Neutral Citation Number: [2011] IEHC 177

THE HIGH COURT

2010 144 EXT

BETWEEN:

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND

IAN BAILEY

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 18th day of March 2011:

The surrender of the respondent is sought by a judicial authority in France on foot of a European arrest warrant which issued there on the 19th February 2010. That warrant was transmitted to the Central Authority here, following which on the 23rd April 2010, it was endorsed for execution by the High Court. On that date also, the respondent was arrested. On the following day he was brought before the High Court as required by section 13 of the European Arrest Warrant Act, 2003 as amended ("the Act of 2003"), and has been on bail since that date pending the completion of this application.

No issue arises in relation to the respondent's identity and I am satisfied that the respondent is the person in respect of whom this warrant has been issued.

The warrant states that surrender is sought for the purposes of prosecuting the respondent on a charge of murdering Sophie Toscan du Plantier, a French citizen, on the night of 22nd/23rd December 1996 in West Cork.

Minimum gravity is satisfied by reason of the length of sentence which such an offence attracts upon conviction in the issuing state.

An unusual aspect of this case is that the murder in question occurred in this State and not in France. However, the victim of the murder was a citizen of France, and under the laws of France the French courts have jurisdiction to prosecute and put on trial an accused in relation to the murder of a French citizen even where it occurs outside France. In that regard, Article 113.7 of the Penal Code provides:

> "French criminal law is applicable to any felony as well as to any misdemeanour punished by imprisonment, committed by a French or foreign national outside the territory of the French Republic, where the victim is a French national at the time the offence took place."

This jurisdiction is exercised on the basis of what is known as "the passive personality principle" which is one of the five bases recognised under customary international law whereby a state may exercise an extra-territorial jurisdiction, where the victim of a crime is a national of that state.

An issue is raised against surrender by virtue of this unusual feature under section 44 of the Act of 2003, and I will come to that.

Another unusual feature of this case is that the respondent was questioned by An Garda Siochana here following the death of Sophie Toscan du Plantier, as were a considerable number of other persons. A file was sent to the Director of Public Prosecutions and a decision has been made that the respondent will not be prosecuted on any charge relating to her death. A letter dated 5th July 2010 from the DPP to the respondent's solicitor, Frank Buttimer, confirms this, and further states that the file has been reviewed on a number of occasions since that decision was made, and most recently in 2007, and the DPP again confirms that "on all occasions the original decision not to prosecute [the respondent] was confirmed". In accordance with the DPP's general policy no reasons for this decision are given, but it is stated in this letter that it was in accordance with the Director's Guidelines for prosecutors available on the DPP website. I mention this feature of the case at this stage as an issue arises in relation to this decision in the context of section 42 (c) of the Act of 2003 as originally enacted, and as to whether the amendment to that section in 2005 which removed paragraph (c) thereof is applicable to this case.

I will return to that issue in due course.

The Points of Objection:

1. Section 44 – extra-territoriality:
The respondent, who, though resident in West Cork for many years, is a citizen of the United Kingdom, submits that surrender is prohibited under the provisions of section 44 of the Act of 2003, since the offence was committed outside the issuing state (France), and the law of the executing state (Ireland) does not permit the prosecution in the State of an offence of murder committed outside the State where the accused person is other than an Irish citizen. As provided for in section 9 of the Offences Against the Person Act, 1861, as amended, only an Irish citizen is amenable to such a charge in this State.

The section stands to be interpreted in the light of the provisions of Article 3 of the Offences Against the person Act 1861 (Section 9) Adaption Order, 1973 (S.I. of 1973). It is unnecessary to set that out in any detail.

Section 44 of the Act of 2003 provides as follows:

> "44. -- A person shall not be surrendered under this Act **if the offence** specified in the European arrest warrant issued in respect of him or her **was committed** or is alleged to have been **committed in a place other than the issuing state and the act** or omission of which the offence consists **does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State**." (emphasis added)

That section appears to give effect to one of the optional grounds for non-execution of a European arrest warrant under the Framework Decision provided for in Article 4.7 (b) below.

Article 4.7 provides:

> "4.7: where the European arrest warrant relates to offences which:
>
> (a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such;
>
> or
>
> (b) **have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territor**y." (emphasis added)

These are optional grounds for refusal, and section 44 seems to reflect paragraph (b).

It is submitted by Martin Giblin SC for the respondent that by reference to (b) above, that because this murder was committed outside the territory of France, and because the law of this State (Ireland) does not allow for the prosecution of a murder committed outside this State (except by an Irish citizen), the surrender of the respondent is prohibited by the provisions of section 44.

This is not a correspondence point but rather one based on the principle of reciprocity reflected in Article 4.7 (b) of the Framework Decision, given effect to by section 44 of the Act of 2003.

Robert Barron SC for the applicant accepts that as far as the offence in this warrant is concerned an Irish Court could not exercise criminal jurisdiction in respect of the commission of an offence of murder against an Irish citizen by a non-Irish citizen done outside this State. He does, however, point to the fact that there are some statutory exceptions to the general Common Law rule in relation to extra-territoriality such as those provided for in the Sexual Offences (Jurisdiction) Act, 1996 and the Misuse of Drugs Acts 1977-1984, as well as in the Criminal Law (Jurisdiction) Act, 1976.

Mr Barron contends for an interpretation of section 44 which differs from that put forward by the respondent. He submits that when the section is given its plain and ordinary meaning it creates no bar to the surrender in respect of this respondent. In his written submissions, he puts it this way:

> "Section 44 creates a bar to surrender where an offence is committed in a place other than **the State** [emphasis added] and which by reason of that fact does not constitute an offence under the law of the State. In this case, if the offence of murder for which surrender is sought was committed, it was committed in the State (Ireland) so the provisions of section 44 do not apply and do not constitute any bar to surrender."

Mr Barron's oral submissions were to the same effect.

I do not believe that submission to be correct.

Section 44 does not provide a bar to surrender simply where the offence is committed "in a place other than the State". It provides for such a bar "where the offence is committed in a state other the issuing state" **and** "the act … does not by virtue of having been committed in a place other than the State, constitute an offence under the law of the State" (emphasis added). The two parts of the sentence are conjunctive and have to be read together.

It seems to me to mean, as far as this case is concerned, that where the offence was committed outside France (as is the case) and if under Irish law the same offence, when committed outside Ireland, does to constitute an offence under Irish law, surrender is prohibited.

The facts of this case are in my experience unique thus far at least, in as much as the offence was committed not just outside the issuing state but in the executing state (Ireland).

As already set forth above, Article 4.7 provides

> where the European arrest warrant relates to offences which:
>
> (a) …
>
> or
>
> (b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory."

Mr Giblin for the respondent, in his written submissions, has described the provisions of section 44 as being quite different from the concept of correspondence, being based on the principle of reciprocity which requires that one state should not be required to extradite a person for an offence if it could not request extradition for the same offence were the roles reversed, and that the principle is directed at ensuring an almost perfect balance of mutual obligations between states. He has submitted that not only is there no provision under Irish law to prosecute for the murder of an Irish citizen committed abroad, but also that it would be impossible to prosecute this respondent under any provision of Irish law, whether based on the nationality of the victim of murder or not. In such circumstances, he submits that the principle of reciprocity is therefore not met

Section 44 would more usually be relevant to a case where an offence has been committed outside the issuing state **but not in the executing state** - in other words in a third country - and where, because it would not be an offence under Irish law by reason of it having been committed in a third country, this State may not order surrender. It is a question similar to that of correspondence, yet different, and is treated separately on the basis of extra-territoriality.

This issue arose previously, though on completely different facts, in *Minister for Justice, Equality and Law Reform v. Aamond,*

unreported, High Court, 24th November 2006 where the offences in a Danish European arrest warrant were alleged to have taken place outside the territory of Denmark (but not in Ireland) – in a third state. An issue was raised by way of objection to surrender on the basis of section 44 of the Act of 2003. Part of the background to that application was that previously the extradition of the respondent had been sought by Denmark under Part II of the Extradition Act, 1965. An order was made on foot of that Request, but the respondent challenged his detention on the basis that the offence was not one in respect of which he could be extradited because of the extra-territoriality of the offence, it having been committed outside Denmark. The Supreme Court agreed, and as I noted in my judgment in *Aamond*:

> "The Supreme Court ordered his release on the ground that extradition for an extraterritorial offence was precluded in the absence of the State also exercising an extra-territorial jurisdiction. It was held, *inter alia*, that extradition should be prohibited since the offence for which extradition was requested had been alleged to have been committed outside the requesting country's territory, and the law of this country did not allow prosecution for such an offence when committed outside the territory of Ireland."

The European Convention on Extradition, done at Paris on 13th December 1957,had been applied in respect of Denmark by S.I. 9/1989, and accordingly by section 8, subsection (5) of the Extradition Act, 1965, had the force of law here in accordance with its terms.

In that instance, *Aamond* was released by the Supreme Court on the basis of the provisions of Article 7.2 of that Convention.

Article 7.2 of the Convention bears a striking resemblance to the provisions of Article 4.7 of the Framework Decision, and provided as follows:

> "7. 2. where the offence for which extradition is requested has been committed outside the territory of the requesting Party, extradition may only be refused if the law of the requested Party does not allow prosecution for the same category of offence when committed outside the latter Party's territory or does not allow extradition for the offence concerned."

On the second application for the surrender of *Aamond*, surrender was in fact refused, but not on the basis of section 44. However, the basis for rejecting the section 44 ground on that application and the reason for refusing surrender have no particular relevance to the present case, and accordingly there is no need to refer to the decision in any more detail.

No doubt it was not in the mind of the Oireachtas that a case such as the present could or might arise, and where, only because the victim of the murder in Ireland was a French citizen, the French court has jurisdiction to prosecute the offence committed here. One cannot say the same in respect of the adoption of the Framework Decision since presumably the French Republic intended that it should be able to seek surrender of persons in respect of crimes against French citizens abroad. But the fact is that section 44 of the Act of 2003 has been enacted to provide that where an offence is committed outside the issuing state and Irish law does not permit the prosecution of such an offence where it is committed outside this State, surrender is prohibited.

The wording used clearly reflects the provisions of Article 7.2 of the Convention which previously governed extradition arrangements between Convention countries. There is therefore nothing new about its intent.

Mr Barron has submitted that the interpretation of section 44 contended for by the respondent is one that fails to give effect to the objective of Article 4.7 of the Framework Decision, and that a conforming interpretation (*Pupino* decision) to give effect to the objectives of the Framework Decision is possible in respect of section 44 without being *contra legem.*

It is submitted that whereas Article 4.7 of the Framework Decision at **paragraph (a)** thereof provided an optional ground for refusing surrender where the offences in the warrant "are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such", the Oireachtas chose not to give effect to that optional provision given the provisions of section 44 itself and also section 42 of the Act.

It is submitted by Mr Barron that by not making any provision for the optional prohibition of surrender under paragraph (a) of Article 4.7 of the Framework Decision, the Oireachtas has decided that there should be no bar to surrender solely on the basis that the offence was committed in this State, and accordingly that section 44 should not be interpreted in the manner contended for by the respondent. Mr Barron submits that his interpretation is not *contra legem*, and reflects the intention of the Framework Decision.

Section 42, **as substituted by section 83 of the Act of 2005,** provides for a prohibition of surrender for offences committed in this State only in two particular circumstances, which, it is submitted do not apply in the present case. It provides as follows:

> "42. — A person shall not be surrendered under this Act if—
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> (a) the Director of Public Prosecutions or the Attorney General is considering, but has not yet decided, whether to bring proceedings against the person for an offence, or
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> (b) proceedings have been brought in the State against the person for an offence consisting of an act or omission of which the offence specified in the European arrest warrant issued in respect of him or her consists in whole or in part."

Hence, it is submitted by Mr Barron, it is clearly not intended by the Oireachtas that the respondent would not be surrendered simply because the offence for which he sought is one committed in this State, otherwise the Act of 2003 would have so provided, and that it is only where the DPP is considering but has not yet decided whether to prosecute the offence here, or where such proceedings have been brought already in respect of same that surrender may not be ordered. It is submitted that it is section 42 and not section 44 which is applicable to offences which are committed in this State.

Given the provisions of section 42, it is submitted by Mr Barron that section 44 should not be considered to provide for a prohibition to the surrender of the respondent, where its provisions, unlike those of section 42, can be seen as referring to a situation such as in *Aamond* where the offence was committed outside the issuing state but not in the executing state – i.e. in a third state.

It is submitted that in circumstances where the judicial authority is seeking to prosecute the respondent for an offence which can be prosecuted under French law, the Framework Decision clearly sets that as an aim and objective, and reference is made to Article 2.1 of the Framework Decision which provides:

"Article 2: Scope of the European arrest warrant:

> 1. A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months."

In further support for his submissions Mr Barron has submitted that if the interpretation of section 44 contended for by the respondent was to be correct it would lead to an absurd anomaly on the facts of the present case, given the provisions of section 9 of the Offences Against the Person Act, 1861, whereby only by the happenstance of the respondent being a British subject and not an Irish citizen would his surrender be prohibited, and that such could never have been the intention of the legislatures of the Member States when they adopted the Framework Decision.

I believe that the applicant's submissions are broadly correct. There is nothing within the Framework Decision that suggests, much less requires, that the surrender of the respondent to France is prohibited. It is true that Article 4.7(a) of the Framework Decision provides an optional ground for refusal where the offence is regarded by the law of the executing Member State as having been committed in part or in whole in the territory of that state, but there is nothing in the Act of 2003 which should be interpreted as giving effect here to that provision.

Section 42 would have been the obvious place in which to do so, but it does not.

The respondent submits that this provision of Article 4.7(a) is provided for within the provisions of section 44. I do not believe that this is correct, even though if one looks **only** at section 44 a strict reading of the section can lead to such a conclusion.

But in reaching a conclusion on this issue the Court must look at the entire Act and the Framework Decision and interpret section 44 by reference to any other relevant sections of the Act of 2003, and in the light of the aims and objectives of the Framework Decision. If one has regard to the manner in which section 42 has been enacted, and has regard also to the absence of any provision of the Framework Decision which **requires** that surrender be refused in the circumstances of this particular offence, it is not *contra legem* to hold that section 44 of the Act of 2003 prohibits surrender in respect of offences which are committed in a country **other than the issuing state** and other than this State (i.e. in a third state), and where under the law of this State such an offence does not, by reason of having been committed in a third state, constitute an offence. That does not do violence to section 44 when one considers section 42 and the Framework Decision in tandem with it.

I have already referred to the equivalent provision under Article 7.2 of the European Convention on Extradition, 1957, and to the judgment of the **Supreme Court** in *Aamond*, and I believe that this judgment lends support my conclusion in the present case in so far as that is necessary. My own judgment in *Minister for Justice, Equality and Law Reform v. Aamond* [supra] has no relevance to my conclusions herein, given the critically different fact in that case that the offence in question was not committed in this State.

I conclude therefore that surrender is not prohibited by the provisions of section 44 or Article 4.7 of the Framework Decision and in particular paragraph (b) thereof.

2. Section 10 and section 21A – no decision by the issuing judicial authority to try the respondent for the offence, and section 21A presumption rebutted:
The relevant provision in section 10 of the Act of 2003 for the submissions made under this heading of objection is as follows:

> "10.— Where a judicial authority in an issuing state duly issues a European arrest warrant in respect of a person—
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> (a) against whom that state **intends to bring proceedings** for an offence to which the European arrest warrant relates, or
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> (b) …
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> (c) …
>
> (d) …
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> 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*)*

The provisions of section 21A are important too. It is provided as follows:

> "21A. -- (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.
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> (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**." (emphasis added)

Also of some relevance is Article 1.1 of the Framework Decision which provides:

> "1. 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** or executing a custodial sentence or detention order." (Emphasis added)

The respondent is submitting that it is clear from the information in the warrant and in other material provided by the issuing judicial authority, and as supported by the contents of an affidavit from a French lawyer, that the respondent is not in fact sought for the purpose of conducting a criminal prosecution, and in particular that it is clear that no decision has been made to "try" the respondent for the offence in question, and further, that the purpose of seeking surrender is simply so that the respondent can be interrogated, or that surrender is sought for the purposes of further investigation only.

In such circumstances it is submitted that the presumption contained in section 21A (2) of the Act of 2003 is rebutted, and that the respondent is not a person to whom section 10 of the Act of 2003 refers, and the Court therefore has no jurisdiction to surrender the respondent on foot of the warrant.

Relevant facts:
The warrant commences with the statement that the warrant has been issued so that the respondent can be arrested and transferred to the issuing judicial authority "for the purpose of conducting a **criminal prosecution**" (emphasis added).

Paragraph (b) of the warrant states that the judicial decision on which the warrant has been issued is a 'warrant of arrest' dated 16th February 2010 pursuant to Section 131 of the Code of Penal Procedure by Mr Patrick Gachon, Examining Magistrate (*juge d'instruction*) "**for the purposes of prosecution**". That section of the French Penal Code provides:

> "131. If the person has absconded or if he resides outside the territory of the Republic, the examining judge (juge d'instruction) may, after hearing the opinion of the public prosecutor, issue an arrest warrant against him if the offence carries a penalty of imprisonment for a misdemeanour or for a more serious penalty."

The respondent has appointed a lawyer in Paris, M. Dominique Tricaud, as his lawyer in respect of these proceedings. He has sworn an affidavit in which he describes and comments upon the procedures being undertaken in France in relation to the respondent. The relevant paragraphs for this point of objection are those set forth in paragraphs 8 – 16 of his affidavit and I will for convenience set these paragraphs in full:

> "8. In this case, it is not clear how precisely the proceedings began. Normally, there is a preliminary examination which may or may not result in the appointment of an investigating judge. In criminal matters in France, (one should understand that this term corresponds to the most serious offences, such as murder, rape, armed robbery, etc.), the preliminary enquiry can be entrusted to the police under the authority of the Public Prosecutor before the appointment of an investigating judge.
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> 9. As a result of the preliminary stage of the proceedings, I do not have automatic access to the file of the Investigating Judge Gachon. I will have a right to see the court file when the respondent first appears before the investigating judge in France. I could apply at this stage of the proceedings to His Honour Judge Gachon to be recognised as the lawyer of the respondent, but this application does not have to be granted.
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> 10. My impression is, based on a reading of the European Arrest Warrant, and as a result of conversations with Mr Frank Buttimer, the solicitor of the respondent in Ireland, that the appointment of the investigating judge, Judge Gachon, was on foot of the information sent by the Irish Police only. However, I cannot put it further than being my impression only, as I do not have access to the files of the investigating judge at this moment.
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> 11. The issuing of the said arrest warrant on 16 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.
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> 12. 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 unknown, the investigating judge would simply direct his arrest and have him/her brought before the investigating judge without formally issuing a warrant for arrest.
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> 13. 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'Assises – a court for the trial of serious offences.
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> 14. 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 of the respondent for trial. If there is not sufficient evidence the respondent will not be sent for trial, and the process will end at the examination phase. If the investigating judge refuses to send the respondent trial, this decision may be appealed to the Court of Appeal.
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> 15. If the respondent is returned for trial, he will be sent to the Court d'Assises where he will be tried by a Presiding judge, 2 assisting judges and 9 ordinary members of the public. All of the members of the court constitute the jury, in effect. A verdict of 8 or more of the jurors is sufficient for a verdict of guilty.
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> 16. Under French law, the 3 judges sit and deliberate with the jury members and also vote. In other words, if the 3 judges and 5 members of the public on the jury find him guilty, this will be sufficient for a guilty verdict."

No replying affidavit or other information from the issuing judicial authority has been provided, and Mr Giblin submits accordingly, that it must be accepted, as deposed to by M. Tricaud, that there has not yet been any decision made **to try** the respondent., and that while there is a presumption in that regard provided for in section 21A (2) of the Act of 2003, the contrary is therefore proved by this affidavit, thereby rebutting the presumption. It is submitted that at best the surrender of the respondent is sought for the purpose of ensuring the respondent's participation of the investigative phase of the criminal proceedings, and not for the purpose of putting him on trial.

Mr Barron on the other hand refers to three matters to which I have already referred, namely (a) that the warrant itself states that surrender is sought for the purpose of conducting a criminal prosecution, (b) the domestic warrant is described as being one for the arrest of the respondent "for the purpose of criminal prosecution", and lastly (c) that within the warrant at paragraph (e) thereof it is stated that there are what are described as "convincing clues" which justify the respondent being charged.

Just in relation to this last point, I should say that in that regard the warrant states more fully "In the course of the investigation carried out by the Garda, serious and convincing clues were accumulated against a journalist named Ian Bailey, of such a nature as to justify that he be charged". It is of course beyond argument that the DPP did not consider that any evidence gathered by An Garda

Siochana justified the bringing of any charges against the respondent.

Mr Barron has referred to a judgment of this Court in Minister *for Justice, Equality and Law Reform v. Stiuna* [2007] IEHC 220 where, in relation to a similar issue raised in those proceedings because the warrant stated that the respondent had gone into hiding from the pre-trial investigation in Lithuania, I stated the following:

> "In order to succeed in rebutting the presumption in this case that a decision to prosecute the respondent has been made, there must be evidence which puts the matter beyond any uncertainty. I do not rule out the possibility in an appropriate case that the material contained in the warrant may be such as to be sufficient to make the matter so clear as to remove doubt, but in the present case the material relied upon is nowhere near strong enough to rebut the presumption, particularly where there is no expert evidence of Lithuanian law. It must be remembered that the stated purpose of the Framework Decision is to remove complexities and delays which resulted at least in part from the fact that the legal systems of different Member State of the European Union will differ, often significantly, in many respects. In some member states for example prosecutors are also judges. In some member states the prosecution is regarded as commencing at a point much earlier than would be the case in this country. If the respondent in the present case wished to establish that under the law of the Republic of Lithuania, the point at which he absconded "from pre-trial investigation" was before the authorities had decided to prosecute him for the offences set forth in the warrant, then very strong, categorical and clear evidence would be required to be adduced. Otherwise the presumption remains."

Mr Barron has submitted that the furthest Monsieur Tricaud has gone in an attempt to rebut the presumption is to say that it cannot be inferred from the French proceedings that there is sufficient evidence to send the respondent forward for trial or that any decision to send him for trial has been made. In other words, it is submitted by Mr Barron, M. Tricaud does not know.

Mr Barron refers to the judgment of this Court in *Minister for Justice, Equality and Law Reform v. Balciunas* [2007] 1 ILRM 516, and *in Minister for Justice, Equality and Law Reform v. Ostrovskij*, [2006] IEHC 242 in which the need for cogent and compelling evidence was emphasised where a respondent seeks to rebut the presumption in section 21A (2) of the Act of 2003, and comments that the Framework Decision is intended and is designed so as to accommodate the necessarily different criminal procedures which apply to the prosecution of offences in the various Member States.

He also refers to the judgment of the Chief Justice in *Minister for Justice, Equality and Law Reform v. McArdle* [2005] 4 I.R. 260 where, again, it was submitted by the respondent that his surrender was being sought not for the purpose of a criminal prosecution but rather for the purpose of continuing a fact finding investigation of the offence. That case pre-dated the enactment of the section 21A (2) presumption, but as then required, there was a certificate from the issuing judicial authority that the purpose of surrender was so that the respondent could be tried for the offence, and there was further material before the Court from the Spanish judge which described the prosecution procedure in Spain, and which explained that the reason why the trial process had not yet commenced was that under the relevant procedures it was necessary for the respondent to be present before the Spanish court, and that this could not occur until surrender was achieved. It was stated also that "after the current preliminary investigation (the general, initial investigative procedure) what would commence is a process of trial by jury …… ."

There was also a statement in the warrant itself that surrender was for the purpose of prosecution.

In the course of his judgment, the Chief Justice stated:

> "In some jurisdictions, particularly in what may be termed civil law jurisdictions, criminal investigations are often conducted by or under the supervision of a judge. Such a judge may require a suspected person to appear before him or attend in his chamber in connection with the conduct of the criminal investigation rather than for the purpose of charging that person with a view to putting him on trial.
>
> Warrants issued for the purpose of such investigations could not be considered as requiring the surrender of a person for the purpose of being tried for an offence. The surrender of a person for the 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 dependent on such further investigation producing sufficient evidence to justify putting a person on trial. Nor would it exclude normal pre-trial procedure in a requesting state, such as, for example, the procedure known as a "preliminary examination" as was provided for in this country under the Criminal Procedure Act 1967 before it was substantially amended."

It was concluded in that case that there was ample evidence to establish that the purpose of the warrant in that case was for the prosecution **and trial** of the respondent. Mr Barron submits that the preliminary procedure underway in France in respect of the respondent in this case is to be likened to the procedure referred to in McArdle whereby the *'juge d'instruction'* makes a decision, after the accused person has been brought before the court, akin to the decision which would formerly have been made here following a preliminary examination in the District Court, whether to send the accused forward for trial, and that the procedure underway in France is part of the procedures which are part of a prosecution process, and that in those circumstances the surrender must be seen as being for the purpose of prosecuting the respondent leading to his trial if the *'juge d'instruction'* considers that there is sufficient evidence, having heard the respondent, to send him forward for trial to the Court d'Assises. In such circumstances, it is submitted, surrender is not being sought solely for the purpose of continuing an investigation into the offence, but is for the purpose of prosecution, as clearly stated in the warrant itself.

Following the hearing of this application, I reserved my judgment. However, quite soon thereafter, the Supreme Court (per O'Donnell J.) delivered its judgment in *Minister for Justice, Equality and Law Reform v. Ollsson,* unreported, Supreme Court, 13th January 2011. As part of that judgment deals with the very issue raised in these proceedings in relation to a decision to prosecute and try the respondent, I considered that the parties should be offered n opportunity to make such further submissions as they might wish, in the light of that judgment. Those submissions have now been made.

As noted in the judgment of O'Donnell J. in *Ollsson* the evidence in the case made it clear that the appellant will not be prosecuted with the offences set out in the warrant until the Swedish prosecutors have interviewed him, and further that it was common case that the result of such an interview may be that the appellant will not be prosecuted at all. The appellant had filed an affidavit from a Swedish lawyer who had spoken to the prosecutor, and as a result was able to state that the appellant was not sought for the purpose of standing trial, since the decision that he should stand trial had not been made, and that he was sought only for the purpose of what was described as a continuing criminal investigation, and not for the purpose of being charged or standing trial.

A replying affidavit from the prosecutor explained the criminal procedures involved, including that the presence of the accused was required before the investigation process could be completed since he must be presented with the information obtained in the investigation and given an opportunity to reply to same. Only upon completion of that process can formal charges be laid and a decision made to prosecute the accused. The affidavit stated also that while there was an intention to prosecute on the basis of the available evidence, the appellant had at all times been abroad and therefore not available for interview, so that the procedure could not be finalised. It went on to say that surrender was being sought for the purposes of a criminal prosecution even though the final decision to prosecute can only be taken after that procedure has been completed.

Before reaching his conclusion that the Swedish warrant sought the surrender of Ollsson for the purposes of prosecution and trial, in accordance with the Framework Decision and the Act of 2003, in spite of the fact that it was necessary for the respondent to be presented with the information obtained and given an opportunity to reply to same before any final decision was made to prosecute him and put him on trial, O'Donnell J. considered carefully the relevant provisions of the Framework Decision and the Act of 2003, and how they ought to be interpreted in order to ensure that the objectives of the Framework Decision are achieved. It is helpful to set forth the following extracts from his judgment:

> "In approaching the question of the interpretation of the Act, 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 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 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."

Having then referred to the speech of Lord Steyn in the House of Lords in *Re Ismail* [1999] 1 A.C. 320 addressing a similar though not identical issue, and in which he emphasised the transnational interest in achieving the aim of the Framework Decision of ensuring that persons accused of serious crimes in a Member State are brought to justice, and that a purposive interpretation ought to be adopted in order to accommodate the differences in legal systems.

O'Donnell J. went on to state:

> "It is also noteworthy that s.10 of the European Arrest Warrant Act 2003 (as substituted by s.71 of the Criminal Justice (Terrorist Offences) Act 2005 ("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 the 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)
>
> 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 and the "purpose" referred to in article 1 of the Framework Decision.
>
> 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 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.
>
> 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 section 21A. As the Chief Justice pointed out in *Minister for Justice v. McArdle,* 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.
>
> It would be entirely within the Framework Decision and the Act 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 that no decision had been made to charge or try the requested person.**

I have underlined a portion of that paragraph because Ronan Munro BL when making further submissions in the light of this judgment has relied upon this passage for his submission that the judgment in fact supports the respondent's submissions, and he of course also seeks to distinguish *Ollsson*, particularly because in the present case there has been no affidavit or other material from the issuing judicial authority to contradict what has been stated by Monsieur Tricaud. I will return to his submissions in due course. But before doing so, I set out the following further extracts from O'Donnell's judgment in *Ollsson*:

> "It is noteworthy, that on the evidence in this case, the position in relation to the appellant 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 s10, 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 presence of the accused and the interview where he could respond to the investigation. In short the intention of the Swedish prosecution authority to bring the appellant before the Swedish Court for the purpose of being charged is but a step in the prosecution process."

Mr Barron has submitted that the *Ollsson* judgment supports the applicant's submission that the warrant in this case has been issued with the intention and purpose of prosecuting the respondent with the offence, and not simply for the purpose of investigating the matter further upon surrender. It is submitted that the prosecution procedure has been commenced and that, as in *Ollsson*, a step in that procedure is that the respondent must be presented before the *juge d'instruction* so that he can be allowed an opportunity to respond to the evidence upon which it is sought to rely. It is accepted that the result of that procedure may be that the respondent is not sent forward for trial having heard him, and therefore no final decision to try him may not be made, but that it is clear that the present intention is to do so, and a decision was made to do so at the time the warrant was issued. It is submitted that the fact of this case are not such as to establish that a decision to prosecute the respondent and put him on trial is dependent upon further investigations producing sufficient evidence to put him on trial.

Mr Barron has also submitted again that in the face of the presumption in section 21A of the Act of 2003, the respondent has failed to adduce any cogent evidence through Monsieur Tricaud or otherwise to **prove** that no such decision was made at the time the warrant was issued, and that the best M. Tricaud can say is, as he has done, that it cannot be inferred from the facts that there is sufficient evidence to put him on trial or that a decision to do so has been made, and further that he does not state that there is a current decision not to prosecute him or that no such decision has been made.

Mr Munro for the respondent has submitted that it is important to note that no replying affidavit to that of Monsieur Tricaud has been filed by the applicant, and that the latter's must therefore be accepted in so far as he has stated that no decision to try the respondent has been made. I have underlined the passage from the judgment of O'Donnell J. in *Ollsson* upon which Mr Munro places considerable importance. He submits that it is clear in this case that the respondent is sought only so that further investigations can be undertaken by the French authorities. He submits that it is clear that the evidence in the case thus far, and which is in the hands of the French authorities, is confined to that garnered by An Garda Siochana here and provided to the French authorities, and that this evidence is below the level sufficient to even charge the respondent, and that this is evident from the consistent view of the DPP here that the evidence is insufficient for this purpose.

He submits that since there has been no new or further incriminating evidence gathered against the respondent, either here or by the French police, the Court should attach significance to that fact in reaching any conclusion on whether it can be seen that a decision to prosecute and try the respondent can really have been made, despite what is stated in that regard in the warrant. This clear lack of incriminating evidence is submitted to dilute or diminish the high level of confidence which would otherwise apply in relation to a warrant from an issuing judicial authority.

Conclusion:
It is uncontroversial to state that the legal systems of the Member States differ considerably. Those systems in Member States which operate under what is sometimes described as civil law jurisdiction differ among themselves, and they in turn differ from systems operating in Common law countries. The same Framework Decision has been adopted by all, with the clear intention, underpinned by a shared high level of confidence in the legal systems of each, and it has been stated in many judgments in this jurisdiction that a purposive and flexible interpretation must be afforded to the provisions of the Framework Decision and national legislation in order to ensure that the objective is achieved of ensuring that persons suspected of committing offences in one Member State do not avoid justice by reason of being present in another Member State. That is a legitimate and important objective in achieving an area of freedom, security and justice throughout the European Union. The mutual recognition of judicial decisions throughout the European Union is stated in Recital (7) of the Framework Decision as being regarded by the European Council as "the cornerstone of judicial cooperation among Member States".

For this reason, where an issuing judicial authority issues a European arrest warrant for the purpose of conducting a criminal prosecution, and has clearly stated that this is its purpose, it would be remarkable if the onus upon a respondent to such a warrant who seeks to prove that this stated purpose is false did not have a very high hurdle to overcome, requiring very cogent and compelling evidence to prove the contrary. The presumption contained in section 21A of the Act of 2003 reflects this clearly.

The warrant in this case states clearly that its purpose is so that the respondent can be prosecuted for the offence. It has been issued pursuant to a domestic warrant issued on the 16th February 2010 by an Examining Magistrate in Paris who states that it is "for the purpose of criminal prosecution". It is nowhere stated that its purpose is simply for the investigation of the offence. The warrant sets out in considerable detail the evidence which has been available to the French authorities, and as stated in paragraph (e) of the warrant, that "in the course of the investigation carried out by the Garda, serious and convincing clues were accumulated against [the respondent] of such a nature as to justify that he be charged". That is an indication that in the opinion of the Examining Magistrate and the issuing judicial authority that there is **under French law** sufficient evidence to charge him with the offence. Monsieur Tricaud confirms as much in his affidavit when he states in paragraph 11 of his affidavit that the issuing of the arrest warrant (i.e. the domestic warrant dated 16th February 2010) "means that the investigating judge has indicated that there is sufficient evidence against the respondent to warrant further criminal prosecution (though not necessarily enough to put him on trial)".

This Court must respect and give recognition to that decision. The fact that the DPP here took a different view under Irish law must yield to the right of the French authority to have a different view under its own law. That is inherent in the arrangements for surrender between Member States, and the presumption in section 21A of the Act of 2003, that at the time it issued the European arrest warrant it had the intention to charge and try the respondent for the offence, operates until "the contrary is proved" by the respondent.

Having read the relevant provisions of the French Code of Penal Procedure, I have no reason to doubt in any way what is stated by Monsieur Tricaud. It is clear from the Code that where an offence has been committed there commences what is described by Monsieur Tricaud as a preliminary examination (*l'inquete preliminaire*), which, not surprisingly, can be carried out by the police so that evidence can be gathered.

In the present case, no doubt, that evidence has been gathered on the basis of what has been provided to them by An Garda Siochana. Once that evidence is gathered it is handed over to an Examining or Investigating Magistrate (*juge d'instruction*) – in this

case Judge Gachon - who has issued an arrest warrant so that the respondent can be brought before the Court and afforded his legal right to respond to the evidence if he so wishes. It is a necessary procedural step in the prosecution procedure. He may not be put on trial until this right has been afforded to him. Were the respondent in France he would be arrested and brought before the *juge d'instruction* for this purpose. As he is in this State, the warrant for his arrest has grounded the issue of a European arrest warrant.

As in Sweden, it is apparent that until this right has been afforded to the respondent, no final decision to send him forward for trial on the charge can be made. This is clearly apparent from the provisions of Article 80.1 of the Code of Procedure which provides:

> "Article 80-1
>
> (Act no. 93-2 of 4 January 1993 Article 23 Official Journal of 5 January 1993 in force on 1 March 1993)
>
> (Act no. 93-1013 of 24 August 1993 Article 7 Official Journal of 25 August 1993 in force on 2 September 1993)
>
> (Act no. 2000-516 of 15 June 2000 Article 19 Official Journal of 16 June 2000 in force on 1 January 2001)
>
> On pain of nullity, the investigating judge may place under judicial examination only those persons against whom there is strong and concordant evidence making it probable that they may have participated, as perpetrator or accomplice, in the commission of the offences he is investigating.
>
> **He may proceed with the placement under judicial examination only after having previously heard the observations of the person or having given him the opportunity to be heard,** when accompanied by his advocate, either in the manner provided by article 116 on questioning at first appearance, or as an assisted witness under the provisions of articles 113-1 to 113-8.
>
> The investigating judge may only proceed to place under judicial examination a person whom he considers unable to use the procedure for assisted witnesses." (emphasis added)

The investigating judge in Paris has come to the view that there is sufficient evidence for the purpose of putting the respondent into the next phase of the prosecution procedure, and that before the matter can proceed further his attendance before the investigating magistrate is required under this Article. This is what is sought to be achieved by having the respondent surrendered. I do not read Monsieur Tricaud's affidavit as disagreeing in any way that this is what is occurring in this case. This procedure is clearly one which occurs within the process of prosecuting the respondent under French law.

I emphasise that Section 21A of the Act of 2003 presumes that a decision to prosecute and try the respondent has been made where a warrant is issued. While the respondent submits that Monsieur Tricaud's affidavit has not been controverted and that his evidence must be accepted, it is relevant to examine exactly what he is saying. It is clear from the provisions of the Code themselves that what he says is correct in relation to the stage at which the prosecution is at in France.

But it is also clear that he is correct in saying that only at the end of the instruction or examination phase, which cannot occur until the respondent is brought before the judge, can a decision be made to put the respondent on trial, and also that it is possible that a decision will ultimately be made that he should not be put on trial. But nothing that Monsieur Tricaud has said, and which I accept as being correct for present purposes, is sufficient to prove that this warrant has been issued only for the purpose of investigation and not for the purpose of conducting a prosecution and trying the respondent. He cannot be tried, if he is to be tried at all, until this phase of the prosecution procedures has been completed.

The procedures under French law bear a similarity to those in respect of which there was evidence of Swedish law in *Ollsson*. The very careful and helpful analysis carried out by O'Donnell J. in *Ollsson* applies equally in present case, as do the learned judge's conclusions, and I respectfully adopt them, being of the view that the case cannot be materially distinguished on the facts, save of course that in *Ollsson* there was evidence to controvert the expert evidence adduced by that respondent.

I am satisfied that for the purpose of section 10 of the Act of 2003 this warrant has been issued in respect of a person against whom the issuing judicial authority **intends** to bring proceedings. I am not satisfied that the presumption in section 21A has been rebutted. It has not been proven that there has not been a decision to prosecute and try the respondent in the sense and meaning to be attributed to such words according to what has been stated in *Ollsson* by O'Donnell J.

As in *Ollsson*, the fact that ultimately, after the respondent has been produced to the court and given an opportunity of responding, a final decision may be made not to try him for the offence, does not mean that when the warrant was issued there was not such an intention. This is not a case where, as submitted by the respondent, the decision to prosecute is dependent on any further investigation producing sufficient evidence to put him on trial. The judge has already formed the opinion, as is made clear in the warrant, that there is sufficient evidence for that purpose, but is not permitted to make the decision to put him on trial until the respondent has been afforded his right to respond under Article 80.1 of the Code of Procedure. The fact that the DPP here took a different view of the available evidence is immaterial to this point of objection.

There is no reason to refuse surrender on this ground of objection.

3. Section 42 (c) of the Act of 2003 as *originally enacted* – DPP's decision not to prosecute the respondent:
In order to consider this point of objection, it is necessary to set out the provisions of section 42 of the Act of 2003 **as it was originally enacted**, and therefore as it existed prior to the amendment of that section by Section 83 of the Criminal Justice (Terrorist Offences) Act, 2005 ("the Act of 2005")

As originally enacted, section 42 (c) of the Act of 2003 provided:

> "42.— A person shall not be surrendered under this Act if –
>
> (a) …
>
> (b) …
>
> (c) the **Director of Public Prosecutions** or the Attorney General, as the case may be, has decided not to bring, or to enter a nolle prosequi under section 12 of the Criminal Justice (Administration) Act, 1924 **in proceedings**

against the person for an offence consisting of an act or omission that constitutes in whole or in part the offence **specified in the European arrest warrant** issued in respect of him or her, for reasons other than that a European arrest warrant has been issued in respect of that person." (emphasis added)

However, the Act of 2005 substituted a new section for section 42. The substituted section does not contain what was previously provided in paragraph (c) above. That paragraph has been removed completely. The new section 42 provides:

"42.— A person shall not be surrendered under this Act if—

(a) the Director of Public Prosecutions or the Attorney General is considering, but has not yet decided, whether to bring proceedings against the person for an offence, or

(b) proceedings have been brought in the State against the person for an offence consisting of an act or omission of which the offence specified in the European arrest warrant issued in respect of him or her consists in whole or in part."

Part 8 of the Act of 2005 effected a number of amendments by way of substitution or otherwise to the Act of 2003. Section 68 of the Act of 2005 provides:

"68. – The amendments effected by this Part (**other than section 83**) shall apply to European arrest warrants, and facsimile and true copies thereof, that are endorsed under section 13, or produced under section 14(7) of the Act of 2003 after the passing of this Act." (emphasis added)

It is submitted that the original section continues to apply on this application in view of the provisions of section 68 of the Act of 2005 which provides that the amendments effected to the Act of 2003 "*other than section 83"* shall apply to warrants which are endorsed for execution after the passing of the Act of 2005 and its commencement on the 8th March 2005.

Mr Giblin has submitted that section 68 of the Act of 2005 therefore makes it clear that all amendments provided for in Part 8 thereof were to apply to warrants endorsed after 5th March 2005, **except the amendment to section 42** enacted by section 83 thereof. In so far as there is no other provision which states to what warrants section 83 is to apply, it is submitted that the provisions of section 27 of the Interpretation Act, 2005 apply. That section provides:

Section 27 provides:

"27. -- (1) Where an enactment is repealed, the repeal does not –

(a) revive anything not in force or not existing immediately before the repeal,

(b) affect the previous operation of the enactment or anything duly done or suffered under the enactment,

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment,

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence against or contravention of the enactment which was committed before the repeal, or

prejudice or affect any legal proceedings (civil or criminal) pending at the time of the repeal in respect of any such right, privilege, obligation, liability, offence or contravention.

(2) Where an enactment is repealed, any legal proceedings (civil or criminal) in respect of a right, privilege, obligation or liability acquired, accrued or incurred under, or an offence against or in contravention of, the enactment may be instituted, continued or enforced, and any penalty, forfeiture or punishment in respect of such offence or contravention may be imposed and carried out, as if the enactment had not been repealed."

In the light of these provisions, it is submitted that the decision of the DPP in 1997 not to prosecute the respondent amounts to a right, existing from that date, not to be surrendered on foot of any European arrest warrant which may have issued after 1st January 2004 (commencement of the Act of 2003) and that in such circumstances, and particular in the light of section 68 of the Act of 2005 above, the repeal of the original section 42 and its substitution by a new section 42 cannot be applied to the respondent. It is submitted that this right not to be surrendered crystallised at latest on the 1st January 2004 when the Act of 2003 came into force.

Mr Giblin also relies upon the principle against 'doubtful penalisation' in the interpretation of section 42, given its capacity to affect the respondent's right to liberty.

Mr Barron submits that the construction of section 68 of the Act of 2003 contended for by the respondent is erroneous, and that its proper construction is that the amendments effected to the Act of 2003 by Part 8 of the Act of 2005 shall apply to all warrants endorsed after 5th March 2005, save that the amendment to section 42 shall apply to all warrants **regardless of when they may have been endorsed**.

In so far as the respondent is relying on section 27 of the Interpretation Act, 2005, he submits that the DPP's decision not to prosecute did not create any right or privilege that he could not or would not be surrendered to France in the event that a Request or warrant in that regard was received. Mr Barron has referred to *Magee v. Culligan* [1992] ILRM 186, and to the judgment of Fennelly J. in the Supreme Court in *Attorney General v. Abimbola* [2008] 2 IR 302 as authority for saying that no such right or privilege accrued to the respondent from the DPP's decision. Those cases did not involve such a decision of the DPP, but it is submitted that the same principles apply, and that the exposure or non-exposure to extradition does not amount to a right or liability in that regard.

I agree with Mr Barron's submissions in this regard. Any comfort which the respondent may have derived from the fact that the DPP made a decision not to prosecute him did not confer upon him any right as such, or privilege, to the effect that he could not or would not be surrendered in the light of section 42 as originally enacted. This has been made clear in a number of decisions, including those referred to by Mr Barron, and I had cause recently to consider a similar question in Minister for *Justice, Equality and Law Reform v. Tobin*, unreported, High Court, 11th February 2011, though on very different facts to the present case.

In the absence of such a right or privilege, the argument based upon section 27 of the Interpretation Act, 2005 is fatally undermined.

It remains to discover what intention is evinced by the wording of section 68 of the Act of 2005 in relation to what warrants the amendment to section 42 is to apply.

Article 4 of the Framework Decision provided for a number of optional grounds for refusing to execute a European arrest warrant, including that at paragraph 3 as follows:

> "3. where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings."

By Section 42 paragraph (c) **as originally enacted** the Oireachtas chose to give effect to this optional provision to some extent, but it need not have done so, and therefore it was open to the Oireachtas to decide to remove it or otherwise amend it.

By section 83 of the Act of 2005 it did so by removing it altogether. Though in passing one can refer to the mandatory ground for refusal of surrender contained in Article 3.2 of the Framework Decision which mandates refusal where the requested person "has been finally judged by a Member State in the respect of the same acts ……". There seems to be some overlap between that provision and part of Article 4.3 thereof. However, nothing turns on that under this point of objection.

It would not make any sense to have removed paragraph (c) of section 42, but to have done so in a way that means, as the respondent contends, that the amendment did not apply to warrants endorsed after the 5th March 2005. That would be an absurd result. It makes complete sense to interpret the section as meaning that while all other amendments effected by Part 8 apply only to warrants endorsed after the 1st March 2005, the removal of paragraph (c) is to apply to all warrants regardless of the date on which they are endorsed, since the provisions apply from the date of enactment except in so far as there is some other date specified in respect of certain provisions. In that way, a situation is achieved whereby warrants which were endorsed prior to the 1st March 2005 but in respect of which orders for surrender have not yet been made, and which are still "in the system" so to speak, may be dealt with by reference to the new section 42.

This ground of objection must also fail.

4. Section 37 – unfair procedure in light of DPP's decision not to prosecute the respondent:
It is submitted that any surrender of the respondent would constitute a violation of the respondent's constitutional right to fair procedures, and a breach of the *'ne bis in idem'* principle, in spite of the removal of paragraph (c) section 42 of the Act of 2003.

It is said to do so particularly by reason of the fact that the DPP here has made a decision, affirmed following several reviews of the file, not to prosecute the respondent, and that the respondent has lost the benefit of that decision if he is now to face prosecution in France for the same offence – the more so when as far as the evidence is known it is based solely on the material which was before the DPP, and nothing more.

Mr Giblin refers to the fact, as averred to by the respondent in his grounding affidavit, that he co-operated with the Gardai, following his arrest, by making a statement, thereby waiving his right to silence, and did so having taken legal advice. It is submitted that at that stage, no solicitor could have anticipated, for the purpose of those advices, that following a decision by the DPP not to prosecute the French authorities might still be able to seek to prosecute the respondent. It is submitted that a manifest and serious unfairness arises due to the fact that the very statements which he made on advice to An Garda Siochana will now be used as the basis for prosecuting him in France if he is surrendered, and that this unfairness is sufficient to mandate a refusal of surrender under section 37 of the Act of 2003.

Further, it is submitted that from the facts set forth in the warrant, it is clear that a statement made by Marie Farrell is part of the evidence which the French prosecutor has relied upon for his view that there is sufficient to prosecute the respondent, and it is an uncontroverted fact that this lady has subsequently withdrawn her statement on the grounds that it is false and obtained under some form of duress. This feature is submitted to add to the unfairness to the respondent of any surrender order.

It is submitted also that this unfairness is aggravated still further by the fact that since the DPP has decided not to prosecute the respondent, he has in fact been deprived of the opportunity, which he would have welcomed, to clear his name and be acquitted here by a jury in view of the paucity or indeed lack of any evidence sufficient to convict him. In such circumstances the principle against double jeopardy would have prevented any further prosecution either here or in France. It is contended that the respondent faces such unfairness by any order for surrender in these circumstances that his surrender should be refused.

It is for this reason also that it is submitted that the decision of the DPP should be accorded the status of an acquittal, or at least a final judgment in the matter, albeit one not achieved in a court of law, and that the application for surrender amounts to an abuse of process and an unfair procedure.

Mr Giblin has referred to the judgment of the Keane C.J. in *Eviston v. DPP* [2002] 3 I.R. 260, and relies on the fact that in that case, while it was always open to the DPP to review his decision not to prosecute, whether or not any new material or evidence had come to light, the fact that the applicant had been notified by the DPP that a decision had been made not to prosecute her, and had not been informed that it was possible that this decision could be reviewed in the future, and because the review procedure was not one prescribed by law "she was subjected to a further and entirely unnecessary layer of anxiety and stress [and] was not afforded the fair procedures to which in all the circumstances she was entitled".

In answer to the suggestion that in fact the respondent in the present case had never been informed by the DPP, as Ms. Eviston had been, that a decision had been made not to prosecute him until the letter from the DPP produced on the present application, Mr Giblin states that it was common and public knowledge that such a decision had been made, and the respondent was entitled to believe that such was the case.

'Ne bis in idem':

As I have mentioned already, it is submitted by the respondent that notwithstanding the removal of paragraph (c) of section 42 by the Act of 2005, it remains the fact that a final decision not to prosecute the respondent here has been made by the DPP, as is clear from the letter provided by him, and that such a 'final decision' in a Member State remains a mandatory bar to execution of this European arrest warrant as provided for in Article 3.2 of the Framework Decision, the provisions of which have been set forth above,

and that section 42, even as it now exists, must be interpreted in conformity with that provision, so that its purpose of preventing a person in respect of whom there has been a final decision has been made in one Member State not to prosecute him/her, should not be faced in another Member State with a prosecution for the same offence.

In that regard, it must be recalled that section 10 of the Act of 2003 requires the Court to order surrender not only in accordance with the Act of 2003 but also in accordance with the Framework Decision.

Two decisions of the European Court of Justice have been referred to, and relied upon by the respondent for his submission that the DPP's decision not to prosecute the respondent is a final decision for the purpose of the *'ne bis in idem'* principle, even though no court decision is involved, and that it prevents the surrender of the respondent. These decisions arose following references for a preliminary ruling and while they concern the interpretation of Article 54 of the Convention implementing the Schengen Agreement ("CISA") which enshrines the same principle, it is submitted that the same reasoning should apply in relation to a European arrest warrant. These cases are Joined Cases C-187/01 and C-385/01 *Gozutok and Brugge* [2003] ECR I – 1345, and also Case C-469/03 *Miraglia*.

In *Gozutok and Brugge,* these persons were being prosecuted in Germany and Belgium respectively for offences in respect of which prosecution for the same offences "had been definitively discontinued after they had paid a sum of money determined by the Public Prosecutor as part of a procedure whereby further prosecution was barred".

Article 54 provides:

> "A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, or can no longer be enforced under the laws of the sentencing Contracting Party."

The criminal proceedings against Gozutok were discontinued after he had accepted offers made by the Prosecutor in the context of a procedure whereby further prosecution was barred if certain agreed sums were paid. The particular provision of Netherlands law provided;

> "Before the start of the court proceedings, the Public Prosecutor may impose one or more conditions for avoidance of prosecution of any offences other than those subject by statute to imprisonment of a term of more than six years, or any misdemeanours. There shall be a bar on further prosecution once those conditions have been fulfilled."

In Brugge's case a similar situation pertained, though under the laws of Germany.

The Court stated that it was clear from the wording of Article 54 of the CISA that a person may not be prosecuted in a Member State for the same acts as those in which his case has been 'finally disposed of' in another Member State. It stated also that the procedures availed of in these cases by the prosecution authorities is a procedure whereby that authority decides to discontinue criminal proceedings, provided sums of money are paid. It was concluded therefore that under such procedures the prosecution is discontinued by an authority *"required to play a part in the administration of criminal justice in the national legal system concerned",* but also that such a procedure penalises the unlawful conduct which the accused is alleged to have committed.

The Court's conclusions include the following:

> "30. In those circumstances, the conclusion must be that, where, following such a procedure, further prosecution is definitively barred, the person concerned must be regarded as someone whose case has been 'finally disposed of' for the purposes of Article 54 of the CISA in relation to the acts which he is alleged to have been committed. In addition, once the accused has complied with his obligations, the penalty entailed in the procedure whereby further prosecution is barred must be regarded as having been 'enforced' for the purposes of Article 54.
>
> 31. The fact that no court is involved in such a procedure and that the decision in which the procedure culminates does not take the form of a judicial decision does not cast doubt on that interpretation, since such matters of procedure and form do not impinge on the effects of the procedure, as described in paragraphs 28 and 29 of this judgment, which, in the absence of an express indication to the contrary in Article 54 of the CISA, must be regarded as sufficient to allow the ne bis in idem principle laid down by that provision to apply.
>
> 32. …
>
> 33. In those circumstances, whether the ne bis in idem principle enshrined in Article 54 of the CISA is applied to procedures whereby further prosecution is barred (regardless of whether a court is involved) or to judicial decisions, there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.
>
> 34. …
>
> 35. The aptness of that interpretation of Article 54 of the CISA is borne out by the fact that it is the only interpretation to give precedence to the object and purpose of the provision rather that to procedural or purely formal matters, which, after all, vary as between the Member States concerned, and to ensure that the principle has proper effect.
>
> 36. …
>
> 37. …
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> 38. … Article 54 of the CISA, the objective of which is to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement, cannot play a useful role in bringing about the full attainment of that objective unless it also applies to decisions definitively discontinuing prosecutions in a Member State, even where such decisions are adopted without the involvement of a court and do not take the form of a judicial decision."

Those proceedings had been discontinued after the accused person was dealt with by the imposition of certain conditions with which

he complied, and this acted as **a definitive bar to further prosecution** under the laws of the Netherlands. Accordingly any further prosecution of the accused on the same charges in another jurisdiction would infringe the principle of *ne bis in idem*.

The Miraglia case was somewhat different, as was the result of the preliminary reference ruling. Miraglia was arrested in Italy in February 2001 on charges of having, with others, organised the transport of heroin to Bologna. Eventually he was allowed his liberty pending his trial, but he absconded before standing trial. He was arrested in the Netherlands in relation to the same offence, but in view of the fact that he was being prosecuted in Italy for the same offence, the Dutch proceedings were closed without any sanction being imposed, and without any prosecution in fact being initiated. There was no assessment of the merits of the case against him by the Dutch prosecutor. In due course, the prosecutor in Italy sought information from the prosecutor in the Netherlands by way of mutual assistance, but this request was refused on the basis that in the Netherlands the case had been declared closed without imposing any penalty, and therefore to provide the information sought by way of mutual assistance would contravene the provisions of Article 225 of the Netherlands Code of Criminal Procedure which provides, according to the judgment of the Court:

> "225. –
>
> (1) Were a case does not proceed to judgment, after the order declaring the case closed has been notified to the defendant, or after he has been notified that no further action is to be taken ……, no further proceedings may be taken against the defendant in respect of the same acts, unless new evidence is brought forward.
>
> (2) Only statements made by witnesses or the defendant or documents, acts or official records which have subsequently come to light and have not been examined can constitute new evidence.
>
> (3) In such a case, the defendant can be summoned before [the Court] only after a preliminary judicial inquiry into that new evidence …"

A further provision of that Code, Article 552-1 provides, *inter alia*, that a request for mutual assistance shall not be granted if to do so would be to collaborate in a manner incompatible with the principle underlying Article 68 of the Code and Article 255(1) thereof i.e. *ne bis in idem.*

However, there was no doubt that the sole ground on which the file had been closed was that there were proceedings already underway in Italy for the same offence, and that any prosecution in the Netherlands would therefore offend the principle of *ne bis in idem*. There had been no consideration of the merits of the case against the accused before the order was made to close the case.

The Court concluded on the referred question by stating*, inter alia*, the following:

> "29. It is clear from the actual wording of Article 54 of the CISA that a person may not be prosecuted in a Member State for the same acts as those in respect of which his case has been 'finally disposed of' in another Member State.
>
> 30. Now, a judicial decision, such as that in issue in the case in the main proceedings, taken after the public prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been initiated in another Member State against the same defendant and in respect of the same acts, but where no determination has been made as to the merits of the case, cannot constitute a decision finally disposing of the case against the person within the meaning of Article 54 of the CISA.
>
> 31. The aptness of that interpretation of Article 54 of the CISA is borne out by the fact that it is the only interpretation to give precedence to the object and purpose of the provision rather than to procedural or purely formal matters, which, after all, vary between the Member States concerned, and to ensure that that article has proper effect.
>
> 32. ……
>
> 33. Now, the consequence of applying that article to a decision to close criminal proceedings, such as that in question in the main proceedings, would be to make it more difficult, indeed impossible, actually to penalise in the member States concerned the unlawful conduct with which the defendant is charged.
>
> 34. First, that decision to close proceedings was adopted by the judicial authorities of a Member State when there had been no assessment whatsoever of the unlawful conduct with which the defendant was charged. Next, the bringing of criminal proceedings in another Member State in respect of the same facts would be jeopardised even when it was the very bringing of those proceedings that justified the discontinuance of the prosecution by the Public Prosecutor in the first Member State. Such a consequence would clearly run counter to the very purpose of the provisions of Title VI of the Treaty on European Union, as set forth in the fourth indent of the first subparagraph of Article 2 EU, namely: 'to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to … prevention and combating of crime'.
>
> 35. Consequently, the reply to be given to the question referred has to be that the principle of ne bis in idem, enshrined in Article 54 of the CISA does not fall to be applied to a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case."

Mr Giblin for the respondent seeks support from *Gozutok and Brugge* for his submission that the decision of the DPP's decision should be considered a final disposal of the case, even though it has not involved any judicial determination, since the letter from the DPP can only be interpreted as meaning that he will never commence proceedings against the respondent there being no evidence sufficient for that purpose, and especially since there have already been a number of reviews of the case by him following which that decision has not been altered. Support is also sought from *Miraglia* on the basis that, unlike the *Miraglia* case, where no consideration of the merits of the case was made by the Public Prosecutor in the Netherlands, the DPP here has on several occasions considered the merits and has concluded that there is no case for the respondent to answer.

Patrick McGrath BL, who made submissions for the applicant in relation to these cases refers on the other hand to the fact that in *Gozutok and Brugge,* the cases were **disposed of finally by the operation of national law***,* in circumstances where the prosecutions was barred by law once the accused persons entered into a settlement of the charge on condition that they fulfilled certain financial conditions. In effect, there was an out of court settlement by which prosecution was thereafter barred by operation

of law once the conditions of the settlement were fulfilled. He makes the obvious distinction between such a scenario and the case of the respondent where there is no bar **under law** to the respondent being prosecuted for the offence, if, for example, new evidence was to become available which is sufficient to charge and try him.

It is submitted that the decision of the Supreme Court in *Eviston* referred to earlier clearly permits the DPP to revisit his decision at any time, either for the purposes of correcting an incorrect decision not to prosecute or in the event that some new evidence should become available which was not previously available when the decision not to prosecute was made. It is submitted that the letter from the DPP cannot be interpreted as displacing in any way the general power of the DPP to reopen the case at some later stage, should he decide to do so, and that the cases can be distinguished by the fact that under the national laws in question in those cases, it is the national law itself which prohibits further prosecution once the conditions of the settlement have been fulfilled.

I am obliged to conclude this particular point of objection against the respondent. While it is undoubtedly the case that even following several reviews of the case by the DPP the decision remains that the respondent is not to face prosecution here for the offence in question, nevertheless the DPP is not precluded from reopening the matter if, for example, some new previously unavailable evidence were to become available. No matter how unlikely the respondent may say such a possibility is, the power nevertheless remains. The case has not been 'finally disposed *of'* by operation of any law under which prosecution is barred. That is a vital distinction in the present case.

I accept of course the distinction between this case and the case of *Miraglia*, as adverted to by Mr Giblin, namely that in *Miraglia* there had never been an assessment of the merits of the prosecution case against *Miraglia* by the Public Prosecutor in the Netherlands, whereas there has been such an assessment by the DPP. But that is not sufficient to dispose of the point in the respondent's favour. It is a question of whether or not the letter from the DPP should be interpreted as a final disposal of the case, even though it involves no judicial decision, so that any prosecution of the respondent is barred or prohibited by law. It is not in my view, and *Eviston* is not authority for the contrary. I am not satisfied that the letter from the DPP or the respondent's awareness that he is not to be prosecuted confers any right as such not to be surrendered, or any sufficient expectation that he would **never** be prosecuted here.

Mr Giblin accepts that the respondent's surrender on a European arrest warrant could not realistically have been sought before the amendment to section 42 in 2005, or at least that if it had been it would have been unsuccessful in view of the DPP's decision not to prosecute him. But nevertheless there has been delay which has resulted in prejudice to the respondent, and in this jurisdiction that is delay which would have to be explained if prosecution were not to be halted on delay grounds, given that the offence dates back to 1996.

Delay – risk of unfair trial:
The respondent has submitted at the outset that the aim and objective of the Framework Decision, and therefore the Act of 2003 giving effect to it, is to ensure that persons do not succeed in avoiding justice, and that in the present case the respondent has never sought to evade justice here or elsewhere. He has not fled from France in order to do so, and he has never avoided the authorities here or attempted to do. The contrary is the case here, it is submitted, since he has at all times made himself available to An Garda Siochana, he has made statements and has volunteered DNA samples.

In fact, it is submitted, it is his very cooperation with the authorities here which has exposed him now to the possibility of being prosecuted in France in the face of a decision by the DPP that there is no evidence against him, since the only evidence which is in the possession of the French authorities is the evidence gathered here, including his own statements.

It is submitted that there is a manifest unfairness now since if he could for one moment have imagined or foreseen that the statements which he might give here might in the future be used against him in France, it would have been open to him, following legal advice or otherwise, not to make any statement at all.

Mr Giblin has referred to the fact that at the date of this offence and at the time the respondent would have sought any legal advice before making any statement to An Garda Siochana, the Framework decision had not even been adopted by Member States, and, it is submitted, no solicitor could have been expected to give advice to the effect that at some unknown date in the future his surrender might be sought under such arrangements.

He has referred also to the fact that even though his extradition could have been sought under Part II of the Extradition Act, 1965, any such application under that Act would have encountered difficulties which do not arise under the European arrest warrant arrangements, since some consideration as to the merits might have to have been undertaken, and issues might have arisen in relation to correspondence/extraterritoriality.

A further disadvantage to which the respondent is exposed by reason of delay in seeking his surrender is the fact that the Act of 2003 was amended in 2005 by the deletion of paragraph (c) of the section 42, which, if surrender had been sought in the immediate aftermath of the coming into operation of the Framework Decision after 1st January 2004, the respondent would have been able to avail of and which would have prevented any order for surrender being made.

That is a background which is said to be relevant to the Court's consideration of the question of whether the present application should be regarded as an abuse of process.

In addition, Mr Giblin has pointed to the fact that if prosecuted in France, the respondent will be faced with the fact that under French law adverse inferences can be drawn from a failure to answer questions. Mr Tricaud has referred to this in his affidavit. He states that upon surrender the respondent will be questioned by the investigating judge, and that while the respondent has the right to remain silent "the prosecution can comment on this during the trial and invite adverse inferences to be drawn by the court". This feature is also submitted to amount to an unfairness to which the respondent should not be exposed by a surrender order.

A further matter said to constitute unfairness sufficient to require a refusal of surrender is that some of the evidence referred to in the warrant consists of the statement of Marie Farrell. This is the only statement which had the capacity to place the respondent in the vicinity of the crime on the night in question, and the fact is that Ms. Farrell has retracted this statement. The warrant therefore is supported by evidence which has been retracted and yet the French prosecutor still seeks to rely upon it, certainly for the purpose of this application, but, it is submitted, presumably at the trial.

In this last respect, Mr Giblin lays emphasis on the fact that the respondent would not be able to compel Ms. Farrell to attend his trial for the purpose of giving evidence in relation to that retraction, or otherwise to be questioned. This is submitted to put him at a substantial disadvantage in defending himself, as is the fact that in fact no witness he might wish to call would be compellable by

subpoena. The respondent does not know how the French court will address the fact that Ms. Farrell's statement has been retracted. No witness would be compellable by the French prosecutor either so that the respondent may have them cross-examined, and it is feared that he will face trial only on the basis of the statements.

In these circumstances it is submitted that there is a real risk that upon surrender the respondent will be unable to receive a fair trial, and that this right to a fair trial will not be one which can be adequately vindicated after any surrender is effected.

Mr Giblin submits that the mutual trust and confidence which underpins arrangements for surrender between Member States should not simply evaporate these fears and difficulties which face the respondent if surrendered.

All the circumstances which the respondent has relied upon are said, cumulatively, to give rise to an abuse of process from which the respondent is entitled to be protected by this Court, and that surrender should be refused also on the basis that at best the respondent is sought only for the purpose of being questioned and not for prosecution.

For the applicant, it is submitted that the Court must have regard to the principle of mutual trust and confidence which underpins the arrangements for surrender under the Framework Decision, and that in the absence of cogent and compelling evidence that the respondent faces a real risk of an unfair trial, the Court should presume, as provided for in section 4A of the Act of 2003 that the issuing judicial authorities will comply with the requirements of the Framework Decision and that the respondent will only be prosecuted by procedures which meet minimum standards of fairness under the European Convention on Human Rights, even if those procedures differ from those which operate in this State. It is submitted that there is no evidence adduced by the respondent to establish that any trial will be an unfair one, and it must be presumed that it will not be unfair. Specifically, in relation to the retracted statement of Ms. Farrell it is submitted that if it is the case that the trial court seeks to rely on her evidence, the fact is that they could not compel her to attend in any event, since she resides outside France. It is submitted that any issues which arise as to the fairness of any trial are matters, as concluded in *Minister for Justice, Equality and Law Reform v. Stapleton* [2008] 1 I.R. 669, which fall to be raised and dealt with before any French court of trial. It is submitted that delay in particular is something which is not relevant to the Court's consideration of the present application.

There is no doubt that the removal of section 42 (c) of the Act of 2003 has resulted in the present application proceeding on foot of the Act of 2003 as amended, and that the respondent has been deprived of a point of objection which he otherwise could have availed of. But I have dealt with the substantive objection raised in that regard, and I cannot conclude that this amounts to an unfairness which mandates refusal of surrender. The Oireachtas is entitled to amend its legislation, and no abuse of process arises as a result.

Similarly, the fact that under the Act of 1965 a Request for extradition under Part II of that Act may have been unsuccessful had the French authorities sought his extradition does not mean that an application under a European arrest warrant, now that the Framework Decision has been adopted by Member States, should be refused. The Framework Decision and the Act of 2003 provide that applications under such warrants may be made in relation to offences which pre-date the coming into operation of that system.

In so far as the respondent submits that in the unusual circumstances of the present case the respondent faces a real risk of an unfair trial in France, this Court would require cogent and compelling evidence that this is the case. There is no such evidence in this case. Of course it is true that the prosecution procedures and trial procedures under French law differ completely from those that pertain in this jurisdiction. Generally speaking, this Court must operate under the presumption that such procedures conform with at the least minimum standards of fairness under the European Convention on Human Rights. One factor which is said to give rise to a risk of an unfair trial include that the statement of Marie Farrell referred to in the warrant will be relied upon as part of the case against the respondent and in circumstances where that person has retracted her statement and has indicated that it was given by her under some form of duress. If such a statement was included in a Book of Evidence in this jurisdiction, no doubt if called as a witness here the question of whether she would stand over her statement and whether her evidence was admissible is something which would be addressed at trial by the trial judge by way of a decision on a *voir dire* or by way of directions to the jury in the judge's charge to the jury. While Mr Tricaud in his affidavit as stated that any witness who attends to give evidence can be cross-examined, he goes on to state that where a person who has made a statement and does not attend the trial to give evidence "the Court will engage in a balancing exercise as to whether it is warranted to admit his/her statements into evidence". He goes on to state that "it is permissible to admit into evidence (both during the examination phase and at the trial before the Court d'Assises) any statements made by such a witness" and that "when this occurs, then submissions may be made as to the weight to be attached to them or any other observations made" and that "as a result, witness statements may be admitted as evidence, even though the relevant witnesses are not available to be cross-examined".

Mr Tricaud then opines that given that all relevant witnesses reside outside France "it creates the risk that the ability of the respondent to defend himself would be impaired".

Another factor said to weaken confidence in the right to a fair trial is that under French law adverse inferences may be drawn from the fact that an accused person remains silent in the face of questions.

Bearing in mind the fact that this court must and does accord full respect to the prosecution procedures in France, and to the system of trials generally in that jurisdiction, it must be presumed that procedures exist where fundamental rights of accused persons are protected. Indeed, one can easily read Mr Tricaud's affidavit as confirming this to be the case since it seems clear that the accused person, and presumably any lawyer appointed to defend him, has an opportunity to address the Court in relation to whether or not statements should be admitted as evidence, and if so, the weight or lack of weight which ought to be attached to same. I am not satisfied that the evidence adduced on this application demonstrates such an egregiously unfair procedure as to establish a real risk of an unfair trial should the '*juge d'instruction*' decide that the respondent should stand trial, either by reference to the statement of Ms. Farrell or the fact that adverse inferences can be drawn from the silence of the accused, or otherwise generally. This Court must and does presume that the rights of accused persons are protected under French law to the standard required under the Convention. That presumption underpins the arrangements for surrender between Member States under the Framework Decision, and has not been displaced by the evidence adduced on this application.

Having considered all issues raised and having reached these conclusions, I am satisfied that there is no reason why surrender must be refused under sections 21A, 22, 23 or 24 of the Act of 2003, and I am satisfied also that his surrender is not prohibited by any provision of Part III of the Act or the Framework Decision. In such circumstances the Court is required to make the order sought for the surrender of the applicant to the French authorities, and I will so order.