Neutral Citation Number: [2014] IEHC 131

THE HIGH COURT

Record No: 2011/ 259 EXT

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

BETWEEN:

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

-AND-

KENNETH BRUNELL

RESPONDENT

JUDGMENT of Mr Justice Edwards delivered on the 21st day of February, 2014.

Introduction:
The respondent is the subject of a European arrest warrant issued by Mr. M.E. Woudman, Public Prosecutor (Officier van Justitie) at the Public Prosecutor's Office in Amsterdam (Openbaar Ministerie Amsterdam), Netherlands on the 6th July, 2011. The Kingdom of the Netherlands (hereinafter "the Netherlands") seeks the rendition of the respondent on foot of this warrant for the purposes of prosecuting him for a single offence as particularised therein. The warrant was endorsed by the High Court for execution in this jurisdiction on the 27th July, 2011, and it was duly executed on the 3rd October, 2011. The respondent was arrested by Sergeant Sean Fallon on that date, following which he 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 his surrender to the Netherlands. 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 him. 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 dependent upon a judicial finding that they have been so satisfied.

Uncontroversial s.16 issues

The Court has received and has scrutinised a true copy of the European arrest warrant in this case.

The Court has also received an affidavit of Sergeant Sean Fallon sworn on the 19th November, 2012, testifying as to his arrest of the respondent. He states at para. 3 of his affidavit that the man that he arrested answered to the name Kenneth Brunell. In addition, counsel for the respondent has confirmed that no issue arises as to either the arrest or identity.

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 the Netherlands for trial in respect of the offence particularised in Part E of the warrant;

(f) The nature and classification of the offence alleged under the law of the issuing state is: homicide "contrary to section 287 or as the case may be 289 of the [Dutch] Penal Code";

(g) The underlying domestic decision on which the warrant is based is stated to be "an arrest warrant by order of the Public Prosecutor in Amsterdam Mr. M.E. Woudman";

(h) The issuing judicial authority has invoked para. 2 of article 2 of Council Framework Decision 2002/584/J.H.A. 13th June 2002 on the European arrest warrant and the surrender procedures between Member States, O.J. L190/1 18.7.2002 (hereinafter referred to as "the Framework Decision") in respect of the single offence listed in Part E by the ticking of a box in Part E.I of the warrant, namely that relating to "murder, grievous bodily injury". Accordingly, subject to the Court being satisfied that the invocation of para. 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;

(i) The minimum gravity threshold in a case in which para. 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. It appears from Part C of the

warrant that the offence carries either a maximum penalty of either 30 years or life imprisonment. The alternatives arise because the issuing judicial authority has indicated that the offence arises "contrary to section 287 or as the case may be 289 of the [Dutch] Penal Code" (presumably reflecting different degrees of homicide). However, the minimum gravity threshold is comfortably met in either case;

(j) The offence is particularised within the warrant as follows:

> "Tuesday February 24th, 2009 around 13:30 hrs the mortal remains of a man were found in the water of the IJ-meer in Amsterdam near Diemerzeedijk. He resulted to be killed as a result of a crime. The body resulted to be cut into several parts and was wrapped in packing material. From investigation the identity of the victim became known:
>
> Keith Francis ENNIS
>
> born in Dublin on August 5th, 1979.
>
> Research has shown that the crime was committed within the period of February 17, 2009 until February 24, 2009
>
> The identity of Kenneth Brunell became known from an investigation.
>
> The suspicion of Brunell consists in the following:
>
> - He has stayed in the location which may be considered as the scene of the crime;
> - He has probably made use of one of the two telephone numbers which are directly involved in the crime;
> - He is directly related to the other suspects of this offence;
> - Forensic traces;
> - Statements that the suspect had committed the crime."

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 "murder, grevious bodily injury" was in error;

(k) 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;

(l) There are no circumstances that would cause the Court to refuse to surrender the respondent under s. 21A, 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. 4) Order 2004 (S.I. No. 400 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, the Netherlands 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

The respondent relies upon the following substantive Points of Objection:

> 1. There is no legal basis for the surrender of the Respondent pursuant to Section (10) of the European Arrest Warrant Act, 2003 in circumstances where the European Arrest Warrant relied upon by the Applicant does not state the purpose for which the domestic warrant, on which it is grounded, was issued. The Respondent is not a person to whom section 10 of the European Arrest Warrant Act 2003 (hereafter "the 2003 Act") as amended applies and accordingly, cannot and should not be surrendered to the issuing state.
>
> 2. The European arrest warrant herein does not comply with section 11(f) of the 2003 Act as amended in that it does not set out the circumstances in which the offence is alleged to have been committed or the alleged degree of involvement of the Respondent herein in the alleged commission of the alleged offence.
>
> 3. The European arrest warrant herein has not been issued by a judicial authority and/or is not a judicial decision within the meaning of the provisions of the 2003 Act as amended and the provisions of Article 1 and Article 6 of the Framework Decision. The warrant states on its face that it was issued by a named "Public Prosecutor" who can not be considered a judicial authority for the purpose of the European Arrest Warrant Act, as amended, nor the Framework decision.
>
> 4. No decision has been made by the requesting state to prosecute the Respondent with and try him for the offence the subject matter of the European arrest warrant herein. Accordingly, the Respondent's surrender would be contrary to section 21A of the 2003 Act as amended.
>
> 5. In all the circumstances of this case, the surrender of the Respondent would amount to a breach of section 37 of the 2003 Act as amended in that, *inter alia*, it would be incompatible with the State's obligations under the Convention or the Protocols to the Convention.
>
> 6. In all the circumstances of this case, the surrender of the Respondent would amount to a breach of section 37 of the 2003 Act as amended in that, *inter alia* it would amount to a breach of his constitutional rights including his personal rights under Article 40.3, his rights to due process and his right to liberty and/or a breach of his right to respect for his private and family life under Article 8 of the European Convention on Human Rights as set out in the European Convention on Human Rights Act 2003.
>
> 7. By virtue of all the circumstances of this case, it would be oppressive, disproportionate and/or unjust to surrender the

Respondent and in violation of his constitutional, natural and human rights to *inter alia*, legal certainty and basic fairness of procedures.

8. The Respondent expressly reserves the right to furnish such further or other points of objection as may arise upon receipt of legal advice from a lawyer qualified to practice in the issuing state and/or a response to correspondence sent to the Applicant herein."

Subsequently, with the consent of the applicant and the leave of this Court, the respondent added one further ground of substantive objection:

> "In all the circumstances of the case, the surrender of the Respondent would constitute an abuse of process."

In regard to this additional ground of objection it is difficult to understand the point being made on a literal reading of what is pleaded, and to understand how a "surrender" yet to take place, and which, if it is to happen, could only take place with the authority of the Court, could constitute an abuse of the Court's process. However, the Court will approach the matter on the basis that the point as pleaded is simply badly phrased and that the intended objection is to the effect that:

> "In all the circumstances of the case, the application seeking the surrender of the respondent constitutes an attempt to abuse this Court's process."

The course of these proceedings

The s. 16 surrender hearing in this case was conducted jointly with the surrender hearing in the related case involving Barry McArdle (Record no. 2011/267 EXT). It was necessary for the Court to first hear and determine a preliminary issue in the case of Mr. McArdle. This occurred on the 22nd November, 2012. The substantive surrender hearing in both matters then took place over the following dates, viz the 8th April, 2013, the 9th April, 2013, the 10th April, 2013, the 8th November, 2013, the 18th November, 2013 and the 9th December, 2013.

Following an initial three days of hearing, the Court, being of the opinion that it had insufficient information to enable it to carry out its function under the Act of 2003, invoked its power under s. 20(1) of the Act of 2003 and required the Central Authority to request certain additional information from the issuing judicial authority. This request for additional information (hereinafter the first s. 20(1) request), to which I will allude in greater detail below, was communicated on the 12th April, 2013 and a reply was received on the 16th April, 2013 and was presented to the Court on the next date on which the case was due to be mentioned, i.e., on the 30th April, 2013, following which the court reserved judgment. Thereafter, the matter was listed for mention from time to time with a view to the Court nominating a date on which it would give judgment. On one such mention date towards the end of Trinity term 2013 it directed that the matter be listed on the 9th September, 2013 for delivery of judgment.

However, in late August 2013, the Court informed the parties through the registrar that, in the course of its deliberations and endeavours to prepare a judgment, it had once again formed the opinion it had insufficient information to enable it to carry out its function under the Act of 2003, and, in the circumstances, that judgment would not in fact be delivered on the 9th September, 2013. Rather, it was the Court's intention to invoke its power under s. 20(1) of the Act of 2003 for a second time and require the Central Authority to request certain further information from the issuing judicial authority. That further s. 20(1) request (hereinafter the second s. 20(1) request), to which I will also allude later in this judgment, was communicated by the Central Authority to the issuing judicial authority by letter dated the 6th September, 2013. A reply was received on the 11th October, 2013, following which the Court heard further submissions from the parties on three subsequent dates, ultimately reserving judgment again on the 9th December, 2013.

Relevant correspondence exchanged pre-surrender hearing.

The European arrest warrant is dated the 6th July, 2011 and, as previously stated, was endorsed on the 27th July, 2011. The respondent was arrested and brought before the High Court on the 3rd October, 2011. The 5th October, 2011, was fixed as the notional hearing date and he was remanded on bail to that date. Thereafter he was further remanded in the same status from time to time until the case was ready to proceed to a substantive surrender hearing, at which point a firm date was fixed for the surrender hearing to commence. During this pre-hearing period the respondent filed his initial points of objection, on the 21st December, 2011, which pleaded, *inter alia*, an objection based on s. 21A of the Act of 2003. Arising out of this, the applicant wrote to the issuing judicial authority on the 23rd May, 2012, in the following terms:

> "I refer to the European Arrest Warrant transmitted by you in respect of the above named. Mr Brunell claims in Court documents that he is wanted for investigation purposes and not for prosecution.
>
> Under Irish law it is not possible to surrender a person under a European arrest warrant unless a decision has been made in the requesting state to charge the person with an offence and also to put him/her on trial for the offence. Under Irish law a charge means that the person has been formally accusing [sic] of having committed a stated offence, that is, an expression which includes, in these circumstances, an indictment for an offence. To be put on trial refers to a decision being made to bring the accused person before a court which will determine whether the accused committed the offence with which s/he has been charged.
>
> This means that Ireland is unable to surrender a person where that person is being sought for questioning and investigation so that a decision can be made whether or not to charge (indict) the person with the offence or for a decision to be made whether or not to put the person on trial. Where, however, a warrant is issued during the course of an investigation but there is an intention, at the time the warrant is issued, to put the person on trial then it is possible for Ireland to surrender the subject. The issues which need to be clear are whether the warrant has been issued
>
> - either where the subject has already been charged (indicted) or
> - with the intention of charging (indicting the subject) and with the intention of putting the subject on trial.
>
> In order to clarify the position in this case we require the following information:

(i) Has a decision been made to charge (indict) the requested person? If so is the charge (indictment) reflected in any summons, indictment or other formal document? If it has please provide a copy of this document.

(ii) If a decision to charge (indict) the requested person has been made, does this mean that a decision has also been made to put the requested person on trial?

(iii) Does a decision to put the person on trial have to be made separately from the decision to charge (indict) him/her and, if so, has a decision been made in this case to put the person on trial?

It would also be helpful if you could provide any other information that you feel might be useful in addressing this issue."

In circumstances where a reply to this letter was outstanding, the applicant sent reminders on the 15th June, 2012, and the 2nd July, 2012. A short reply was then received from the issuing judicial authority, dated the 10th July, 2012, in the following terms:

"Referring to your fax dated 02/07/2012 I herewith send you the translated summons of mr. Brunell and mr. McArdle.

As you will see, mr. McArdle has authorized a Dutch sollicitor, mr . Rammelt, to hes defence. I can also confer that mr. Brunell also has a Dutch sollicitor, mrs. Bouwman.

M.E. Woudman

Public Prosecutor"

Enclosed with this letter were copies of two court summonses, each dated the 6th March, 2012, one relating to the respondent Mr. Brunell and the other relating to his co-accused Mr. McArdle.

These summonses commanded the person summoned to appear before the District Court of Amsterdam "as defendant on **Wednesday 28 March 2012, at 13:30** hours, at the court session of the Full-Bench Criminal Division which will be held at the District Court [Arrondissementsrechtbank], **Parnassusweg 220, Amsterdam**, in order to stand trial in respect of the charge set forth below".

The charge set forth in each instance was in terms that:

"he at some time in the period from 17 February 2009 to 24 February 2009 inclusive in Rotterdam and/or in Mijdrecht and/or elsewhere in the Netherlands, together and in concert with another or others, at any rate alone, intentionally and with premeditation, took the life of K. Ennis, as the defendant and/or (one or more of) his perpetrator(s) with that intent and after calm consideration and careful deliberation stabbed and/or cut said Ennis with a knife, at any rate with a sharp and/or pointed object, one or several times in his body, causing the death of said Ennis.

(Section 289 Dutch Criminal Code)"

It emerged in subsequent correspondence with the issuing judicial authority that procedural hearings were held on the return date of the 28th March, 2012, and the 30th August, 2012. Further summonses dated the 27th July, had been issued that required the attendance of the respondent and his co-accused on the 30th August, 2012. The position was further explained by the issuing judicial authority in a faxed message to the applicant dated the 26th September, 2012, in which he stated:

"In answer of your fax dated September 26th in which you have asked about the meaning of the summons which were issued on July 27th the following. The meaning of these summons was for the court and the defense lawyers - of Brunell, Mcardle as well as County - to decide upon the question of how to go further in the procedure. The proceedings took place on August 30. It was mainly a matter of appointing the witnesses for the defense by the court. The court has granted the following witnesses:

1. Kenneth Brunell, Flat l North Circular Rd 235;

2. Barry Mcardle, Cloverhill Remand Prison, Clondalkin, Dublin 22 Ierland;

3. [Name redacted]

4. [Name redacted]

5. [Name redacted]

6. [Name redacted]

7. [Name redacted]

8. [Name redacted]

9. [Name redacted]

10. [Name redacted]

The court will order the examining judge to interrogate these witnesses in Eire. The interrogations are scheduled for the last two weeks of November this year. As you can imagine, it is of the upmost importance that Brunell and Mcardle will be extradited before the interrogations can take place, because the Amsterdam CID by the person of Mr. Ron Tesselaar can cross examine both suspects far more better than a examining judge. That is also the reasen why if have asked you if my presence in Dublin to argue for the extradition could speed up the procedure or at least increase the chances of the extradition of both suspects.

With kind regards,

Machiel Woudman

Public Procecutor"

On the 12th November, 2012, the applicant forwarded to the issuing judicial authority an affidavit filed on behalf of the respondent of a Dutch lawyer, Mr. Jozef Rammelt, sworn on the 2nd November, 2012, (reviewed in detail in the next section of this judgment), seeking his comments. The issuing judicial authority replied on the 14th November, 2012, stating:

> "Contrary to the conclusion of Mr. Brunell's counsel I can assure you that Mr. Brunell — as well as the co-suspect Mr. Barry McArdle — are suspects in a serious crime, namely that they have jointly and in conjunction with one or more others taken the life of Keith Ennis.
>
> It should be noted, for the sake of completeness, that Lisa Marie Glynn was also considered a suspect and was heard as a suspect at the time.
>
> Concerning Ms Glynn it could be established that she was not in the Netherlands when Mr.Ennis' life was taken and that she had no part in that.
>
> I contest the counsel's conclusion that except in the case of Ms Glynn, I would also misuse the European arrest warrant for Brunell and McArdle to have them examined as witnesses by the Amsterdam police in the criminal case against Philip County in the Netherlands.
>
> There is a strong suspicion against both of them, based on the statements made by Mr. County."

Evidence adduced by the Respondent

The respondent relies, *inter alia*, upon three affidavits of a Dutch lawyer, Mr. .Jozef Rammelt sworn on the 2nd November, 2012, the 4th April, 2013 and the 29th November, 2013, respectively. There is no issue as to Mr. Rammelt's credentials as a person expert in Dutch criminal law. He is not, however, a wholly independent expert in as much as he was, and continues to be, the lawyer acting for the respondent in the Netherlands in connection with the charges which are the subject matter of the European arrest warrant in this case.

In his first affidavit sworn on the 2nd November, 2012, Mr. Rammelt deposes to the following matters [with remarks of this Court in parentheses]:

> 2. I say that the Respondent herein is one of three persons currently sought in respect of the offence set out in the European Arrest Warrant, already had herein. I say and believe that Mr. Barry McArdle is a Respondent to an extant European Arrest Warrant listed with that of this Respondent before the Honourable Irish High Court. I say and believe that Mr. Philip County was surrendered, pursuant to a European Arrest Warrant, from Ireland to Holland in April 2011. I say that I previously represented Ms. Lisa Marie Glynn who was sought by way of a European Arrest Warrant from Holland in respect of the same offence. I say that the warrant in respect of Ms. Lisa Marie Glynn was ultimately withdrawn. I say and believe that there was never an intention to prosecute Ms. Glynn in respect of the offence in the warrant, which was broadly similar in its terms to that of this Respondent, but rather she was sought in order to assist the investigation as against Mr. County. …[Warrant in respect of Ms Glynn exhibited as "JR1"]
>
> 3. I say that, notwithstanding the existence of the European Arrest Warrant already had herein, a summons dated the 16th March 2012 for the first public hearing on the 28th March 2012 was issued in Holland for the Respondent in respect of this alleged offence. …[Summons exhibited as "JR2"] … I say that I appeared for the Respondent on the 28th day of March 2012 and furnished to the Court the power of attorney signed by the Respondent … [Power of Attorney exhibited as "JR3"]. I say that the Court accepted the power of attorney and I was permitted to represent the Respondent in the ensuing proceedings. I say that on this date the case [sic] of Mr. Philip County and Mr. Barry McArdle were also before the Court as co-accused.
>
> 4. I say that the Court adjourned the proceedings in circumstances where the police file had been furnished to me only on the day previously, the 27th March 2012. I say that I informed the Court that the Respondent had not received the summons referred to above and in those circumstances the Court adjourned the proceedings for an indefinite period of time and did not fix a further date in respect of proceedings.
>
> 5. I say that I continued thereafter to act specifically for Mr. Barry McArdle, the co-accused of the Respondent herein, who is also a Respondent before this Court. I say that my colleague, Ms. Myrddin Bouwman, acted thereafter for this Respondent. I say that the proceedings in respect of both parties have travelled together through the domestic Court and I am in a position to aver to the passage of the domestic proceedings as they relate to this Respondent.
>
> 6. On the 28th March 2012, the first domestic hearing in respect of the subject matter of the European Arrest Warrant, the Prosecutor stated a number of particularly relevant matters to the European Arrest Warrant proceedings, which are set out hereunder and I beg to refer to a copy of the relevant transcript … [transcript exhibited marked "JR4"] … [although the affidavit sets out the quotations attributed to Mr.Woudman both in original Dutch and in English translation, only the translation is reproduced here] :
>
> > *"The case cannot be heard today as the investigation is still ongoing.*
> >
> > *A number of witnesses still have to be heard amongst whom are the suspects (Mr. Mc Ardle JMR) and his co defendant Mr. Brunel [sic], they are witnesses in the case against County. The investigating judge is planning these examinations and shall travel to Ireland in the very near future. Because the former investigating judge is replaced by another judge, the investigation is slowed down a bit. But it is certain that the (new JMR) investigating judge travels to Ireland to examine the witnesses because according to the Irish authorities a video recorded examination is impossible"*

Further;

> *"Brunel [sic] and the suspect (Mc Ardle: added JMR) received a summons to appear as a suspect. The reason for this is that the Irish authorities showed to be very uncooperative in the surrender of both suspects. Brunell is out on bail and he indicated that he is willing to come to Holland voluntarily. This is however a problem because his passport has been seized as a result of which he is unable to leave his country. I explore at this moment the possibilities of using the same construction as we used with another former suspect in this case (the former suspect is Lisa Glynn added by JMR). The passport has to be handed over at the airport before he leaves for Schiphol (Amsterdam added JMR) and Brunel (sic) shall be arrested upon arrival at Schiphol Airport. I wrote this proposal on paper and at this very moment this proposal is with the translator to be translated. One of the coming days I will send this proposal to the Irish Authorities".*

Further;

> *"By the way, informally I heard that to examine the suspect (added: Mc Ardle) and Brunel (sic) as witnesses in the case against County could have consequences for the decision which the Irish court has to make in the request for the surrenders. Chances are that our surrender request will be denied because than they are (the Irish court) of the opinion that surrender is no longer necessary . This is the reason why I decided to serve the suspect (added: Mc Ardle JMR) and Brunel (sic) with a summons. The Irish authorities indicated that they only want to surrender if an act of prosecution is done. By serving the summons (added; to Mc Ardle and Brunell) I did everything within my powers to put the maximum pressure on the Irish authorities."*

It should be indicated at this point that what is described as the "transcript" of the proceedings of the 28th March, is a document more accurately described in its title as the "minutes" of the said proceedings. It is not a verbatim transcript, but rather a summary of what occurred before the court on the date in question including the parties respective submissions. Since the swearing of Mr. Rammelt's affidavit, the applicant has procured the official English translation of the said minutes, and has placed this document before the Court. I have been given to understand that in circumstances where a defendant before a Dutch Court is not a native Dutch speaker, the record of proceedings will be made available not just in Dutch but also, if requested, in the defendant's own language – in this instance English. The passages relied upon by Mr. Rammelt, and unofficially translated by him in his affidavit, (ostensibly with reasonable accuracy, it has to be said) are officially translated as follows:

"The public prosecutor states, essentially

The case cannot be substantively addressed today, because the investigation is not yet finished. There are a number of witnesses to be heard, including the defendant and co-defendant Brunell as witnesses in criminal proceedings against the County. The magistrate will soon travel to Ireland. If there is a change of magistrate there will be some delay in the investigation. In this case the magistrate will go to Ireland to the witnesses, as currently a video interview by the Irish authorities is not possible.

Brunell and the accused have now been summoned as suspects. The reason for this is that the Irish authorities have so far not been very cooperative regarding the surrender of the two suspects. Brunell is on bail and has indicated that he is willing to voluntarily come to the Netherlands. This is currently difficult because his passport was seized and he is therefore not able to leave the country. I am now trying to complete a structure in order to fit with another former suspect in this case. The passport can be left at the airport for departure to Schipol and Brunell can be taken into detention upon arrival at Schipol. That is what I propose and what I will put on paper and this is currently being translated by the translator. Today or tomorrow I will fax the proposal to the Irish authorities.(3) or …

I was also informally notified that the hearing of the accused and Brunell as witnesses in criminal proceedings against the County may affect the decision of the Irish court regarding the request to surrender. It is likely that this will be rejected because it is considered that this is no longer necessary. That is why I have decided to sue the accused and Brunell. The Irish authorities have indicated that they just want to surrender as an act of persecution is made. Through the summons I consider this the ultimate act of persecution made as security, as the pressure is carried by the Irish Authorities."

Mr. Rammelt's affidavit then continues:

7. I say that on the 28th March 2012, having been furnished with the relevant prosecution file only on the previous day, I was unable to ask the Court if they would allow me to give them the names of the witnesses I wanted to be heard by the Investigating Judge. Therefore the Court directed that all witnesses called by the defence of Mr. Philip County would be heard by the Investigating Judge. I say that in the case of Mr. McArdle and this Respondent this was not ordered by the Court. I say and believe that because of the fact that the Investigating Judge in the case of Mr. Philip County expected similar requests from the defence lawyers of Mr. McArdle and Mr. Brunell, namely to hear witnesses in Ireland, she postponed her efforts to travel with a rogatory commission to Ireland.

8. I say and believe that since the 28th March 2012, the Prosecutor took no initiative to plan a second hearing. I further say that in the normal course such a second hearing would be arranged but was not done so in this instance. I say and believe that the Prosecutor did not do so for tactical reasons as to do so would run the risk that the Court would agree to my motion to hear witnesses in Ireland. If that were to happen then Mr. Brunell and Mr. McArdle would be heard as witnesses in the case against Mr. Philip County by the Investigating Judge. I say and believe that the Prosecutor wishes to avoid this situation as it would prevent the police of examining Mr. McArdle and Mr. Brunell as suspects.

9. I say, by way of background, that in Holland where a person receives a summons to appear in Court as a "suspect" he would usually have been already examined by the police when unaware as to the content of the investigation file. In such examination leading questions are permitted and would not be identifiable as such to the questioned person. In the instant case the Respondent is entitled to disclosure of the investigation file upon being summoned which is a significant advantage to the Respondent and his advisors. I believe that it is for that reason the prosecutor is seeking to avoid disclosing the investigative file and states in his letter dated 28th September 2012 to the Irish Central Authority that "It is of the utmost importance that Brunell and Mc Ardle will be extradited before the interrogations (of the investigating Judge : added JMR) can take place ". … [Letter of 28th September 2012 exhibited as "JR5"] … I say that if the Respondent is surrendered before the Investigating Judge is able to examine him, under the rogatory commission, the police in Holland would be in a position to exert more pressure upon him where his lawyer has no rights in interview with police, as opposed to that with an Investigating Judge. I say and believe that it is the prosecutor's intention to avoid that happening.

10. I say that on the initiative of the Chair of the Criminal Court a second hearing was planned. I say that this hearing was for the purpose only of ascertaining whether the defence lawyers of Mr.McArdle and Mr.Brunell wanted to hear witnesses in these two cases. I say that this hearing took place on the 30th August 2012, wherein I requested the Court to allow me to examine ten witnesses in Ireland. …[Motion to examine witnesses exhibited as "JR6"]

11. I say that the Court granted my request and ordered the investigating Judge to examine these ten witnesses. I say that during this hearing the Chair mentioned that the Court was in possession of a file consisting of thirteen large volumes. I say that I informed the Court that I had only received three volumes (pages 1 - 749). I say that this meant that the Prosecutor, without fulfilling his legal obligation to notify the defence, did not give full disclosure of the file after he served Mr. McArdle and Mr.Brunell with a summons. I say and believe that the Chair was clearly angered by this failure and ordered the Prosecutor, referred to in the European Arrest Warrant herein, Mr. Woudman, to disclose the complete file immediately to the defence. The Prosecutor failed to perform his legal duties in this regard, and on 16th October 2012 I notified the prosecutor, by fax, of my intention to issue a motion to direct compliance with the Court order. The same correspondence was copied to the Chair and the Investigating Judge.

12. I say that in a letter to the Chair and the Investigating Judge I stated that the Prosecutor Mr. Woudman is deliberately frustrating the defence rights by not acting according to the Court's ruling of 30th August 2012. I say that I therefore informed the Investigating Judge that in circumstances where the Prosecutor continues to act unlawfully in failing to comply with his obligations that I can not go to Ireland to interview witnesses. …[Correspondence exhibited marked "JR7"]

13. I say that it was only on 23rd October 2012 that the Prosecutor complied with his duty to provide full disclosure to the defence.

14. I say that in the transcript of the Court hearing on the 28th March 2012, already had herein, on the first page last paragraph the Chair of the Court states:

> *"The chair declares that this case (McArdle added JMR) will be dealt with during the same hearings as Mr. Brunel [sic] and Philip County (Court nr.) but the cases remain treated as separate cases. "*
>
> I say that the aforesaid comment means in practice that the Court transcripts will only state what is said or happened in the case as if it was a stand alone case. Therefore the transcript of the Respondent will only reflect what happens in his case and not in the case of co-accused even though it is the same hearing. I say that on the same date being the 28th March 2012 the prosecutor stated:
>
> *"If it turns out that the court hearing against McArdle cannot take place before November 9th, 2015 (date of release of Mr . McArdle in Ireland) then I think that I will try to deal with this case separate of the cases of Mr. County and Mr . Brunell "*

15. I say that Mr. Philip County, who was sought in respect of the same offence as the Respondent herein, was surrendered to Holland in April 2011. I say and believe that Mr. County was ultimately released on bail and I believe that this happened for two reasons:

> a) his pre trial detention had lasted 16 months on August the 30th 2012 and the investigation was still on going without making real progress;
>
> b) the court found it absolutely unacceptable to keep him in pre trial detention because the prosecutor could not give any specific dates on which the witnesses could be heard in Ireland nor could he give any specific details of when Mr. McArdle and/or Mr. Brunell would be surrendered to Holland or not.

16. I say that on the 18th October 2012 I was contacted by the Prosecutor, Mr. Woudman, who stated that he was shocked by the "tone" of my letter to him, the Chair and the Investigating Judge. He further stated that he was convinced that the investigating Sergeant Tesselaar was far better equipped to examine Mr. McArdle and Mr. Brunell than the Investigating Judge.

17. I say and believe that the Investigating Judge invited all lawyers to include the Prosecutor to a meeting scheduled for 1st November 2012 to discuss developments in the investigation. I am unaware as to the reason for such a meeting, although I believe that the rogatory commission intended for November 2012 is to be postponed. I believe that the passage of the case and difficulties as regards same will be discussed at this meeting.

18. I say that I have extensive experience in regard to the prosecution of offences in Holland and it is my clear and unequivocal professional view that the Respondent is, in fact, wanted for questioning in respect of the offence that is the subject matter of the European Arrest Warrant. I have arrived at that conclusion in circumstances where Mr. Philip County is the sole witness to incriminate Mr..Brunell. I say and believe that none of the details in Mr. County's statement were confirmed in the police investigation, which statement was made only after he had been appraised of incriminating detail in the police file. In arriving at my conclusion I have had particular regard to the service, by the prosecutor, of a summons to the Respondent as a suspect. It has been stated by the prosecutor that this was done for the purpose of getting him surrendered to Holland. It is of paramount importance that the prosecutor did not state that the Respondent must be regarded as a suspect. The Prosecutor only served a summons in respect of the matter, again according to his own statement, after the Irish authorities suggested this way of action to him. I say and believe that this is manifestly clear from what was stated by the Prosecutor at the hearing on the 28th March 2012, as set out at paragraph 6 herein. I further say and believe that the European Arrest Warrant is being used as a device to render the Respondent amenable to questioning in the same way in which it was used in respect of Ms. Lisa Marie Glynn."

It is accepted by all concerned that in so far as there is a reference in para. 3 of this affidavit to a summons dated the 16th March, 2012, there is a typographical error with respect to the date and that the correct date is the 6th March, 2012.

In Mr. Rammelt's second affidavit, otherwise described as his "supplemental affidavit", sworn on the 4th April, 2013, for the purposes both of this respondent's case and also Mr. McArdle's case, he deposes to the following additional matters:

> "3. I have made thorough enquiries in regard to the existence of written domestic warrants grounding the European Arrest Warrants of both Mr. Brunell and Mr. McArdle. I have in my possession a complete file in respect of these proceedings and can confirm that there are no such warrants on those files.
>
> 4. The European Arrest Warrants in respect of Mr. Brunell and Mr. McArdle were issued by Mr. M.E. Woudman, who is also the prosecutor in respect of the offence set out in both warrants. The role of the prosecutor is to decide if a suspect is going to be prosecuted, or not, and in these cases Mr. Woudman made the decision to prosecute both Mr. Brunell and Mr. McArdle, as set out in the warrants. In order to arrive at a determination as regards prosecution the prosecutor is in constant contact with the investigating police and is directly responsible for the conduct of the investigation, as Mr. Woudman was and is in these cases. As previously stated in my affidavits of the 2nd November 2012 and 6th November 2012 the prosecutor in this case has acted in furtherance of that prosecution at all stages and could not, in any way, be considered to be independent to it. In the same affidavit I have set out the involvement of the investigating Judge, such as it was at that stage.
>
> 5. I say that the issue of a summons, by the prosecutor Mr. Woudman, in respect of both Mr. McArdle and Mr. Brunell, as set out in my previous affidavits, was extremely unusual. The usual situation is that only after being questioned extensively by the police, the investigating Judge and after the questioning of witnesses will the prosecutor make a decision as to whether to issue a summons to stand trial, in respect of an individual. As set out in my previous affidavits, and referred to in an email which I believe is before the Court, Mr.Woudman appears to have taken this step in order so deal with concerns from the Irish regarding the European Arrest Warrant proceedings I am also aware that requests in respect of mutual assistance have been sent to the Irish authorities notwithstanding the proceedings in Holland. It is an unusual feature of this case that both the European Arrest Warrant proceedings and the mutual assistance request are in being at the same time in circumstances where both Respondents are sought to be questioned as witnesses in the context of the mutual assistance proceedings."

Then in his third affidavit, otherwise described as his "second supplemental affidavit", sworn on the 29th November, 2013, for the purposes both of this respondent's case and also Mr. McArdle's case, Mr. Rammelt further deposes to the following additional matters:

> "2. Ms. Catherine Almond, who acts for both this Respondent and the co-respondent, Mr. Barry McArdle, has sought my advice in respect of the remedies available to the Respondent in the Netherlands arising out of the conduct of the Dutch prosecutor and the alleged abuse of process resulting.
>
> 3. Under Dutch criminal procedural laws there is no facility to institute separate legal procedures to prohibit the trial of the Respondents. Nor is there any facility to challenge the issue of the European Arrest Warrant prior to the conclusion of the substantive trial. Therefore the issue of the European Arrest Warrants in this case is not amenable to any separate or preliminary review. The effect of this is that the Respondents could be surrendered, and detained for a significant period of time in custody, on foot of warrants which we contend were issued as an abuse of process. It is open to the trial Court to find that the issue of the European Arrest Warrant amounted to an abuse of process, in wholly exceptional circumstances, but same is dependent upon final argument in the trial itself when application will be made to deprive the prosecutor of his right to prosecute.
>
> 4. The only Court competent to deal with the issues of an unfair trial and abuse of process, is the trial Court. It is only at the conclusion of the trial, that the trial court has theoretical jurisdiction, upon oral motion filed by the accused, to determine that the Prosecutor is deprived of his right to prosecute because of his ongoing actions to frustrate the procedure. If the court decides that the abuse is not sufficiently serious enough the Court could convict the Respondents and decide to impose a lower sentence. There is no remedy available to the Respondents in advance of this application, which most likely would occur after both Respondents have spent some considerable time in custody. A third individual, Mr. Philip County, who was surrendered to the Netherlands was detained in custody for at least a year.
>
> 5. Any application to the trial Court to prohibit the criminal proceedings, and effect the discharge of the Respondents, by virtue of the risk of an unfair trial, can only be made before the first hearing. Where an accused receives a summons to appear before a criminal court he has the right to object in writing against his prosecution if he is of the opinion that the criminal court will most likely not convict him taking into account the proof presented in the written file, which I understand is akin to an application in Ireland under Section 4 (E) of the Criminal Justice Act, 1999.1 say that the procedure is very limited and focuses only on this question. The "first hearing" in the case of these two Respondents took place one and half years ago. In any event, the conduct of Mr. Woudman, which also postdates this hearing, is not a ground on which to base any such application. I say that the prosecutor, Mr. Woudman, caused the summons in this case to issue in circumstances where he was absolutely aware that neither Respondent could attend the "first hearing". As I pointed out in my previous affidavit Mr. Woudman stated in court that he served the summons as an ultimate act of prosecution upon being advised by the Irish authorities who he claimed demanded an act of prosecution in order to have a better likelihood of success in having the European Arrest Warrants executed."

The respondent also relies upon four affidavits sworn by his solicitor in this jurisdiction, Ms. Catherine Almond, on the 14th November, 2012, the 21st November, 2012, the 7th November, 2013 and the 18th November, 2013. For the most part it is unnecessary to specifically review these affidavits as they are largely devoted to recounting information communicated to her by the lawyers acting for the respondent and for Mr. McArdle in the Netherlands, i.e., Ms Myrddin Bouwman and Mr. Jozef Rammelt, respectively, which information is later repeated in the affidavits of Mr. Rammelt.

However, the exhibits to Ms. Almond's affidavit of the 14th of November 2012 do contribute significantly to filling in gaps in the procedural history of this case.

First of all, she exhibits a series of e-mails exchanged with Detective Sergeant Tesselaar of the Amsterdam Police Department over a six week period from mid March to early May 2012 in response to an inquiry from the Detective Sergeant concerning the possibility of both Mr. Brunell and Mr. McArdle travelling voluntarily to Amsterdam to be interviewed by the police. It seems that both Ms Almond and her clients were unaware at the commencement of this exchange, and for quite some time thereafter, that the summonses dated the 6th March, 2012, and hereinbefore referred to had been issued by Mr. Woudman. In response to Detective Sergeant Tesselaar's enquiry, Ms. Almond advised that while both Mr. Brunell and Mr. McArdle were agreeable in principle to doing so, there were some immediate obstacles to them doing so. In Mr. Brunell's case it was a condition of his bail, granted following his arrest on foot of the

European arrest warrant, that he should not leave the country. Moreover his passport was with An Garda Siochána. Even if the Central authority had no objection, the High Court would have to be asked to vary his bail conditions to permit him to travel. In Mr. McArdle's case he was serving a sentence and was therefore not able to travel. However, it was indicated by Ms. Almond he was still willing to talk to the Dutch police if visited in prison in Ireland. It seems that Sergeant Tesselaar and or Mr. Woudman may then have attempted to progress matters with the Irish Central Authority, but precisely what occurred is not apparent. However, the e-mails exhibited suggest that it was indicated to the prosecutor's office in Amsterdam that the Central Authority would not object to the proposed variation of bail in the case of Mr. Brunell, but that the Central Authority had stated that it was up to Mr. Brunell to make the necessary application. Detective Sergeant Tesselaar sent an e-mail to Ms. Almond requesting that that be done. However, there is nothing before the Court to indicate that any such application was in fact made. Ms Almond indicates that negotiations were broken off on her client's instructions when they became aware that summonses (the summonses dated the 6th March, 2012,) had been issued by Mr. Woudman.

Secondly, Ms. Almond exhibits a letter forwarded to her by Detective Sergeant Tesselaar at the behest of the assistant prosecutor, being a copy of a letter dated the 28th April, 2012, sent by the investigating judge and addressed to the public prosecutor and to the defence lawyers for County, Brunell and McArdle respectively. That letter is in the following terms:

> "Dear Public Prosecutor and Defence Lawyers.
>
> I am writing to all of you at the same time in order to inform you of the following with regard to the aforementioned case.
>
> I have since received the official arrest reports in all three cases. The District Court referred Mr County's case back to the Examining Magistrate for the purpose (among other things) of obtaining testimony from the witnesses residing in Ireland, namely: the co-defendants, Mr McArdle and Mr Brunell.
>
> A request for mutual legal assistance for the purpose of obtaining testimony from witnesses was already sent at the beginning of this year and the Irish authorities have undertaken to assist in taking testimony from these witnesses. The witnesses/co-defendants have also made it known that they are prepared, in principle, to answer questions.
>
> The cases against Mr McArdle and Mr Brunell were adjourned without being referred back to the Examining Magistrate. The defence lawyers of Mr McArdle and Mr Brunell have informed me that they wish to participate in the planned witness interviews to be held in Mr County's case, i.e. that Mr McArdle should also be questioned as a witness in the case against Mr Brunell and vice versa. The Public Prosecutor has opposed this proposal but, despite several requests to do so, he has failed to state his reasons for opposing the questioning of Mr McArdle and Mr Brunell as witnesses in each other's case and as witnesses in Mr County's case at the same time.
>
> In addition to this, the defence lawyers of Mr McArdle and Mr Brunell have requested to have the two statements made by the witnesses, Ms Davis and Mr Burton respectively, to the Examining Magistrate (in the case against Mr County) placed in their clients' case files.
>
> I have considered as follows with regard to obtaining testimony from the witnesses.
>
> As the cases of Mr McArdle and Mr Brunell have not been referred to the Examining Magistrate for the purpose of conducting any investigation in the case, 1 am not free to include the defence lawyers in the execution of the rogatory commission in Ireland. I greatly regret this because, in my opinion, it is in the interest of Mr McArdle's and Mr Brunell's defence that testimony is taken from the co-defendants as witnesses in each other's case and moreover, I would prefer, for reasons of efficiency, to take testimony from all witnesses at the same time.
>
> Regarding the documents, please be informed as follows:
>
> The defence lawyers of Mr McArdle and Mr Brunell have requested to have the aforementioned testimony taken by the Examining Magistrate in the case against Mr. County placed in the case files of Mr McArdle and Mr Brunell. The Public Prosecutor opposes this request as, in his opinion, this would be contrary to the interest of the investigation. Despite several requests to do so, he has not further substantiated this interest. My opinion in this matter is that the interest of the investigation, which I can well imagine, is outweighed by the interest of all parties in being able to adequately conduct their defence. Apart from the question whether at this stage, after summons has been issued, documents can be withheld by law from the defendants. However, it is the prerogative of this District Court in chambers to pass a final decision on this matter in objection proceedings. I again hereby request the Public Prosecutor to officially notify the defence lawyers that he wishes to withhold documents relating to the case from them and to also state his reasons for doing so. The defence lawyers then have the option of lodging an objection against this decision if required.
>
> The defence lawyers of Mr McArdle and Mr Brunell have informed me that they will advise their clients to remain silent if they do not have access to the aforementioned testimony taken by the Examining Magistrate, as without this testimony they will not have a full picture of their clients' interests. With regard to the testimony to be taken from the other witnesses, Mr County's three family members, Mr County's lawyer has informed me that she is waiving her right to have testimony taken from these witnesses. Mr McArdle's lawyer does wish to obtain testimony from these witnesses.
>
> In view of the time and effort that has been invested in arranging to have testimony obtained from the witnesses in Ireland, and as it is still uncertain whether and when the co-defendants Mr McArdle and Mr Brunell will be surrendered to the Netherlands, it is of the utmost importance, in my opinion, that the proceedings to obtain testimony from the witnesses in Ireland take place.
>
> The line which the Public Prosecutor is taking in this matter, for reasons unclear to me, frustrates the execution of the instructions given by the District Court to the Examining Magistrate and delays the judicial process in its entirety.
>
> That is regrettable.
>
> As a result of the foregoing, the current situation is as follows.
>
> As the cases of Mr McArdle and Mr Brunell were not referred back to the Examining Magistrate, I am not free to include the defence lawyers in the execution of a rogatory commission. However, for the time being, it does not appear to be expedient to travel to Ireland, as in this current situation it seems likely that neither of the witnesses is prepared to

answer questions and in the context of the execution of the rogatory commission this testimony can only be obtained on a voluntary basis. In the light of the possible surrender of Mr McArdle and Mr Brunell to the Netherlands, I have decided not to travel to Ireland at the present time in order to verify that the witnesses are indeed unwilling to answer questions. With regard to the withholding of documents relating to the case from Mr McArdle and Mr Brunell, objection proceedings will possibly have to be conducted. Mr McArdle's and Mr Brunnel's request to obtain testimony from witnesses will have to be made at a court hearing, after which their cases can be referred back to me.

I will await further developments.

Yours sincerely,

J. Edgar,

Examining Magistrate"

It should also be recorded that Ms. Almond's affidavit of the 7th November, 2012, exhibits an official English translation of the minutes of a court proceeding before the District Court of Amsterdam on the 14th June, 2012, in the case of Philip County, upon which the respondent in these proceedings places significant reliance as illustrating the attitude, disposition and motivation of the prosecutor, Mr. Woudman, in regard to actions taken by him in the cases being pursued in the issuing state against the respondent and Mr. McArdle; and, further, as putting in context Mr. Woudman's actions in the present proceedings. This record is an important document in this Court's view, and requires description in some detail, and selectively quoting from.

It is apparent from the said minutes that Mr. County's case was before the District Court of Amsterdam on the 14th June, 2012, in connection with the ongoing judicial preliminary investigation into his alleged involvement in the death of Keith Francis Ennis. Mr. County had been summonsed by the prosecutor to attend. At the commencement of the proceedings on that date the prosecutor requested an adjournment of the investigation for an indefinite period not exceeding three months. Although not expressly stated, it is to be inferred that his reason for doing so was that Mr. Brunell and Mr. McArdle, although both the subject of European arrest warrants seeking their return to the Netherlands for the purposes of also being prosecuted for the murder of Mr. Ennis, were still in Ireland. Mr. County's lawyer indicated that there was no objection to the adjournment being sought but that he was making a cross application for the lifting, alternatively the suspension, of the pre-trial detention order on foot of which his client, Mr. County, was being held in custody. The prosecutor indicated that he was opposed to the lifting of the pre-trial detention order but would not resist its suspension taking into consideration "the personal situation of the defendant" and "the fact that Ireland is not willing to cooperate".

The District Court of Amsterdam, in the course of deliberating upon the said application and cross application, considered the investigation file, and closely questioned the prosecutor, Mr. Woudman, on a number of aspects of the case. One aspect concerned whether or not the prosecutor had complied with previous directions that the court had made in relation to disclosure. It emerged that the prosecutor had not fully complied with the court's previous directions. Another aspect concerned why it was that only Mr. County's case was before the District Court of Amsterdam. It was noted by the court that the examining judge had complained that, as of the last court date, the progress of her investigation into Mr. County's case was being impeded by the failure of the prosecutor to refer the related cases of McArdle and Brunell to her. In those circumstances the court was demanding to know whether the prosecutor had deliberately not done so, and if so, why. The minutes record the prosecutor, Mr. Woudman as responding as follows:

"You are asking me why I only summoned the defendant for this session, whereas it was my intention to deal with the cases of the co-defendants together with that of the defendant. I only summoned the defendant Mr County for this court session, because the investigation is on hold. The other defendants are not detained and there was no necessity to summon them therefore.

You are confronting me with the fact that the examining judge notes in her letter of 28 April 2012 that the cases of McArdle and Brunell have not been referred to her at the last court session, which is an impediment to the progress of her investigation. You are asking me if I deliberately did not bring in the cases of McArdle and Brunell today in order that the district court cannot refer the cases to the examining judge and the examining judge cannot hear McArdle and Brunell as witness. That is correct, I did it deliberately. I did not want the cases of the co-defendants to be referred back to the examining judge, because I first wanted to have the co-defendants questioned by the police. The police has a plan ready to question the gentlemen as suspects and there would be no sense anymore if the examining judge had heard both gentlemen as witnesses. I disagree with the examining judge on this point. I think it is important that the co-defendants are heard by the criminal investigation department, as they have a proper questioning plan. That is a different type of questioning than the examining judge had in mind.

You are confronting me with the fact that the examining judge writes in said letter that I am sailing an unclear course, a course through which I am frustrating the district court order and the judicial process as a whole and you ask my response to this reproach. It is not the case that I am frustrating de district court order deliberately in order to be able to have the co-defendants questioned by the police first. You are asking me if I am not depriving the defendant of the possibility to corroborate his story this way. At this moment I am.

You are confronting me with the fact that the defendant pictured an alternative scenario and ask me if there is evidence disproving the defendant's statement. There is not."

Ultimately, the District Court of Amsterdam acceded to the adjournment application, acceded to the cross-application to have Mr. County's pre-trial detention completely lifted (rather than temporarily suspended), and directed the prosecutor to file additional documents and make specific further disclosure to the defence within a time limit fixed by the court.

Additional information
The first s.20(1) request was made in the following circumstances. It became relevant in the course of a consideration of the s.21A issue to determine when, and on whose authority, the underlying domestic arrest warrant had issued. S.11(1A)(e) of the Act of 2003 requires that a European arrest warrant shall specify "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." However, although it is stated in part (b) of the warrant in this case that the decision to issue the European arrest warrant was based upon "arrest warrant by order of the Public Prosecutor in Amsterdam Mr. M.E.Woudman", no information was provided concerning when that warrant had been issued or as to the exact terms of it.

In those circumstances, the Court caused the applicant to write to the issuing judicial authority in the following terms:

> "The presiding Judge has directed this office to seek clarification from your office on the following issues:
>
> 1. Please confirm the date of the arrest warrant made by order of the Public Prosecutor in Amsterdam (referred to at section (b) 1 of the European Arrest Warrants)
>
> 2. Please state precisely what the arrest warrant authorises;
>
> 3. Please state if the arrest warrant is said be immediately enforceable;
>
> 4. Please state whether there is a written record of the arrest warrant and if so, please provide a copy of same;
>
> 5. If there is no written record, please identify the legal provisions in Dutch law which permit a verbal order or arrest warrant to be issued."

The issuing judicial authority replied by letter dated the 16th April, 2013, stating (*inter alia*):

> "The Dutch national arrest warrant was not issued in writing; under Dutch law there are no specific requirements as to the form of the arrest warrant and the public prosecutor may issue the warrant verbally or in writing to the investigating officers. In the case in question I gave the police verbal permission for the arrest on 11th June 2011. Please also find herewith enclosed, for the record, the applicable sections of the law."

Enclosed with the reply was a copy of ss. 54 and 56 of the Dutch Code of Criminal Procedure. It is not necessary to reproduce them as it was accepted by counsel on both sides that the prosecutor was entitled to authorise the arrest of the respondent on foot of these provisions. It is sufficient to note that s.54.1 provides that the public prosecutor is authorised to arrest a suspect, who is not caught red handed, for any offence for which pre-trial detention is permitted and take him to a location for questioning. He may also order his arrest or arraignment. Section 67.1 lists the suspected offences for which the pre-trial detention of a suspect may be ordered and the list includes serious offences carrying a term of imprisonment of at least four years. The murder offence with which this accused is charged falls into that category. Moreover, it is noteworthy that s. 67.3 provides that pre-trial detention may only be ordered where it can be shown on the basis of facts or circumstances that there are serious suspicions against the suspect.

The second s. 20(1) request was made in circumstances where the Court considered that, in order to properly address the issues that had been raised in the case, it required to have some understanding of the Dutch criminal justice system and Dutch criminal procedure, particularly with reference to the role of the public prosecutor in criminal proceedings vis a vis the criminal courts in the Netherlands on the one hand, and the police on the other hand. In accordance with the Court's direction, the applicant wrote to the issuing judicial authority on the 6th September, 2013, stating (*inter alia*):

> "The presiding Judge has informed this office that in the course of his deliberations in these cases he has formed the opinion that the documentation and information provided to him is not sufficient to enable him to perform his functions under the European Arrest Warrant Act 2003. In particular, to enable him to determine issues arising in the context of the s.21A of the European Arrest Warrant Act 2003 and abuse of process objections.
>
> S.21A of the European Arrest Warrant Act 2003 provides;
>
> *"21 A.—(I) 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."*
>
> Accordingly, the presiding Judge (Edwards J), has invoked his powers under S.20(1) of the European Arrest Warrant Act 2003 regarding the provision of further information and has directed this office to request the issuing judicial authority to provide a detailed overview of Dutch Criminal Procedure, with particular reference to the role of the public prosecutor in criminal proceedings vis a vis the criminal courts in The Netherlands on the one hand, and the police on the other hand.
>
> The Court is itself aware of the existence of an English language textbook that purports to provide such an overview, i.e., "*The Dutch criminal justice system*" by Peter J.P. Tak of the University of Nijmegen (3rd edition. Boom Juridische uitgevers: Wetenschappelijk Onderzoeken Documentatiecentrum 2008)(www.english.wodc.n1). However, Judge Edwards has advised that as this publication relates to foreign law, he cannot and will not take its contents into account in his deliberations unless both parties are agreeable that he should do so or at least one party has adduced satisfactory evidence in verification of its contents and confirming the accuracy thereof.
>
> In that context it is open to you to endorse the contents of the said legal book as accurately reflecting the law of The Netherlands at the present time."

The issuing judicial authority replied by letter dated the 11th October, 2013, as follows:

> "In your letter dated 6 September 2013. you provided me with an update on the developments in the proceedings for the surrender of the suspects named in the heading.
>
> You informed me, in sum and in substance, that the court hearing the application has not received sufficient information in order to be able to review, in particular, S. 21A of the European Arrest Warrant Act.
>
> I infer from your letter that the court is not convinced that the decision has been made to prosecute and charge the suspects of participation in the murder or manslaughter of Keith Ennis and to try them for this serious offence.
>
> For that reason, the court has requested me to provide a detailed overview of the Dutch criminal proceedings and the law of criminal procedure.
>
> Evidently it is still not clear to the court that the public prosecutor — the only authority competent to do so in the Netherlands — ordered the arrest and that the public prosecutor — the only authority competent to do so in the Netherlands — made the decision to prosecute and charge the suspects in order to have them tried before the District

Court as court of first instance, which will decide on their guilt.

All possible means provided under the Dutch law of criminal procedure have already been used for that purpose. Documentary evidence of the charge has also been sent.

Furthermore, under Section 44 of the Dutch Surrender Act, the public prosecutor is the only authority competent to issue an EAW. A court may not instruct a public prosecutor to issue an EAW. Nor may the Dutch court instruct a public prosecutor, ex officio, to order the arrest of a person on national territory. This follows from the hierarchical organisation of the Dutch Judiciary as embodied in the Dutch Judicial Organisation Act; said act is an organic law prescribed by the Dutch Constitution.

Moreover, in my opinion, a foreign court may not issue such an order at all, as its authority is restricted in accordance with the territorial principle as understood under international law and therefore extends no further than the territory of its state, except in the case of an explicit provision of treaty law to the contrary. I am not aware, in my capacity as public prosecutor, of such a provision.

The court refers, in connection with its request for a detailed overview, to a book written by Professor Tak, 'The Dutch Criminal Justice System'. The court has indicated that it could take the subject matter of this book into consideration in its judgment if explicitly requested by the parties — I am assuming that "the parties" refers to I myself, in my capacity as public prosecutor, and the lawyers of the suspects. If it is common ground between the parties to the Irish proceedings that the book in question gives an adequate rendition of Dutch law in this matter, then I would like to tell you now that I can only regard as such the official legislation of authentic Dutch origin and the official commentary given thereon by the government. Therefore, I cannot accept a book composed by any person, however authoritative he may be, as an authentic source of any interpretation in the proceedings in your domicile. I assume that you are aware of the relationship between your state and mine under a treaty on obtaining information concerning the applicability, the scope of application and the application of the mutual law. My next assumption is that you see reason to not follow the diplomatic path, for which provision is made in that relationship. I would be grateful if you would inform me of your reasons for declining to follow this path.

As I indicated above and in my previous correspondence, I have instituted criminal proceedings against the suspects by charging them with participation in the murder or the manslaughter of Keith Ennis. I would, moreover, refer, *inter alia*, to my letters dated 5 December 2012 and 16 April 2013. A summons was delivered to each suspect.

There have already been two hearings in the trial against the suspects at the District Court as court of first instance, which will decide on the question of guilt, namely on 28 March 2012 and on 30 August 2012. The suspects were represented at both hearings by the authorised lawyers, Mr J.M. Rammelt and Ms M.W. Bouwman respectively.

The prolonged wait for a decision to be given on the application for surrender is a considerable hindrance to the proceedings in the Netherlands.

It is, in my opinion, not possible to provide an adequate answer to the question of the court. The request to provide a detailed overview of criminal proceedings and the law of criminal procedure has been formulated so generally that it is not possible to satisfactorily answer this question without having a precise understanding of what the court is driving at.

In regard of the question as to whether the book of Professor Tak may be taken into consideration in the judgment of the court, I would like to make it known that I oppose any such consideration of this book and I am not confirming the accuracy of this book either. First of all, because, as I set forth above, the question is unclear, does this involve the entire book (126 pages), or passages from it? And if so, which ones?

Moreover, the book dates from 2003 and the legislation has since been amended.

The Dutch Code of Criminal Procedure contains approximately 936 sections, of which about 400 relate to the prosecution at the District Court as court of first instance. In view of the question presented by the court, it has requested, in particular, information on the role of the Public Prosecutor in relation to the District Court on the one hand and the police on the other, it is not possible to adequately answer this question due to the extensiveness of the Dutch Code of Criminal Procedure, and certainly not by referring to the aforementioned book.

Finally, I would like to bring the following matter to your attention. I cannot get away from the impression that the court has doubts about the answer to the question as to whether the requested persons are regarded as suspects and have been deemed suspects and charged as suspects.

Perhaps the court's doubts have been prompted by the affidavit, dated 2 November 2012, which was submitted by Mr Rammelt, the defence counsel of the suspect Brunell. The defence counsel writes, *inter alia*, in his affidavit that the surrender of the suspect Brunell has been requested for the purpose of questioning him as a witness and not for the purpose of prosecuting him. As I informed you in my previous correspondence, I deny this opinion of the defence counsel. It is simply not true. It may be Mr Rammelt's opinion that the requested persons should be considered as such, however I strongly oppose the suggestion that this actually represents my position too.

I have requested Prof. Dr. G.A.M. Strijards, Senior Legal Adviser in the Public Service of the Kingdom of the Netherlands, attached to the National Office of the Public Prosecution Service of that state and professor in international criminal law by special appointment, to write in that official capacity an affidavit concerning the applicability of Dutch law in this case, its scope of application abroad and the review limitations of any foreign court in regard of such matters according to generally accepted international law.

For the purpose of achieving progress in the proceedings, I would like to propose the following. Please find herewith enclosed a list of his expertise. This list is an extract from a previous affidavit which he wrote in an English criminal case before the Crown Court in Birmingham. I will try to have this affidavit sent to you before 15 October, although it may take somewhat longer. I respectfully request the court to take this letter and the aforementioned affidavit into consideration. If the court is still of the opinion that it does not have sufficient information, Prof. Dr. G.A.M. Strijards is prepared to be heard as an expert witness at the hearing in Ireland. If required, I am also prepared to appear before the court for that purpose."

Shortly thereafter the applicant presented, and filed with the Court, two notarised affidavits of Professor Dr. G.A.M. Strijards. The first, dated the 14th October, 2013, and sworn specifically for the cases of Brunell and McArdle, asserted (*inter alia*) that:

> "2. According to article 3 para.'s 2 and 3 of the Treaty on European Union (hereinafter: TEU) in conjunction with article 67, para. 1 of the Treaty on the Functioning of the European Union (hereinafter: TFEU) the Member States have to depart from the basic assumption of perfect mutual trust in all areas of judicial cooperation and assistance, including that of criminal law. The issuing of and compliance with a European Arrest Warrant is a form of mutual assistance in that field. This kind of cooperation is governed by the rule of non inquiry according to article 4, para. 3 TFEU. This implies amongst others the assumption that the issuing authority of the administered state will use the results of any compliance by the requested state for the goals and objectives as set out in the considerations of the request. Furthermore this assumption prompts the presumption that the issuing authority has acted in perfect conformity with the national law of his state: *omnia rite atque sollemniter acta esse praesumuntur dnec probetur in contrarium.* All the acts of the prosecutorial authorities are deemed to be in line of the national law unless the opposite proves to be within the likelihood. Therefore it is not with the judiciary of the administering state to investigate as to whether the issuing authority might consider the claimed person rightfully as a suspect according to the criteria of his own national criminal law.
>
> 3. …. the Amsterdam Public Prosecutor took the decision to prosecute the claimed person Brunell. It is with the Dutch Judicary to rule further upon the lawfulness of this decision. This flows from various decisions of the EU-Court, departing from the principles as articulated in Case C-476/*06 Criminal proceedings against Felix Kapper* [2004] ECR 1-5205."

The second is an affidavit of laws that appears to have been sworn for the purposes of another case altogether that was pending at some point before the Courts of the United Kingdom. It was sworn on the 16th November, 2009, and deals with various issues, not all of which have any relevance to present proceedings (much of it is concerned with phone-tapping, for example). However, a portion of it deals with the role of the prosecutor in Dutch criminal law, and it is to that extent relevant. The deponent states in that regard:

> 1. In the Netherlands, the judiciary departs, according to long standing jurisprudence, from the legal assumption *ius curia novit*. The Dutch judiciary acknowledges, by virtue of its office, Dutch Law, legislation and jurisprudence. This is an irrebuttable presumption of law (*praesumptio iuris et de iure*). There is no expert who has the authority to give the Dutch judiciary guidance in Dutch legal matters, others than members of that judiciary. The attorneys of the Prosecutorial Service being member of that judiciary have the same authority. Only the Dutch Supreme Court can correct them. With regard to other states, the members of the judiciary enjoy the same authority *erga omnes* by virtue of their appointment and their office according to Dutch law. A district attorney of the Dordrecht Prosecutorial Service belongs to the Dutch Prosecutorial Service.
>
> 2. Secondly, according to Dutch Law, as far as investigative actions and prosecutorial actions are concerned, the maxim goes *omnia rite atque solemniter esse acta praesumuntur or omnia praesumuntur rite atque solemniter esse acta (donee probetur in contrarium):* all the acts of the prosecutorial authorities are deemed to be in line of the law unless the opposite proves to be within the likelihood. This also valid for transterritorial investigative actions.
>
> 3. Professors in (Dutch) criminal law can only act as experts in open court when it deals with foreign criminal law, which law has to be considered as "facts" by virtue of a mandatory provision inserted in the Statute of the Organisation of the Judiciary. To give authoritative (mandatory) renditions on operative articles taken out from Dutch Statutes, they are deemed incompetent in Open Court."

This Court wishes to comment, hopefully in a measured way, that the indignant tone of the issuing judicial authority's reply dated the 11th October, 2013, and also that of the supporting affidavit of Professor Dr. Strijards sworn on the 14th October, 2013, is really most unfortunate. It is unfortunate in circumstances where there is required to be trust and confidence between member states, and also where both issuing and executing authorities are required by the Framework Decision to afford mutual recognition to each other's decisions and rulings. Ireland made a declaration during the intergovernmental negotiations leading to the adoption of the Framework Decision to the effect that Ireland would only execute a European arrest warrant for the purpose of bringing a person to trial or for the purpose of executing a custodial sentence or detention order. The declaration was intended to make clear Ireland's opposition to extradition or surrender for the purpose of investigative detention. Legislative effect was initially given to this declaration in s.11(3) of the Act of 2003 (repealed by s. 72(c) of the Criminal Justice (Terrorist Offences) Act, 2005 (hereinafter "the Act of 2005")), and later by s.21A of the Act of 2003 (inserted by s.79 of the Act of 2005). Accordingly, a person opposing surrender on foot of a European arrest warrant before an executing judicial authority in Ireland is entitled to make the case that he is wanted for investigation purposes and not for the purposes of being tried. Where a person's surrender is sought on foot of a European arrest warrant there is a statutory presumption under Irish law that a decision has been made to charge that person with, and try him or her in the issuing state for, the offence to which the warrant relates, unless the contrary is proved. However, where, as in the present proceedings, a case to the contrary is being made, the executing judicial authority is obliged, whether the issuing judicial authority likes it or not, to engage with that objection. If the Court considers that it has cogent evidence before it sufficient to rebut that which is presumed, it must then seek to ascertain whether, as a matter of fact, decisions had been made, before the issuing of the European arrest warrant, to charge the person with, and to try him or her in the issuing state for, the offence(s) to which the European arrest warrant relates, bearing in mind that the onus of proving that such decisions were not made rests on the objector. The timing of the decisions is important because Irish jurisprudence requires that they should have been made before the European arrest warrant was issued. Frequently, the answer to these questions is not readily apparent and requires to be inferred from an examination of the evidence concerning the procedural history of the particular case in the issuing state.

In order to be in a position to draw the correct inference(s) it is necessary for the executing judge to have at least a rudimentary understanding of how the criminal justice system in the issuing state works, and some general understanding of the rules of criminal procedure in the issuing state. It may sometimes be necessary to delve more deeply into some aspects of the procedural history of a case than into others, and it may sometimes be necessary to seek additional information on more than one occasion. It will always depend on the circumstances of the case.

Accordingly, when an executing judicial authority states that it needs additional information to enable it to perform its function it is entitled to expect that such a request will be received respectfully and acted upon, if it is possible to do so, in accordance with the issuing judicial authority's duty to afford mutual recognition to the executing judicial authority's decision in that regard. Mutual recognition is not a one way system that only governs judicial decisions and communications emanating from the issuing state. It is a reciprocal obligation also governing judicial decisions and communications emanating from the executing state.

It is a matter of particular concern that in response to a straightforward request by this Court for additional information to assist it in establishing the facts in regard to the procedural history of the case, and without the Court having expressed any view whatsoever

on the merits or otherwise of the objection that it was considering, that the issuing judicial authority should conclude that, simply by virtue of such a request being made at all, the executing judicial authority had in some fashion pre-judged the substantive issues before it; and, moreover, that it proposed to engage in some form of extra-territorial judicial review of the actions of the Dutch courts and/or prosecuting authorities. That simply was not, and is not, the case, and this Court is at a loss to understand how on any interpretation of the applicant's correspondence on behalf of the executing judicial authority such a view could reasonably have been arrived at.

This Court is prepared to accept that there has been some level of genuine misunderstanding on the part of the issuing judicial authority, possibly due to the language barrier between us and lack of familiarity with each other's laws and procedures, particularly where on one side there is a civil law jurisdiction and on the other side a common law jurisdiction, and also on one side an inquisitorial system and on the other side an adversarial system.

Indeed, it now seems likely that at least part of the misunderstanding may be due to the fact that, if I understand Professor Dr. Strijards correctly, only prosecutors are competent before the Dutch courts to give the court guidance as to Dutch law. I have no reason to doubt that that is so. However, this Court was not seeking interpretation of the law, merely a description of it – a fine distinction, perhaps. A more significant point is that the explanation that this Court sought as to Dutch law was (a) requested from a Dutch prosecutor *i.e.*, the issuing judicial authority himself, and (b) it was never intended to be used before a Dutch Court, but rather before the Irish High Court where the Dutch rules of evidence and procedure do not apply. To the extent that the prosecutor's attention was drawn to the textbook in question, it was thought that that might be of possible assistance to him in circumstances where this Court's reasonable working assumption was that most academic commentary on the Dutch criminal justice system was likely to be in the Dutch language rather than in English. Moreover, it was expressly stated that no regard would be had to it unless both parties were agreeable, or at least one party had adduced satisfactory evidence in verification of its contents and confirming the accuracy thereof.

If, as I am prepared to accept, there has indeed been a genuine misunderstanding, it only serves to emphasise the need for trust and confidence; such that, where a judicial authority on one side has indicated that it needs additional information, that request will be respected and acted upon by the judicial authority on the other side, even if that need is not readily apparent or understood by that other judicial authority. Moreover, this Court would venture to suggest that if the request is not understood, or, as in this case, is considered to be insufficiently specific, the appropriate response ought to be respectful engagement and a rejoinder requesting some explanation as to why the information is required, and/or a recasting of the request in more specific or closely focused terms, rather than expression of indignation.

Be all of that as it may, the second affidavit of Professor Dr. Strijards was ultimately helpful, and it has provided some assistance to this court in understanding properly the role of the public prosecutor in criminal proceedings in the Netherlands, in particular that the public prosecutor is regarded as being a member of the judiciary.

In addition, the Court has taken due note of the emphatic assertion of the issuing judicial authority that he has charged the respondent, and his co-accused Mr. McArdle, and that "[t]here have already been two hearings in the trial against the suspects at the District Court as court of first instance, which will decide on the question of guilt, namely on 28 March 2012 and on 30 August 2012".

The s. 21A issue

The relevant statutory provision

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".

Relevant jurisprudence

Section 21A of the Act of 2003 has been considered in some detail by the Supreme Court in *Minister for Justice, Equality and Law Reform v. Olsson* [2011] 1 I.R. 384 and in *Minister for Justice, Equality and Law Reform v. Ian Bailey* [2012] IESC 16 (Unreported, Supreme Court, 1st March, 2012.). This Court has in turn sought to apply its understanding of that jurisprudence in a number of recent cases including *Minister for Justice and Equality v. Connolly* [2012] IEHC 575 (Unreported, High Court, Edwards J., 6th December, 2012) ; *Minister for Justice and Equality v. Holden* [2012] IEHC 62 (Unreported, High Court, Edwards J., 11th February, 2013); *Minister for Justice and Equality v. Jočienė* [2013] IEHC 290 (Unreported, High Court, Edwards J., 31st May, 2013); *Minister for Justice and Equality v. T.E.* [2013] IEHC 323 (Unreported, High Court, Edwards J., 19th June, 2013); and *Minister for Justice and Equality v. Quilligan* [2013] IEHC 452 (Unreported, High Court, Edwards J., 26th July, 2013).

In *Minister for Justice and Equality v. Quilligan* I said:

> "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] IESC 1; [2011] 1 I.R. 384. I stated in *Minister for Justice & Equality v. Holden* at paras. 44-45:
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> > '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*."'

Notwithstanding counsel for the respondent's excellent submissions in this case, this Court remains of the view that it expressed in *Minister for Justice and Equality v. Connolly* [2012] IEHC 575 and in *Minister for Justice & Equality v. Holden* [2013] IEHC 62, and indeed more recently in *Minister for Justice and Equality v. Jočienė* [2013] IEHC 290, (Unreported, High Court, Edwards J., 31st May, 2013), that *Minister for Justice, Equality & Law Reform v. Olsson* [2011] IESC 1 was not modified in *Minister for Justice and Law Reform v. Bailey* [2012] IESC 16, or departed from, and that it remains good law and a binding precedent that this Court is obliged to follow."

As Minister for Justice, Equality & Law Reform v. Olsson represents the leading precedent it is important to set forth in some detail what O'Donnell J., giving judgment on behalf of the Supreme Court, said in that case:

> **"[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:-
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> > '[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.'
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> **[27]** Murray C.J. also observed, at pp. 266 to 267:-
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> > '[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.'
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> **[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:-
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> > '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. This has not been established."

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

This Court has carefully considered the submissions of counsel on both sides, both written and oral, in respect of this issue. It considers that the evidence adduced by the respondent, particularly that contained within the affidavits of Mr. Rammelt, is undoubtedly cogent and goes far beyond a mere unsupported assertion that at the time at which the European arrest warrant in this case was issued a decision to charge and try the respondent had not been taken, and that he is in fact wanted for questioning in the context of an on-going investigation.

Neither Mr. Rammelt's credentials as a member of the Dutch criminal bar, nor his integrity, have been challenged. He has stated it to be his clear and unequivocal professional view that the respondent is, in fact, wanted for questioning in respect of the offence that is the subject matter of the European Arrest Warrant. He bases that conclusion upon a number of circumstances, which it may be convenient to summarise.

First, he points to the fact that Mr. Philip County is the sole witness to incriminate the respondent and indeed, Mr. McArdle. He points out that none of the details in Mr. County's statement were confirmed in the police investigation, which statement was made only after he had been appraised of incriminating detail in the police file.

Secondly, Mr. Rammelt also points to what he considers to be very irregular conduct by the prosecutor in the court proceedings to date, and about which he (Mr. Rammelt) has complained in a letter addressed to the court's chair and to the investigating judge. He has sworn that in the said letter (a copy of which – in Dutch- he exhibits) he characterised the prosecutor's conduct as being "unlawful" and as "deliberately frustrating the defence rights". Moreover, in his view the issuing of a summons at the point at which it was issued was extremely unusual. He stated that the usual situation is that it is only after a person suspected of a crime has been questioned extensively by the police, by the investigating Judge, and after the questioning of other witnesses, that the prosecutor makes a decision as to whether to summons that person to stand trial.

Thirdly, Mr. Rammelt lays particular emphasis on the prosecutor's admission before the District Court of Amsterdam that he had served a summons on the respondent for the purpose of getting him surrendered to Holland. He states that it is of paramount importance that the prosecutor did not state that the respondent must be regarded as a suspect, and that the prosecutor only served the respondent with a summons after the Irish authorities suggested to him that there could be difficulty in securing the respondent's surrender unless the case had been sent forward for trial. He further points out that having served the summons on the 16th March, 2012, the prosecutor was then seen to be dragging his feet in the trial proceedings, particularly in regard to arranging a second hearing, so as to try to ensure that the respondent was not questioned by the examining judge in Ireland on foot of a mutual assistance request. Mr. Rammelt points to the prosecutor's letter to the Irish Central Authority dated the 28th September, 2012, in which he stated that *"It is of the utmost importance that Brunell and Mc Ardle will be extradited before the interrogations can take place…"*

It is clearly suggested that the prosecutor's initiative in summonsing the respondent was a strategic move, cynically engaged in for the purpose of negotiating a way past a likely Irish objection to surrender for the purposes of investigation, of which the prosecutor had learned, in circumstances where the reality was that the respondent's surrender was being sought for precisely the purpose of him being questioned by the police in the context of an on-going investigation.

Finally, Mr. Rammelt points to the case of Ms. Lisa Marie Glynn as being illustrative of how a similar tactic was used by Mr. Woudman to secure her surrender even though in truth he never intended to prosecute her. This Court is asked to note that the European arrest warrant seeking her surrender was withdrawn after she returned to Holland voluntarily and was subjected to questioning.

Having considered the evidence adduced on behalf of the respondent the Court is of the view that it is sufficiently cogent in its terms, and concerning in its substance, as to rebut that which is presumed by s.21A(2) of the Act of 2003. The Court is therefore placed upon enquiry concerning whether, at the time at which the European arrest warrant in this case was issued, decisions had not been taken to both charge and try the respondent for the offence to which the warrant relates.

It appears to be the position in Dutch law that the only person who is competent to make the required decisions to both charge and try a person suspected of having committed a serious crime in the Netherlands is the public prosecutor. Moreover, it also appears to be the case that prosecutors in the Netherlands are considered to be members of the judiciary and their decisions are judicial decisions.

The latter consideration goes some way to explaining how it can be that a public prosecutor can also be an issuing judicial authority for the purposes of the European arrest warrant. It is of course a matter for each member state to provide by its laws, in accordance with article 6(1) of the Framework Decision, for the nomination of a competent issuing judicial authority. However, as the United Kingdom Supreme Court has held, in this Court's view persuasively, in the conjoined cases of *Bucnys and Sakalis v. Ministry of Justice of Lithuania and Lavrov v. Ministry of Justice of Estonia* [2013] 3 W.L.R. 1485, member states were not intended to have carte blanche to define 'judicial authority' however they choose. The concept is embedded in European Union law and falls under European Union law to be interpreted by looking at the instrument's context and intended effects. It was held by the United Kingdom Supreme Court that in the context of the Framework Decision, the most obvious purpose of insisting on the concept was to ensure objectivity (including freedom from political or executive influence) in decision-making and to enhance confidence in a system which was going to lead to a new level of mutual cooperation including the surrender of member states' own nationals to other member states. Clearly, in

circumstances where a public prosecutor in an issuing state has the status of being a member of that state's judiciary it is readily to be appreciated how such a person would be regarded as being suitable in principle to act as an issuing judicial authority.

In this particular case, the issuing judicial authority, Mr. Woudman, has asserted emphatically that it is not the case that the respondent's extradition is sought for the purpose of questioning him rather than prosecuting him. Moreover, it is unquestionably the case that he has been charged and he has been sent forward for trial. In this Court's, admittedly limited, understanding of Dutch criminal procedure as gleaned from the explanations variously provided by Mr. Rammelt, Mr. Woudman and Professor Dr. Strijards, respectively, the effect of the prosecutor issuing the summons on the 16th March, 2012, was to terminate the pre-trial investigative procedure and send the case forward to the District Court of Amsterdam for trial. It is also understood by this Court that, while the issuing of a summons to court thereby sending the case forward for trial does not preclude further investigative steps taking place after the case has been sent forward, the taking of this step may be regarded as *prima facie* evidence of a prosecutorial decision that the respondent should face trial as soon as possible. Moreover, it may be inferred from the minutes of the court proceedings on the 14th June, 2012, in Mr. County's case, and also from those of the 28th March, 2012, in the cases of the respondent and Mr. McArdle respectively, that while both the prosecutor and the defendants may seek adjournments from the court of trial for good reasons, once the case has been sent forward the timetable for the trial is ultimately under the control and direction of the court.

In the present case the issuing judicial authority has been quite open and up-front about the fact that he hopes to have the respondent and his co-accused, Mr. McArdle, questioned by the police upon their return, and to use the fruits of that testimony at the trial. He has not said, however, that his ability to proceed with the trial is dependent on the outcome of that exercise.

It seems reasonable to infer that he hopes his case may get better, by securing admissions, or additional incriminating material to add to the evidence that he already has, but there is nothing to suggest an inability to proceed with such evidence as he already has. It seems that he already has a statement from Mr. County tending to incriminate the respondent and Mr. McArdle. There is nothing in the affidavits, particularly those of Mr. Rammelt, to suggest that Mr. County's evidence alone would be insufficient to enable the respondent and Mr. McArdle to be tried and possibly convicted.

It is true that in Ireland a case involving only the uncorroborated evidence of an accomplice would probably be regarded as being very weak, but it is not a case that is incapable of being prosecuted. There is nothing to suggest that it is any different in the Netherlands. Indeed, to the extent that Mr. Rammelt refers at para 18 of his affidavit of the 2nd of November 2012 (and similarly at para. 25 of his affidavit of the 6th November, 2012 sworn in the related proceedings seeking Mr McArdle's rendition), to the evidence against his clients, the high water mark of what he seems to be saying is that the case may be regarded as weak given that the only evidence believed to be available to the prosecutor is the testimony of Mr. County, an alleged accomplice who had had the benefit of seeing the prosecution file before making his statement.

The decision of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Olsson* [2011] 1 I.R. 384 makes it clear, per O'Donnell J. at para. 35 of his judgment, that

> "[w]hat is impermissible is that a decision to prosecute should be dependent on … 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."

Mr. Rammelt clearly suspects that at the time that Mr. Woudman issued his summons he had made no decision to prosecute and had no genuine intention to bring proceedings. Mr. Woudman emphatically asserts that Mr. Rammelt is wrong.

The onus of proving that decisions to both charge and try the respondent had not been taken at the time that the European arrest warrant was issued rests upon the respondent. The Court must be "satisfied" in regard to that, and satisfaction requires a higher standard of proof than proof on the balance of probabilities, but not proof to the standard of beyond reasonable doubt. The respondent's lawyers, both here and in the Netherlands, are suspicious. It is fair to say that objectively speaking they have some reasonable grounds for suspicion. Unfortunately, the mere existence of some reasonable grounds for suspicion is not enough to satisfy the Court that the respondent has discharged his burden of proof. The respondent has to satisfy this Court that that which he may reasonably have cause to suspect as being the case is in fact the case. It would require very strong evidence for the Court to conclude that an express representation of the issuing judicial authority should be discounted as being false and untrue. Unless it is satisfied that bad faith has been demonstrated on the part of the issuing judicial authority this Court will be obliged to pay due regard to that party's emphatic assertion that the respondent and his co-accused are not just wanted for questioning and that it is his intention to place them on trial. The principle of mutual recognition requires that any such statement emanating from an issuing judicial authority who has not demonstrably acted in bad faith should be respected, and accepted at face value, by this Court.

In considering whether bad faith may justifiably be imputed to Mr. Woudman, it is of some importance to note that Mr. Woudman has at all stages been completely forthright and open about the fact that his decision to issue the summons was influenced by what he had learned concerning the inability of an Irish court to surrender a person on foot of a European arrest warrant, for an offence of which he has not yet been convicted, 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. Indeed, it is implicit in Mr. Woudman's various express statements as to his motivation in issuing the summons that he was acting upon the advice given to him by the Irish Central Authority in the letter of the 23rd May, 2012, to the effect that the Irish courts would require clarity as to whether the warrant had been issued in circumstances where (i) the subject had already been charged, alternatively, there was an intention that he would be charged, and (ii) there was an intention that he be put on trial. One inference open to this Court on the evidence before it, is that Mr. Woudman may have concluded that the best means of providing that clarity, and allaying any potential concerns an Irish court might have, was to proceed to issue the said summons, which step involved actually charging the respondent and his co-accused and sending them forward for trial, thereby putting his intentions beyond doubt.

It is not reasonable in this Court's view to construe the said statements, as the respondent seeks to do, as representing a shameless and barefaced admission by Mr. Woudman before the District Court of Amsterdam that the issue of the said summons was nothing but a contrivance to frustrate the Irish Court's process, that his objective was in reality to recover the respondent and his co-accused for questioning, and that he had formed no true intention of placing the respondent and his co-accused on trial. It is almost unthinkable that a person enjoying the status of a member of the Netherlands judiciary would seek, in breach of all notions of judicial comity, not just to abuse the process of the Irish courts, but to indirectly implicate the courts of his own country in that abuse by using their process in order to achieve that objective; and moreover that he would openly admit to doing so before the District Court of Amsterdam. While experience has shown that there is no vista so appalling that it can never be contemplated, it would in this

Court's view require the clearest and most unambiguous evidence before this Court would be justified in construing Mr. Woudman's actions in the manner suggested by the respondent. The available evidence does not approach what would be required in this Court's view. The evidence before this Court readily admits of an alternative construction being placed upon Mr. Woudman's actions, namely the construction referred to in the preceding paragraph. In this court's view this alternative, and altogether more benign, construction is the only one that is reasonably open on the evidence presently before this Court.

As to timing, whilst it is true that the summons to Court that was issued on the 6th March, 2012, post dated the issuing of the European arrest warrant by some eight months approximately, that is not dispositive of the matter. In *Minister for Justice and Equality v. Quilligan* [2013] IEHC 452 (Unreported, High Court, Edwards J, 26th July, 2013) this Court has previously expressed the conviction that

> "…the reference to a "decision" in s. 21A refers to a mental process, i.e., the formation of an intention to do something, in this instance an intention to charge and try, rather than the recording of that process in some formal way, or the carrying out of action on the basis of that intention."

The European arrest warrant was issued on the 6th July, 2011, and there is nothing in the evidence before me in the present case to suggest that the decision, in the sense just indicated, to charge and try the respondent had not already been made at that time. While this Court is satisfied that the prosecutor's preference was to delay actually charging the respondent and sending the case forward for trial until after the respondent and his co-accused had been interviewed by the police – indeed he is completely up front about that - that is not to find that he had not decided to charge and try them as of the 6th July, 2011. In the Court's view it may be inferred that the decisions in that regard were in fact made either on, or some time before, the 6th July, 2011, in circumstances where, at that point in time, the prosecutor was in possession of Mr. County's statement incriminating the respondent and his co-accused, Mr. County having himself been surrendered to the Netherlands from Ireland in April, 2011, on foot of another European arrest warrant and having been interviewed upon his return.

In conclusion on this issue, the Court considers that it has not been established to its satisfaction that at the time at which the European arrest warrant was issued in this case a decision had not been made to charge the respondent with, and try him in the issuing state for, the offence to which the warrant relates. In the circumstances the Court is not obliged by the terms of s. 21A of the Act of 2003 to refuse to surrender the respondent.

Alleged Abuse of the Process

Although the Court has already indicated its views that no attempt to abuse its process has been proven, it is appropriate in this section of this judgment to amplify those views and engage more particularly with the specific submissions made by counsel for the respondent under this heading.

It was submitted that it has long been recognised, both at common law and subsequently under the Constitution, that the Courts have an inherent jurisdiction to prevent an abuse of their own processes. In *The State (Trimbole) v. Governor of Mountjoy Prison* [1985] I.R. 550 both the High Court and Supreme Court affirmed that the well-known jurisdiction is in fact amplified and reinforced by the position of the courts within the framework of the Constitution and that a direct positive duty arises to prevent an abuse of the process of the Court. The Court's attention was particularly drawn to the judgment of Finlay C.J., wherein, at p.573, he distilled and deduced the following general principles from earlier case law:-

> "The Courts have not only an inherent jurisdiction but a positive duty (i) to protect persons against the invasion of their constitutional rights; (ii) if invasion has occurred, to restore the person so damaged to the position in which he would he if his rights had not been invaded; and (iii) to ensure as far as possible that persons acting on behalf of the Executive who consciously and deliberately violate the constitutional rights of citizens do not for themselves or their superiors obtained the planned results of that invasion.
>
> Notwithstanding the fact therefore that of the four cases to which I have referred, three are concerned with the admissibility of evidence in criminal trials and the fourth was concerned with the punishment of persons acting in breach of the Constitution where neither protection nor reparation to the injured party was practical, I am satisfied that this principle of our law is of wider application than merely to either the question of the admissibility of evidence or the question of the punishment of persons for contempt of court by unconstitutional action
>
> This jurisdiction and direct duty arising from the Constitution and the position of the courts created by it is in some ways similar to, though more ample and dominant than, what I am satisfied was an inherent jurisdiction recognised by the common law in courts to prevent an abuse of their own processes"

The Court is further asked to note that in delivering his judgment in the recent case of *Minister for Justice v. Tobin (No. 2)* [2012] IESC 37 (Unreported, Supreme Court, Hardiman J, 19th June, 2012) Hardiman J., when considering the application of the principle of "abuse of process" to extradition cases, referred *inter alia* to the case of *The State (Quinn) v. Ryan* [1965] I.R. 70 and made the following comment: -

> "It appears, therefore, to be well established that abuse of process of the sort alleged here is separate and distinct from *res judicata* which is not relied upon in the circumstances of this case. It is, instead, a separate but conceptually related weapon in the armoury of the Courts to protect a litigant from oppression or harassment, to use two of the words employed in the cases. It is necessary that the Court should have such powers, over and above strict rules of *res judicata*, because the right to be free of harassment and vexatious litigation, and to fair procedures and equality of arms in litigation, are rights of a constitutional nature and arise fundamentally from respect for the dignity of the human person"

The respondent concedes and acknowledges that the system of the Framework Decision is, as repeatedly emphasised by this Court, and by the Supreme Court (*e.g.*, by Murray C.J. in *Minister for Justice, Equality and Law Reform v. Altaravicius (No. 1)* [2006] 3 I.R. 148), founded on the principle of mutual recognition of judicial decisions and judicial action, described by the European Council as the "cornerstone" of judicial co-operation, as well as the existence of mutual trust and a high level of confidence between the issuing and executing member states. It was submitted that the Irish Courts will not, however, allow these principles to excuse a breach of the good faith upon which such surrender arrangements are made between member states of the European Union. Where, as it was suggested had occurred here, the European arrest warrant process is used in a manner which seeks to wrongly circumvent the requirements of Irish Law it was submitted that this Court has a positive duty to intervene and refuse surrender. It was suggested that such an approach would be consistent with the comments of Henchy J. in *Shannon v. Ireland* [1984] I.R. 548 when he stated (at p.567): -

> "Extradition treaties and reciprocal arrangements operate on the presumption that both parties to extradition proceedings will act in good faith. That is not to say that a *prima facie* case must necessarily be shown to exist at the time extradition is sought in respect of a pending charge. It is sufficient if, on the particular extradition being questioned, someone duly authorised to do so avers in good faith that a *prima facie* case exists. If, however, it were to transpire that the charge in the warrant was trumped up or insubstantial or brought for ulterior purposes, the good faith which is the prerequisite for the operation of extradition would be absent and the extradition arrangements would break down".

It seems to the Court that the legal principles underpinning the respondent's arguments have been correctly set forth, and that they are uncontroversial. What was greatly in controversy, however, were the facts to which the Court would be required to apply those principles.

It was submitted on behalf of the respondent that there was ample evidence for the Court to conclude that both the respondent and his co-accused Mr. McArdle are in fact being sought for an ulterior purpose other than that for which surrender is allowed under the 2003 Act. Counsel for the respondent contended that the actions of the Dutch public prosecutor, Mr. Woudman, represented an attempt to misuse the processes of the Irish Courts in order to facilitate the surrender of the respondent and Mr. McArdle to Holland. It was suggested that the evidence indicates that, conscious of the need to ensure that both men were the subject of a criminal prosecution (and not just a criminal investigation) in order to secure surrender, the prosecutor tactically and strategically decided to issue a summons in Holland. It was urged that this summons was admittedly issued for the purposes of making it more likely that the respondent and his co-accused would be surrendered and was issued in circumstances which, for reasons set out by Mr. Rammelt, are unusual under Dutch law. It was contended that the issuance of the summons requiring the appearance of the respondents in the District Court of Amsterdam - the event that appeared to change their status to accused persons - was not done as a result of any developments in the case *e.g*. further evidence gathered in the course of the investigation. Rather, it was submitted, it was a cynical and strategic move on the part of Mr. Woudman to circumvent the requirements of Irish law.

However, in replying submissions, counsel for the applicant contended that the statements of the issuing judicial authority in the Dutch Court on the 28th March. 2012, which in effect forms the main basis of the assertion that at the material time no decision had been made to try the respondent, was an insufficient evidential basis for that assertion. This Court has already indicated its agreement that, without more, that evidence was insufficient, particularly in circumstances where the issuing judicial authority was emphatically asserting the contrary and there was no demonstrable evidence of bad faith.

Moreover, to the extent that Mr. Rammelt had expressed concern in his principal affidavit concerning the attitude of the issuing judicial authority to the questioning of the respondent and his co-accused, his evidence went no further than establishing that Mr. Woudman's action in issuing the said summons when he did was extremely unusual. It was not suggested that it was unlawful, or a step that it was not open to the prosecutor to take.

While it had been suggested by Mr. Rammelt in a letter to the Chair of the District Court of Amsterdam and to the investigating judge that the prosecutor had been acting unlawfully and attempting to frustrate defence rights, the focus of that assertion seems to have been the failure of the prosecutor to comply in a timely fashion with the Court's earlier disclosure orders. It is true that the non-compliance with the Court's disclosure orders appears to have been strategic, and part of a larger strategy designed to bring about a situation where the respondent and his co-accused would be interviewed by the police rather than the investigating judge if that could be achieved, as this would be more procedurally advantageous to the prosecution. The ostensibly deliberate non-compliance with disclosure, and deliberate foot dragging by the prosecutor, clearly caused some eyebrows to be raised in the District Court of Amsterdam, and led to the prosecutor being admonished both by that Court, and by the examining magistrate. This Court can therefore readily appreciate how, in the circumstances, Mr. Rammelt felt justified in characterising the said non-compliance as unlawful and designed to frustrate defence rights. However, as counsel for the applicant submitted, it does not necessarily follow that the larger strategy being pursued was unlawful or abusive of anybody's process. While criticism was levelled at the prosecutor for his non-compliance with disclosure, and for seeking to delay the intended interviewing of Messrs. Brunell and McArdle by the investigating magistrate so as to facilitate them being interviewed by the police, there is nothing in the record of the proceedings before District Court of Amsterdam to suggest that that court considered that he was not entitled to summon the respondent and his co-accused, or that the overall strategy being pursued was unlawful, or in breach of interested parties rights, or abusive of that court's process.

Counsel for the applicant submitted that it is well established that criminal procedures differ, particularly as between continental Europe on the one hand and the United Kingdom and Ireland on the other. That, in itself, is not regarded as a breach of any right of the respondent. The purpose of the Framework Decision is to provide for a system of transfer between member states of the European Union on the basis of mutual trust and confidence. It is a matter for the issuing judicial authority as to how best to progress the criminal prosecution in the Netherlands. The fact that the procedures are different from those which would apply in this State does not undermine the validity of the Dutch criminal proceedings. This principle has been reiterated so often that it may now be regarded as trite law:- see the Supreme Court decisions in *Minister for Justice, Equality and Law Reform v. McArdle* [2005] 4 I.R. 260; *Minister for Justice, Equality and Law Reform v. Altaravicius* [2006] 3 I.R. 148 ; *Minister for Justice Equality and Law Reform v. Brennan* [2007] 3 I.R. 732 and *Minister for Justice Equality and Law Reform v. Olsson* [2011] 1 I.R. 384

Counsel for the applicant makes the valid point that if the respondent has a concern about the protection of his rights in the course of the criminal proceedings in the Netherlands, it is presumed that the Netherlands will protect those rights by *inter alia*, its Court procedures and indeed its recognition of the right to legal advice and representation, as well as the right to a fair hearing. The matter of the defence of those rights within the Dutch criminal proceedings is a matter for the Dutch authorities. It is noteworthy that while complaints are made about non-disclosure of documents, and the delaying of the proceedings, the District Court of Amsterdam did intervene to compel the prosecutor to address those matters in respect of which he was in default. At para. 19 of his principal affidavit, Mr. Rammelt confirmed that, as a result of the directions of the Court and as a result of his objections and actions on behalf of the respondent, the issuing judicial authority had complied, as of the 23rd October, 2012, with his duty to provide full disclosure, as required by Dutch law.

The high water mark of the abuse of process claim appears to be this. A summons has been issued against the respondent and his co-accused. This amounts to the charging of the parties concerned and the sending of their cases forward to the court of trial, in this instance the District Court of Amsterdam. It appears that under Dutch criminal procedure the court of trial has the power to require that potential witnesses who have not already been interviewed by the police be questioned before an examining magistrate. Mr. Rammelt complains that this has not been done in the case of the respondent and his co-accused, and he appears to have the very legitimate purpose of ensuring that his client will, by ensuring that they are questioned by the examining magistrate as part of the applicable procedures in the Netherlands, have the benefit of his advice and representation during the questioning, and notice of the evidence against them at that point, something they would not have if interviewed by the police. He alleges that the issuing judicial authority, the Public Prosecutor in Amsterdam, wishes to have the respondent surrendered to the Netherlands before that procedure can take place before the examining magistrate, so that the respondent can be questioned by the police. However, and as

counsel for the applicant has submitted, this is an aspect of criminal procedure in the Netherlands, and the mere fact that Mr. Rammelt is unhappy about the consequences of tactical steps taken by the prosecutor is neither here nor there.

There is no reason to believe that the tactical steps already taken, or contemplated and yet to be taken, by the prosecutor are or would be unlawful or that they would breach the rights of the respondent and his co-accused. It is simply the case that the suspects would enjoy the advantage of having greater procedural benefits were they to be interviewed by the examining magistrate rather than by the police. It is not suggested anywhere by Mr. Rammelt that the public prosecutor is legally obliged to defer the interviewing of the suspects by the police so as to facilitate that. In the absence of any such obligation it is difficult to see how the taking of tactical steps by Mr. Rammelt that were legally open to him under the law of the issuing state, in the interests of the intended prosecution, could constitute evidence of bad faith on his part, or by any process of taxonomy something done in an attempt to abuse the process of this Court.

The evidence simply does not support any alleged attempt by the prosecutor to abuse this Court's process. For the prosecutor's conduct to be regarded as abusive of this Court's process it would have to be proven that his representation that he has at all material times intended to charge and try the respondent and his co-accused is false and untrue, leading to the conclusion that he took the step of issuing the summonses of the 6th March, 2012, solely for the purpose of recovering them so that they might be questioned by the police in circumstances where he had no true intention of in fact putting them on trial. The evidence, such as it is, does not support that conclusion. It is a non sequitur to suggest otherwise.

On the contrary, what the evidence in fact suggests, in this Court's assessment, is that the prosecutor felt compelled by circumstances to take, sooner than he would have wished, a step that he always intended taking. His preference would have been to defer taking that step until later for tactical reasons. It is true that having been forced to act sooner rather than later, he may have sought by various acts of non-cooperation with the defence and the examining magistrate, to slow down the process that was then underway before the District Court of Amsterdam in the hope of recovering the tactical advantage that he feared he had lost. While his behaviour in the latter regard might not reflect to his credit, it is inappropriate to express any view as to whether his non-cooperation might be regarded as having possibly been abusive of the process of the Dutch Court, because it is a matter for that court to protect its own process, and that Court, being fully apprised of the circumstances, has given no indication that it regards its process as having been abused. In any case such behaviour, even if un-judicial and something to be deprecated on that account, has no implications in terms of what the issuing judicial authority is asking this Court to do, namely to surrender the respondent for prosecution on foot of a request contained in a warrant that long predates any acts of non-cooperation with, or foot-dragging in relation to, the work of the examining Magistrate in the proceedings under way before the courts of his own country.

In conclusion on this issue, in circumstances where the evidence does not establish that the prosecutor was untruthful in suggesting to this Court that he has at all material times had an intention to charge and try the respondent and his co-accused, there is nothing to establish *mala fides* on the prosecutor's part in having summonsed those parties when he did, or that he has attempted to abuse this Court's process in any way.

In the circumstances the Court is not disposed to uphold the abuse of process objection.

The European arrest warrant was not issued by a judicial authority and/or is not a judicial decision within the meaning of Article 1 and Article 6 of the Framework Decision.

Both this respondent and Mr. McArdle, have made similar cases in this regard. Briefly they may be summarised as follows. It is suggested that the Framework Decision requires independent judicial scrutiny in respect of the issue of a European arrest warrant, or at the very least that there should have been an antecedent process in which there was independent judicial involvement in, or oversight of the making of, the underlying domestic decision.

Particular reliance is placed on the judgment of the United Kingdom Supreme Court in *Assange v. Swedish Prosecution Authority* [2012] 2 A.C. 471. While in that case a challenge to the effect that a Swedish prosecutor was not an "issuing judicial authority" within the meaning of article 6 of the Framework Decision and s.2 (2) of the (United Kingdom) Extradition Act 2003 was unsuccessful, the respondents draw comfort from the following passage from the judgment of Lord Phillips of Worth Matravers PSC where he states (at para. 79):

> "Under the scheme of the Framework Decision the safeguard against the inappropriate issue of an EAW lies in the process antecedent to the issue of the EAW. I have drawn attention to the uncertainty on the material before us as to whether a court is involved in that process in all Member States, though this material indicates that it is in at least most States. No material has been put before us that suggests that EAW's are being issued on the basis of an antecedent process that is unsatisfactory for want of judicial involvement. The scheme does not provide for a second judicial process at the stage of the issue of the EAW. To interpret "issuing judicial authority" as meaning a court or judge would result in a large proportion of EAWs being held to be ineffective in this country, notwithstanding their foundation on an antecedent judicial process."

The respondents contend that in the present case, the essential ingredient that allowed the United Kingdom Supreme Court to dismiss the challenge to the appropriateness of the Swedish prosecutor acting as an issuing judicial authority in the European arrest warrant context, is missing. They contend that the evidence establishes that in the present case, and unlike in the *Assange* case, there was no antecedent process in which there was independent judicial involvement in, or oversight of the making of, the underlying domestic decision. On the contrary, the underlying domestic decision was not independent, it was also that of Mr. Woudman, and by his own admission it consisted of just a verbal permission to the police to arrest the respondent and his co-accused, and there is no documentary record of it.

The respondents further contend that Lord Philips' approach reflects the thinking of the Supreme Court in this jurisdiction in *Damache v. The Director of Public Prosecutions* [2012] 2 I.L.R.M. 153. In the *Damache* case, the Court held that s. 29 of the Offences Against the State Act 1939 was unconstitutional. This section permitted a member of An Garda Siochána, not below the rank of superintendent, to issue a search warrant in certain specified circumstances. However, the section did not provide that such a person should also be a person who was also independent of the relevant investigation. The section was found to be repugnant to the Constitution on the basis that the administrative act of issuing a warrant should not be carried out by a garda superintendent who was involved in an investigation or prosecution as this offended against the principles of fair procedures and *nemo iudex in sua causa*. Counsel for the respondent in the present case points specifically to para. 51 of the judgment of Denham C.J., in the *Damache* case, where the learned Chief Justice stated:

> "For the process in obtaining a search warrant to be meaningful, it is necessary for the person authorising the search to

> be able to assess the conflicting interests of the State and the individual in an impartial manner. Thus, the person should be independent of the issue and act judicially. Also, there should be reasonable grounds established that an offence has been committed and that there may be evidence to be found at the place of the search."

It was suggested that even greater scrutiny regarding the independent issue of a warrant must attach to any warrant which affects the personal liberty of an individual.

Counsel for the respondent has submitted that the peculiarities about the manner in which the prosecutor has acted in this case illustrate that he is acting solely in the interests of furthering the prosecution or investigation of alleged offences and not in the interests of justice in the sense of balancing the interests of investigation and prosecution against the rights of the individual affected. It is contended that the issue of the European arrest warrant in this case was devoid of independent or judicial scrutiny in the "*process antecedent to the issue of the EAW*" and in the act of issuing it, and that in the circumstances that this Court should refuse to act upon it.

The Framework Decision and the Act of 2003

As reliance is placed on articles 1 and 6 of the Framework Decision, it is appropriate to set them out.

Before doing so, it is appropriate to remark that while the Framework Decision is not directly effective, some regard may be had to it in circumstances where s. 10 of the Act of 2003, at least in the form in which it was enacted, both at the time at which the warrant in this case was issued and at the time at which it was endorsed, authorised surrender "subject to and in accordance with the provisions of this Act and the Framework Decision" (underlining by the Court). While this method of legislating has rightly been criticised, and it is perhaps no coincidence that the words "and the Framework Decision" where they appeared in s. 10 have recently been removed by an amendment to that section effected by the Act of 2012, the "old" form of s. 10 does not create a problem in this particular case. It is not suggested by either side that there is any significant tension or conflict between the wording of the relevant provisions of the Framework Decision and the transposing provisions contained within the Act of 2003. The Court is, however, invited to look at the provisions of the Framework Decision underpinning the implementing domestic legislation for the purpose of affording to the relevant domestic provisions a fully conforming interpretation in accordance with the decision of the European Court of Justice in *Criminal Proceedings against Pupino* (Case C-105/03.) [2005] E.C.R. I - 05285

Article 1 of the Framework Decision provides as follows:-

> "1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by an other Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.
>
> 2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.
>
> 3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union."

Article 6 of the Framework Decision provides:-

> "1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.
>
> 2. The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State.
>
> 3. Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law."

These provisions are reflected in the Act of 2003 (as amended by the Criminal Justice (Terrorist and Fraud Offences) Act 2005 and the Criminal Justice (Miscellaneous Provisions) Act 2009). Section 2(1) of the Act of 2003 as amended provides for the following definitions. The expression "issuing judicial authority" means, in relation to a European arrest warrant, "the judicial authority in the issuing state that issued the European arrest warrant concerned"; and "judicial authority" means "the judge, magistrate or other person authorised under the law of the Member State concerned to perform functions the same as or similar to those performed under s. 33 by a court in the State".

The functions referred to are those provided for in s. 33(1) of the Act of 2003, as amended, which provides that:

> "(1) A court may, upon an application made by or on behalf of the Director of Public Prosecutions, issue a European arrest warrant in respect of a person where it is satisfied that—
>
> (a) a domestic warrant has been issued for the arrest of that person but has not been executed, and
>
> (b) a term of imprisonment or detention of not less than 4 months has been imposed on the person in respect of the offence concerned and the person is required to serve all or part of that term of imprisonment or detention, or, as the case may be, the person would, if convicted of the offence concerned, be liable to a term of imprisonment or detention of 12 months or more than 12 months."

Counsel for the applicant has submitted that there is no evidence before the Court to the effect that Mr. Woudman, as prosecutor, is not the person authorised under the law of the Netherlands to perform functions the same as or similar to those performed under s. 33 of the Act of 2003 as amended by a court in this State. There may be no dispute about that, but that does not amount to a concession by the respondent and his co-accused that Mr. Woudman is a judicial authority within the definition provided for in s. 2(1) which, they point out, must be interpreted in a manner that conforms with the Framework Decision.

It is not disputed on behalf of the respondent that a public prosecutor could be an "other person" within the scope of the definition in s. 2(1) of the Act of 2003. That is sensible and accords with previous jurisprudence of this Court opened by counsel for the applicant,

i.e., the decision of MacMenamin J. in *Minister for Justice, Equality and Law Reform v. Alteravicius (No. 2)* [2007] 2 I.R. 265, but it is suggested that for such other person to be imbued with the required "judicial" quality, in circumstances where the underlying domestic warrant was not issued in the context of any kind of antecedent judicial process, he or she would have to be a person independent of the investigation. The complaint is that Mr. Woudman is not independent and that, as the domestic warrant was not the result of an antecedent judicial process, his lack of independence means that he does not qualify.

The judgments of the United Kingdom Supreme Court in the case of *Assange v. Swedish Prosecution Authority* engage, *inter alia*, with the argument that an issuing judicial authority, in relation to a European arrest warrant, is required to be independent of the investigation into an offence to which the warrant relates and for which it is intended to prosecute the person before the courts of the issuing state. They are helpful, at least to the extent of providing a detailed analysis of the arguments that may be made on both sides.

Before looking at the judgments in *Assange* it requires to be stated that the context in which the United Kingdom Supreme Court's analysis took place was a contention that a Swedish public prosecutor could be an issuing judicial authority both within the meaning of article 6 of the Framework Decision and also s. 2(2) of the of the (United Kingdom) Extradition Act 2003. Section 2(2) of that Act requires an EAW to be issued by a judicial authority. However, it is important to appreciate that there is a significant difference between the (United Kingdom) Extradition Act 2003 and our Act of 2003. While our Act expressly defines "judicial authority" as meaning "the judge, magistrate or other person authorised under the law of the Member State concerned to perform functions the same as or similar to those performed under s. 33 by a court in the State", the (United Kingdom) Extradition Act 2003 does not define "judicial authority" at all.

The battleground in *Assange* was therefore the contention on one side that, in the absence of any definition in the (UK) Extradition Act 2003, there was a strong presumption that the expression in question where it appears in s. 2(2) of that Act should bear the same meaning as it does in article 6(1) of the Framework Decision and that, accordingly, it should be interpreted as meaning no more than an authority which is vested with responsibility for issuing such a warrant and which the issuing Member State has notified to the General Secretariat of the Council of Ministers under article 6 of the Framework Decision as competent to do this under its own domestic law. On the other side, however, it was contended that, for a variety of reasons including assurances given in parliament by the relevant government minister when the Bill (that later became the (United Kingdom) Extradition Act 2003) was being debated, the phrase refers both to an authority which is not only vested with responsibility for issuing such a warrant, but which is independent of the executive and of the parties and impartial in the same sense as the "competent legal authority" or the "court" referred to in article 5.1(c) and 5.4 of the European Convention on Human Rights. In essence, it was suggested that "judicial authority" mean a court, tribunal, judge or magistrate as conventionally understood, and that it was a step too far to include prosecutors, but particularly the prosecutor who was conducting the case.

The case was heard by a seven judge bench of the United Kingdom Supreme Court, and the ultimate decision in favour of the Swedish Prosecution Authority was by a five - two majority. Lord Phillips of Worth Matravers PSC, Lord Walker of Gestingthorpe JSC, Lord Kerr of Tonaghmore JSC, Lord Dyson JSC and Lord Brown of Eaton-under-Heywood JSC were in the majority, with Baroness Hale of Richmond JSC, and Lord Mance JSC dissenting.

The leading judgment was that of Lord Phillips. He considered in the first instance whether the narrow issue of whether the words "judicial authority" in section 2(2) of the 2003 Act should, if possible, be accorded the same meaning as those two words bear in the parallel requirement in article 6 of the Framework Decision. He concluded that while, for reasons stated by Lord Mance, the Court was not bound to do so by the findings of the European Court of Justice in *Criminal Proceedings against Pupino, (Case C-105/03.)* [2005] E.C.R. I – 05285 it was plain that the Court should do so.

He then considered the parliamentary material relied upon by Mr. Assange, and following that moved to a consideration of "judicial authority" in the Framework Decision. In doing so, he considered the natural meaning in the first instance and concluded that it was necessary to do this in respect of both the English words "judicial authority" and the equivalent words in the French text "autorité judiciaire". He explained:

> "In the final version of the Framework Decision the same weight has to be applied to the English and the French versions. It is, however, a fact that the French draft was prepared before the English and that, in draft, in the event of conflict, the meaning of the English version had to give way to the meaning of the French."

He noted that the critical phrase does not bear the same range of meanings as in the French. In English, in the context of "a judicial authority", the appropriate meanings are: "having the function of judgment; invested with authority to judge causes". He felt that a public prosecutor would not happily fall within this meaning. However, in French "judiciaire" was capable of bearing a wide or narrow meaning, and he gave various examples illustrating the width of meaning that "autorité judiciaire" is capable of bearing and the fact that the ambit of the phrase can vary according to its context.

Moving then to the general scheme of the Framework Decision he noted its purpose as expressed in recital No. 5 of its preamble, foremost of which was the desire to "remove the complexity and potential for delay inherent in the present extradition procedures". He noted that complexities and potential for delay that the Framework Decision sought to avoid were those that arose out of the involvement of the executive in the extradition process. He concluded that the Framework Decision did not set out to build a new extradition structure from top to bottom, but rather to remove from it the diplomatic or political procedures that were encumbering it. The objective was that the extradition process should involve direct co-operation between those authorities responsible on the ground for what he described as the antecedent process and those authorities responsible on the ground for the execution process.

Lord Phillips felt it was important in the circumstances to consider the manner in which extradition used to work under the 1957 Convention and, in particular, to identify those who, under the operation of that Convention, were responsible for the antecedent process. Article 1 of the 1957 Convention provided that the contracting parties undertook to surrender to each other, subject to the provisions of the Convention, all persons (referred to for convenience as "fugitives" by Lord Phillips) against whom the "competent authorities" of the requesting party were proceeding for an offence or who were wanted by "the said authorities" for the carrying out of a sentence or detention order. The effect of article 12(2) of the 1957 Convention was that where the fugitive was someone accused of a crime, the Convention required that there should have been an antecedent process that resulted in "a warrant of arrest or other order having the same effect". This had to be issued in accordance with the law of the requesting State. The Convention itself did not impose any specific requirement as to the status of the authority responsible for the "warrant of arrest or other order", although it is recorded in the *traveaux preparatoire* that during a discussion of the draft article 12 it was found that most of the States represented on the Committee of Experts did not extradite a person claimed until after a decision by a judicial authority. Lord Phillips points out that this was noted in the Council of Europe Explanatory Report on the 1957 Convention.

Lord Phillips also noted that there was no requirement under the 1957 Convention for a requesting State to adduce any evidence to support the allegation that the fugitive had committed the crime in respect of which he was accused. In contrast, when concluding bilateral extradition treaties, the United Kingdom had always insisted on evidence being produced that would have been sufficient to lead to a defendant within the jurisdiction being committed for trial. He noted that the authors of one well regarded textbook on extradition considered that this lack of any evidence requirement in the Convention was one of the reasons why the United Kingdom allowed over 30 years to pass between signing the 1957 Convention and embodying its provisions in United Kingdom domestic law. The United Kingdom acceded to the 1957 Convention in 1991 and was incorporated into domestic law by the European Convention on Extradition Order 2001 (S.I. 2001/962). Article 3 of this order removed the requirement to produce evidence of the commission of the offence in respect of which extradition was sought. However, by way of reservation the United Kingdom required foreign documents supplied pursuant to article 12 to be authenticated by being signed by a judge, magistrate or officer of the State where they were issued and certified by being sealed by a Minister of State. Accordingly when negotiations began in relation to the terms of the Framework Decision, the United Kingdom had given effect to a European Convention that required it to surrender fugitives on proof of an antecedent process, namely that there had been issued in the requesting State a warrant of arrest or other order having the same effect, notwithstanding that, at least in 1957 when the Convention was negotiated, this might not have resulted from a judicial process and where the authority initiating the request might be a court or a public prosecutor.

Lord Phillips then went on to consider the nature of the office of public prosecutor. He stated (at paras. 36 to 38):

> 36. "As the issue on this appeal is whether a public prosecutor constitutes a "judicial authority" under Part 1 of the 2003 Act, it is appropriate to consider the nature of that office. Public prosecutors as their name suggests are public bodies that carry out functions relating to the prosecution of criminal offenders. On 8 December 2009 the Consultative Council of European Judges and the Consultative Council of European Prosecutors published for the attention of the Committee of Ministers a joint Opinion [2009] that consisted of a declaration, called the Bordeaux Declaration together with an explanatory note. This comments at para 6 on the diversity of national legal systems, contrasting the common law systems with the Continental law systems. Under the latter the prosecutors may or may not be part of the "judicial corps". Equally the public prosecutor's autonomy from the executive may be complete or limited. Para 23 of the note observes:
>
> > 'The function of judging implies the responsibility for making binding decisions for the persons concerned and for deciding litigation on the basis of the law. Both are the prerogative of the judge, a judicial authority independent from the other state powers. This is, in general, not the mission of public prosecutors, who are responsible for bringing or continuing criminal proceedings.'
>
> 37. A recurrent theme of both the declaration and the note is the importance of the independence of the public prosecutors in the performance of their duties. Para 3 of the declaration states that judges and public prosecutors must both enjoy independence in respect of their functions and also be and appear to be independent of each other. Para 6 states:
>
> > 'The enforcement of the law and, where applicable, the discretionary powers by the prosecution at the pre-trial stage require that the status of public prosecutors be guaranteed by law, at the highest possible level, in a manner similar to that of judges. They shall be independent and autonomous in their decision-making and carry out their functions fairly, objectively and impartially.'
>
> The note comments at paras 33 and 34 that public prosecutors must act at all times honestly, objectively and impartially. Judges and public prosecutors have, at all times, to respect the integrity of suspects. The independence of the judge and the prosecutor is inseparable from the rule of law.
>
> 38. Later , at para 48, the note deals with the roles and functions of judges and public prosecutors in the "pre-criminal" procedures:
>
> > '48 At the pre-trial stage the judge independently or sometimes together with the prosecutor, supervises the legality of the investigative actions, especially when they affect fundamental rights (decisions on arrest, custody, seizure, implementation of special investigative techniques, etc).'
>
> Both the function and the independence of the prosecutor must be borne in mind when considering whether, under the Framework Decision, the term 'judicial authority' can sensibly embrace a public prosecutor."

The learned Supreme Court judge then examined the genesis of the Framework Decision, identifying the stepping stones leading to it an important one of which was the Schengen Agreement of 1985. Title IV of the 1990 Convention implementing the Schengen Agreement established the Schengen Information System ("SIS"). Lord Phillips noted that article 95 provided for the "judicial authority" of a Member State to issue an alert requesting the arrest of a person for extradition purposes. This had to be accompanied by, *inter alia*, information as to whether there was "an arrest warrant or other document having the same legal effect". Article 98 made provision for the "competent judicial authorities" to request information for the purpose of discovering the place of residence or domicile of witnesses or defendants involved in criminal proceedings. In some Schengen states the police, security police, tax and customs authorities, border guard authorities and other authorities competent for criminal investigations are also competent to decide on article 98 alerts. Although the nature of the judicial authorities competent to issue an Article 95 alert were not specified, Lord Phillips considered it certain that public prosecutors must, in some member states, have been responsible for initiating an article 95 alert and it was thought not unlikely that other authorities competent to decide on an article 98 alert may have done so.

It was noted that the European Council met at Tampere on the 15th and 16th October, 1999, and that meeting led to the Commission submitting to the Council on the 19th September, 2001, a first draft (referred to by Lord Phillips as "the September draft") of what would ultimately become the Framework Decision. This was reviewed in detail by the learned Supreme Court judge. For the purposes of this judgment it is sufficient to record that so far as a fugitive from prosecution was concerned, article 2 of the September draft provided for the issuance of European arrest warrants and envisaged that before the issue of the European arrest warrant there would be an enforceable "judicial" decision involving deprivation of liberty. Moreover, article 3 of the September draft included the following important definitions:

> "(a) *'European arrest warrant'* means a request, issued by a judicial authority of a Member State, and addressed to any other Member State, for assistance in searching, arresting, detaining and obtaining the surrender of a person, who has been subject to a judgment or a judicial decision, as provided for in article 2;
>
> (b) *'issuing judicial authority'* means the judge or the public prosecutor of a member state, who has issued a European arrest warrant;
>
> (c) *'executing judicial authority'* means the judge or the public prosecutor of a member state in whose territory the requested person sojourns, who decides upon the execution of a European arrest warrant."

It was noted that in dealing with this article the explanatory memorandum that accompanied the September draft made the following summary of the effect of the scheme

> "(a) The European arrest warrant is a warrant for search, arrest, detention and surrender to the judicial authority of the issuing country. In the previous system, under the 1957 Convention as implemented by the Schengen Convention, the provisional arrest warrant and the extradition request were two separate phases of the procedure. Pursuant to the principle of mutual recognition of court judgments, it is no longer necessary to distinguish the two phases. The arrest warrant thus operates not only as a conventional arrest warrant (search, arrest and detention) but also as a request for surrender to the authorities of the issuing State. "

Lord Phillips considered that this provided an important insight as to the manner in which it was envisaged that the Framework Decision would alter the extradition process. The "judicial authorities" who were responsible for the article 95 Schengen alert requesting provisional arrest were those who might be expected to be responsible for the issue of the new European arrest warrant. However, the definition of "issuing judicial authority" in article 3 of the September draft made it clear that in so far as this included police or other authorities responsible for article 98 alerts this was not acceptable. The explanatory memorandum put the matter beyond doubt, stating:

> "The procedure of the European arrest warrant is based on the principle of mutual recognition of court judgments. State-to-State relations are therefore substantially replaced by court-to-court relations between judicial authorities. The term 'judicial authority' corresponds, as in the 1957 Convention…to the judicial authorities as such and the prosecution services, but not to the authorities of police force. The issuing judicial authority will be the judicial authority which has authority to issue the European arrest warrant in the procedural system of the Member State."

Lord Phillips considered that the position envisaged at that point in respect of the issue of a European arrest warrant could be summarised as follows. Before the European arrest warrant was issued there would be an antecedent process that would result in an enforceable judicial decision involving deprivation of liberty. In most, but not necessarily all, member states this would involve a judge. The subsequent issue of the European arrest warrant would have to be done by a "judicial authority", but that this term embraced both a judge and a public prosecutor. The judicial authority in question might or might not be that responsible for the antecedent process.

The September draft was not, however, adopted and it was replaced with an amended draft following discussions at the Council of Ministers in December, 2001, (referred to by Lord Phillips as "the December draft"). The December draft formed the basis of the final Framework Decision approved by the Council.

Significantly, the definitions of issuing judicial authority and executing judicial authority in the final version no longer define these as being a judge or public prosecutor. The overall scheme of the European arrest warrant did not change from that proposed in the September draft. In particular there remained a requirement for an antecedent process before the issue of the European arrest warrant. Article 2, under the heading "Scope of the European arrest warrant" set out the offences in respect of which a European arrest warrant could be issued. Article 8 specified the content of the warrant, which included

> "(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."

This simplified the description of the antecedent process in articles 2 and 6 of the September draft. It adopted the description of the antecedent process in the 1957 Convention.

The critical question in Lord Phillip's mind was whether the changes made to the draft Framework Decision between September and December altered the meaning of "judicial authority" so as to exclude a public prosecutor from its ambit. He concluded that the most probable reason for the removal of the precise definition of "judicial authority" that had been included in article 3 of the September draft was to broaden the meaning so that it was not restricted to a judge or a public prosecutor. His reasoning in that regard is to be found at paras. 61 to 67 of his judgment, from which it is proposed to quote selectively:

> "61. *In the first place*, had the intention been to restrict the power to issue an EAW or to participate in its execution to a judge, I would expect this to have been expressly stated. The change would have been radical, and would have prevented public prosecutors from performing functions that they had been performing in relation to the issue of provisional arrest warrants since 1957.
>
> 62. *In the second place* it is hard to see why the majority of Member States would have wished to restrict the ambit of the issuing judicial authority in this way. The significant safeguard against the improper or inappropriate issue of an EAW lay in the antecedent process which formed the basis of the EAW. If there had been concern to ensure the involvement of a judge in relation to the issue of an EAW, the obvious focus should have been on this process. The function of the issuing authority was of less significance. That fact is underlined by the only case outside the United Kingdom to which we have been referred where a challenge was made to the issue of an EAW by a public prosecutor. In *Piaggio v. Italian Republic* (Unreported) 14 February 2007, Court of Cassation Sez 6 (Italy) the appellant challenged the issue by the Hamburg Public Prosecutor's Office of an EAW on the ground that it should have been issued and signed by a judge. The Court rejected this contention for the following reasons:
>
> > "The claim alleging breach of article 1(3) of Law no 69 of 2005 on the ground that the EAW was not signed by a judge is completely unfounded.
> >
> > The provision allegedly requiring signature by a judge does not refer to the EAW, as the appellant mistakenly claims, but to the precautionary measure on the basis of which the warrant was issued: in the present case, it is in fact the arrest warrant issued by the Hamburg District Magistrate's Court on 24 August 2005, regularly signed by Judge Reinke.
> >
> > The guarantee specified in the aforesaid article 1(3) does not relate to the act requesting the Member State to grant extradition but is directly connected with the custodial measure, that is to say it is a substantial guarantee concerned with the basic conditions underlying the EAW, which must be subject to jurisdiction. In this procedure, the true guarantee of personal freedom is not the fact that the EAW is issued by a judicial authority but the fact that the warrant is based on a judicial measure.

> Moreover, article 6 of the Framework Decision leaves to the individual member state the task of determining the judicial authority responsible for issuing (or executing) a European Arrest Warrant, and the Italian implementing law, with regard to the active extradition procedure, provides for certain cases in which the Public Prosecutor's office is to be responsible for issuing the EAW (article 28 of Law no 69/2005). Essentially, the alleged breach of the law in respect of the fact that the EWA was signed by the Hamburg Public Prosecutor's Office, must be excluded.'"

> "65. *In the third place* I find it likely that the removal of the definition of judicial authority as being a "judge or public prosecutor" was not because member states wished to narrow its meaning to a judge, but because they were not content that its meaning should be restricted to a judge or a public prosecutor. Member states had existing procedures for initiating an extradition request and for requesting provisional arrest in another member state which involved their domestic arrest procedures. They also had existing procedures for giving effect to extradition requests. The authorities involved in these procedures were not restricted to judges and prosecutors. It seems to me likely that the removal of a precise definition of judicial authority was intended to leave the phrase bearing its "sens vague" so as to accommodate a wider range of authorities.
>
> 66. *In the fourth place* aspects of the December draft suggest that the meaning of judicial authority was not restricted to a court or judge. The requirement that became article 6.3 of the final version to inform the General Secretariat of the Council of "the competent judicial authority under its law" makes more sense if there was a range of possible judicial authorities. …
>
> "67. *In the fifth place* the manner in which not merely the member states but also the Commission and the Council acted after the Framework Direction took effect was in stark conflict with a definition of judicial authority that restricted its meaning to a judge. Article 31.3(b) of the 1969 Vienna Convention on the Law of Treaties permits recourse, as an aid to interpretation, to "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". The EAW processes of the Member States were subject to Reports by the Commission and Evaluation Reports on the working of the EAW were prepared by experts and submitted to the Council (see below). The practices of the member states in relation to those they appointed as issuing and executing "judicial authorities" coupled with the comments of the Commission and the Council in relation to these, provide I believe a legitimate guide to the meaning of those two words in the Framework Decision."

In terms of how member states had implemented the Framework Decision, Lord Phillips noted that 11 member states designated a prosecutor as the issuing judicial authority in relation to fugitives sought for prosecution and 10, not in every case the same, designated a prosecutor as the issuing judicial authority in respect of fugitives who had been sentenced. Ten member states designated a prosecutor as the executing judicial authority. Some of these had designated a judge or court as the issuing judicial authority. A handful of member states had designated the Ministry of Justice as the issuing or executing judicial authority.

Moreover, he noted that there have been periodic mutual evaluation reports into "the practical application of the European Arrest Warrant and corresponding surrender procedures between Member States" made to the Council by experts nominated by member states. While the reports contain adverse comment on the use of ministries of justice as issuing or executing judicial authorities, there is no adverse comment on the use of prosecutors in this role. On the 28th May, 2009, the Council published a Final Report on the fourth round of mutual evaluations. Its conclusions included, in para 3.1, comments on "the role of the judicial authorities". These commented that in some member states non-judicial central authorities continued to play a role in fundamental aspects of the surrender procedure. This was criticised as "difficult to reconcile with the letter and the spirit of the Framework Decision." No criticism was made of the use of prosecutors as judicial authorities. The Council went on to call on member states to provide "judges, prosecutors and judicial staff" with appropriate training on the EAW. In Lord Phillips's view there was once again a clear inference, this time in relation to the Council, that there was no objection to prosecutors performing the role of issuing judicial authorities.

Lord Phillips ultimately concluded that the purpose of the Framework Decision, its general scheme, the previous European extradition arrangements, the existing procedures of the member states at the time that the Framework Decision was negotiated, the preparatory documents and the variety of meanings that the French version of the phrase in issue naturally bears, the manner in which the Framework Decision has been implemented and the attitude of the Commission and the Council to its implementation all lead to the conclusion that the "issuing judicial authority" bears the wide meaning contended for by counsel for the Swedish Prosecuting Authority and embraces the prosecutor in the case under consideration.

Finally upon considering whether it was possible to give "judicial authority" the same meaning in the United Kingdom Extradition Act 2003 as it bears in the Framework Decision, the learned Supreme Court judge concluded that it was. It was in explaining why (at paras. 77 to 79), that the statement on which the respondent places reliance in the present case was made. He said:

> "77 …..The Act does not make clear the overall nature of the EAW scheme for which the Framework Decision provides. It does not make clear the vital part that the antecedent process plays in the scheme. The scheme is founded on the mutual recognition of the decision that is taken in that process. Article 8 of the Framework Decision provides that the EAW must contain evidence of "an enforceable judgment, an arrest warrant or other enforceable judicial decision having the same effect". Section 2 (4) of the 2003 Act requires the arrest warrant to give "particulars of *any other warrant* issued in the category 1 territory for the person's arrest in respect of the offence" (my emphasis). I am not surprised that this provision has given rise to some judicial confusion, as evidenced by the series of decisions that culminated in the decision of the House of Lords in *Louca v Public Prosecutor*, *Bielefeld, Germany* [2009] 1 WLR 2550. Only in that case was it appreciated that the provision referred to "any domestic warrant on which the European warrant is based" per Lord Mance JSC at para 15.
>
> 78. Because the 2003 Act does not make clear the importance of the antecedent decision, it can give the impression that the decision to issue the EAW is the step in the procedure at which are considered all the matters that will be taken into account in the course of the antecedent process. This, in its turn, can lead to the conclusion that the decision to issue the EAW is of such importance that Parliament must have intended it to be taken by a judge, and that "judicial authority" must be interpreted as meaning a judge. As I have sought to demonstrate this reasoning is unsound.
>
> 79. Under the scheme of the Framework Decision the safeguard against the inappropriate issue of an EAW lies in the process antecedent to the issue of the EAW. I have drawn attention to the uncertainty on the material before us as to whether a court is involved in that process in all Member States, though this material indicates that it is in at least most States. No material has been put before us that suggests that EAW's are being issued on the basis of an antecedent process that is unsatisfactory for want of judicial involvement. The scheme does not provide for a second judicial process

> at the stage of the issue of the EAW. To interpret "issuing judicial authority" as meaning a court or judge would result in a large proportion of EAWs being held to be ineffective in this country, notwithstanding their foundation on an antecedent judicial process.
>
> 80. For these reasons I can see no impediment to according to "judicial authority" in Part 1 of the 2003 Act the same meaning as it bears in the Framework Decision. On the contrary there is good reason to accord it such meaning. I have concluded that the Prosecutor who issued the EAW in this case was a "judicial authority" within the meaning of that phrase in section 2 of the 2003 Act and that Mr Assange's challenge to the validity of the EAW fails."

While it is of course true that the *Assange* case is not binding on this Court, I find the majority finding, exemplified and best explained in the judgment of Lord Phillips, that the Framework Decision envisaged that judicial authorities, certainly issuing judicial authorities, could include prosecutors, to be highly persuasive. While this Court has previously held in *Minister for Justice, Equality and Law Reform v. Alteravicius (No. 2)* that a prosecutor constitutes an "other person" for the purposes of s. 2(1) of our Act of 2003, the careful analysis of Lord Phillips puts it beyond doubt in this Court's mind that s.2(1) of our Act is wholly in conformity with the Framework Decision.

That said, the fact that our legislation conforms has never really been at issue in the present case. The respondent's complaint, such as it is, is not with the fact that a prosecutor *per se* is the issuing judicial authority in the present case. It is more nuanced than that. It is that this particular prosecutor, Mr. Woudman, is also the issuing judicial authority in this case. The problem with Mr. Woudman, it is said, is that he has also issued the underlying domestic warrant of arrest. Therefore, there was no adequate antecedent process and in the circumstances where he is in charge of the investigation and for that reason cannot be regarded as independent, he is not qualified in terms of what the Framework Decision envisaged, to act as issuing judicial authority.

I am not satisfied that this reasoning is necessarily sound. It is necessary to look at the evidence. Yes, it is true that Mr. Woudman has issued both the underlying warrant of arrest and the European arrest warrant. However, it is entirely possible that there may be safeguards under Dutch law to prevent inappropriate issuance of a domestic arrest warrant, or to remedy it in short order were it, or a wrongful arrest, to occur. Lord Phillips referred to the remedy of habeas corpus in the United Kingdom and, of course, in this country we have the enquiry under Article 40.4.2 of the Constitution. Moreover, it is the case that in Holland prosecutors form part of the judiciary. It may therefore be inferred that they are at the very least statutory office holders who are expected and required by virtue of their office to exercise independence of mind, impartiality and fairness while at the same time faithfully upholding and applying the law of the Netherlands. That in itself is a safeguard to some degree.

While there is no evidence on either side as to what other possible safeguards or remedies may exist under Dutch law, this Court must approach the case on the basis that s. 4A requires that it shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown. To the extent that the Framework Decision may be regarded as requiring the existence in the issuing state of an antecedent process involving safeguards against the inappropriate issuance of a domestic arrest warrant, and effective remedies in the case of wrongful arrest on foot of such a warrant, this Court is obliged to presume that such an antecedent process exists, and/or that such remedies exist, unless the contrary is shown. The evidential burden in regard to that rests upon the party seeking to rebut that which is presumed. The evidence in the present case is to the effect that the issuing judicial authority issued both the underlying domestic arrest warrant and the European arrest warrant; that the prosecutor was entitled to authorise the arrest of a suspect under article 54 of the Dutch Code of Criminal Procedure; that the prosecutor before issuing such authorisation was required to be satisfied on the basis of facts or circumstances that there were serious suspicions against the suspect; that Dutch law does not specifically require such authorisations (warrants) to be in writing, and that the prosecutor himself says that in this case he gave an oral permission to the police to arrest the respondent. The respondent has adduced no evidence, either from Mr. Rammelt or anybody else, concerning the absence of safeguards or remedies under Dutch law in respect of arrests authorised under article 54, or as to the absence of a satisfactory antecedent process in terms of what is envisaged by the Framework Decision. In the circumstances, I do not regard the s. 4A presumption as having been rebutted and I am not therefore disposed to uphold this particular objection.

Finally, in resolving this issue in the manner that I have, this Court is not to be taken as having arrived at a definitive view as to whether it is possible at all, having regard to the trust and confidence that underpins the European arrest warrant system, and the principle of mutual recognition, for an executing judicial authority to seek to look behind the designation of an issuing judicial authority by another member state. It is very much an open question. It was to some extent indirectly engaged in *Minister for Justice, Equality and Law Reform v. Alteravicius (No. 2)*, a case that was really concerned with the construction of s.2(1) of the Act of 2003, and specifically whether it was appropriate to apply the *ejusdem generis* rule in its interpretation. Moreover, it is clear that in the United Kingdom the view is that it is possible. However, in the case of *Minister for Justice, Equality and Law Reform v. Ferenca* [2007] IEHC 199 (Unreported, High Court, Peart J., 24th May, 2007), Peart J. sitting in this court declined to do so, stating:

> "The respondent pleads in his Points of Objection that the fact that the Minister for Justice, as the judicial authority, has issued the European arrest warrant in this case, rather than a judge *"flies in the face of the rationale underlying the European arrest warrant system and does not trigger the principle of mutual recognition, the cornerstone of judicial co-operation".*
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> In my view it is not for the respondent to raise the question of whether the Minister for Justice in the Republic of Lithuania should or should not be a judicial authority for the purpose of issuing a European arrest warrant. That country has been designated by the Minister for Foreign Affairs for the purpose of s.3 of the Act, and therefore if a European arrest warrant has been issued by a Minister for Justice in the issuing state in his or capacity as "the judicial authority" this Court respects that warrant as one properly issued in the issuing state for the purpose of the Framework Decision and the Act. It would be a matter for the Minister for Foreign Affairs to be satisfied about such a matter before designation takes place, and not for a respondent to raise the matter on an application such as the present one.

In the present case, in circumstances where the s.4A presumption was not rebutted, it was unnecessary to engage with that issue. If, however, the presumption had in fact been satisfactorily rebutted and the Court had not been satisfied as to the existence of an appropriate antecedent process, it might then have had to consider whether it could in fact look behind the designation of this particular issuing judicial authority. As to whether or not it can in fact be done will be a matter for argument and determination in some other case on another day.