 LTL, promised V. Antuchas to arrange a trip for the amount of 8000 LTL on 15 September 1998, promised A. Katkauskas to arrange a trip for the amount of 8644 LTL on 18 September 1998, concluded a trip arrangement agreement for the amount of 10000 LTL with A. Muzikevičius on 18 September 1998 and promised S. Šimkevičius to arrange a trip for the amount of 2800 LTL on 2 November 1998, but failed to perform the condition of the agreements and did not repay the money and thus acquired by deceit and for her own benefit another's property of a high value in the amount of 135737 LTL, i.e. she committed the criminal offence defined by Article 182 paragraph 2 of the Criminal Code of the Republic of Lithuania (wording of the Criminal Code of the Republic of Lithuania, dated 2000).

Besides, Angleina (*sic*) Jočienė is suspected of the following: while being the owner and manager of UAB "Turizmo patariamoji grupe", registered address: Kęstučio g. 78. Kaunas, from 1 September 1998 Angelina Jočienė avoided payment of 732,26 LTL for the services provided on the basis of the Internet Service Agreement No. I-980161A concluded on 29 May 1998 between UAB "Vainagis" and UAB

"Turizmo patariamoji grupe" under which UAB "Vainagis" provided internet network and FaxSAV information services, avoided payment of 4977,24 LTL for the cards manufactured on the basis of the Plastic Cards Manufacture Agreement No. 002 concluded on 21 August 1998 between UAB "Vainagis" and UAB "Turizmo patariamoji grupe" and thus inflicted property damage to UAB "Vainagis" in the amount of 5709,50 LTL, avoided payment of 11114,85 LT L for the services provided on the basis of the Telecommunication Service Agreement No. 1295 concluded on 19 May 1998 between the Kaunas branch of the public limited liability company AB "Lietuvos telekomas" and UAB -Turizmo patariamoji grupe", avoided payment for four plane tickets to Chicago in the amount of 9680 LTL on the basis of the Agency Service Agreement concluded on 24 March 1998 between the representative office of the Polish Airlines "LOT"' in Vilnius and UAB "Turizmo pataariamoji grupe", avoided payment for the following nine insurance policies: series TAAV No. 265010, series TAAV No. 265020, series TAAV No. 282384-282388 (5 pcs.), series TAAV No. 282399-282400 (2 pcs.) in the amount of 1425 LTL for each insurance policy with the total amount being 12825 LTL that had been issued on the basis of the Agency Agreement No. 1 7 concluded on 25 February 1998 between the public insurance company ADB "Preventa" and UAB "Turizmo patariamoji grupe" and by abusing the confidence of UAB ""Vainagis", AB "'Lietuvos telekomas". Polish airlines "LOT" and ADB "Preventa" avoided settlement for the works performed and services provided by the said companies as a result of which they suffered damage in the total amount of 39329,35 LTL, i.e. she committed the criminal offence defined by Article 277 paragraph 1 of the Criminal Code of the Republic of Lithuania (wording of the Criminal Code, dated 1961).

The data obtained in the course of the investigation provide reasonable grounds to believe that the said criminal offences had been committed by Angelina Jočienė, personal number 46411200104, last known residence address: Grigiškių g. 19a-l, Kaunas. Suspicions are based on the evidence given by the victims and witnesses and on other written material available in the case.

Since Angelina Jočienė was not found at her residence address, it was impossible to get in contact with her and her whereabouts were unknown, on 14 February 1999 she was announced wanted and is to be recognised as a suspect on the basis of the decision passed by the prosecutor.

Pursuant to Article 21 paragraph 3 of the Code of Criminal Procedure of the Republic of Lithuania, the Prosecutor

decided the following:

1. To recognize Angelina Jočienė, personal number 46411200104, as a suspect in the criminal case No. 20-1-683-98 for the commission of the criminal offences defined by Article 182 paragraph 2 of the Criminal Code of the Republic of Lithuania and Article 277 paragraph 1 of the Criminal Code of the Republic of Lithuania (wording of the Criminal Code of the Republic of Lithuania, dated 1961).

2. Upon establishing Angelina Jočienė's whereabouts, to notify her about the suspicions and the present Decision.

Prosecutor /signature/ Živile Muliuolytė

3rd Division of Crimes against Public Order”

**The s. 21A objection**

The Framework Decision and the Act of 2003

- relevant provisions

Before describing the arguments of counsel it may be helpful to set out the relevant provisions of the Framework Decision and of the Act of 2003, as amended.

Recital (10) to the Framework Decision provides:-

> *"The mechanism of the European arrest warrant is based on a high level of confidence between the Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof".*

Article 1 of the Framework Decision provides, inter alia:-

> *"The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution ... "*

S. 10 of the Act of 2003 (as amended, and to the extent relevant) provides:-

> *"Where a judicial authority in an issuing state issues a European arrest warrant in respect of a person -*
>
> *(a) against whom that state intends to bring proceedings for an offence to which the European arrest warrant relates,*
>
> *(b) who is the subject of proceedings in that state for an offence to which the European arrest warrant relates,*
>
> *(c) who has been convicted of, but not yet sentenced in respect of, an offence in that state to which the European arrest warrant relates, or*
>
> *(d) on whom a sentence of imprisonment or detention has been imposed in that state in respect of an offence to which the European arrest warrant relates, that person shall, subject to and in accordance with the provisions of this Act be arrested and surrendered to the issuing state ".*

Section 21A of the Act of 2003 provides:-

> *"(1) Where a European arrest warrant is issued in the issuing state in respect of a person who has not been convicted of an offence specified therein, the High Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing state.*

*(2) Where a European arrest warrant is issued in respect of a person who has not been convicted of an offence specified therein, it shall be presumed that a decision has been made to charge the person with, and try him or her for, that offence in the issuing state, unless the contrary is proved".*

Counsels' submissions

The Court has received extensive written and oral submissions from counsel on both sides for which it is grateful. These have been carefully considered.

Counsel for the respondent contends that on the totality of the information before the Court the s.21A(2) presumption ought to be regarded as having being sufficiently rebutted so as to place the Court upon enquiry concerning whether or not the issuing state has decided to both charge and try the respondent for the first offence on the warrant.

He contends that the evidence suggests overwhelmingly that his client is sought as a suspect rather than as an accused and, moreover, is sought for the purposes of "pre-trial investigation." He further contends that the evidence in the present case falls four square within the decision of the Supreme Court in *Minister for Justice and Law Reform v. Bailey* [2012] IESC 16, (Unreported, Supreme Court, 1st March, 2012), and that the position of the respondent is precisely analogous to that of Bailey. Moreover, he has submitted that insofar as it may be suggested that that there is any ambiguity in the responses received from the issuing state same cannot be said to arise from a lack of clarity on the part of the applicant. From a very early stage in the proceedings the applicant made clear what the appropriate test under s.21A was.

It was further submitted that as s.21A(1) is expressed conjunctively and not disjunctively, it requires that a decision has been made to both charge and try the respondent. The height of the indication given by the issuing state is that there exists an intention and decision to conduct a criminal prosecution against the respondent. As much is, in any event, indicated by the European arrest warrant itself. It was submitted that an intention to conduct a criminal prosecution can never be regarded as analogous to a decision to charge or try a given respondent. In counsel for the respondent's submission the indication lately given by the Lithuanian authorities that a decision has been made to conduct a criminal prosecution against the respondent is largely irrelevant to the issue which arises under s.21A. The real question is whether there has been a decision to both charge and try the respondent. It was submitted that the evidence strongly suggests that no such decision has in fact been taken. Even if the expressed intention to conduct a criminal prosecution and to charge the respondent were to be taken at face value, the response at number three in the letter of additional information dated the 2nd October, 2012, makes it clear that there has been no decision to try her.

In response to this counsel for the applicant has contended that the s.21A(2) presumption has not been displaced. She submitted that the position is entirely distinguishable from *Bailey* in which there was positive evidence that a decision had not been made to try him, hence the rebuttal of the presumption in that case. Cogent evidence is required to rebut the presumption and no such evidence exists in the present case.

It was further submitted that while much is made of the response at number three in the additional information of the 2nd October, 2012, the respondent appears to ignore all that is stated at responses number four and five therein, i.e., that:

(i) the charging process comprises many procedural steps (which are set out);

(ii) the trial is commenced by the bill of indictment being read out and after which the presiding judge asks the accused whether he understood the charge; and

(iii) the respondent "*is sought for the purposes of criminal prosecution, and it is intended to charge her with the crimes specified in the warrant*".

It was submitted that the latter is a clear statement that it is intended to charge the respondent. Moreover, it is clear from the additional information that charging the respondent involves the trial process. It was urged upon the Court that this evidence has not been rebutted.

It was further submitted by counsel for the applicant that the fact that there may be differences in procedure does not operate to preclude surrender. Indeed in *Minister for Justice and Law Reform v. Bailey* [2012] IESC 16, (Unreported, Supreme Court, 1st March, 2012), the court referred to the fact that the issuing of a domestic warrant in France was "roughly equivalent" to charging Bailey with the offence. This accords with the "cosmopolitan approach" that was referred to by Lord Steyn in *In re Ismail* [1999] 1 A.C. 320 and approved in *Minister for Justice, Equality and Law Reform v. Olsson* [2011] 1 I.R. 384 and is good law. The additional information makes it clear that charging the respondent is the commencement of the trial process and, that being so, there is no evidence that a decision has not been made to charge and try her for offence number one.

The applicant does not accept that the respondent is sought as a suspect for pre-trial investigation, particularly in circumstances where the issuing state states that it is intended to charge and try her with offence number one, which invariably involves a change of status from suspect to accused

**The Law**

In this Court's judgments in the cases of *Minister for Justice and Equality v. Connolly* [2012] IEHC 575, (Unreported, High Court, Edwards J., 6th December, 2012) and *Minister for Justice & Equality v. Holden* [2013] IEHC 62 (Unreported, High Court, Edwards J., 11th February, 2013) I considered the recent jurisprudence of the Supreme Court in respect of the correct interpretation and application of s.21A(1) of the Act of 2003, and in particular whether in *Minister for Justice and Law Reform v. Bailey* [2012] IESC 16, (Unreported, Supreme Court, 1st March, 2012), the Supreme Court had departed from or modified the approach advocated in its earlier judgment in *Minister for Justice, Equality & Law Reform v. Olsson* [2011] 1 I.R. 384. I stated in Holden at pgrfs. 44-45 :

"44. In so far as the case law is concerned, in the intervening period since the conclusion of the s. 16 hearing in the present case and during which my judgment has been reserved, I delivered a judgment in a case of *Minister for Justice and Equality v. Connolly* [2012] IEHC 575, (Unreported, High Court, Edwards J., 6th December, 2012) in which I said the following at paragraph 8.20:-

"As the Court understands the decision in *Minister for Justice, Equality and Law Reform v. Bailey* the Supreme Court did not depart from or modify the analysis of s. 21A by O'Donnell J. in *Minister for Justice, Equality and Law Reform v. Olsson* [2011] IESC 1, [2011] 1 I.R. 384. Rather, it seems to have been accepted that O'Donnell J.'s analysis was

correct at the level of principle (even though O'Donnell J.'s analysis does not allude to the Irish Government's reservation, a matter on which much emphasis was placed in the majority judgments in the *Bailey* case). However, when what might be called the *Olsson* analysis was applied in the particular circumstances of the *Bailey* case it was impossible to conclude, on the evidence before the Court in that case, that a decision had been made to try the respondent in that case."

45. The Court sees no reason to deviate from the view that it expressed in the *Connolly* case that *Olsson* was not overturned or significantly modified by *Bailey* and that it remains good law. To be fair to counsel for the respondent he has not suggested otherwise. However, to the extent that he has submitted that the *Olsson* approach was "refined" in *Bailey* I do not regard that as being a correct characterisation, and I think it is an over-statement. In this Court's view it is more correct to say, as counsel did acknowledge later on in his submission, that the Supreme Court in *Bailey* took the opportunity to reiterate and stress, or lay particular emphasis upon, a number of matters that had previously been alluded to by O'Donnell J. in his judgment in Olsson; and, in addition, to set out the background to the enactment of s. 21A (to which O'Donnell J. had not specifically alluded in his judgment in *Olsson*) as evidenced within the *travaux prèparatoires* relating to the Proposal for a Council Framework Decision on the European arrest warrant, and in particular the Statement by Ireland contained within a document entitled "Corrigendum to the Outcome of Proceedings", 6/7 December 2001, and dated 11th December, 2001, in which it is asserted that "*Ireland shall, in the implementation into domestic legislation of this Framework Decision, provide that the European Arrest Warrant shall only be executed for the purpose of bringing that person to trial or for the purpose of executing a custodial sentence or detention order*."

It is appropriate to quote fairly extensively from the judgment in Olsson, and in particularly paragraphs 26 to 36 of the judgment where O'Donnell J. stated:

"[26] The issue here, however, is not merely one of the evidence before the court. As is apparent, s. 21A(2) of the Act of 2003, as inserted by s. 25 of the Act of 2005, contains a presumption that a decision has been made to charge the person and try him or her for the offence. Furthermore, the opening lines of the European arrest warrant itself, request that the person mentioned below "be arrested and surrendered for the purposes of conducting a criminal prosecution …" That statement, and the further statements made in Ms. Maderud's affidavit in relation to the practice of the Kingdom of Sweden, must also be read in the light of recital 10 of the Framework Decision which describes "[t]he mechanism of the European arrest warrant [as being] based on a high level of confidence between Member States". It is clear, therefore, that cogent evidence is required to raise a genuine issue as to the purpose for which a warrant has been issued and surrender sought. This was emphasised in the judgment of Murray C.J. in *Minister for Justice v. McArdle* [2005] IESC 76, [2005] 4 I.R. 260 at p. 268:-

'[24] The European Arrest Warrant Act 2003 gives effect in this jurisdiction to the European Council Framework Decision of the 13th June, 2002, on the European arrest warrant and the surrender procedures between member states. The recitals to that decision make reference to the implementation of "the principle of mutual recognition of criminal proceedings" and in particular recital number 6 which states "the European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council refer to as the 'cornerstone' of judicial cooperation". Accordingly, it seems to me that where a judicial authority of a member state issues a European arrest warrant and that is accompanied by a certificate referred to in s.11(3) of the Act of 2003, both of which state and certify respectively, that the surrender of the person named in the warrant is sought for the purpose of prosecution and trial, that must be acknowledged as at least *prima facie* evidence of the purpose for which the request is made. It would, in my view, normally require cogent evidence to the contrary to raise a genuine issue as to the purpose for which the warrant in question has been issued and the surrender sought.'

[27] Murray C.J. also observed, at pp. 266 to 267:-

'[19] … The surrender of a person for purpose of prosecution and trying him or her on a criminal offence means that the decision taken by the relevant authority to prosecute and try that person is not contingent on the outcome of further factual investigation. That requirement does not of course preclude the pursuit of any continuing or parallel investigation into the circumstances of the offence. It means that the decision to prosecute is not dependant on such further investigation producing sufficient evidence to justify putting a person on trial.'

[28] In approaching the question of the interpretation of the Act of 2003, it is necessary to keep both the nature of the Act and its origins in view. One thing which can be said with assurance is that the Act of 2003 does not intend that words such as 'charge' and 'prosecution' should only be understood as meaning a charge or prosecution as in the Irish criminal justice system. The Act establishes a procedure for the reciprocal execution of warrants with legal systems, almost all of which differ in some ways, even at times significantly, from that of this jurisdiction. If the Act of 2003 intended that only warrants emanating from a criminal justice procedure which was identical to that of Ireland would be executed here, then the Act would manifestly fail to achieve its object, and indeed that of the Framework Decision. A similar point was made in a slightly different context by Lord Steyn in the United Kingdom House of Lords case of *In re Ismail* [1999] 1 A.C. 320 at pp. 326 to 327:-

'Given the divergent systems of law involved, and notably the differences between criminal procedures in the United Kingdom and in civil law jurisdictions, it is not surprising that the legislature has not attempted a definition [of the word "accused"]… It is, however, possible to state in outline the approach to be adopted. The starting point is that "accused" in s. 1 of the Act of 1989 is not a term of art. It is a question of fact in each case whether the person passes the threshold test of being an "accused" person. Next there is the reality that one is concerned with the contextual meaning of "accused" in a statute intended to serve the purpose of bringing to justice those accused of serious crimes. There is a transnational interest in the achievement of this aim. Extradition treaties, and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permits it in order to facilitate extradition: *Reg. v. Governor of Ashford Remand Centre, Ex parte Postlethwaite* [1988] A.C. 924, 946-947. That approach has been applied by the Privy Council to the meaning of "accused" in an extradition treaty: *Rey v Government of Switzerland* [1999] A.C. 54, 62G. It follows that it would be wrong to approach the problem of construction solely from the perspective of English criminal procedure, and in particular from the point of view of the formal acts of the laying of an information or the preferring of an indictment …

It is not always easy for an English court to decide when in a civil law jurisdiction a suspect becomes an "accused"

person. All one can say with confidence is that a purposive interpretation of "accused" ought to be adopted in order to accommodate the differences between legal systems. In other words, it is necessary for our courts to adopt a cosmopolitan approach to the question whether as a matter of substance rather than form the requirement of there being an "accused" person is satisfied.'

[29] The origins of the Act of 2003 are also important. The Act is the mechanism by which this State performs its obligation to ensure that the objectives of the Framework Decision, are achieved. As was pointed out by Fennelly J. in *Dundon v. Governor of Cloverhill Prison* [2005] IESC 83, [2006] 1 I.R. 518, at p. 544:-

'[62] … [t]he Act of 2003 as a whole …should be interpreted "as far as possible in the light of the wording of the purpose of the framework decision in order to attain the result which it pursues".'

[30] Taking this approach to the interpretation of s. 21(A) of the Act of 2003, as amended by the Act of 2005, the relevant provision of the Framework Decision is that contained in the opening words of article 1(1). This provides that a European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender to another member state of:-

'… a requested person, *for the purposes of conducting a criminal prosecution* or executing a custodial sentence or detention order.' (emphasis added)

[31] It is also noteworthy that s.10 of the Act of 2003 (as substituted by s. 71 of the Act of 2005 and as amended by s. 6 of the Criminal Justice (Miscellaneous Provisions) Act 2009), provides that where a judicial authority in an issuing state issues a European Arrest Warrant in respect of a person *'against whom that state intends to bring proceedings* for an offence to which the European arrest warrant relates …that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision, be arrested and surrendered to the issuing state' (emphasis added).

[32] Thus, the concept of the 'decision' in s. 21A should be understood in the light of the 'intention' referred to in s. 10 of the Act of 2003 and the 'purpose' referred to in art. 1 of the Framework Decision.

[33] When s. 21A speaks of 'a decision' it does not describe such decision as final or irrevocable, nor can it be so interpreted in the light of the Framework Decision. The fact that a further decision might be made eventually not to proceed, would not therefore mean that the statute had not been complied with, once the relevant intention to do so existed at the time the warrant was issued. The Act of 2003 does not require any particular formality as to the decision; in fact, s. 21 focuses on (and requires proof of) the absence of one. The issuing state does not have to demonstrate a decision. A court is only to refuse to surrender a requested person when it is satisfied that *no* decision has been made to charge or try that person. This would be so where there is no intention to try the requested person on the charges at the time the warrant is issued. In such circumstances, the warrant could not be for the purposes of conducting a criminal prosecution.

[34] The requirement of the relevant decision, intention or purpose can best be understood by identifying what is intended to be insufficient for the issuance and execution of a European arrest warrant. A warrant issued for the purposes of investigation of an offence alone, in circumstances where that investigation might or might not result in a prosecution, would be insufficient. Here it is clear that the requested person is required for the purposes of conducting a criminal prosecution (in the words of the Framework Decision) and that the Kingdom of Sweden intends to bring proceedings against him, (in the words of s. 10 of the Act of 2003). Consequently it follows that the existence of any such intention is virtually coterminous with a decision to bring proceedings sufficient for the purposes of s. 21A. As Murray C.J. pointed out in *Minister for Justice v. McArdle* [2005] IESC 76, [2005] 4 I.R. 260, that result is not altered by the fact that there may be a continuing investigation, or indeed that such investigation will be assisted by the return of the requested person.

[35] It would be entirely within the Framework Decision and the Act of 2003 if, after further investigation, the prosecution authorities decided not to prosecute because, for example, they had become convinced of the requested person's innocence. There would still have been an 'intention' to prosecute, and a decision to do so at the time the warrant was issued and executed. Accordingly, the warrant would have been issued for the purposes of conducting a criminal prosecution. What is impermissible is that a decision to prosecute should be dependent on such further investigation producing sufficient evidence to put a person on trial. In such a situation there is in truth no present 'decision' to prosecute, and no present 'intention' to bring proceedings. Such a decision and intention would only crystallise if the investigation reached a certain point in the future. In such a case any warrant could not be said to be for the purposes of conducting a criminal prosecution: instead it could only properly be described as a warrant for the purposes of conducting a criminal investigation. In such circumstances, a court would be satisfied under s. 21A of the Act of 2003, as amended that no decision had been made to charge or try the requested person.

[36] It is noteworthy, that on the evidence in this case, the position in relation to the respondent is not by any means unusual in the Swedish system, and indeed represents the norm in a number of European countries. It would be a surprising result if either the Framework Decision or the Act of 2003 were to be interpreted so as to prevent the execution of the European arrest warrant in respect of such countries and where (as here) the requesting authority had in the terms of the warrant, and in sworn evidence in the case, stated that the warrant was issued for the purposes of conducting a criminal prosecution. The High Court was entirely correct to conclude that there was here a clear intention to bring proceedings within the meaning of s. 10, and that the warrant could be said to be for the purposes of conducting a criminal prosecution within the meaning of the Framework Decision and that the only thing which stood in the way of commencement of such prosecution was the requirement of the presence of the respondent and the interview where he could respond to the investigation. In short the intention of the Swedish prosecution authority to bring the respondent before the Swedish Court for the purpose of being charged is but a step in the prosecution process. For the reasons set out above the High Court was correct to conclude that the respondent was not being sought only to be questioned as part of the investigation and that there was a decision to charge the respondent within the meaning of the Act of 2003. Certainly even without the presumption contained in s. 21A(2), the section requires clear proof. Once a court finds the European arrest warrant to be in order (and therefore on its face a request made for the purpose of prosecution or trial), then before a court can refuse to surrender a person requested under such a warrant, it must be satisfied by cogent evidence to the contrary that a decision has not been made to charge the particular person with, and try him or her for, the offence."

The Court's decision on the s. 21A issue

The Court agrees with counsel for the respondent that the s. 21A(2) presumption is to be regarded as having been rebutted in this particular case and that the Court is placed upon its enquiry as to whether a decision has been taken by the issuing state to both charge and try the respondent for the sole offence in the warrant with which the Court remains concerned. In my view the totality of the information provided by the issuing state creates sufficient uncertainty, as whether that which is generally to be presumed by virtue of s.21A(2) of the Act of 2003 is in fact so in this particular case, so as to rebut the presumption and put this Court on its enquiry. The position is that notwithstanding numerous and repeated attempts, both by the Irish Central Authority and by this Court, to obtain clarity from the issuing state concerning the exact status of the respondent's case within the Lithuanian criminal procedure, little clarity has in fact been provided.

I have no reason to believe that the Lithuanian authorities are deliberately avoiding the issue. The European arrest warrant system is predicated upon the idea that participating member states have trust and confidence in each other, and I therefore accept that there must be a genuine inability on the part of the Lithuanians to fully appreciate what the particular concern of the Irish authorities is. In particular, the difficulty encountered in this case may be a function of the fact that the strict requirements of the Irish legislation contained within s.21A of the Act of 2003 are, to the best of this Court's knowledge, unique amongst the laws of the member states of the European Union that are parties to and operate the European arrest warrant system. Moreover, I consider that the fact that our s.21A requirements are not included amongst the "optional grounds for non surrender" provided for in Article 4 of the Framework Decision probably compounds the problem. Ireland is the only state in the European Union to have made a reservation in the negotiations leading to the Framework Decision allowing us to include in our domestic legislation a provision such as that which is now contained in s.21A of the Act of 2003. This Court deals every day with European arrest warrant cases and in its experience the fact that the Irish state has made such a reservation does not appear to be well known or widely recognised by issuing judicial authorities in other member states. Moreover, our s.21A requirements are not readily understood in circumstances where the Framework Decision itself makes no provision for such requirements.

Be all of that as it may, the fact remains at the end of the day that this Court has not received a direct answer to the critical question that is troubling it in terms of s.21A(1) of the Act of 2003 i.e., "*has a decision been taken to try the respondent*" for the offence in question.

The evidence before the Court establishes that Ms. Jočienė's case is still in the pre-trial investigation stage of Lithuanian Criminal Procedure (as that procedure was explained in the additional information provided by the issuing state). The prosecuting authorities considered as far back as late 2007 that they had sufficient information to recognise her as a suspect and this Court has been provided with a copy of the decision of the Kaunas City District Prosecutor's office dated the 4th December, 2007, recognising her as such. Moreover, it is expressly stated in response number five in the letter of additional information dated the 2nd October, 2012, that "[we] confirm that Ms. Jočienė is sought for the purposes of criminal prosecution, and *it is intended to charge her with the crimes specified under section e) of the EAW*" (the Court's emphasis).

However, the requirements of s.21A(1) are conjunctive. The fact that there has been a decision to charge her is not enough in itself. In addition, the Court must be satisfied that there has also been a decision to try her. While a direct answer to the Court's question as to whether such a decision has been taken has not been received, I consider that the answer can be inferred from the evidence before me, and in particular from response number three as contained in the letter of additional information dated the 2nd October, 2012.

As O'Donnell J. emphasised in *Olsson*, what is impermissible is that a decision to prosecute should be dependent on further investigation producing sufficient evidence to put a person on trial. In response number three as contained in the letter of additional information dated the 2nd October, 2012, it is stated that:

> "If A. Jočienė was surrendered to Lithuania on the grounds of the EAW and there was sufficient information gathered in evidence of her committing the crime specified in Section e) of the EAW, then she would be put on trial (for the first offence) and recognised as an accused."

That response is highly contingent and is strongly indicative that a decision to try the respondent has not yet been taken. It suggests that more evidence has yet to be gathered and that it will only be at a point in the future where it is adjudged that sufficient evidence implicating her in the crime has been gathered that a decision will be taken to put her on trial. It invites the inference that that point has not yet been reached, and that in fact no decision has yet been taken to try her. I am prepared to draw that inference and to hold that the conjunctive requirements of s.21A(1) of the Act of 2003 have not been met in this case. While the evidence establishes that there has indeed been a decision to charge the respondent, the evidence does not establish that there has been a decision to try her. The evidence is in fact to the contrary, and in circumstances where the s.21A(2) presumption stands rebutted, I am satisfied to hold that a decision has not been made to try the respondent for the first offence on the warrant in the issuing state. In the circumstances, I am obliged in accordance with s.21A(1) to refuse to surrender the respondent.

**The S.37(1) Issue**

I have carefully considered the contents of the respondent's affidavit, and the general circumstances of the case. Having done so, and while acknowledging that there has been very considerable and largely unexplained delay in the case, and also that the respondent has put down roots in this country to some extent (although it seems she has only been in Ireland for between three and four years and therefore those roots can be regarded as being fairly shallow), I consider that overall she has failed to adduce evidence of sufficient cogency to demonstrate that to surrender her would represent a disproportionate interference with her right to respect for family life in breach of article 8 of the E.C.H.R.. On the contrary, her evidence does not establish, or even come close to establishing, either that she personally, or that somebody else in her family, would be so profoundly affected by a decision to surrender her as to outweigh the significant public interest in her extradition, and the necessity and desirability for this state to comply with and fulfill its international obligations with regard to extradition, particularly in circumstances where her surrender is being sought for the purposes of conducting the prosecution of an alleged fraud offence involving 135,737 Litas. The Court is therefore not disposed to uphold the s.37(1) objection. However, the Court's decision in that regard is academic in circumstances where it is precluded in any event from surrendering the respondent on s. 21A(1) grounds.