Neutral Citation [2016] IEHC 485

THE HIGH COURT

[2015 No. 121 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

MOHAMED JALLOH

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered the 13th day of June, 2016.

1. This is an application under s. 16(1) of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003") for the surrender of the respondent to France. The main issue raised by the respondent was that no decision has been made in France to charge and try him for the offences for which he has been sought in the European Arrest Warrant ("EAW"), and his surrender is thereby prohibited under s. 21A of the Act of 2003. That issue resulted in various exchanges of affidavits and additional information between the parties, the contents of which inform the decision in this case. Other issues were raised by the respondent or fell to be dealt with under the Act of 2003.

The European Arrest Warrant

2. The EAW is dated 9th September, 2014. It states that it has been issued by an issuing judicial authority in France, namely the Public Prosecutor of the French Republic, and signed on his behalf by the Deputy Public Prosecutor. The decision on which the EAW is based is stated to be a warrant of arrest of 8th September, 2014, delivered by M. Philippe Salomon, Investigating Judge at the Court of First Instance of Bobigny. The EAW indicates that the maximum length of the sentence is ten years. The EAW states that the warrant relates to a total of three offences.

3. Under the nature and legal classification of the offences and the applicable statutory provision/code, it is stated as follows:-

> "- Complicity of importing narcotics
>
> - Complicity of transportation and possession of narcotics
>
> - Interest in fraud"

There is then a reference to various articles in the French Penal Code and in the French Customs Code.

4. At point E.II of the EAW, the box "illicit trafficking in narcotic drugs and psychotropic substances" is ticked. In doing so, the Public Prosecutor has indicated that these offences are list offences in accordance with Article 2.2 of the Council (EC) Framework Decision of 13th June 2002 (2002/584/JHA) on the European arrest warrant and surrender procedures between Member States ("the 2002 Framework Decision"). The description of the circumstances in which the offences were committed is set out as follows:-

> *"The 17th August, 2012, at 9:15am, the customs officers at the Roissy-Charles de Gaulle international airport were engaging in the control of Mr. Isaac Conteh, an Irish citizen, coming from Rio de Janeiro on board of the AF457 flight, in transit in Paris and whose final destination was Dublin (Ireland). The latter recognized having transported 'in corpore' 79 eggs of cocaine for a total weight of 1100 grams. It had been supported in the outskirts of Sao Paolo by a certain (H) friends who supplied him the cocaine to ingest. He recognized, both before the police services that before the judge, having been solicited by a certain Mohamed UMARr (or UMARU) nicknamed Jalloh, international letters rogatory addressed to the Brazilian and Irish authorities allowed to identify Mohamed JALLOH born 10th October, 1984 in SIERRA LEONE remains in Dublin as the person denounced by Mr. CONTEH."*

5. By letter dated 27th April, 2015, the central authority sought clarification from the Public Prosecutor in respect of:-

> (a) the specific acts committed by the respondent which led him to be charged with the offence of interest in fraud;
>
> (b) whether with respect to the offence of interest in fraud, the issuing judicial authority was relying on the offence box of "illicit trafficking in narcotic drugs and psychotropic substances"; and
>
> (c) with reference to the three offences set out the EAW the maximum sentence applicable for each offence.

6. The Public Prosecutor replied by letter dated 9th June, 2015, that the interest in fraud was a customs offence, punishable by the French Customs Code and not by the French Penal Code. It was an infringement characterised when an individual organised the entry on French territory of products or goods considered as dangerous or unhealthy, which is the case of narcotic products such as cocaine. It was stated that by hiding the goods from French Customs, the individual will be able to benefit, fraudulently, to financial gains, considerable in terms of cocaine. The Public Prosecutor went on to state that:-

> *"The box illicit trafficking in narcotic drugs has been tick[ed] (sic) because if the alleged infringements to JALLOH Mohamed have been more precisely qualified has 'complicity of illicit import of narcotic products' and 'complicity of illicit possession and transport of narcotic products', those infringements correspond to the more generic term of 'illicit trafficking in narcotic drugs'. The criminal jurisdiction who will be in fine investigating this case, will be done before facts of illicit trafficking in narcotic drugs. The same jurisdiction will have as well to decide of the guilty of JALLOH Mohamed for the facts of 'interest to the fraud' previously explained".*

It was then set out that the same penalty applied to each of the offences, *i.e.* that of ten years.

7. On 30th June 2015, the EAW, together with that additional documentation, was endorsed for execution in this jurisdiction. The respondent was subsequently arrested on 20th July, 2015, and in due course released on bail. He filed points of objection and a series of affidavits, the contents of which are referred to in more detail below.

8. By letter dated 3rd November, 2015, the central authority sought further details of how it was alleged that the respondent solicited Isaac Conteh to carry the drugs and sought confirmation of the value of the drugs. Clarification was also sought as to whether the respondent was alleged to have carried out any acts in furtherance of the offences, the subject matter of the EAW, while on the territory of France. This latter request related to a point of objection that s. 44 of the Act of 2003, dealing with the principle of extraterritoriality, prohibited the surrender of the respondent to France. That point was expressly abandoned during the course of the hearing of this application.

9. By reply dated 17th November, 2015, the Public Prosecutor gave information as to how it was alleged that the respondent had solicited Mr. Conteh to carry the drugs. The value of the drugs was given at €36,300. Finally, the Public Prosecutor gave a third answer and headed it "Offences Mohamed JALLOW (sic) is facing in FRANCE". This was in answer to a question directed towards the issue of extra-territoriality and the full reply is as follows:-

> *"As a consequence, regarding to your final question, Mohammed JALLOH is suspected to the following offences in France:*
>
> *Complicity of:-*
>
> *- unauthorized transportation, possession, purchase, import and transfer of narcotics*
>
> *- smuggling of prohibited merchandise*
>
> *Facts committed in Roissy-Charles de Gaulle Airport on August 2012."*

Vagueness

10. The respondent relied upon the case of *Minister for Justice and Equality v. Connolly* [2014] 1 I.R. 720, in which it was stated by the Supreme Court (Hardiman J.) at para. 30:-

> *"It is a mandatory requirement of the European Arrest Warrant procedure that there be unambiguous clarity about the number and nature of the offences for which the person sought is so sought."*

11. Counsel for the respondent submitted that the EAW in this case is vague and poorly translated and that the additional information adds to the confusion. In reliance upon the reply of the Public Prosecutor of 17th November, 2015, quoted above, it was submitted by the respondent that he is now being sought in respect of complicity in only two offences. Alternatively, it was submitted that it can be read as referring to six offences, *i.e*. if transportation, possession, purchase, *etc*. read as separate offences. The respondent submitted that the interest in fraud appears to have fallen away.

12. Counsel for the minister has correctly pointed out that, the facts stated on the EAW in this case are wholly unlike the facts set out in *Connolly*. In *Connolly*, there was unclear and contradictory information in the documentation before the Supreme Court, as to how many offences were contained in the EAW. There is no such ambiguity here. The EAW sets out that he is sought in respect of three offences and it lists those three offences. The information dated 9th June, 2015 also sets out the three separate offences, namely: complicity of importing narcotics; complicity of transportation and possession of narcotics; and finally, interest in fraud. The interest in fraud is explained as a customs offence concerning the importation of unhealthy or dangerous merchandise. The information of 9th June, 2015, also sets out the penalties for each of those three infringements. The answer given by the issuing judicial authority on 17th November, 2015, refers to the respondent being suspected in relation to certain matters, the first of which relates to matters concerning trafficking in narcotics, whereas the second matter refers to smuggling of prohibited merchandise.

13. In the view of the Court, that reply must be viewed in the light that it was given in answer to a question concerning extraterritoriality. Of fundamental importance is that the phrase "smuggling in prohibited merchandise" clearly refers back to the interest in fraud offence which is the customs offence. Furthermore, the reference to the narcotics offences is clearly a catch all reference, given in shorthand to cover the two offences for which he is sought in the warrant. There is no lack of clarity or ambiguity in what he is being sought for; they are the three offences set out in the EAW.

14. There is another aspect of this EAW and additional documentation that raises issues of vagueness and lack of clarity arising out of the answers given to the question regarding the issue of s. 21A of the Act of 2003. These will be dealt with further in this judgment.

Section 38 of the Act of 2003

15. In this case, a single box has been ticked in respect of an offence of illicit trafficking in narcotics and psychotropic substances. This is a list offence under Article 2.2 of the 2002 Framework Decision. It is a matter for the issuing judicial authority as to whether the offences for which the person is sought are offences coming within that paragraph. In the present case, the acts all refer to complicity in the importation into France of the drug cocaine. This, it appears, contravenes a number of offences in French law, under its Penal Code and also contravenes an offence under its Customs Code. The Customs Code offence involving, as it does, a dangerous substance, has been indicated as one which is covered by the designation under the relevant box under Article 2.2 of the 2002 Framework Decision. There is no manifest irregularity in such a designation and there has been no expert evidence placed before this Court on behalf of the respondent to show that such designation is incorrect in French law. This Court places mutual trust and has mutual confidence in the issuing judicial authority in France. These are also offences which comply with the requisite three years sentence of minimum gravity which must apply to these offences. In all the circumstances, the surrender of the respondent is not prohibited under s. 38 of the Act of 2003.

The Claim of "Disproportionality"

16. The respondent also made submissions with regard to "disproportionality." It was submitted that there were less intrusive means through which the investigation of the respondent for the alleged offences could have proceeded, other than by use of the EAW procedure.

17. In *Minister for Justice and Equality v. Ostrowski* [2013] IESC 24, the Supreme Court clarified that, it is not for the High Court to exercise a proportionality test as to whether an EAW should have been issued by the issuing judicial authority in any given case. Therefore, it is not a matter for the court to examine whether there were less intrusive means available to the French authorities for the furtherance of their investigation. The court is limited to the issue of whether there are grounds under the Act of 2003 to refuse surrender. The court is required under the Act, to consider if there is a real risk that surrender would amount to a violation of the rights of the respondent under the Constitution or under the European Convention on Human Rights ("ECHR").

Personal and family rights
18. The respondent also submitted that it would violate his right to respect of his family and personal rights under Article 8 of the ECHR to surrender him. In relation to his family and personal situation, the evidence placed before the court is as follows: - The respondent said that he was born in Sierra Leone and that he came to Ireland from Sierra Leone in 2002 and was granted refugee status in that same year. He said that he has lived in Ireland since then and has a PPS number. He outlined that, at the time of his arrest under this EAW, he was living at an address in Dublin 3 which he said he had lived in for seven years. He outlined that he has two sons with his partner, one born in 2005 and who is now school-going and the other born in 2013. According to the respondent, his partner and sons were living at an address in Crumlin at the time of his arrest but had been planning on moving in with him at his address in Dublin 3 and have now since moved in to this address. He stated that he has played an active role in bringing up his two sons and often stayed with his partner and sons at their Crumlin address prior to them moving in with him. He also averred that he was a student in DIT at the time of the alleged offences outlined in the EAW and that he studied construction there from 2011-2013. He said that he and his partner have sometimes had relationship problems in the past twelve years but that they are in a committed relationship.

19. At the time of swearing of his affidavit, the respondent described that he was unemployed and in receipt of social welfare payments. His partner also swore that the respondent was in receipt of social welfare payments at the time of his arrest. Subsequently, however, the respondent stated in a supplemental affidavit that he was not in receipt of any social welfare payments since 19th May, 2015 and that he had been looking for employment.

20. The law in relation to objections to surrender based on Article 8 ECHR and Article 41.1 of the Constitution is clear and well-established by the court. The ample case law on the area, such as *Minister for Justice and Equality v. T.E.* [2013] IEHC 323 and *Minister for Justice and Equality v. R.P.G.* [2013] IEHC 54, indicate that the points of principles laid down in those cases are to be applied on a case by case basis according to the particular facts arising. While there is a strong public interest in general in the surrender of a person who is wanted for criminal prosecution or to serve a sentence, the actual level of public interest may vary depending on such factors as the nature of the alleged or committed crime and the delay in seeking surrender as well as the many variables that can arise in the requested person's family and private life.

21. The Court is satisfied that the public interest is very high in seeking the surrender of this respondent in light of the gravity of the alleged offences for which he is wanted for prosecution by the issuing state, namely a series of drug trafficking offences. This Court has already stated in the case of *Minister for Justice and Equality v. E.P.* [2015] IEHC 662, on the basis of the case law, that while a respondent does not have to show exceptional facts, there must be particular injurious or harmful consequences that would make surrender disproportionate. Furthermore, the court must have and does have, regard to the best interests of the respondent's children in considering this matter. However, the inevitable interference with the relationship between a parent and children that surrender will entail is not a matter which, of itself, automatically makes surrender disproportionate.

22. In this case, the evidence before the Court does not show that it would be disproportionate to surrender this respondent. It will be exceptional for the court to refuse surrender for a breach of Article 8 ECHR rights or constitutional rights to family and private life. While there is no necessity to show exceptional facts, there are no particularly injurious or harmful consequences to this respondent's private and family life (or that of his children or partner) that will occur in the event of his surrender. The outcome of any surrender of which he complains amounts to little more than those consequences that will usually flow from the surrender of a person being sought by another member state. In particular, in light of the serious drugs offences for which he is sought, the public interest in his extradition is high. In conclusion, the consequences of his any surrender to France would not be disproportionate.

Section 21A of the Act of 2003
23. In written submissions, filed prior to the first date of hearing, the respondent sought to rely upon the decision in *Minister for Justice and Equality v. Bailey* [2012] 4 I.R. 1, to establish that his surrender was prohibited under s. 21A of the Act of 2003. The evidence upon which he then relied upon to show that no decision had been made to charge or try him for the offences set out in the EAW, was the statement on the EAW that the case was being dealt with by the investigating judge at the Court of First Instance. It was also submitted that on the same day the EAW was issued, a search warrant pursuant to s. 74 of the Criminal Justice (Mutual Assistance) Act, 2008 ("the Act of 2008"), was issued by the District Court judge in respect of the respondent's premises in Ireland. It was submitted that, on the face of the search warrant, this request had been received relating to a criminal investigation rather than criminal proceedings (which is an alternative provided for in s. 74 of the Act of 2008).

24. The respondent also relied upon the statement in the additional information of 17th November, 2015 received from the issuing judicial authority, that he was "suspected [of the] following offences in France". The court notes that, although the respondent appears to equate the request for mutual assistance in a criminal investigation as being made contemporaneously with the EAW, the face of the search warrant shows that the request for mutual assistance had, in fact, been made on 28th November, 2013. Indeed, the face of the search warrant shows that the request for obtaining evidence for the purposes of a criminal investigation was into a number of various offences including importation of narcotics in an organised gang. It is perhaps noteworthy that this latter offence does not form part of the offences for which he is sought under the EAW.

25. On the day of the hearing, counsel for the respondent produced an affidavit of law sworn by M. Dominique Tricaud, a criminal lawyer of renown in France, and who was also the expert who had given evidence in the *Bailey* case referred to above. This necessitated the adjournment of the case and thereafter, there was a further lapse of time to allow for responses to be made and considered by each side.

26. M. Tricaud gave evidence as to relevant French criminal procedure. He stated that in France, criminal proceedings usually begin with a preliminary examination which may or may not lead to the appointment of an investigating judge. The preliminary examination of criminal matters may be entrusted to the police under the authority of the Public Prosecutor, prior to the appointment of an investigating judge. The investigation phase begins once the investigating judge has been appointed. At the investigation phase, the investigating judge may decide to issue an arrest warrant for a person in respect of whom there are serious and corroborating indications that the person has committed, or has tried to commit, the alleged offences. Once arrested, the person is brought before the investigating judge.

27. M. Tricaud stated that an investigating judge who wishes to question a person who lives outside France in respect of an allegation of criminal conduct can issue an arrest warrant for that purpose (Article 133 of the French Code of Criminal Procedure should be read together with its Article 122 which refers to issuing an arrest warrant against a person). When a person appears for the first time before the investigating judge on foot of an arrest warrant, the investigating judge may decide to either put the person "under examination" ("*mise en examen*") or to hear the person as a witness ("*témoin assisté*"). The investigating judge shall decide to put a person *mise en examen* when he or she has before him or her serious and corroborating indications that the person has committed the alleged acts but does not (yet) have sufficient evidence to charge the suspect and put him or her on trial. It is only

once such sufficient evidence is available that the investigating judge can charge the suspect and put him or her on trial, which would close the investigation phase of the procedure.

28. If there is not sufficient evidence to charge the suspect, he or she will not be sent to trial and the criminal proceedings will end at the investigation phase. The *mise en examen* phase of the procedure affords a number of rights to the person *mise en examen* in that it places him or her under judicial supervision of the investigating judge. A person *mise en examen* has the right to legal representation and the right to remain silent. Further, there is a right of appeal to the Chambre d'Instruction against the investigating judge's decision. Pursuant to Article 175 of the French Code of Criminal Procedure, once the investigating judge considers that there is sufficient evidence to send the person *mise en examen* before a court for trial, he or she automatically loses jurisdiction over that case. Thus, the decision to prosecute a person is entirely dependent upon the production of sufficient evidence at the investigation phase.

29. In respect of the current stage of the procedure, M. Tricaud stated that the case against the respondent is at the investigation phase - Judge Salomon has decided that there are serious and corroborating indications that the respondent may have committed the alleged acts and he has accordingly issued an arrest warrant for the respondent to appear before him. However, M. Tricaud said:-

> *"[…] [i]t follows that it cannot be inferred from the issuance of an arrest warrant against the respondent that there is sufficient evidence to charge him with any offence, let alone put him on trial. On the contrary, for so long as Judge Salomon has not made a decision to put him 'under examination' the respondent is not the subject of criminal proceedings and a decision has not been taken to place him on trial in respect of the alleged offences."*

30. By letter dated 18th January, 2016, the central authority sent the copy of the respondent's points of objection and supporting affidavit of M. Tricaud to the Public Prosecutor. A request was made for a response to the averments made by M. Tricaud in his affidavit and in particular to confirm the current status of the proceedings in France. The Public Prosecutor was also asked to "*confirm that evidence exists against the respondent which is sufficient to enable him to be charged and put on trial if he is surrendered to France and that is the present intention of the relevant authority in France*". The central authority went on to explain the provisions of s. 21A of the Act of 2003 by reference to the fact that notwithstanding that there may be a present intention to charge and try the respondent, the investigation into the commission of the offence can be continued and indeed, the decision to charge and try the respondent could be changed.

31. What is striking about that request is that it did not make it clear that the relevant intention to charge and try the person for the offences set out in the EAW, must have existed at the time the EAW issued. This is a requirement in this jurisdiction in accordance with the decisions of the Supreme Court in *Minister for Justice and Equality v. Olsson* [2011] 1 I.R. 384 and in *Bailey*, and applied by the High Court (Edwards J.) in the case of *Minister for Justice and Equality v. T.E.* [2013] IEHC 323.

32. The Public Prosecutor replied to the central authority's request on 26th January, 2016. The letter from the central authority, perhaps, had not been totally clear as to what was required from the Public Prosecutor, enclosing as it did all of the points of objection and the affidavit of M. Tricaud. In any event, the Public Prosecutor answered the letter under three headings, the relevant parts of which are as follows:-

> *"(1)* ***Regarding the strength of the evidence.***
>
> *The investigation made both in France and Ireland regarding this case brought enough evidence to charge Mr. JALLOH:*
>
> *- Mr. JALLOH was accused by Mr. CONTEH of being at the head of this drug trafficking. Mr. CONTEH denounced Mr. JALLOH twice; in France, before he was sentenced and after his release, when he testified as a witness in Ireland.*
>
> *- Mr. CONTEH did not know Mr. JALLOH's name, he only knew is (sic) surname 'Umar'. However, he gave precise information to locate and identify him (brand of the car, gym club where he has sport, name of his girlfriend). Mr. JALLOH himself confirmed his nickname is 'Umar'.*
>
> *- Mr. CONTEH's telephone analysis brought evidence of phone- calls between him and 'Umar' just before he left Ireland and when he was in Brazil. The telephone has no other use than the drug business.*
>
> *- The telephone used by the chief of this drug trafficking to communicate with Mr. CONTEH was found in Mr. JALLOH's house in Dublin. The SIM card used was also discovered.*
>
> *- The analysis of the phone proved that it was used by Mr. JALLOH and the telephone stopped working just after Mr. CONTEH's arrest in France. The analysis brought evidence of phone contact in Brazil, that is to say exactly the country where Mr. CONTEH confessed to have picked up the cocaine.*
>
> *(2)* ***Regarding the fact that no decision to charge Mr. JALLOH has been made and the decision to prosecute depend on the investigation.***
>
> *At this stage of the case, there is serious evidence to prosecute Mr. CONTEH. The investigating judge issued a European Arrest Warrant because it is the only judicial act that allows him to bring Mr. JALLOH to a court. No other warrant would allow to put Mr. CONTEH on trial. As a consequence, there is securing sufficient evidence to charge and try Mr. JALLOH. Contrary to what Mr. TRICAUD asserted, the European Arrest Warrant is a decision to put him under examination and Mr. JALLOH is now subject of criminal proceedings and this warrant is a decision to place him on trial in respect of the alleged offenses.*
>
> *Obviously, he still has a right, at any stage of the case, to give his own explanations, with the help of a lawyer, and contest the charges against him."*

33. On 15th February, 2016, M. Tricaud swore a supplemental affidavit. With reference to the above sentence commencing "[c]ontrary to what M. Tricaud asserted, the European arrest warrant is a decision…". M. Tricaud averred "this statement is legally incorrect". M. Tricaud said that it was the Deputy Public Prosecutor's decision to enforce the investigating judge's arrest warrant which, itself, was a decision to request public force to find the respondent and bring him before the investigating judge. He referred to Article 695-11 of the French Code of Criminal Procedure in which the EAW is stated to be, inter alia, a judicial decision by a

member state of the European Union ("E.U.") with the aim of achieving the arrest and surrender of a person wanted in relation to a criminal prosecution. He also referred to Article 122 of the same code. That article states:-

> *"The investigating judge may issue a warrant to search for a person; a subpoena, a summons or an arrest warrant, according to the case.*
>
> *[…]*
>
> *A subpoena, summons or arrest warrant may be issued in respect of a person in respect of whom there exists serious or corroborating evidence making it likely that he may have participated, either as principle or accomplice, in the commission of an offence. It may be issued even where the person is an assisted witness or is under judicial examination.*
>
> *[…]*
>
> *An arrest warrant is the order given to the law enforcement authorities to find the person against whom it is made and to bring it before him, having first taken him, if appropriate, to the remand prison mentioned on the warrant, where he will be received and detained.*
>
> *The investigating judge is required to hear as assisted witnesses any person against whom there has been issued a subpoena, a summons or an arrest warrant, unless he/she is placed under judicial examination according to the provisions of article 116. […]"*

34. M. Tricaud went on to say it could not be inferred from the issuance of the arrest warrant that Judge Salomon has decided to put the respondent under examination. He also outlined in considerable detail his view that, as a matter of fact and in accordance with French law, no decision had been made so far to put the respondent under examination or on trial.

35. On 1st March, 2016, the central authority sent the supplemental affidavit of M. Tricaud to the Public Prosecutor. The central authority also included a translated extract from the judgment of the Supreme Court in *Minister for Justice and Equality v. Olsson*. The letter stated with respect to s. 21A of the Act of 2003, the following:-

> *"The legal criteria that must be met, as determined by the Irish Supreme Court as it applies in relation to the French legal system, it that at the time of the issue of the European Arrest Warrant, the relevant Juge d'Instruction has an intention, based on sufficient evidence existing, to place the person sought mise en examen. It is not necessary that the Juge d'Instruction has made a formal irrevocable decision to place the person mise en examen just that there is an intention to do so based on the evidence which intention may change once the person is heard or if new evidence comes to light and it may indeed transpire that the person is never placed mise en examen.*
>
> *What is not permissible under Irish law is to issue a European Arrest Warrant when not enough evidence exists at the time to place a person mise en examen and the purpose in seeking the person is to obtain sufficient evidence to reach a decision on putting the person mise en examen."*

36. The Public Prosecutor replied on 14th March, 2016, stating:-

> *"Regarding the strength of the evidence, I would like to refer to our latest answers on the matter, in our letter of 26th of January. This evidences were brought to the judge, Mr. SALOMON **before** he decide to issue the European Arrest Warrant. The Public prosecutor decided to open the case on the 13th of March, 2013. (emphasis in original)*
>
> *The charges being pre-existent to the issue of the EAW, the will to arrest and hear Mr. JALLOH in the office of Mr. SALOMON is not to create other evidences but to let him a chance of explaining himself, assisted by his lawyer, regarding the charges and evidences already gathered in the case, before bringing hom (sic) to court for his trial.*
>
> *If you are doubting of the intentions of the Juge d'instruction M. SALOMON, I invite you to contact him directly to know his intentions on this precise case (email given)."*

37. The central authority sent a further letter saying that it would assist matters if the investigating judge could clarify the position in advance of the next court date in relation to the French authorities' intention to charge and try the respondent.

38. Judge Salomon replied on 30th March, 2016, as follows:-

> *"The French judicial file has compiled enough evidence to charge Mr. JALLOH.*
>
> *As a brief summary, he is denounced by his partner CONTEH in two different testimonies (in France and in Ireland), the telephone he used to call CONTEH in France and the provider of drug in Brazil as being founded in his home and the data of his phone calls confirmed his involvement.*
>
> *Regarding the burden of the evidence against him, I decided to issue a european arrest warrant in order to give him the possibility to explain on the case and to bring him in front of a courthouse."*

The Court's Analysis and Determination

39. The EAW system operates as a system both of mutual recognition of criminal decisions and of mutual trust in the organs, particularly the judicial organs, of member states of the E.U.. Even without the presumption set out in s. 21A(2) of the Act of 2003, this Court would require proof that no decision had been made to charge and try this respondent before a French court for the offence for which his surrender is sought. In *Bailey*, the issue of deciding whether, on the basis of the material before the court, that there had been a decision to charge and try that appellant, was characterised by Murray J. at para. 177 as a "*fairly net issue of fact*."

40. It must be understood that while this is a net issue of fact, it is one that can only be determined based on the factual position of the respondent's legal case within the legal system of the issuing state. The presumption (whether such presumption is inherent in s.

21A(1) or derives from s. 21A(2) of the Act of 2003) may only be rebutted on the basis of cogent evidence of the factual position. This will require evidence of the legal system of the issuing state in so far as it relates to the issue before the court, that is whether a decision has been made to charge and try the particular respondent with the particular offence(s) set out in the EAW.

41. As McGrath stated in Evidence (2nd Edition, Round Hall, 2014) at para. 6-92 "*[i]t is well established that expert evidence is not admissible in respect of any matter of domestic law. However, it is not only admissible but is mandatory in respect of matters of foreign law and the evidence of a non-expert as to a foreign law is inadmissible*." McGrath goes on at para. 6-99 to say that "*[i]t is important to note that an issue of foreign law is regarded as a matter of fact. Therefore, the finding of the court on the issue has no precedential value and if the point arises again, it must be decided anew by reference to fresh expert evidence*."

42. The requirement for proof of foreign law with regard to the EAW system has been recently restated by the Supreme Court (O'Donnell J.) in *Balmer v. Minister for Justice and Equality* [2016] IESC 25 when he said at para. 46: "*The regime of life sentences in the United Kingdom is a matter of foreign law and requires proof unless it is not contested*." In this case, both sides have sought, albeit at different stages of the proceedings, to rely upon the findings of the Supreme Court regarding French law as evidence as to what French law is. That is not permissible, unless perhaps, a stage is reached that French law becomes so well-known on this issue to become "notorious" so as to permit judicial notice to be taken of it. That position of notoriety has clearly not been reached regarding this particular French law. In this case, there was no agreement as to the contents of French law.

43. It was the belated service of the affidavit of M. Tricaud that caused an initial adjournment of these proceedings. Following the adjournment, the central authority sought and received further information from the French authorities. That is information which the court must consider in deciding on this application for surrender.

44. In the present case, the parties made weighty submissions as regards Irish law, French law and the stated facts in this case. Many of the submissions referred to findings in the *Bailey* case which were based on evidence which was not present here *e.g.* in *Bailey*, Hardiman J. stated that the French phrase "*mise en examen*" was translated as "indicted". As a result of that evidence, Hardiman J. made certain observations as to the legal effect of a decision to put someone under "*mise en examen*". No such explanation of "*mise en examen*" was given in this case.

45. It is, however, unnecessary to recite the particular submissions made under s. 21A of the Act of 2003, as the Court's decision is based upon the contents of the evidence placed before the Court, and in particular the additional information. The additional information raises issues of fundamental importance to the execution of the particular EAW placed before this Court.

46. The original EAW stated that the issuing judicial authority was the Public Prosecutor. It was signed by Anne Laure Mestrallet, who holds the post of Deputy Public Prosecutor and whom the EAW described as the representative of the issuing judicial authority. The Public Prosecutor of the Republic of France in a subsequent letter, (albeit through a different named prosecutor) has stated that it was Judge Salomon, the investigating judge, who issued the EAW. Judge Salomon has also stated that he issued the EAW.

47. Pursuant to s. 11(1A) of the Act of 2003, an EAW is required to state the name of the judicial authority that issued the EAW. This Court is also obliged to consider information received pursuant to s. 20 of the Act of 2003. This Court has now been given completely contradictory information. This is not a question of the identity of a particular prosecutor or a particular judge. For example, if the High Court issues an EAW in this jurisdiction, the particular judge who signs the EAW is acting as the representative of the High Court.

48. In the instant case, there is a clear difference between the Public Prosecutor, undoubtedly a judicial authority for the purposes of the Act of 2003, as amended, and a member of the French judiciary. They are different entities (*i.e*. different judicial authorities) within the French legal system, a fact which is both notorious but also clarified in the legal opinions of both M. Tricaud and the additional information sent to the High Court, via the central authority by the Public Prosecutor in France.

49. As referred to above, the Supreme Court in *Connolly* held that it was a mandatory requirement of the EAW procedure that there be unambiguous clarity about the number and nature of the offences. In *Minister for Justice and Equality v. Herman* [2015] IESC 49, the Supreme Court (Denham C.J.) at para. 19 stated: "*It is essential that the documents in an application for surrender under a European arrest warrant be in order. They should state the information required under the Act of 2003. This information should be provided with clarity. This clarity is required both in relation to the documents and to the translations*."

50. The Supreme Court has thereby confirmed that what is required is that there is unambiguous clarity regarding the vital components of the EAW. It is essential that the issuing judicial authority be identified and identifiable: that is a requirement under s. 11(1A) of Act of 2003. Indeed, the identification of the issuing judicial authority is a *sine qua non* of a valid EAW. As the fifth recital to the 2002 Framework Decision records: "Tradition cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice." The sixth recital identifies the EAW as "the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the 'cornerstone' of judicial cooperation."

51. In the present case, due to the subsequent information received from the issuing state, through the channel for communication provided by s. 20 and s. 12(3) of the Act of 2003, the identification of the issuing judicial authority has not just been blurred, but has been completely altered. We now have a situation where the Public Prosecutor of France, identified originally as the issuing judicial authority, is stating that a separate entity, namely the investigating judge, was the issuing judicial authority. Moreover, the particular investigating judge has confirmed that he himself issued the EAW. Therefore, this Court has been given evidence by the French authorities that the EAW is signed by a judicial authority which did not in fact issue it.

52. Occasionally, additional documentation received from an issuing state may clarify, even to the point of contradiction, information in an original EAW. The initial, apparently incorrect, information may have been given through oversight or other error and it is a matter for the High Court to consider whether it can be satisfied that the information later provided is correct, that the lack of clarity or ambiguity no longer exists, and that all matters required under s. 11(1A) and s. 16(1) of the Act of 2003 are proven to the satisfaction of the court. What has occurred here is fundamentally different. The High Court, as executing judicial authority, is being asked to give mutual recognition to a judicial decision which the issuing state now states is a judicial decision of an entirely different judicial entity to that which appears on the face of the EAW. Thus, the nature or essence of the warrant itself has been changed by that indication. That is a "*change to a fundamental element in the nature […] of the warrant*" (Denham C.J. at para. 33 in *Herman*). It is simply not possible to execute the EAW, because the EAW before this Court was not issued by the judicial authority that appears on the face of the EAW to have issued it. Such a fundamental change to an EAW requires a new EAW before surrender could be ordered. For that reason, I must refuse the surrender of the respondent.

Conclusion
53. In this case, the main argument put forward by the respondent was a claim that s. 21A of the Act of 2003 prohibited his surrender as there had been no decision to charge and try him with an offence. The factual basis for this argument was based upon affidavits of French law and the additional information provided by the Public Prosecutor of France as to French law and of the facts of the respondent's pending case in France. It has not been necessary to determine that point because the responses revealed to this Court that the issuing judicial authority as stated on the EAW, namely the Public Prosecutor, had not in fact issued the EAW. This Court has been told by the Public Prosecutor that the EAW was instead issued by the investigating judge in France and that fact was confirmed in a communication from the investigating judge himself.

54. The surrender system under the 2002 Framework Decision is based upon mutual recognition of judicial decisions. The identity of the judicial authority that made the judicial decision to issue an EAW is vital to the entire operation of the surrender system. Having indicated to the High Court that a different judicial authority issued the EAW (as distinct from a different representative of the judicial authority), there has been a "*change to a fundamental element in the nature […] of the warrant*". In those circumstances, this Court must refuse surrender of this respondent on foot of this particular EAW.