Neutral Citation: [2013] IEHC 452

THE HIGH COURT

[2013 No. 28 EXT.]

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003

Between/

THE MINISTER FOR JUSTICE & EQUALITY

Applicant

-AND-

JOHN QUILLIGAN

Respondent

JUDGMENT of Mr Justice Edwards delivered on the 26th day of July, 2013.

Introduction
The respondent is the subject of a European arrest warrant issued by the Republic of Austria on the 23rd July, 2012. The warrant was endorsed by the High Court for execution in this jurisdiction on the 22nd, January, 2013, and it was duly executed on the 23rd, January, 2013. The respondent was arrested by Garda Alan McGrath 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 Republic of Austria. 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 dependant 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 Garda Alan McGrath sworn on 24th June, 2013, testifying as to his arrest of the respondent and as to the questions he asked of the respondent to establish the respondent's identity, and the answers he received, which the Court notes correspond with information contained in Part A of the European arrest warrant. At paragraph 15 of the said affidavit Garda McGrath opines that the man he arrested on the 23rd January, 2013 and brought before the High Court on the same day is the same person as the John Quilligan named in the European arrest warrant. 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 Austria for trial in respect of the four offences particularised in Part E of the warrant. These are four separate instances of an offence classified as an

> "offence of partially completed, partially attempted professional aggravated theft through burglary as a party to §§ 12 second case, 15, 127, 128 section 1 cipher 3, section 2 2, 130, second clause of the (Austrian) Criminal Code."

(f) The underlying domestic decision on which the warrant is based is an arrest warrant issued by the Public Prosecutor's Department of Krems a.d. Donau (Staatsanwaltschaft Krems a.d. Donau) dated 23rd, July, 2013.

(g) The issuing judicial authority has invoked paragraph 2 of article 2 of Council Framework Decision 02/584/J.H.A. of 13 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 four offences listed in Part E by the ticking of three boxes in Part E.I of the warrant, namely those relating to "participation in a criminal organisation", "organised theft or armed robbery" and "illicit trafficking in cultural goods, including antiques and works of art". All three ticked boxes are understood as applying to all four offences. Accordingly, subject to the Court being satisfied that the invocation of paragraph 2 of article 2 is valid (i.e. that the minimum gravity threshold is met, and that there is no basis for believing that there has been some gross or manifest error), it need not concern itself with correspondence;

(h) The minimum gravity threshold in a case in which paragraph 2 of article 2 of the Framework Decision is relied upon is that which

now finds transposition into Irish domestic law within s. 38(1)(b) of the Act of 2003, as amended, namely that under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than three years. It appears from Part C of the warrant that all four offences carry a term of imprisonment of up to ten years. Accordingly, the minimum gravity threshold is comfortably met;

(i) The offences are particularised within the warrant as follows:

> "Based on the report of the Provincial Bureau of Investigation in St. Pölten, file no. B5/17382/2012, and according to the results in the preliminary proceedings of the Public Prosecution Department of Krems a.d Donau John Quilligan is strongly suspected of being a member of an Irish criminal group specialized in thefts of rhinoceros horns, whereas locations of rhinoceros horns were spied out by John Quilligan after which thefts were instigated. John Quilligan is strongly suspected of having encouraged or having attempted to encourage Damian Lukasz Lekki, who is prosecuted separately, to capture someone else's movable property exceeding the value of € 50,000.00 from the following persons:
>
> 1. on or before the 26 August, 2011 from Dipl.Kfm. Dorian Thurn-Valsassina in Rastenfeld, two rhinoceros horns valued at EUR 170.000.00, thus someone else's movable properties of generally accepted historical value that were situated in a generally accessible collection;
>
> 2. from Dipl.Kfm. Dorian Thurn-Valsassina in Rastenfeld in regard to one rhinoceros head, thus someone else's movable property of generally accepted historical value that was situated in a generally accessible collection, by way of burglary, as they smashed the window of the animal hall of the mansion and climbed in, which remained an attempt;
>
> 3. before the 8 January, 2012 from the taxidermist Raith in Vienna, whereby the principal offence remained an attempt since the entrance door was locked;
>
> 4. on 17 January, 2012 he attempted by sending an SMS to encourage to steal a rhinoceros head in Weißenkirchen in Styria."

There is no reason, upon a consideration of the underlying facts as set out above, to believe that the ticking of the three boxes relating to "participation in a criminal organisation", "organised theft or armed robbery" and "illicit trafficking in cultural goods, including antiques and works of art" was in error;

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

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

In addition, the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) (No. 3) Order 2004 (S.I. No. 206 of 2004) (hereinafter "the 2004 Designation Order"), and duly notes that by a combination of s. 3(1) of the Act of 2003, and article 2 and the Schedule to the 2004 Designation Order, "Austria" (or more correctly the Republic of Austria) 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 sole point of objection now being proceeded with is point no. 1 which raises a s. 21A objection and pleads that no decision has been made in the issuing state to charge and try the respondent in respect of the offence with which we are concerned.

The Respondent's Evidence
The Court has before it an affidavit of Roland Kier, lawyer, of Rechtsanwaltsbüro, Soyer & Partner/in, Kärntner Ring 6, 1010 Wien, Austria sworn on the 23rd April, 2013. This affidavit was filed on behalf of, and is relied upon by, the respondent. It states:

> "1. I say and believe that I work in the firm of Soyer & Partner/in. I am a qualified lawyer since 2005 and I am partner in the firm Soyer & Partner/in since 2008. My areas of practice are Criminal Law, Criminal Appeal Procedure, Narcotics Law, Corporate Crime, Penitentiary Law and Administrative Criminal Law. Unfortunately I do not have a certification of my degree of fluency of English. However, I confirm that I am proficient in the English language and conduct professional business through that medium.
>
> 2. I say and believe that I have been asked to provide this affidavit in order to give an explanation of certain aspects of the Austrian Criminal Procedure. Specifically I have been asked to explain the point in the Austrian criminal process that the proceedings against Mr Quilligan have reached. I say and believe that it is my understanding that Section 21A of the European Arrest Warrant Act, 2003 requires that a decision has been made both to charge a person with the offence and also to put that person on trial.
>
> 3. I say and believe that the criminal proceedings being conducted in Austria against Mr. Quilligan are currently in the pre-trial stage, and that once the investigations are completed, the prosecution will decide whether to press charges or to terminate the proceedings. I further say and believe that below I will set out in greater detail the steps in this process and the relevant provisions of the Austrian Criminal Procedure Code.
>
> 4. I say and believe that Austrian criminal proceedings are generally divided into three phases: the investigative (pre-trial) phase, the trial phase as well as the appeal phase. Law enforcement authorities are the police, the prosecution and the courts.
>
> 5. I say and believe that the first phase is the so-called pre-trial (investigative) phase. Pursuant to § 101 Austrian Criminal Procedure Code ("CPC") this phase is led by the prosecution, i.e. it is the prosecutor who is in charge of the proceedings. I further say and believe that during this investigative phase, it is for the prosecutor to decide whether to terminate the investigations based on the fact that a conviction would likely not be achieved or to submit an indictment to the court (*see also* § 4 para 1 CPC).

6. I say and believe that the pre-trial proceedings are led under the caveat of § 3 para 1 CPC, wherein it is set out that the police, the prosecution and the courts have to explore the truth and to solve all facts that are of concern for the assessment of the deed. § 91 para 1 CPC stipulates that the purpose of the pre-trial (investigative) phase is to establish the facts of the case and the suspicion so as to put the prosecution into a position to decide whether to press charges, withdraw the prosecution or terminate the proceedings and that in the case of an indictment, the trial proceedings can be conducted swiftly.

7. I say and believe that generally the investigative steps are conducted by the police (*see* §§ 99 to 100a CPC). Pursuant to § 99 para 1 CPC the police will either investigate ex officio or based on a report. § 99 para 1 CPC further stipulates that the police has to follow orders issued by the prosecution and the court (§ 105 para 2 CPC). § 100 CPC deals with the different forms of reports the police has to submit to the prosecution at the beginning, during and at the end of an investigation.§ 103 para 1 CPC provides that the prosecutor can participate in all investigative acts conducted by the police and pursuant to § 103 para 2 CPC the prosecution can conduct investigative acts themselves or through an expert.

8. I say and believe that generally, coercive measures have to be ordered by the prosecutor (limited exceptions to this rule are stipulated in § 99 para 2 and para 3 in cases of a danger in delay and in the case of para 3 if this is explicitly foreseen by law). I further say and believe, however, the most important coercive measures shall be ordered by the public prosecutor only after judicial approval. If a coercive measure has to be approved by court, § 101 CPC requires the prosecution to submit a reasoned request to court. If the court approves the request for the coercive measure, it is for the prosecution to decide about the implementation (§ 101 para 4 CPC).

9. I say and believe that the proceedings at the pre-trial or investigative phase take place in private.

10. I say and believe that when a case is at the pre-trial phase it cannot be said that a decision has been taken to charge or try the person for the offence. That is a decision which is only taken at the end of the pre-trial phase.

11. I say and believe that once the investigations are concluded the prosecution will decide whether to press charges or to terminate the proceedings. § 210 para 1 CPC provides that if a conviction seems likely based on the sufficiently clarified set of facts and no grounds for the withdrawal of the prosecution exist, the prosecution has to file an indictment with the relevant court. § 210 para 2 CPC stipulates that with this filing of the indictment the second phase, i.e. the trial phase, of the proceedings commences. I say and believe that this phase is led by the judge and the position of the prosecution shifts from being in charge of the proceedings to a party to the proceedings (see § 210 para 2 CPC).

12. I say and believe that it is only at this point when the case moves from the pre-trial phase to the trial phase that it can properly be said that a decision has been made to charge and try the person.

13. I say and believe that the third phase known to the Austrian criminal proceedings is the appeal phase. Depending on what court issued the judgement, different types of remedies exist. In principle one can distinguish the so-called Nullity Appeal, the "Ordinary" Appeal and the "Full" Appeal. I further say and believe and understand that this phase is not relevant to the questions that I have been asked.

14. I say and believe that the most relevant part of the CPC for the purpose of the question that has been asked is § 210 CPC. Pursuant to § 210 para 1 CPC the prosecution has to file an indictment with the relevant court if a conviction seems likely based on the sufficiently clarified set of facts and no reason for the withdrawal of the prosecution exists. § 210 para 2 CPC states that with this filing of the indictment the second phase, i.e. the trial phase, of the proceedings is started.

15. I say that below I have prepared a draft translation of § 210. However, as I am not a professional interpreter I suggest that it may also be prudent to have the relevant sections from the CPC translated by an interpreter to ensure the utmost accuracy. Unfortunately no official translations of the Austrian Penal and Criminal Procedure Codes exist.

> *§ 210*
>
> *Para 1 CPC: If – based on a sufficiently clarified set of facts – a conviction seems likely and no reasons for the termination of the proceedings or the withdrawal of the prosecution exist, the prosecution has to press charges at the cognizant court; at the Regional Court sitting as jury – or mixed court (Schöffengericht) with indictment (Anklageschrift), at the Regional Court sitting as single judge or at the district court with demand for prosecution (Strafantrag).*
>
> *Para 2 CPC: Through the bringing of the charges the trial proceedings commence, whose conduct behooves with the court. The prosecution becomes a party to the proceedings.*
>
> *Para 3 CPC: The arrest of the accused has to be ordered by court based on a request by the prosecution, also other coercive measures and the taking of evidence, which during the pre-trial proceedings require the order of the prosecution, have to be ordered or approved by the court after the pressing of the charges. The implementation still behooves the police; reports and notifications have to be addressed to the court. Requests for the termination of the proceedings (§ 108 CPC) are no longer permissible (sic), already submitted requests become redundant.*
>
> *Para 4 CPC: Outside of the main trial the responsibility of the Regional Court as Jury Court or Mixed Court is determined by § 32 para 3.*

16. I say and believe that once the prosecution has pressed charges, it is the judge that is in charge of the proceedings. I further say and believe that the criminal procedure does foresee some *a limine* powers of the judge, however they vary depending on whether the case is heard in front of a District Court, the Regional Court sitting as a single judge or whether it is a mixed or jury trial.

17. I say and believe that before the District court the following law is applicable: § 451 para 2 CPC stipulates that if the judge is satisfied that the deed on which the demand for prosecution is based is not punishable by law or that circumstances exist which exclude punishability, the district court judge has to terminate the proceedings by issuing an order.

18. I say and believe that before the Regional court sitting as a single judge the following law is applicable: § 485 para 1 CPC sets out the framework for district court trials in relation to the review of demands for prosecution. Pursuant to § 485 para 1 CPC the court has to examine the demand for prosecution. § 485 para 1 subpara 2 CPC states that in the cases of § 212 subpara 3 CPC (the facts of the case have not been sufficiently clarified, so as to make a conviction likely) and subpara 4 CPC (other decisive formal shortcomings) the judge has to issue an order rejecting the demand for prosecution. Pursuant to § 485 para 1 subpara 3 CPC the judge has to reject the demand for prosecution with an order and to terminate the proceedings in the cases of § 212 subpara 1 (the indictment is based on a deed that is not punishable or other reasons exist excluding the conviction based on legal reasons), subpara 2 (the allegations presented are not sufficient to even consider a conviction likely and further investigations will not strengthen the allegations), subpara 7 CPC (the request of a person legal entitled to press charges is missing).

19. I say and believe that in cases with Mixed and Jury Trials the following law is applicable: § 212 CPC provides that the defendant is entitled to raise an objection against the indictment submitted by the prosecution to the court under certain reasons set out in § 212 subparas 1 to 7 CPC. I say and believe that unlike in the above two mentioned cases, the court can only object if it considers itself not to be the competent court in a mixed or jury trial. Besides that, the court has to declare the indictment to be legally valid if no objection is raised or if the objection is dismissed by the Higher Regional Court.

20. I say and believe that I have also been asked to provide a description of the nature of the office of the public prosecutor under Austrian law as I understand that it may be argued that a public prosecutor should not be regarded as a judicial authority.

21. I say and believe that pursuant to Article 90a of the Austrian Federal Constitutional Law, prosecutors are considered functionaries (*sic)* of the jurisdiction.

> Article 90a of the Federal Constitutional Law states the following:
>
> *Public prosecutors are functionaries of the jurisdiction. They represent the investigation and prosecution in cases for acts carrying a penalty by court. Federal Law determines the detailed regulations on their being bound to instructions of their superior functionaries.*
>
> I say and believe that this translation of Article 90a of the Austrian Federal [Constitutional Law] can be found on the legal information system provided by the Office of the Federal Chancellor.
>
> (see http://www.ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930_1.html)
>
> In the original German version Article 90a of the Federal Constitutional Law provision reads as follows:
>
> *Staatsanwälte sind Organe der Gerichtsbarkeit. In Verfahren wegen mit gerichtlicher Strafe bedrohter Handlungen nehmen sie Ermittlungs- und Anklagefunktion wahr. Durch Bundesgesetz werden die näheren Regelungen über ihre Bindung an die Weisungen der ihnen vorgesetzten Organe getroffen.*

22. I say and believe that in (*sic*) Austria public prosecutors act within a hierarchy and must take instructions and directions from their superiors. I further say and believe that they also act under the direction of the Federal Ministry of Justice.

23. I say and believe that whilst public prosecutors have the power to grant certain coercive measures or orders during the pre-trial phase, the most important coercive measures shall be ordered by the public prosecutor only after judicial approval. For example they have limited powers to remand a person in custody. § 170 para 1 CPC sets out the four reasons when a person can be remanded in custody:

- apprehension in the act;
- risk of flight;
- danger of collusion;
- danger of repetition.

24. I say and believe that according to § 171 para 1 CPC an arrest has to be imposed by the prosecution based on a decision issued by the court and has to be executed by the police. § 171 para 2 CPC sets out the cases where the police is entitled to arrest an accused of their own accord (*sic*).

25. I say and believe that in the case of § 171 para 1 CPC, i.e. when the arrest is judicially approved, ordered by the prosecution and executed by the police, the judicial decision has to be served to the accused immediately or within 24 hours after his arrest. In the case of § 171 para 2 CPC the accused has to be served a written reasoning by the police dealing with the suspicion and the grounds for detention.

26. I say and believe that pursuant to § 172 para 1 CPC the police has to promptly inform the prosecution, which has to inform the court about the enforcement of the warrant of arrest. The accused has to be brought to the cognizant prison without undue delay, at the longest within 48 hours after arrest; some exceptions to this principle exist, however.

27. I say and believe that § 174 para 1 CPC stipulates that every arrested accused has to be interrogated immediately after his imprisonment concerning the prerequisites for the pre-trial detention. The court is allowed to conduct immediate investigations prior to its decision or have them conducted by the police if their outcome is influential for the evaluation of the suspicion or the ground of detention. In any case, the court has to decide at the longest within 48 hours after the imprisonment, whether the accused should – at best under the application of less severe measures – be released or whether the pre-trial detention shall be imposed.

28. I say and believe that, as stated above, it is the prosecution that is in charge of the pre-trial (investigative) proceedings. However, the most important coercive measures shall be ordered by the public prosecutor only after judicial approval. The following measures, for example, require judicial authorization before being implemented by the prosecution and police:

- search of premises;
- surveillance of persons;
- seizure of letters and date of communication and surveillance of communication."

Relevant Additional Information
Arising out of the affidavit of Mr. Kier the Irish Central Authority wrote to the issuing judicial authority on the 15th May, 2013 seeking the following clarifications (*inter alia*):

> "(i) Attached for your attention, please copy *(sic)* of affidavit of laws sworn by Mr. Roland Kier on behalf of Mr. Quilligan. Please provide any comments you wish to have presented to the High Court in order to rebut any of the averments contained therein.
>
> (ii) The affidavit suggests that the case is at the pre-trial stage and that a decision has not been made to charge or try Mr. Quilligan for the offence detailed in the EAW. Please clearly state whether or not, based on the information received to date, that *(sic)* a decision has been made by the appropriate authority in Austria to charge Mr. Quilligan of *(sic)* the offences and to send him before a Court to determine if he is guilty of committing the offences detailed in the EAW? In relation to this issue, please see attached copy of Section 21 of the EAW Act 2003 for your consideration.
>
> (iii) Please provide details of the procedures that explain the current status of these proceedings in Austria."

Clearly the reference to s. 21 of the Act of 2003 was intended to be a reference to s. 21A of that Act. However, it is understood the correct provision was in fact forwarded and nothing turns on it.

The issuing judicial authority replied by letter dated the 23rd May, 2013 stating (*inter alia*):

> "It is true that the criminal proceedings against John Quilligan are currently in the pre-trial stage, whereby the facts and circumstances have already been clarified extensively. However, the submission of an indictment to the court implies that the defendant, too, should have had the opportunity to comment on the accusations raised against him (fair hearing). John Quilligan could not be interrogated as a defendant so far. We have the intention to submit an indictment against him as soon as his respective response is available, unless the suspicion can be invalidated. The court will have to decide whether John Quilligan has committed the crimes he is accused of and whether he is guilty.
>
> According to the current stage of the criminal proceedings John Quilligan is highly suspicious of being a member of an Irish gang which has specialized in stealing rhinoceros horns. According to the European Arrest Warrant he explored the locations and thereafter commissioned the thefts. This suspicion is grounded particularly on the testimony of Damian Lukasz Lekki, who has already been sentenced; he stated that he had been instigated by John Quilligan to perform these criminal acts, and moreover, he was able to identify him unambiguously on a photo. With regard to his relevant statement made at the trial before the Regional Court of Krems we refer to the attached photocopy of the protocol dated 02.08.2012. The person referred to as John Ross by Damian Lukasz Lekki could be identified with the aid of presented photos as John Quilligan.
>
> On 02.08.2012, Damian Lukasz Lekki was sentenced by the Regional Court of Krems for the thefts commissioned by John Quilligan to a prison term of four years.
>
> The nullity appeal raised against this sentence by Damian Lukasz Lekki has been rejected. A decision in the matter of the remedy raised against the level of the penalty has not yet been adjudicated."

The Court has read and considered the contents of the protocol attached to the said letter which contains what is effectively the deposition of Damian Lukasz Lekki before the Regional Court of Krems. It is not considered necessary to review it in detail within this judgment. To the extent that they are relevant, the contents of it are fairly summarised within the letter of additional information.

The s. 21A Objection

The Framework Decision and the Act of 2003 - Relevant Provisions

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

Recital (10) to the Framework Decision provides:-

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

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

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

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

> *"Where a judicial authority in an issuing state issues a European arrest warrant in respect of a person—*

(a) against whom that state intends to bring proceedings for an offence to which the European arrest warrant relates,

(b) who is the subject of proceedings in that state for an offence to which the European arrest warrant relates,

(c) who has been convicted of, but not yet sentenced in respect of, an offence in that state to which the European arrest warrant relates, or

(d) on whom a sentence of imprisonment or detention has been imposed in that state in respect of an offence to which the European arrest warrant relates,

that person shall, subject to and in accordance with the provisions of this Act be arrested and surrendered to the issuing state."

Section 21A of the Act of 2003 provides:-

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

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

Counsels' submissions

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

The applicant relies upon the s. 21A(2) presumption, and contends that the evidence adduced, and/or relied upon, by the respondent lacks cogency and is in any event insufficient to rebut that which is presumed.

The respondent accepts that it cannot be gainsaid that the Austrian authorities have an intention to prosecute, or, indeed, that there has been a decision to charge, the respondent. That was accepted by counsel for the respondent as being so notwithstanding that such decision has not been formally recorded in any sense, nor acted upon. The battle ground in this case relates to whether or not the conjunctive requirement is satisfied, *i.e.*, that at the material time there should also have been in existence a decision to try the respondent. The respondent contends that that the evidence taken as a whole is sufficient not only to rebut that which is to be presumed under s. 21A(2), but also to prove that at the material time, *i.e.*, as of the date on which the warrant was issued, there was no decision to try the respondent for the offences which are the subject matter of the European arrest warrant. Elaborating on this, counsel for the respondent submitted that the Court would be perfectly entitled to take the view that the evidence shows that there is, all other things being equal, a desire or an intention at some point, subject to a qualification, to make a decision to indict and thereby initiate a process that will lead to the trial of the respondent. The qualification is that they are seeking to do something else first, and the evidence, such as it is, indicates that no decision to indict has in fact been made.

Counsel for the respondent places some reliance on the reference within the additional information dated the 23rd May, 2013 to the fact that "*the criminal proceedings against John Quilligan are currently in the pre-trial stage, whereby the facts and circumstances have already been clarified extensively*", and points out that §210 of the Austrian Criminal Procedure Code (CPC) requires no extensive clarification but rather "*a sufficiently clarified set of facts*" for the initiation of court proceedings intended to lead to the trial of an accused.

Counsel for the respondent asked rhetorically "what is different in principle about the interviewing of a suspect from the gathering of any other piece of evidence in the case?" He relies upon the implied answer, which is "None", and suggests that, unlike the position of the Swedish authorities as described in *Minister for Justice, Equality and Law Reform v. Olsson* [2011] IESC 1, [2011] 1 I.R. 384, which he seeks to distinguish, the Austrian authorities are not saying that they are precluded from making the relevant decision until they have interviewed the respondent. He suggests that it is of particular relevance that Swedish law did not permit trial *in absentia*. The evidence in *Olsson*, therefore, was to the effect that **before** a decision to try could be made the respondent would have to be present. Counsel submitted that this is not the position in the present case where, it is contended, the evidence establishes that a decision has not been made in circumstances where there is no formal bar to the making of that decision.

In the respondent's written submissions to the Court, it was urged upon it that the warrant itself tends to support the contention that an issue under s. 21A arises insofar as it notes:

"Based on the report of the Provincial Bureau of Investigation in St. Polten, file no. B5/173S2/2011 and according to the results in the preliminary proceedings of the Public Prosecution Department of Krems a.d. Donau John Quilligan is strongly suspected of being a member of an Irish criminal group specialized in thefts of rhinoceros horns…"

It was further submitted that the reference to preliminary proceedings and the fact of a suspicion rather than a formal allegation suggest that no decision has been made to charge or try the respondent.

The Court was then asked to note that when signing up to the Framework Decision Ireland made the following declaration:

"Ireland shall, in the implementation in domestic legislation of this Framework Decision provide that the European arrest warrant shall only be executed for the purposes of bringing that person to trial or for the purpose of executing a custodial sentence or detention order."

Counsel submitted that this would appear to have been due to a deep seated and traditional mistrust of the possibility of extradition for the purposes of investigation. This manifested itself in the provisions of s. 21A of the European Arrest Warrant Act, 2003.

It was submitted that the provisions of s. 21A were considered by the Supreme Court in *Minister for Justice, Equality and Law Reform v. Baile*y [2012] IESC 16, (Unreported, Supreme Court, 1st March, 2012). In that case the evidence before the court was set out at

some length in the judgments of Denham C.J., Fennelly and Hardiman JJ. Counsel suggested that in effect they concluded that, whilst it could certainly be said that Mr. Bailey was wanted for the purpose of conducting a criminal prosecution, he was being sought for surrender so that he could return to an interlocutory point in the proceedings which might or might not result in a decision being made to prosecute him. It was submitted that the evidence in the instant case permits the same conclusion.

Elaborating further, it was pointed out that Mr. Bailey was the subject of a prosecution in France. However, it was clear that his surrender was sought at a point in the proceedings where a decision had not actually been made to put him on trial. If he had been returned he would have been brought before a magistrate who would then make a decision as to whether or not he should be tried. This led the Supreme Court to conclude that it could not be said that a decision had been made to try him. It was urged upon this court that in the same way the respondent's surrender is being sought in order that the public prosecutor might make a decision as to whether or not to indict him.

The Court's attention was drawn to the judgment of Denham C.J., in the *Bailey* case where (at pp. 26-31 of her judgment) she set out in great detail the evidence before the court relating to the French criminal process. This was provided in affidavits sworn on behalf of both the applicant and the respondent. Whilst there were some differences in emphasis in the evidence advanced by both sides, the picture painted was reasonably consistent.

Counsel submitted that it was clear in *Minister for Justice, Equality and Law Reform v. Bailey* that the domestic arrest warrant underpinning the European arrest warrant was issued on foot of a suspicion that Bailey had committed an offence. The affidavit of Dominique Tricaud, quoted by the Chief Justice (at para. 82), had stated:

> "The issuing of the said arrest warrant on the 16th February, 2010, is roughly equivalent to charging the Respondent with the offence. It means that the investigating judge has indicated that there is sufficient evidence against the respondent to warrant further criminal prosecution (though not necessarily enough evidence to place him on trial). The prosecution is now in the phase of 'l'instruction', or the examination phase. When the person (in this case the Respondent] has been arrested and appears before the investigating judge, the investigating judge can confirm the charge or simply hear the person as a witness.
>
> It is worth noting that the case of the Respondent is unusual in two respects. Firstly, his whereabouts are known, and secondly, he lives outside France. Normally, if the person under investigation was present in France, and his whereabouts were known, the investigating judge would simply direct his arrest and have him/her brought before the investigating judge without formally issuing a warrant for arrest.
>
> After the end of the current phase, 'l'instruction' or examination, the 'juge d'instruction' or investigating judge, Patrick Gachon, will make a decision whether or not there is sufficient evidence to send the Respondent for trial which will be in the Court d'Assize, a court for the trial of serious offences.
>
> It cannot be inferred from the existing French proceedings that there is sufficient evidence to send the Respondent for trial, or that there has been a decision to try the Respondent. Only the investigating judge can make the decision whether or not to send the Respondent for trial. If there is not sufficient evidence the Respondent will not be sent for trial, the process will end at the examination phase. If the investigating judge refuses to send the Respondent for trial, this decision may be appealed to the Court of Appeal."

This was largely confirmed in additional information advanced by the applicant (and quoted by the Chief Justice at para. 86 of her judgment) which made it clear that the decision underlying the warrant was grounded on a suspicion as opposed to a decision to put the respondent on trial as such:

> "The Code of Criminal Procedure (Article 122) states that an arrest warrant can be issued if serious or corroborating circumstantial evidences exist regarding a person which makes it likely that he or she could have taken part, as perpetrator or accomplice, in committing a crime."

It was submitted that it was also clear within the same material (and quoted by the Chief Justice at para. 87 of her judgment) that the decision to indict or not was one that was made subsequently on foot of a consideration of the evidence. That decision must necessarily be informed by the presumption of innocence:

> "The Code of Criminal Procedure (preliminary article) lays down the principle of the **presumption of innocence**, whereby a person is presumed innocent as long as his/her guilt has not been established, *i.e.*, as long as the person has not been sentenced by a trial court, since only such a court can convict a person subject to trial.
>
> This principle therefore obviously applies to the investigation of a criminal matter. Indeed, this is only an interlocutory procedure during which the person subject to trial can be indicted but he/she cannot, under any circumstances, be sentenced at this stage of the procedure."

This led Denham C.J. to conclude as follows:

> "Thus it is clear that if the appellant were surrendered to France on the warrant it would be at the investigation stage of the case.
>
> This document sets out clearly the investigation and decision procedure in France. It states plainly that if the appellant were handed over to France by the Irish authorities he would be at the investigation procedure stage of the case. It is a question of Irish law as to whether this meets the requirements of s. 21A of the Act of 2003, as amended."

This Court was also referred to the judgment of Hardiman J. in *Minister for Justice, Equality and Law Reform v. Bailey* where he also sets out the relevant evidence in some detail. At p.24 he noted:

> "On the third unnumbered page of the translation, the investigative procedures are described in some detail. It is then stated that, after the procedure described has taken place:
>
> > '... the investigating judge notifies the person either that he is or is not indicted' (le juge d'instruction notifie a la personne soit qu'elle n'est pas mise en examen, soit qu'elle est mise en examen)

> The French phrase 'mise en examen' is translated 'indicted'. It is this, it appears to me, which is the beginning of the trial and it is manifest from the statement of the vice procureur that this is something which may, or may not, happen in the case of Mr. Bailey."

Hardiman J. went on to conclude that the fact that a decision to *indict* or not, as the case may be, had yet to be made was fatal to the applicant's case. At p. 27 he stated:

> "Therefore, no decision has been made to put Mr. Bailey on trial or 'to try him for the offence specified in the warrant'. This continues to be the position, and all the more clearly so, after the additional evidence of French law which has been presented.
>
> It also appears from the statement of the vice procureur that the decision to indict the person, the 'mise en examen', is a decision for the examining magistrate alone and, still more significantly, that it is a decision which he has not taken, and which he may never take. The 'indictment', which is 'the act by which the investigating judge officially brings proceedings against a person...', has not yet issued and may never issue.
>
> It appears to me, therefore, that on the evidence of the French authorities themselves, the Court can be affirmatively satisfied 'that a decision has not been made... to try Mr. Bailey for the offence in the warrant'."
>
> (emphasis as in original)

The Court was also referred to the judgement of Fennelly J. in *Minister for Justice, Equality and Law Reform v. Bailey* in which the evidence is summarised as follows:

> "102. Me Tricaud said in his statement to the High Court: 'The issuing of the said arrest warrant on the 16th February, 2010, is roughly equivalent to charging the Respondent with the offence. It means that the investigating judge has indicated that there is sufficient evidence against the respondent to warrant further criminal prosecution (though not necessarily enough evidence to place him on trial]. The prosecution is now in the phase of "l'instruction," or the examination phase.'
>
> 103. Mme Françoise Chaponneaux agrees. She describes the procedure in great detail. She says that the juge d'instruction is only responsible for a procedure preparatory to the trial procedure. The aim of the investigation is to reveal the truth; it must consequently examine evidence of both innocence and guilt (à charge et à décharge). The accused enjoys the presumption of innocence. Quite explicitly she states that the appellant, if he is surrendered to France, will find himself at the stage of the instruction. It is only at the conclusion of the instruction that the juge d'instruction decides whether to place him in mise en examen, *i.e.*, send him for trial.
>
> 104. To be clear, therefore, the first stage of what has been described by Me Tricaud as a prosecution has commenced and is still in existence. The domestic French arrest warrant already issued is the equivalent of a charge."
>
> (emphasis as in original)

Counsel for the respondent submitted that allowing for procedural and evidential differences the position in *Minister for Justice, Equality and Law Reform v. Bailey* is similar to that in this case. He submitted that the respondent has put specific evidence before the court setting out the relevant provisions of the Austrian penal code which, it is contended, expresses the emphatic view that no decision to try the respondent has been made.

Counsel for the respondent, correctly anticipating that the applicant would suggest that the situation is more analogous to that in *Minister for Justice, Equality and Law Reform v. Olsson* [2011] IESC 1; [2011] 1 I.R. 384, sought to make a number of further points; the first of which this Court has already alluded to, i.e., the suggestion that, unlike in Sweden, in Austria it is not a condition precedent to a decision to prosecute that the respondent be present to be interviewed or have the allegations put to him. In addition to this, it was submitted that it may not be possible to reconcile certain aspects of the decision in *Olsson* with the decision in *Bailey*.

It was submitted that, in particular, the identification in *Minister for Justice, Equality and Law Reform v. Olsson* of Article 1.1 of the Framework Decision as being the basis for s. 21A is suspect. In this context the Court was referred to the judgment of O'Donnell J. in where (at paras. 29-32) he stated:

> "[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 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."

Despite suggesting that the judgment of O'Donnell J. in *Minister for Justice, Equality and Law Reform v. Olsson* was to that extent *per incuriam*, counsel for the respondent acknowledges that in *Minister for Justice, Equality and Law Reform v. Bailey* Denham C.J. considered the earlier case of *Olsson* and expressed the view that, notwithstanding that the facts of each case were different, "the analysis [in *Olsson*] is helpful".

Moreover, none of the judges of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Bailey* sought to suggest that *Olsson* was wrongly decided. However, counsel placed much reliance on certain aspects of the analysis of O'Donnell J. upon which the Chief Justice had placed particular emphasis by underlining them in her judgment. She said (at para. 96):

"O'Donnell J., in giving a judgment with which the other members of the Court agreed, analysed s. 21A. He stated at pp.399-400:-

> [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."

(Underlining for emphasis by Denham C.J.)

In conclusion, counsel for the respondent submitted that *Olsson* is best regarded as a somewhat exceptional case, in terms of the result, by reason of the peculiar position under Swedish law that precluded the making of a decision to try until the formality of questioning or confrontation had taken place. He urged upon the Court that that peculiarity is not present in the instant case and submitted that in the circumstances the provisions of s. 21A are engaged.

Counsel for the applicant submitted that the Court should follow and adopt the analysis of O'Donnell J. in *Olsson*, and further submitted that in any event the respondent has been unable to point to cogent evidence sufficient to rebut the s. 21A(2) presumption upon which the applicant relies.

The Law

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

> "44. In so far as the case law is concerned, in the intervening period since the conclusion of the s. 16 hearing in the present case and during which my judgment has been reserved, I delivered a judgment in a case of *Minister for Justice and Equality v. Connolly* [2012] IEHC 575, (Unreported, High Court, Edwards J., 6th December, 2012) in which I said the following at paragraph 8.20:-
>
> > 'As the Court understands the decision *in Minister for Justice, Equality and Law Reform v. Bailey* the Supreme Court did not depart from or modify the analysis of s. 21A by O'Donnell J. in *Minister for Justice, Equality and Law Reform v. Olsson* [2011] IESC 1, [2011] 1 I.R. 384. Rather, it seems to have been accepted that O'Donnell J.'s analysis was correct at the level of principle (even though O'Donnell J.'s analysis does not allude to the Irish Government's

reservation, a matter on which much emphasis was placed in the majority judgments in the *Bailey* case). However, when what might be called the *Olsson* analysis was applied in the particular circumstances of the *Bailey* case it was impossible to conclude, on the evidence before the Court in that case, that a decision had been made to try the respondent in that case.'

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

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. While some important passages from *Olsson* have already been quoted in my rehearsal of counsel's submissions, I think it is appropriate for completeness, and also to place in context the passages already quoted, to set out certain other passages, and in particularly paragraphs 26 to 28, and 35 and 36 of the judgment of O'Donnell J. The learned Supreme Court judge stated:

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

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

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

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

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

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

v Government of Switzerland [1999] A.C. 54, 62G. It follows that it would be wrong to approach the problem of construction solely from the perspective of English criminal procedure, and in particular from the point of view of the formal acts of the laying of an information or the preferring of an indictment …

It is not always easy for an English court to decide when in a civil law jurisdiction a suspect becomes an "accused" person. All one can say with confidence is that a purposive interpretation of "accused" ought to be adopted in order to accommodate the differences between legal systems. In other words, it is necessary for our courts to adopt a cosmopolitan approach to the question whether as a matter of substance rather than form the requirement of there being an "accused" person is satisfied.'

[29] (previously quoted)

[30] (previously quoted)

[31] (previously quoted)

[32] (previously quoted)

[33] (previously quoted)

[34] (previously quoted)

[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."

Even if there were validity in counsel for the respondent's contention that the analysis of s. 21A conducted by O'Donnell J. was flawed in its approach, this Court has not been persuaded by counsel for the respondent that the actual construction placed upon s. 21A by O'Donnell J. was incorrect. Even if O'Donnell J. was wrong to interpret s. 21A in conformity with article 1.1 of the Framework Decision, I consider that it was still entirely legitimate for him to construe, as he did, the reference to a "decision" in s. 21A as referring 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. Moreover, it also seems to this Court that to the extent *that Minister for Justice, Equality & Law Reform v. Olsson* [2011] IESC 1; [2011] 1 I.R. 384 is authority for the proposition that what is impermissible is that a decision to prosecute should be dependent on further investigation producing sufficient evidence to put a person on trial, the correctness of that proposition would be unaffected by any defect, if indeed there were a defect, in the process of statutory construction engaged in by the learned Supreme Court judge.

The Court's Decision on the s. 21A Issue

As Denham C.J. emphasised in *Minister for Justice and Law Reform v. Bailey* [2012] IESC 16 (at para. 98) *Olsson* was decided on its facts, as was *Bailey*. This case must also be decided on its facts. In that regard the first question for the Court is whether it has sufficient evidence of a cogent nature before it to enable it to regard that which it is required to presume under s. 21A(2) of the Act of 2003 as having been rebutted. The Court agrees with counsel for the applicant that the evidence before the Court is insufficient to rebut the s. 21A(2) presumption.

The fact that there is an ongoing investigation in this case could never have been dispositive of the issue, and to be fair to counsel for the respondent he did not seek to suggest otherwise. Rather, as O'Donnell J. emphasised in Olsson, what is impermissible is that a decision to prosecute should be dependent on further investigation producing sufficient evidence to put the person on trial. If the evidence before me suggested that that was the position here, this Court would, as indeed it did in of the case of *Minister for Justice and Equality v. Jočienė*[2013] IEHC 290 to which I referred earlier in this judgment, regard the s. 21A(2) presumption as having been rebutted, and go on to consider whether in those circumstances the available evidence was sufficient to enable the Court to be satisfied that the respondent's contention, namely that a decision to try him had not been taken by the material date, was correct. However, the evidence viewed in its totality does not suggest that. It actually suggests the contrary in this Court's view.

In that regard the Court attaches some significance to the language used in the description of circumstances set out at Part E of the warrant. It speaks of the existence of a "*report of the Provincial Bureau of Investigation in St. Polten, file no. B5/173S2/2011*" and of "*the results in the preliminary proceedings of the Public Prosecution Department of Krems a.d. Donau*". The existence of a "report" and of "results" suggests that the ongoing investigation had reached a point where a decision as to charging and trying the respondent could be taken. Moreover, further support for this is found in the additional information dated the 23rd May, 2013 which confirms that "*the facts and circumstances have already been clarified extensively*." Indeed, the warrant characterises the respondent as being "*strongly suspected*" and the basis for that strong suspicion is clearly identified in the additional information. It is clear that he had been incriminated by an alleged accomplice.

When this evidence is viewed in conjunction with the further statement within the said additional information that, "*the submission of an indictment to the court implies that the defendant, too, should have had the opportunity to comment on the accusations raised against him (fair hearing). John Quilligan could not be interrogated as a defendant so far. We have the intention to submit an indictment against him as soon as his respective response is available, unless the suspicion can be invalidated*", it strongly supports a conclusion that a decision to try him has in fact been made, but that the position of the prosecuting authorities is that that decision will not be acted upon before the respondent has been given "*the opportunity to comment on the accusations raised against him".* Moreover, in the Court's opinion § 210 of the Austrian Criminal Procedure Code, upon which counsel for the respondent places such reliance, does not serve to undermine, or erode support for, that view. It states (*inter alia*):

> *"Para 1 CPC: If – based on a sufficiently clarified set of facts – a conviction seems likely and no reasons for the termination of the proceedings or the withdrawal of the prosecution exist, the prosecution has to press charges at the cognizant court;"*

This strongly implies that it is in fact a requirement of Austrian Law, or at the very least that it is a well established convention, that before matters are moved on the suspect should be confronted. However, it certainly does not suggest that the making of a decision to proceed, as opposed to action upon any such decision, must await the outcome of the confrontation process.

Moreover, as O'Donnell J. pointed out in *Olsson* (at para. 35):

> "It would be entirely within…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."

The Court considers that whether or not it is a requirement of Austrian Law that the respondent be confronted before an indictment is in fact laid, or something that is merely regarded as being good practice within the Austrian criminal legal system, is not of central relevance. In circumstances where an explanation has been proffered for no indictment having yet been laid, then provided such explanation is credible (and in this Court's judgment it is), and not inconsistent with a decision to try the respondent having been taken, it really does not matter whether the pause pending confrontation is something required by law or something done because it is considered to be good practice. The important thing is that there is nothing to suggest that evidence critical to the taking of a decision to send the respondent for trial remains to be acquired in the context of any ongoing investigation. If cogent evidence to that effect existed it would indeed tend to rebut the s. 21A(2) presumption. However, there is no such evidence in this case.

In the absence of cogent evidence tending to suggest that a decision to prosecute the respondent would be dependent on further investigation producing sufficient evidence to put him on trial, the Court is entitled to regard that which is presumed as not having been rebutted.

In the circumstances, the Court is not required to refuse to surrender the respondent on s. 21A(2) grounds, and I reject the s. 21A objection.