Neutral Citation [2012] IEHC 575

THE HIGH COURT

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

Record No. 2010/ 192 EXT.

BETWEEN:

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

MICHAEL CONNOLLY

RESPONDENT

JUDGMENT of Mr. Justice Edwards delivered the 6th day of December, 2012.

1. Introduction:
1.1 The respondent is the subject of a European arrest warrant issued by a judicial authority in the Kingdom of Spain on the 24th September, 2009. The warrant was endorsed for execution by the High Court in this jurisdiction on the 19th May, 2010. The respondent was arrested at the Criminal Courts of Justice, Dublin 7 on the 28th March, 2011 by Sergeant James Kirwan and was brought before the High Court on the same day pursuant to s.13 of the European Arrest Warrant Act, 2003 (hereinafter the Act of 2003).

1.2 The respondent does not consent to his surrender to the Kingdom of Spain. Accordingly, this Court is now being asked by the applicant to make an Order pursuant to s.16 of the European Arrest Warrant Act 2003 as amended (hereinafter the Act of 2003) directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him. In the circumstances the Court must enquire whether it is appropriate to do so having regard to the terms of s.16 of the Act of 2003.

1.3 The respondent, as is his entitlement, does not concede that any of the requirements of s.16 aforesaid are satisfied. Accordingly, as no admissions have been made, the Court is put on inquiry as to whether the requirements of s. 16 of the Act of 2003, both controversial and uncontroversial, have been satisfied and this Court's jurisdiction to make an order directing that the respondent be surrendered is dependant upon a judicial finding that they have been so satisfied. In addition the Court is required to consider in the particular circumstances of this case certain specific objections to the respondent's surrender which are pleaded in detail in the Points of Objection that have been filed as follows:

> "1. The European Arrest Warrant fails to specify with a sufficient degree of particularity the criminal acts or omissions alleged against the respondent in respect of which is surrender is sought. Whilst the warrant set out a great amount of detail this largely concerns other suspected persons. It is clear that the warrant purports to allege an offence *in rem* rather than one *in personam*. As such a warrant fails to comply with the provisions of Section 11 of the European Arrest Warrant Act, 2003 and is defective. In the premises surrender ought to be refused.
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> 2. By reason of the matters referred to and pleaded at 1 above the respondent, if surrendered, will not be able to avail of the rule of specialty by reason of the unduly broad and vague nature of the allegation against him. In reciting large amounts of extraneous detail at paragraph (e) of the warrant the issuing state has *de facto* rendered the rule of specialty ineffective as regards the respondent. For the sake of clarity the respondent does not seek to argue that the rule of specialty will not be observed in the event to surrender, but rather that he will not be able to invoke same due to the vagueness of the information already referred to.
>
> 3. In addition to being unable to avail of the rule of specialty the respondent will similarly be unable to avail of the prohibition on further prosecution in other member states, in particular the United Kingdom, in the event that he is surrendered for prosecution to the Kingdom of Spain. The same considerations as recited at 2 above will apply *mutatis mutandis* and the *ne bis in idem* rule.
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> 4. The offence in respect of which surrender is sought is an extra-territorial offence vis-à-vis the issuing state. The surrender of the respondent is precluded by reason of the provisions of Section 44 of the European Arrest Warrant Act, 2003."

2. Uncontroversial Section 16 Issues
2.1 The Court has received an affidavit of Sergeant. James Kirwan sworn on the 27th May, 2011, and has also received and scrutinised a copy of the European arrest warrant in this case. Moreover the Court has also inspected the original European arrest warrant which is on the Court's file and which bears this Court's endorsement. The Court is satisfied following its consideration of this evidence and documentation that:

> (a) the European arrest warrant was endorsed for execution in this State in accordance with s.13 of the Act of 2003;
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> (b) the warrant was duly executed;
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> (c) the person who has been brought before the Court is the person in respect of whom the European arrest warrant was issued;

(d) the warrant is a prosecution type warrant and the respondent is wanted in the Kingdom of Spain for prosecution in respect of two offences particularised in Part E of the warrant;

(e) no question arises of the respondent having been tried *in absentia* (as the case is a prosecution case), and accordingly it is not a case in which the court would require an undertaking under s. 45 of the Act of 2003;

(f) Subject to dealing with the specific objection raised in relation to an alleged lack of specificity, the Court is otherwise satisfied that the European arrest warrant in this case is in the correct form.

2.2 In addition the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) Order 2004 (S.I. 4/2004) (hereinafter the 2004 Designation Order), and duly notes that by a combination of s. 3(1) of the Act of 2003, and Article 2 of, and the Schedule to, the 2004 Designation Order, the Kingdom of Spain is designated for the purposes of the Act of 2003 as being a state that has under its national law given effect to Council Framework Decision 2002/584/J.H.A. of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States, O.J. L190/1 18.7.2002 (hereinafter referred to as "the Framework Decision")..

3. Correspondence and Minimum Gravity
3.1 This case concerns a conspiracy to conduct drug trafficking and acts done in furtherance of that conspiracy and the warrant relates to two offences described as being endangerment of public health as set forth in articles 368 and 369 of the Spanish Penal Code. Detailed particulars of the circumstances of the alleged offences are set out at part E of the warrant and they can broadly be characterised as concerning (a) the respondent's alleged involvement in a criminal gang organised and based in Spain and (b) his alleged involvement as a member of that gang in the trafficking of drugs from continental Europe (consigned from a suspected point, or points, of origin in Belgium and/or the Netherlands) through the port of Calais, France, to the United Kingdom where the ultimate intended destination was Scotland. The issuing judicial authority has sought by the ticking of the boxes relating to "participation in a criminal organisation" and "illicit trafficking in narcotic drugs and psychotropic substances", respectively, in Part E.I. of the warrant to invoke paragraph 2 of Article 2 of the Framework Decision. Moreover, the boxes ticked both apply to each of the two offences. Accordingly, providing the requirements of s.38(1)(b) of the Act of 2003 with respect to minimum gravity are met with respect to each offence, the Court is not required to concern itself with correspondence, and correspondence does not require to be demonstrated.

3.2 In so far as minimum gravity is concerned, s.38(1)(b) of the Act of 2003 requires that *"under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than 3 years."* In the present case the issuing judicial authority has answered the question in Part C.1 of the warrant concerning what is the maximum length of the custodial sentence or detention order which might be imposed for the offence(s) in a somewhat unusual way. The answer recites in full articles 368 and 369 of the Spanish Penal Code. The terms of article 368 make it clear that the penalties are either three to nine years imprisonment plus a fine of three times the value of the drug, if the substances or products concerned cause serious harm to health, or one to three years imprisonment plus a fine of twice the value of the drug otherwise. However, article 369 provides for increased penalties of up to thirteen and a half years plus a fine of up to four times the value of the drugs where certain aggravating circumstances, listed in the article, are proven to exist. It is clear from the terms of the warrant read as a whole that the Spanish prosecuting authorities are relying on both articles 368 and 369 so that the maximum length of the custodial sentence or detention order which might be imposed for the offences in question is thirteen and a half years. However, even if the lowest potential range of custodial penalties was applicable, i.e. one to three years imprisonment, it would still meet the requirements of s.38(1)(b). Accordingly, the statutory requirements as to minimum gravity are satisfied on any view of the matter.

1. The Offences Particularised in Part E of the European Arrest Warrant.
4.1 In circumstances where the warrant is challenged as being invalid for lack of specificity and particularity in relation to the offences alleged to have been committed by the respondent, and as containing large amounts of extraneous detail, it is necessary to set out precisely what particulars are in fact given in relation to the offences in question.

4.2 The following information (with formatting and emphasis preserved) appears under the heading *"Description of the circumstances in which the offence(s) was (were) committed, including the time, place and degree of participation in the offence(s) by the requested person"* in Part E of the warrant:

> "From the result of the preliminary investigations carried out it can be inferred that on Thursday 16th October 2008, members of the SCDA -Scottish Crime and Drugs Agency contacted me and advised me that an important amount of drugs was on its way from the United Kingdom. As supporting evidence, I received information regarding a Spanish telephone surveillance, which informed me that the lorry transporting the drugs had planned to return to the United Kingdom on 22nd of October 2008 and that it was believed that the person who had organised the drug transport lived in Ireland.
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> As a possible name of the organiser of the drug transport, the SCDA named Michael Connolly.
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> As a result of the investigations, I waited at the piers of Dover on Wednesday 22nd of October.
>
> At 10:25 p.m. I saw a black Ford Focus, with plate number NG0FSX driving around the piers. Members of the Revenue Custom Police stopped and searched the vehicle. This was the information seized:
>
> The driver of the vehicle was the Irish citizen:
>
> ***Name:*** Michael Martin Connolly
>
> ***Date of birth:*** February 19th 1966, in the UK
>
> ***Irish passport:*** PA0193691
>
> ***Address:*** Doon East Roscahill; Country Galway (sic),
>
> Republic of Ireland.
>
> He was questioned by the officer Stephens, the interrogation was put on record. CONNELLY (sic)stated that he had been travelling for three days and that he spent one night in Holland, another night in Belgium and one night sleeping in his car.

He furthermore stated that he was on a business trip in order to "take a look". He said he was the owner of a food and drink shop.

Later, he stated that he was Irish and that the night in question he was on his way back to Ireland. He had taken a flight from Ireland to the United Kingdom (departure on the 19th) through Luton airport and that he had rented the before-mentioned Ford Focus. He showed the vehicle's rental papers to the Police officer. He was asked why he had rented the car and he answered that his own vehicle was out of order. He was asked to produce the receipt of the places he had stayed at and he showed a receipt of a hotel called Goleen Tulip (sic) at Amsterdam, dated on 20th of October 2008 and a card for the Hotel Iris in Belgium.

Officer Twyman found a laptop bag inside the vehicle. Inside, the Police found a telephone bill issued to the name of:

Doon Stores Ltd Connolly Shop

Lettermullen

Galway County

Republic of Ireland

The Bill was dated on 11th August 2008 and showed account number 63261200, which the officer put on the record. The telephone provider and the telephone number were not included. The investigations carried out in the company P&O show that CONNOLLY had booked a ticket, the departure date of which could be changed to 17th of October 2008, and for which he paid 182£. He stated that he intended to make a short holiday trip and gave the following telephone number: 00353 87 125 9217 (Irish number). He paid for the booking with credit card number 4539 2585 0279 6903.

He said that he would travel on 19th of October 2008, which he did departing from Dover at 5:30 p.m. by the ferry Pride of Calais. The return was scheduled for 22nd of October at 4:10 p.m. (French time) by the ferry Pride of Calais. CONNOLLY did not check in for this trip. He would check in later and travelled to Dover on the ferry Pride of Burgundy, arriving at 10:25 p.m. (UK time).

Investigations on P&O are being carried out in order to confirm this.

This is the address of the hotels mentioned:

Golden Tulip

Groenlandsekade 1.

3645 BA Vinkeveen

Telephone: + 31 294 29 30 66

This invoice is dated on 20th of October and shows that CONNOLLY stayed at room number 125. The date of his arrival was 19th of October and checked out on 20th of October. He paid 125.50 £ for the housing.

He didn't have a bill for his housing at the Hotel Iris, but he did have a card with the following information:

Hotel Iris

Duinkerkelaan 41

8660 De Panne

Telephone: 058/ 41 51 41 – 058/ 42 07 42

The questioning of CONNOLLY ended at 11:35 p.m., whereupon he was released.

The SOCA officers were not able to visually link CONNOLLY with the lorry driver Gerard MOONEY.

At 03:02 a.m., on Thursday 23rd of October 2008, the Police observed how a heavy vehicle, with Irish plate number 03C3815, drove to Oxford services on A40 at Oxfordshire. The vehicle in question was an articulated lorry with a trailer with 12 m long awnings signed BEGLEY TRANSPORT.

At 03:1 3 a.m., the lorry driver, later identified as Gerard MOONEY, was seen at a gas station using a cash dispenser. It has to be stressed out that MOONEY wasn't identified as the lorry driver until he was arrested.

At 03:36 a.m., the police observed that the heavy vehicle at Oxford Services drove off and that it stopped on the hard shoulder of A318 at 03:38 a.m. It left the hard shoulder and took A40 direction Oxford. Afterwards, it took the motorway M40, where the lorry was stopped at my request by the police officers of the Thames Valley Police. It was then the police officers confirmed that the lorry driver was:

Name: Gerard Mooney

Date of birth: 3rd of August 1961 in Dublin

Irish passport: PB7709346

Address: Ballyconlough, Headford, Galway County, Republic of Ireland

MOONEY was taken to the police station in Oxford and was arrested with custodial number 43BA/7048/08. He is currently

under the responsibility of the SOCA officers.

The heavy vehicle with plate number 03C3815 was searched and approximately 40 kgs of different kinds of drugs were found inside a batch of "base coating", a product used for udder cleaning. The drugs are currently being analysed. The results gained up to now show that the product is mainly amphetamine sulphate, with a small amount of cannabis (skunk (a cannabis hybrid)). At the time of this report, no cocaine was found, although the substances are still being analysed.

When arrested, MOONEY was carrying along with him two laptop computers. We still ignore the telephone numbers. Nevertheless, they will be handed over on 27th of October in order to be analysed. It is expected that the investigations will show a small list of contact people and a list of last outgoing calls.

MOONEY will probably be formally accused today.

The investigations carried out at the company P&O ferries show that MOONEY and the heavy vehicle drove from Dover to Calais on the ferry Pride of Burgundy at 01:55 p.m. on 19th of October 2008. The same day as CONNOLLY. He returned on the ferry Pride of Dover at 10:35 p.m. (French time) on 22nd of October 2008. This was the next ferry that departed after the Pride of Burgundy, which CONNOLLY took.

The investigations continue.

FIRST: This court issues on 23rd of September 2009 an indictment regarding the following facts: On 22.10.08, at about 03: 56 a.m., an articulated lorry with Irish plate number 03C3815 was stopped at M40 at Oxfordshire in the United Kingdom, which was carrying, hidden among udder cleaning products, 65.8 kgs of amphetamine sulphate -- speed -- in 29 bags. Once dry, the drugs confiscated had a weight of impure amphetamine (with a purity of 7 and 18%), which equals 4.99 kgs of 100% pure drug. The value on the illegal market amounts to 806,662.40€ wholesale price and to 1,742,869.224 if sold in doses. Another bag contained two packages of 1.98 kgs of hashish with a value on the illegal market of 1591.92€ wholesale price and 6454.80 retail price. This was the reason for MOONEY'S arrest, of age, British citizen who was prosecuted for these acts. He pronounced himself guilty of the charges on 11th of February 2008 and was sentenced by virtue of an enforceable judgement passed by the Crown Prosecution to an imprisonment term of 3 years.

The black Ford Focus with plate number NG08FSX was intended to act as a "surveillance vehicle". That was driven by MICHAEL MARTIN CONNOLLY, British citizen, of age, with no previous criminal records in Spain, for whom an arrest warrant has been issued. He was in charge of the surveillance and alert in case of police presence in order to keep the lorry driver informed, who managed to escape temporarily.

This drug was provided to the group which will be mentioned later by JOHN EVANS, British citizen, of age, without previous criminal records in Spain, for whom an arrest warrant has been issued, and by another person, who hasn't been identified yet known as BIG RON. BIG RON transferred the drug in Belgium and was intended for distribution in the UK by the organisation led by RONALD O'DEA.

This shipping, which was organised at a previous meeting held in Marbella (Málaga) on 16.10.2008 at JAMES MCDONALD'S (a.k.a. JIM, of age, British citizen, without previous criminal records in Spain, held in custody in relation to this case since 05.11.08) place under the supervision and direction of RONALD O'DEA a.k.a. RONALD or RONNIE, of age, British citizen, without previous criminal records in Spain, held in custody since 05.11.08, was supported by STEPHEN DENNIS BROWN'S (a.k.a STEVE) cooperation, management and financing, of age, British citizen, without previous criminal records in Spain, held in custody since 05.11.08, who uses as second identity the name of WAYNE SCOTT EATON, who was permanently in phone contact (Portuguese telephone number 35191560 9736) with MICHAEL MARTIN CONNOLLY, who acted as the lorry's surveillance vehicle and with JOHN EVANS (British telephone number 351912479081), his provider, and who used the British telephone number 447531703527. He was in charge of financing the initial costs of the group members and was the principal manager of the illegal proceeds of previous successful drug operations. IAN ROBERT DONALDSON was up to date of the operation's details.

RONALD users third parties who, conscious of the illegal operations in which he is involved, offer him coverage and infrastructure, laundering thus part of the money by means of services, tickets, cars, and expenses in general. BRIAN SIDNEY RAWLINGS, of age, British citizen, without previous criminal records, held in custody from 05.11.08 until 07.11.08, acts as a messenger, lorry and trailer driver, gardener, caretaker and carrier of RONALD, IAN and JIM, who are in charge of different activities (paying additionally the flights of the group members, and being in charge of the vehicles and mansions) and other bureaucratic formalities) channels the information and helps by transporting vehicles and trailers. DEBORAH TAMARA BLEARMOUTH a.k.a. DEBBIE, of age, British citizen, without previous criminal records in Spain, held in custody from 05.11.08 until 06.11.08, clerk at the agency Flight Centre SA, provides the tickets to RONALD; JIM; JAMIE who pays RONALD and who provides "coverage" invoices whenever needed.

SECOND: IAN ROBERT DONALDSON, of age, British citizen, without previous criminal records, held in custody since 26.06.09, knowing that JAMES MC DONALD a.k.a. JIM, RONALD O'DEA a.k.a. RONALD or RONNIE and STEPHEN DENNIS BROWN a.k.a. STEVE were involved in drug trafficking, was in charge of the logistics and coverage. He was furthermore in charge of preparing, financing and organising the material infrastructure on British and Spanish territory through the shell companies "Ians sport cars" on the Canary Islands and "IRD Services LTD" in Great Britain for the drug operations, purchasing luxury cars with money exclusively stemming from drug trafficking activities and transferring huge amounts of the proceeds of crime using cash in the payments. On the other side, they were able to purchase different properties with the proceeds of crime. In these operations, several front men (Vg.: Colin Wallace, Francisco J Tristán Osta, Joseph Lindsay, Joseph Campbell and Mary Croal Henry), like e.g. the 50,000£ hidden inside their clothing and shoes that were seized (f. 131) at 04:00 on 22.09.08 at the airport at Glasgow on the flight Globespan GSM111 destination Málaga and like the money with which he financed the seized drug in Oxfordshire at the beginning of November.

This is how JAMES MCDONALD a.k.a JIM, RONALD O'DEA a.k.a. RONALD or RONNIE and STEPHEN DENNIS BROWN a.k.a. STEVE, operate individually, in order to give a legal appearance to the illegally obtained money, disguising the true origin of the money used to purchase properties, which actually stem from drug trafficking. According to the investigations carried out, I attach a list of the properties acquired with the proceeds of drug trafficking (which proves that they do not belong to the front men):

A. PHYSICAL PERSONS

RONALD O'DEA with national identification number (NIE) X - 0186 5175 – J

Born in Glasgow (United Kingdom) on 03/09/1966, son of Frank and Lilian, passport number 053414W.

STEPHEN DENIS BROWN with national identification number (NIE) X - 539 8404-M

Born in London (United Kingdom), on 20.10.1966, son of Dennis and Edith.

JAMES MCDONALD with national identification number x - 0366 9461-H

Born in Glasgow (United Kingdom) on 05. 07.1949.

IAN ROBERT DONALDSON with national identification number x - 412 0094-H

Born in Glasgow (United Kingdom) on 30.09.1979, son of Andrew and Elizabeth, addressed, according to the NIE at Urbanizacion Mareverde edificio estrella 14 1, in Playa de las Américas de Santa Cruz de Tenerife.

COMPANIES TO WHICH HE IS LINKED

- Registered as sole director of Ian Sports Car SL with company registration number CIF B38803326.

B. BODIES CORPORATE

Ian Sports Car SL with CIF B38803326

1. Business purpose

Sale, purchase, acquisition, disposal, lease and operating of real estate deeds, like e.g. land and urban properties, hotels, buildings, houses, bungalows.

2. Registered office: C/Bajo 2, Parque de la Reina de Arona, Santa Cruz de Tenerife.

3. Corporate capital: Three thousand one hundred Euro (3,100€)

4. Start-up: 10.01.2005

5. Corporate bodies: SOLE DIRECTOR Ian Robert Donaldson. Attorney-in-fact: Rafu Motiram Dayanani

THIRD: When STEPHEN DENNIS BROWN was arrested at 12, Calle Severo Ochoa in Marbella, he produced as identification document a fake passport 461260145 issued to the name of WAYNE SCOTT EATON. The keys to a Ford Focus with plate number 6548DGM, rented at a car rental company called Holiday Car Hire to this name (page 312, 349). This individual's real name is STEPHEN DENNIS BROWN, whose real identification documents were found during the entry and search of JAMES MCDONALD'S place at house number 9 at the Urbanización La Quinta Hills, in Marbella (page 336).

FOURTH: Once proceedings had been instituted, IAN ROBERT DONALDSON, being fully advised of these proceedings, after being released by the UK government in order to discuss the extradition to Spain, held countless meetings with JOSEPH CAMPBELL, of age, British citizen, and without previous criminal records, on pre-trial release and MARY CROAL HENDRY, who also uses the particulars MARY DURKIN HENDRY, of age, British citizen, without previous criminal records in Spain, released. The goal was to produce false documentation in order to give the impression that the illegal proceeds that the criminal organisation and DONALDSON stemmed from a non-existent commercial activity of the company Scruffy Murphy's and the nightclub Fibber Mcgee, both located at the mall Puerto Rico de Gran Canaria, part of which (page 2907 and following) was found during a search that the British authorities found at DONALDSON'S domicile at Dumbarton (United Kingdom)

WITH REGARDS TO MICHAEL MARTIN CONNOLLY, IT HAS TO BE NOTED THAT HE ACTS AS THE DRIVER OF THE SECURITY VEHICLE AND THAT THE CRIME HAS BEEN INTELLECTUALLY ORGANISED IN SPAIN, TAKING INTO ACCOUNT THAT THIS CRIMINAL ORGANISATION'S CORE EXECUTES ITS OPERATIONS FROM MARBELLA, SPAIN, ESTABLISHING THE TRANSPORTATION ROUTES OF THE DRUGS, THE SHIPPING DATE AND THE PLACE WHERE THE ORGANISATION BUYS ITS PROPERTY THAT WOULD GIVE THEIR ACTS A LEGAL APPEARANCE"

5. Additional Information:

5.1 Some additional information was provided by the issuing judicial authority by letter dated the 3rd March, 2010, which enclosed in turn a copy of an official note from the Spanish Ministry of Home Affairs, Dirección General de la Policía y de la Guardia Civil also dated the 3rd March ,2010, and which was in the following terms:

"This is information regarding pre-trial proceedings ***Diligencias Previas 250/08*** that are conducted by *Juzgado Central de Instrucción* number six of the *Audiencia Nacional*. Within these proceedings approximately SEVENTY KILOGRAMS (70Kg) of "speed" were seized and Ronald O'DEA and others were arrested. The following information on the arrested individual ***Michael Martin CONOLLY*** is provided following a request issued by the London Prosecution Service.

Monitoring of telephone conversations as well as ongoing investigations showed that the narcotic substance, to be precise amphetamine sulphate, was purchased by the organisation in Belgium. The drug was transported to Scotland in the lorry, and the drug was hidden inside of cans.

It is important to stress that the only person with whom Michael Martin CONOLLY got in touch in Spain was STEVE, for that purpose he used the English telephone number **447531703527**. The operation centre of the organisation which is investigated and which was disrupted in the Spanish town Málaga, to be precise in Marbella, where the important members of the organisation led by O'DEA were.

Michael Conolly's involvement in the investigated and failed operation was detected as a consequence of monitoring that was authorised by Your Honour, mainly as of 17th October 2009. On the 17th of October 2009, exactly one day after a meeting with JIM and O'DEA, STEVE started to get in touch with a third party we will refer to in the first place as the haulage contractor and who was later identified as Conolly and who used the English telephone number 447531703527. This communication clearly showed that STEVE was coordinating the transport of an indeterminate amount of drugs.

CONOLLY was driving in the surveillance vehicle in order to detect possible police controls which might put in danger the operation and in order to warn the lorry driver. On the 22nd of October CONOLLY embarked on the ferry prior to the ferry which had to transport the narcotic substance. MOONEY embarked on the second ferry.

The vessels on which both CONOLLY and MOONEY embarked were not searched. The vessels were regular means of transportation for the Calais (France) to Dover (United Kingdom) crossing.

As of the beginning of the investigation into the mentioned organisation in July 2008 until it's disruption in October 2008 there is no evidence of Michael Martin Connolly having travelled to Spain.

Thus there is nothing that points to CONOLLY having carried out acts of cooperation on Spanish territory, although there is no doubt that he was part of the organisation for he was one more link of the criminal group which tried to operate from Spain in order to make difficult any police activities. For that purpose the criminal group took advantage of the English community which has settled in the south of the peninsula.

With reference to the Calais Dover crossing: CONOLLY embarked on the ferry Pride of Burgundy and arrived at the destination on the 22nd of October at 10:15 p.m.. MOONYE *(sic)* who drove the trailer in which the narcotic merchandise had been hidden embarked on the following ferry on the 22nd of October, to be precise the ferry Pride of Dover which left at 10:35 p.m.

With reference to the origin of the narcotic substance that was transported by the organisation investigation suggests that the merchandise was supplied in the Netherlands, to be precise Belgium, and the organisation's intention was to transport the merchandise to the United Kingdom. Spain was the operation centre since both the organisation and coordination of the failed operation were carried out in Spain."

6. The objection based on alleged non-compliance with s. 11A of the Act of 2003, alleged lack of specificity and particularity and too much extraneous detail

6.1 The first thing to be said is that the Court agrees with Messrs Farrell and Hanrahan who opine in their book entitled The European Arrest Warrant in Ireland, (Clarus Press, 2011) at para 2-25 that:

> " …the purpose of the standard form of the warrant in the Framework Decision is not necessarily to provide the respondent with information in relation to the prosecution against him in the requesting state but rather to provide him with sufficient information to deal with the proceedings under the European Arrest Warrant Act of 2003. Any complaint to the effect that the warrant contains inadequate particulars must be considered in that context."

6.2 That having been said, I believe it is fair to characterise the manner in which particulars have been set out in this case as idiosyncratic. Furthermore, although the Court hesitates to characterise it thus, the approach adopted was also somewhat lazy. What the author of the warrant appears to have done is to simply cut and paste, or otherwise extract in an unedited fashion, portions of a police investigation file. That this is what has been done is clear from the reference to things like: *"As a result of the investigations, I waited at the piers of Dover on Wednesday 22nd of October"* and *"Mooney will probably be formally accused today"*.

6.3 S.11 of the Act of 2003 (as amended) governs the form and contents of a European Arrest Warrant and in that regard reflects Article 8 of the Framework Decision. Subs.11(1A) of the Act of 2003 (as inserted by s.72 of the Criminal Justice (Terrorist Offences) Act 2005 and as amended by s.7 of the Criminal Justice (Miscellaneous Provisions) Act, 2009) provides:

> "(1A) Subject to subsection (2A), a European arrest warrant shall specify—
>
> (a) the name and the nationality of the person in respect of whom it is issued,
>
> (b) the name of the judicial authority that issued the European arrest warrant, and the address of its principal office,
>
> (c) the telephone number, fax number and email address (if any) of that judicial authority,
>
> (d) the offence to which the European arrest warrant relates, including the nature and classification under the law of the issuing state of the offence concerned,
>
> (e) that a conviction, sentence or detention order is immediately enforceable against the person, or that a warrant for his or her arrest, or other order of a judicial authority in the issuing state having the same effect, has been issued in respect of one of the offences to which the European arrest warrant relates,
>
> (f) the circumstances in which the offence was committed or is alleged to have been committed, including the time and place of its commission or alleged commission, and the degree of involvement or alleged degree of involvement of the person in the commission of the offence, and
>
> (g) (i) the penalties to which that person would, if convicted of the offence specified in the European arrest warrant, be liable,
>
> (ii) where that person has been convicted of the offence specified in the European arrest warrant but has not yet been sentenced, the penalties to which he or she is liable in respect of the offence, or
>
> (iii) where that person has been convicted of the offence specified in the European arrest warrant and a sentence has been imposed in respect thereof, the penalties of which that sentence consists."

6.4 For completeness, subs (2A) goes on to provide:

> "If any of the information to which subsection (1A) (inserted by section 72*(a)* of the Criminal Justice (Terrorist Offences) Act 2005) refers is not specified in the European arrest warrant, it may be specified in a separate document."

6.5 In so far as they have been articulated in argument and submissions, the respondents complaints about alleged non-compliance with s. 11 appear to be, more specifically, alleged non-compliance with s.11(1A)(f). As set out above, s.11(A)(f) requires, *inter alia*, the European arrest warrant to specify "the degree of involvement or alleged degree of involvement of the person" concerned. This reflects Article 8(1)(e) of the Framework Decision which, using slightly different language, speaks of "the degree of participation in the offence by the requested person."

6.6 *In Minister for Justice, Equality and Law Reform v. Stafford* [2009] IESC 83 (Unreported, Supreme Court, 17th December 2009) Denham J., as she then was, giving judgment on behalf of the Supreme Court (*nem diss*), considered what is required by the Act of 2003 in that regard and said:

> "15. It is required that there be a description of the acts upon which the warrant is based. This is similar to the situation under the Extradition Act 1965, as amended, and indeed classically in extradition law. A description of the acts, or the acts alleged, are the facts upon which the executing judicial authority may apply the law. By describing the acts the facts are before the court and so a decision may be made as to whether there is, for example, double criminality."

6.7 Further, in *Minister for Justice, Equality and Law Reform v. Desjatnikovs* [2009] 1 I.R. 618, Denham J., again giving judgment on behalf of the Supreme Court (*nem diss*), stated at p. 632:-

> "The fact that there is a precise description of the facts of the case is important, even though the issue of double criminality is not required to be considered. It is important that there be a good description of the facts. An arrested person is entitled to be informed of the reasons for his arrest and of any charge against him in plain language which he can understand. Also, in view of the specialty rule, the facts upon which a warrant is based should be clearly stated."

6.8 Dealing specifically with what is required to be stated in terms of participation or involvement, Denham J. stated further in the *Stafford* case (at paras. 16 -20):

"Participation

> 16. The next issue is the submission that the information is insufficient to show that the appellant "participated".
>
> 17. The Framework Decision, in Article 8, in describing the content and form of the European arrest warrant states in (1) (e) "… and degree of participation in the offence by the requested person". The European arrest warrant form in the annex to the Framework Decision states: "… and degree of participation in the offence(s) by the requested person". The Act of 2003, as amended by s.72 of the Criminal Justice (Terrorist Offences) Act 2005, requires in s.11(1A)(f) "… and the degree of involvement or alleged degree of involvement of the person in the commission of the offence…". It is these words which fall to be considered in this case.
>
> 18. While the Framework Decision uses the word "participation" and the Act of 2003 uses the word "involvement", I am satisfied that no issue arises on the use of different terms. Both mean to take part in, to participate in, to be involved in. There is no significance in the use of the different words.
>
> 19. The question which arises for determination is whether the acts alleged on the warrant show a link with the requested person. It is not necessary to show a *prima facie* case. It is not necessary to show a "strong" case. The issue of guilt or innocence is for the jury in the requesting state.
>
> 20. This case is one of circumstantial evidence. There is no reason why an accusation of a crime based upon circumstantial evidence could not be the basis for a European arrest warrant. It is necessary to look at the facts alleged in each warrant."

6.9 This Court has itself stated in *Minister for Justice and Equality v. Cahill* [2012] IEHC 315 (Unreported, High Court, Edwards J., 19th July, 2012) (at para. 18) that:

> "The … objective ……. is to enable the respondent to know precisely for what it is that his surrender is sought. A respondent is entitled to challenge his proposed surrender and in order to do so needs to have basic information about the offences to which the warrant relates. Among the issues that might be raised by a respondent are objections based upon the rule of specialty, the *ne bis in idem* principle and extra-territoriality to name but some. In order to evaluate his position, and determine whether or not he is in a position to put forward an objection that might legitimately be open to him to raise, he (and also his legal advisor in the event he is represented) needs to know, in respect of each offence to which the warrant relates, in what circumstances it is said the offence was committed, including the time, place, and degree of participation in the offence by the requested person."

Alleged vagueness and lack of specificity

6.10 As far as this Court is concerned the European arrest warrant in this case provides a sufficient description of the circumstances in which the offences were committed including the time, place and degree of participation in the offences by the requested person, notwithstanding the idiosyncratic way in which the relevant particulars are set out. It is clear that the respondent is alleged to have been a member of an organised criminal gang that was involved in a conspiracy, hatched and organised in Spain and administered from Spain, to import drugs from continental Europe to the United Kingdom. It is further alleged between the 19th October, 2008, and the 23rd October, 2008, in furtherance of that conspiracy, the respondent personally travelled by air from Ireland to Luton Airport in the United Kingdom where he hired a car. It is alleged that he then drove to Dover and took a car ferry to Calais in France. From there he is believed to have travelled to Belgium and Holland before returning to Calais on the evening of the 22nd October, 2008. The alleged purpose of his trip was to rendezvous on the continent with, and then on the return journey to the U.K. to proceed in advance of an articulated lorry, driven by a co-conspirator, and aboard which a large quantity (65.8kgs) of amphetamine sulphate (speed) and a smaller quantity of hashish was concealed, for surveillance purposes i.e., to act as look-out and thereby assist his co-conspirators in avoiding police and/or customs interception. The respondent is alleged to have returned to the U.K. aboard the MV Pride of Burgandy car ferry, arriving at Dover at 10.25p.m. (U.K. time) on the 22nd October, 2008, while still acting in the said surveillance role. Later on

the same evening the articulated lorry containing the drugs is alleged to have also returned to the U.K. from Calais to Dover, on the ferry Pride of Dover which departed Calais at 10.35p.m., and which was the next ferry sailing to Dover from Calais following the ferry sailing on which the respondent is alleged to have travelled. The articulated lorry was then intercepted by Thames Valley Police in the early hours of the 23rd October, 2008, heading in the direction of Oxford on the M40. It is alleged that the drugs cache was discovered when the vehicle was searched after it was stopped.

6.11 While it is clear from the particulars furnished that the case against the respondent is based in large measure upon circumstantial evidence, it is clear from the judgment of Denham J. in the *Stafford* case, and indeed this Court's recent judgment in *Minister for Justice and Equality v. Shannon* [2012] IEHC 91 (Unreported, Edwards J., 15th February, 2012) applying *Stafford*, that there is nothing wrong with, or even unusual, about that.

However, the Court is not concerned with sufficiency of evidence. The critical issue is whether the respondent has sufficient information to enable him to deal with the proceedings under the European Arrest Warrant Act of 2003. The Court is satisfied that the respondent has sufficient information in the particular circumstances of this case. In the circumstances the Court is satisfied that the objections based on alleged vagueness, and lack of particularity or specificity are not made out.

Specialty

6.12 In so far as the respondent further complains that, if surrendered, he will not be able to avail of the rule of specialty by reason of the unduly broad and vague nature of the allegations against him, the Court does not agree. It will be recalled that in his points of objection the respondent pleaded "For the sake of clarity the respondent does not seek to argue that the rule of specialty will not be observed in the event of surrender, but rather that he will not be able to invoke same due to the vagueness of the information already referred to." The allegations are not broad or vague. On the contrary they are quite specific, albeit contained with a large amount of background material set out in the manner that I have earlier described. While the Court has been somewhat critical of the way in which the narrative has been constructed, the Court does not consider that the background material supplied was unhelpful. While some of it might perhaps be characterised as unnecessary detail in terms of satisfying what is required by s.11 (1A)(f) of the Act of 2003, it is by no means extraneous detail as has been suggested. It describes in considerable detail the conspiracy in which the respondent is alleged to have been involved, and the acts done in furtherance of that conspiracy to which the respondent was a party. It is certainly not true to say, as the respondent contends, that by supplying more detail than was perhaps strictly necessary the issuing state has de facto rendered the rule of specialty ineffective as regards the respondent.

6.13 The Court is satisfied that in all the circumstances of this case it is not required to refuse to surrender the respondent under s. 22, 23 or 24 (inserted by ss. 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005),of the Act of 2003.

Ne Bis in Idem

6.14 In so far as *ne bis in idem* is concerned there is no basis for believing that the respondent has been tried for, and that a final judgment has been rendered, by any court, in any country, in respect of any relevant, or potentially relevant, offence. In those circumstances the question of *ne bis in idem* simply does not arise at the present time.

6.15 However, there is a complaint to the effect that the warrant is so vague as to preclude the respondent, in the event that he is surrendered to the Kingdom of Spain, from asserting the *ne bis in idem* rule before the courts of that state, or any other state. The respondent appears to be particularly apprehensive that, in the event of being surrendered to Spain, and of being tried there and receiving a final judgment in respect of a relevant offence or offences, he will not easily be able to invoke, or perhaps be able to invoke at all, the principle of *ne bis in idem* in the event of another member state attempting to prosecute him for an offence or offences consisting of the "same acts" as constituted the offences for which he was tried. (He seems to be particularly worried that the U.K. may attempt to do so.) In that regard, the Court has already expressed its conclusion that the allegations the subject matter of the European arrest warrant are neither broad nor vague. The matters alleged appear to me to be quite specific notwithstanding the unorthodox form of the narrative contained in the warrant, and readily comprehensible to any person or court potentially concerned with them.

6.16 Moreover, and quite apart from that, the judgment of the European Court of Justice in the case of *Mantello (Case 261/09)* 2010 E.C.R. I 11477 could be relied upon by the respondent. Article 3(2) of the Framework Decision gives force to the ne his in idem principle. In *Mantello*, the Court of Justice held that the concept of 'same acts' in Article 3(2) of the Framework Decision constitutes an autonomous concept of European Union law and that the executing judicial authority may rely on a statement by an issuing judicial authority that the offence alleged does not comprise the 'same acts' as an offence in respect of which there has been a final judgment. The Court of Justice held that the interpretation of 'same acts' for the purposes of Article 54 of the CISA (Schengen Agreement) is equally valid for the purposes of Article 3(2) of the Framework Decision. The term 'same acts' in Article 54 has been defined as *"the existence of a set of facts which are inextricably linked together and…. that that criterion applies irrespective of the legal classification given to those acts or the legal interest protected" Kretzinger* (Case 288/05) [2007] E.C.R. I 6441 (18th July 2007).

6.17 There are also a number of other relevant considerations in this context. It is to be presumed under s. 4A of the Act of 2003 that Spain, and any other member state that might possibly be interested in prosecuting the respondent, will act in accordance with the Framework Decision, and the European Convention on Human Rights. Further, the circumstances in which Spain could prosecute the respondent for any offence, committed prior to surrender, other than the offences the subject of the warrant, are restricted, and are as set out in Article 27(2) of the Framework Decision. Article 28 of the Framework Decision also restricts the potential for onward surrender or extradition. In the event that the issuing state wished to prosecute the respondent for an offence which had been committed prior to the surrender of the respondent, or surrender or extradite him to another state, the consent of this Court is required.

6.18 In all the circumstances, the Court considers that respondent's objection based upon a theoretical or hypothetically conceived inability to assert *ne bis in idem*, in the event that he should need to do so, is not made out and must be rejected as being unfounded. The Court therefore refuses to uphold this objection.

7. The objection based on extra-territoriality.

7.1 The respondent contends that the offence in respect of which surrender is sought is an extra-territorial offence *vis-a-vis* the issuing state, and that in the circumstances the surrender of the respondent is precluded by reason of the provisions of s. 44 of the Act of 2003. It is necessary in the circumstances to consider s. 44, and the Supreme Court's recent interpretation of that provision in *Minister for Justice, Equality and Law Reform v. Ian Bailey* [2012] IESC 16 (Unreported, Supreme Court, 1st March, 2012.).

7.2 Section 44 of the Act of 2003 provides:

> "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."

7.3 There are within s.44, as pointed out by Denham C.J. in her judgment in the *Bailey* case (at p.6), two specific conditions that must be satisfied. The first condition is that

> "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"

The second is that:-

> "…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"

7.4 With regard to the second condition, Denham C.J. states in her judgment in the *Bailey* case (at p.9, para 24):

> "It is helpful to read the third phrase before the second, in construing the meaning of the section. This would thus be:
>
> > "and the act or omission of which the offence consists does not, constitute an offence under the law of the State, by virtue of having been committed in a place other than the State".
>
> These are clear words and so may be considered and applied literally. The section prohibits the surrender of a person where the act of which the offence consists does not constitute an offence in Ireland by virtue of having been committed, i.e. because it was committed, in a place other than Ireland."

7.5 The learned Chief Justice added at (at p.16, paras 44 and 45):

> "44. By section 44 of the Act of 2003, Ireland adapted into Irish law Article 4.7.b. of the Framework Decision, which itself had roots in the Convention on Extradition, 1957, Article 7. The systems of extradition following on the Convention on Extradition, 1957 were different, separate treaties were entered into between States. Today in Europe, pursuant to the Framework Decision, there is a new system, a system of surrender of persons between judicial authorities, based on mutual trust and confidence. However, s. 44, and Article 4.7.b., have roots in the system of reciprocity that existed under the earlier regime and this informs the construction of s. 44.
>
> 45. I construe s. 44 as enabling Ireland to surrender a person in respect of an offence alleged to have been committed outside the territory of the issuing State in circumstances where the Irish State would exercise extra-territorial jurisdiction in reciprocal circumstances."

7.6 It is uncontroversial that the first of the two s.44 conditions is satisfied in this case. The respondent is not alleged to have carried out any act whilst in Spain. However, it is clear from the facts alleged against the respondent that he is one of a number of persons accused of being involved in a criminal organisation which carried out the trafficking of drugs and which organisation is centred in Spain. It is specifically alleged within the warrant that the respondent's crime "has been intellectually organised in Spain" and that "this criminal organisation's core executes its operations from Marbella, Spain". Accordingly, the case is that the decisions regarding the trafficking of drugs were made in Spain.

7.7 For the purpose of considering whether the second of the two s. 44 conditions is satisfied, it is necessary to consider the offences charged, and more importantly, to examine the specific acts or omissions alleged and which it is said constitute the offences in question.

7.8 As previously stated, paragraph 2 of article 2 of the Framework Decision has been invoked by the issuing state. The issuing state has ticked the boxes relating to "participation in a criminal organisation" and "illicit trafficking in narcotic drugs and psychotropic substances". The underlying Spanish offences are offences contrary to Article 368 and 369 of the Spanish Criminal Code.

7.9 The Supreme Court has held in *Minister for Justice, Equality and Law Reform v. Ferenca* [2008] 4 I.R. 480 that paragraph 2 of article 2 of the Famework Decision does not refer to offences in any conceptual way but simply lists a number of offences by way of general name or label and it is exclusively for the issuing member state to determine what offences as defined by its law are offences to which the paragraph applies. Accordingly, looking at the general name or label attached to the offences within the Article 2.2 list is not particularly helpful for the purpose of precisely determining the act(s) or omission(s) of which the offences consist. It is a little more helpful to look at the required ingredients of the underlying domestic offences, namely offences contrary to Articles 368 and 369 of the Spanish Penal Code. The effect of Articles 368 and 369 of the Spanish Criminal Code is described within Part E of the European arrest warrant as follows:

> "Article 368 establishes that those who carry out acts of growing, elaborating or trafficking, or otherwise promote, favour or facilitate the illegal consumption of toxic drugs, narcotics or psychotropic substances, or who own them for those purposes, will be punished with prison terms of three to nine years and a fine of three times the value of the drug, if the substances or products cause serious harm to health; and with a prison term of one to three years and a fine of twice the value in the remaining cases.
>
> Article 369 of the Spanish Criminal Code establishes that prison terms higher in one degree than those pointed out in the previous article and a fine of four times the value will be imposed where:
>
> * The culprit is an authority, public servant, doctor, careworker, teacher or educator who acts in the exercise of his charge, profession or trade.
>
> * The culprit belongs to an organisation or association, even of temporary nature, the purpose of which is that of spreading those substances or products, even occasionally

* The culprit takes part in other organised criminal activities or activities whose execution is made easier by the commission of the offence.

* The deeds were carried out in premises open to the public, by people in charge of those premises or by their employees.

* The substances mentioned in the previous article are given to minors under eighteen years, mentally handicapped people or to people who are undergoing a rehabilitation treatment.

* The amount of the mentioned substances is of notorious importance.

* The mentioned substances are adulterated, manipulated or mixed with each other or with other substances, thereby increasing their possible harm to health.

* The conducts described in the previous article happen in educational institutions, in military centres or rehabilitation centres or in their vicinity.

* The culprit uses violence or shows or makes use of arms to commit the deed.

* The culprit introduces into or takes out illegally from the country the mentioned substances or products and helps to carry out those conducts."

7.10 It is clear from these provisions that no question of a gross or manifest error arises in terms of the ticking of the two boxes in question with Part E.I. of the European arrest warrant.

7.11 The Court has already summarised the underlying facts pleaded within Part E, at 6.10 above, and it is unnecessary to repeat them. The question for this Court is whether these acts or omissions of which the offences consist do not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State. In the Court's view this question must be answered in the affirmative in the particular circumstances of this case, and for the reasons set out below.

7.12 It was submitted by counsel for the applicant that the respondent could be prosecuted under the law of this State for the statutory inchoate offence of conspiracy to commit a serious offence contrary to s. 71 of the Criminal Justice Act 2006 (hereinafter the Act of 2006) as originally enacted. Before examining that proposition, the Court first gave consideration to whether or not the respondent could be prosecuted for some chaote offence because there is a convention in criminal law to the effect that a person should not be charged with the inchoate offence of conspiracy if it is possible to charge them with a choate offence. The position is that if the acts or omissions done in furtherance of the conspiracy, and which are themselves evidence of the conspiracy, were to be committed today he could be prosecuted instead for the choate offence of Participation in a Criminal Organisation, contrary to s. 72 of the Act of 2006 as substituted by s.6 of the Criminal Justice (Amendment) Act 2009 (hereinafter the Act of 2009). However; as the acts and omissions in question predate the substitution effected by the Act of 2009, the Irish Courts would not, in the circumstances of this case, have jurisdiction to try him for an offence under s. 72 of the Act of 2006 as it was initially enacted.

7.13 Returning then to whether the Irish Courts would, in the circumstances of this case, have jurisdiction to try the respondent for the statutory inchoate offence of conspiracy to commit a serious offence under s. 71 of the Act of 2006 as it was initially enacted, it is necessary to consider the relevant provision in some detail. S. 71 of the Act of 2006 as originally enacted provided:

"(1) Subject to subsections (2) and (3), a person who conspires, whether in the State or elsewhere, with one or more persons to do an act—

(a) in the State that constitutes a serious offence, or

(b) in a place outside the State that constitutes a serious offence under the law of that place and which would, if done in the State, constitute a serious offence,

is guilty of an offence irrespective of whether such act actually takes place or not.

(2) *Subsection (1)* applies to a conspiracy committed outside the State if—

(a) the offence, the subject of the conspiracy, was committed, or was intended to be committed, in the State or against a citizen of Ireland,

(b) the conspiracy is committed on board an Irish ship,

(c) the conspiracy is committed on an aircraft registered in the State, or

(d) the conspiracy is committed by an Irish citizen or a stateless person habitually resident in the State.

(3) *Subsection (1)* shall also apply to a conspiracy committed outside the State in circumstances other than those referred to in *subsection (2)*, but in that case the Director of Public Prosecutions may not take, or consent to the taking of, proceedings for an offence under subsection (1) except in accordance with *section 74 (3).*

(4) A person charged with an offence under this section is liable to be indicted, tried and punished as a principal offender.

(5) A stateless person who has his or her principal residence in the State for the 12 months immediately preceding the commission of a conspiracy is, for the purposes of *subsection (2)*, considered to be habitually resident in the State on the date of the commission of the conspiracy."

7.14 S. 74 of the Act of 2006 (as originally enacted) provided:

"(1) Proceedings for an offence under section 71 or 72 in relation to an act committed outside the State may be taken in any place in the State and the offence may for all incidental purposes be treated as having been committed in that place.

(2) Where a person is charged with an offence referred to in subsection (1), no further proceedings in the matter (other than any remand in custody or on bail) may be taken except by or with the consent of the Director of Public Prosecutions.

(3) The Director of Public Prosecutions may take, or consent to the taking of, further proceedings against a person for an offence in respect of an act to which subsection (1) of section 71 applies and that is committed outside the State in the circumstances referred to in subsection (3) of that section if satisfied—

(a) that—

(i) a request for a person's surrender for the purpose of trying him or her for an offence in respect of that act has been made under Part II of the Extradition Act 1965 by any country, and

(ii) the request has been finally refused (whether as a result of a decision of the court or otherwise),

or

(b) that—

(i) a European arrest warrant has been received from an issuing state for the purpose of bringing proceedings against the person for an offence in respect of that act, and

(ii) a final determination has been made that the European arrest warrant should not be endorsed for execution in the State under the European Arrest Warrant Act 2003 or that the person should not be surrendered to the issuing state concerned,

or

(c) that, because of the special circumstances (including, but not limited to, the likelihood of a refusal referred to in paragraph (a)(ii) or a determination referred to in paragraph (b)(ii)), it is expedient that proceedings be taken against the person for an offence under the law of the State in respect of the act.

(4) In this section "European arrest warrant" and "issuing state" have the meanings they have in section 2(1) of the European Arrest Warrant Act 2003".

7.15 It was argued by the respondent in relation to s.71 that it does not apply because its application to the circumstances of this case is excluded by virtue of the terms of s. 71(2) and (3).

7.16 In reply, counsel for the applicant argued that the case comes within s. 71(3) and that the fact that the Director of Public Prosecution "may not take, or consent to the taking of, proceedings for an offence under subsection (1) except in accordance with section 74 (3)" does not mean that s.71 (1) has no application, or that the Irish Courts do not have jurisdiction to try such a case. It was urged that the jurisdiction exists, albeit that the provisions of s.74 (3) may present a procedural obstacle to the actual commencement of proceedings in some cases.

7.17 In the Court's view it must uphold the respondent's view of how the jurisdiction conferred by s.71 of the Act of 2006 is to be regarded for the purposes of s.44 of the Act of 2003 when applied to the circumstances of this case. The object of s. 44 is to implement Article 4.7(b) of the Framework Decision. However, the applicant's argument amounts to this. In considering whether this State, if it were in the position of the requesting state, could exercise extra-territorial jurisdiction for a corresponding but hypothetical offence of conspiring to commit a serious offence (e.g., a drug trafficking offence, as in the case we are concerned with), it is sufficient to have regard only to the factual components of the offence and it is neither necessary nor legitimate to consider conditions pertaining under Irish law to the exercise of extra-territorial jurisdiction in relation to such an offence, e.g., those arising under s. 74(3). In this Court's view both the factual components of the offence and conditions pertaining under Irish law to the exercise of extra-territorial jurisdiction have to be taken into account.

7.18 The Court finds support for its views in the judgment of Fennelly J. in *Minister for Justice, Equality and Law Reform v. Bailey* [2012] IESC 16 (with whose analysis on the s.44 issue Murray J., and Hardiman J. expressed agreement). In the course of his judgment Fennelly J. said at p.145-148:

"85. ……Article 4.7(b) must mean that the issuing State has jurisdiction to prosecute the person sought even though the offence was committed outside its territory.

86. As a matter of Irish law, a person not a citizen of Ireland could not be prosecuted for the crime of murder committed outside Ireland. Adverting to the words of Article 4.7(b), it is not true that Ireland does not exercise extra-territorial jurisdiction in respect of the crime of murder. Equally, it would not be true to say, without qualification, that Ireland exercises extra-territorial jurisdiction over the crime of murder. The question, "does Ireland prosecute for murder committed outside its territory?" is not susceptible to a yes or no answer.

87. The extra-territorial laws of Ireland and France are the converse of each other. A too-literal interpretation of Article 4.7(b) leads, in my view, to an uneven, capricious and arbitrary result, well illustrated by the present case. The English-law concept of *corresponding circumstances* tends to a more consistent result. It obviously envisages more that the mere search for correspondence, which is, after all, provided for elsewhere in the Framework Decision.

88. I believe that a sensible and fair interpretation of Article 4.7(b) demands the recognition of a principle of reciprocity. Thus, where a State exercises the option, surrender will be prohibited where the executing State does not exercise

extraterritorial jurisdiction in respect of offences of the type specified in the warrant in the same circumstances. In the present case, the relevant circumstance is that the person whose surrender is sought is not an Irish citizen. Under Irish law, a person cannot be prosecuted outside the territory of the State unless he or she is an Irish citizen.

Section 44 interpreted in the light of Article 4.7(b)

89. For reasons I have already given, it is clear that section 44 must be interpreted, *so far as possible*, in the light of the relevant provision, here Article 4.7(b) of the framework decision.

90. The first part of section 44 sufficiently replicates the first part of paragraph (b) to make it clear that it was intended by the Oireachtas to implement that option. The offence was committed outside the territory of France.

91. It is true that the second part of the section does not use language which obviously corresponds to that paragraph. However, it does replicate two aspects of the second part of paragraph (b). Firstly, it concerns an offence committed *"in a place other than the State, "* which corresponds with *"offences…committed outside its territory… "* in Article 4.7(b). Secondly, it raises the question whether the offence *"does not……constitute an offence under the law of the State, "* also found in paragraph (b).

92. Perhaps the most problematical aspect of section 44 is to be found in the words requiring that "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." These are the words which led counsel for the Minister to argue that they refer to the actual offence committed in this case. I have already declined to accept this argument as incompatible with the terms of Article 4.7(b).

93. My view is that, in the light of paragraph 4(7)(b) these words can only refer to a corresponding but hypothetical offence of murder, committed outside Ireland, in which the question of Irish exercise of extra-territorial jurisdiction falls to be considered. The section relates to a hypothetical offence of murder. Thus, without doing any significant violence to the language of the section, the term, "does not," is necessarily a reference to what Irish law provides for in such a situation. Looking at it as a grammatical problem, the use of the indicative form, "does not," is equivalent to the conditional, "would not" and could, if necessary, be so read. However, that may not be necessary. Once the question is recognised as being hypothetical, the issue is whether, the crime of murder generally, when committed outside Ireland "constitute[e] an offence under the law of the State."

94. In such a hypothetical situation, the question is whether the offence "does not," *"by virtue of having been committed in a place other than the State constitute an offence under the law of the State."*

95. The final lines of section 44 are: *"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. "* If the words were inverted to read as follows, they would be: *"the act or omission of which the offence consists does not… constitute an offence under the law of the State, by virtue of having been committed in a place other than the State."*

96. In this way, section 44 can be made compatible with Article 4.7(b) without doing violence to the words, but merely by placing them, for better understanding, in a different order.

97. In my view, it is perfectly possible to interpret section 44 in conformity with Article 4.7(b). Under that provision, correctly interpreted, the surrender of the appellant is prohibited for the following reasons. Firstly, the offence specified in the European arrest warrant was committed outside France, the issuing Member State. Secondly, murder committed outside Ireland is not an offence under Irish law, unless the alleged perpetrator is an Irish citizen. Interpreted in the light of the Framework Decision, section 44 applies where Ireland would not have the power to prosecute on the same basis as France: under Irish law, a person who is not an Irish citizen cannot be prosecuted for a murder committed outside Ireland.

98. It follows that section 44 prohibits the surrender of the appellant. I would allow the appeal and set aside the order of the High Court. I would make an order pursuant to section 16(8) refusing an order for surrender of the appellant pursuant to section 16 of the Act of 2003 refusing and direct his release from custody."

7.19 Applying the reasoning employed in this extract from Fennelly J.'s judgment in the *Bailey* case, and the same logic, to the circumstances of the present case: it is manifest that the applicant cannot in fact validly rely upon s.71 of the Act of 2006 as conferring the required extra-territorial jurisdiction to prosecute the respondent in Ireland for the corresponding but hypothetical offence of conspiring outside of Ireland to commit a serious offence outside of Ireland. The case does not satisfy any of the conditions set out in s.71(2) of the Act of 2006. Equally, it seems to the Court that s.71(3) of the Act of 2006 could not be availed of as the Director of Public Prosecutions could not, in the circumstances of this case, be satisfied as to the matters specified in s. 74(3)(a), (b) or (c) of the Act of 2006. The Court has therefore concluded that the second condition within s. 44 of the Act of 2003 is also satisfied. Accordingly, the Court is obliged to refuse to surrender the respondent on extra-territoriality grounds.

7.20 Just for completeness, before leaving the extra-territoriality issue it is appropriate to record that counsel for the respondent (rather than counsel for the applicant) raised the question as to whether s.20 of the Misuse of Drugs Act 1977 could perhaps avail the applicant in the present context. S. 20 provides:

"(1) Any person who aids, abets, counsels or induces the commission in a place outside the State of an offence punishable under a corresponding law in force in that place shall be guilty of an offence.

(2) In this section "**a corresponding law**" means a law stated in a certificate purporting to be issued by or on behalf of the government of a country outside the State to be a law providing for the control or regulation in that country of the manufacture, production, supply, use, exportation or importation of dangerous or otherwise harmful drugs in pursuance of any treaty, convention, protocol or other agreement between states and prepared or implemented by, or under the auspices of, the League of Nations or the United Nations Organisation and which for the time being is in force.

(3) Any statement in a certificate mentioned in subsection (2) of this section as to the effect of the law mentioned in the certificate or any such statement that any facts constitute an offence against the law so mentioned shall, for the purposes of any proceedings under this Act, be evidence of the matters stated."

7.21 In the course of a written submission to the Court counsel for the respondent, anticipating possible reliance on s. 20 of the Act of 1977 by counsel for the applicant, submitted that s. 20 would not assist the applicant because, *inter alia*, "it must be presumed that the aiding, abetting, counselling or inducing has to take place within the State as there is no mention in the section of extraterritorial jurisdiction." The Court agrees with this submission. Counsel for the applicant did not, in the event, seek to rely on s. 20 of the Act of 1977 in advancing her case. However, had she done so it would not have availed her client because in the Court's view s. 20 is both territorial and extra-territorial in its application. It is territorial to the extent that the aiding, abetting, counselling or inducing has to take place within the State.

8. The supplemental objection – s. 21A point

8.1 At a very late stage of these proceedings (the hearing had concluded and the Court was on the point of reserving judgment) the respondent brought a motion seeking leave of the Court to ventilate a further point of objection, based upon s. 21A of the Act of 2003. The Court acceded to the application, albeit with some reluctance, in circumstances where the important decision of the Supreme Court in *Minister for Justice, Equality and Law Reform v Bailey* [2012] IESC 16 [2012] 3 JIC 0101 had not been available to counsel for the respondent either when drafting his points of objection initially, or when the date for the s.16 hearing was fixed.

8.2 The additional point of objection is pleaded in the following terms:

> "As no decision has been made to charge and to try the Respondent an order for his surrender cannot be made. For a lawful surrendering to take place a decision must have been made by a competent judicial authority to both charge and try the person sought. Such a decision has not yet been made in the Respondents case. CF Section 21(A) of the European Arrest Warrant Act 2003."

8.3 In support of this further objection the respondent has placed before the Court, an affidavit of a Spanish lawyer based in Barcelona, Spain, a Ms. Miriam Amoras Bas, sworn on the 21st May, 2012. In her said affidavit Ms. Amoras Bas deposes to the following:

> "2. I have been requested to provide information to this Honourable Court concerning the Spanish Legal System and in particular Spanish Criminal Law procedure. I have studied the Spanish version of the European Arrest Warrant issued by Central Trial Court 6 Audiencia National in Madrid, Spain in proceedings Sumario 53/2009 arising from Diligencias Previas 250/2008 and concerning Michael Martin Connolly D.O.B. 19.02.1966 who was born in the United Kingdom and who is the holder of an Irish Passport PA019369 and who resides at Doon East, Roscahill, County Galway in the Republic of Ireland.
>
> 3. From my study of the aforementioned European Arrest Warrant it is evident that the criminal proceedings in Spain involving Michael Martin Connolly are presently at a stage where 'Auto de Procesamiento" has been ordered. This order has been made by the Investigating Judge and when such an order is made it indicates that the Investigation stage of the matter is almost, but not yet, finished and what is now required is the appearance of the suspect before the court where his side of the case can be heard and considered before a final decision is made to send the case forward for indicting and trial. In order to bring the suspect before the Investigating Judge an arrest order is made and such an order appears to have been made in this case on the 23rd of September 2009.
>
> 4. It is only at the conclusion of the Investigation stage that the Investigating Judge will make an 'Auto de Conclusion de Sumario' order. An 'Auto de Conclusion dc Sumario' order has been made in respect of other defendants in the matter, however this stage has not been reached with Mr. Connolly. The Court has not been able to notify him the 'Auto de procesamiento' and the investigation in pending on the notification and the hearing in order to continue the process. When the 'Auto de conclusion de sumario' is made, the case is sent forward to the Audiencial Nacional where the Public Prosecutor can then Indict the suspect with the alleged crime. Once that has happened the suspect becomes an accused person and his trial will then take place, as it occurred in this case against other defendants. When the Public Prosecutor indicts the suspect, the suspect is deemed to be formally charged with the offence and it effectively means that a lawful decision has been made to put him on trial for that offence.
>
> 5. In the case of Michael Martin Connolly investigations are ongoing and no decision has been made to put him on trial for the offence he is suspected of having committed. The 'Auto de conclusion de Sumario' order has not yet been made in respect of Mr Connolly."

8.4 In response, the applicant points to Part B of the European arrest warrant wherein it is stated that the arrest or enforceable judgment having the same effect is *"Court order dated on 23rd September 2009 ordering the prosecution and issuance of an ARREST WARRANT for MICHAEL MARTIN CONNOLLY for an alleged offence, endangerment of public health, as set forth in Articles 368 and 369 of the Spanish Penal Code."* Further, counsel for the applicant has pointed out that within Part (I) of the warrant it refers to the domestic file reference as being *"Diligencias Sumario 53/2008 (Proceedings 250/08) arising from "DILIGENCIAS PREVIAS" 250/2008 (Pre-trial proceedings).*

8.5 Certain additional information bearing on this issue has also been put before the Court by the applicant. In a letter from the issuing judicial authority to the Irish Central Authority dated the 12th June, 2012, it is stated:

> "I send this letter in order to inform the requesting authorities that the currently ongoing proceedings, i.e. the so-called ordinary proceedings-since the type of proceedings is determined by the kind of offence and penalty that applies to that offence- are divided into three phases: An investigating phase or preliminary proceedings in which investigations take place, an intermediate phase in which decisions regarding accusation or stay of proceedings are taken, and a third phase in which the oral hearing takes place and judgment is given.
>
> The Order of *"auto de procesamiento"* is issued during the investigating phase if the judge considers that there is sufficient evidence to impute an offence to a person. The Order of *"auto de conclusion"* which chronologically follows always the Order of *"auto de procesamiento"* implies a total closure of the investigations and a referral of the record of proceedings to the court that will try the case, in order to start the intermediary and oral hearing phase.
>
> An Order of *"auto de conclusion"* does necessarily require that the prosecuted person has previously given a statement before the Investigating Judge. Otherwise, although there is an Order of *"auto de procesamiento "* that imputes the facts to a person, no Order of *"auto de conclusion"* may be issued nor may the case move to the intermediary phase and to the oral hearing phase.
>
> In the specific case of Michael Connolly, an Order of *"auto de procesamiento"* has been issued, as set forth in the EAW.

The investigating phase has finished, too, but no Order of *"auto de conclusion"* may be issued since Connolly is unavailable to the Spanish authorities.

Once Connolly is available to the Spanish authorities, a statement shall be taken from him and an Order of *"auto de conclusion"* shall be issued in order to move to the intermediary phase and oral hearing phase. No other procedural steps regarding Connolly are pending, unless Connolly makes a request for other evidence to be given for his defence.

The decision whether to accuse him or not is taken by the Public Prosecutor once the case has moved to the intermediary phase. The Public Prosecutor can not formally issue an indictment unless there is an Order of *"auto de conclusion "*. and no *"auto de conclusion* can be issued without having previously taken a statement from Connolly, However, the Public Prosecutor deems that there is sufficient evidence to indict Connolly and he will issue an indictment at the appropriate time.

On the other hand, the requesting authorities are advised that there has already been given a judgment regarding the other defendants. Proceedings cannot be closed completely until a decision is taken regarding Connolly."

Submissions on behalf of the Respondent

8.6 The respondent has submitted that it is clear from the evidence that the Spanish Pre-Trial Criminal Procedure is a civil law investigative one and that no decision has yet been made to try the Respondent. It is urged that for a lawful surrendering to take place a decision must have been made by a competent judicial authority to both charge and try the person sought. In support of this counsel relies upon *The Minister for Justice Equality and Law Reform v. Bailey* [2012] IESC 16. The Respondent believes that the proceedings are at a preliminary investigation stage and that no decision has been made to charge and try him. He relies heavily on the affidavit of Miriam Amoras Bas in this regard. It was urged that he is wanted for investigative purposes only and that no final decision has been made to try him.

8.7 The respondent submitted that Section 21(A) of the Act of 2003 requires the Court to enquire whether a decision has been made both to charge the respondent and to try him for the relevant offence. The warrant in this case when taken as a whole fails to unambiguously state that the prolonged course of preliminary proceedings in the Spanish inquisitorial system have been concluded and that a decision has been made by a competent judicial authority to charge him with an offence and to try him upon it. In the *Minister for Justice v. McArdle* [2005] 4 I.R. 260 the former Chief Justice Murray said at page 266-267 "The mere fact that an arrest warrant is issued by a judge in a foreign jurisdiction may not of itself necessarily imply that it is issued only for the purpose of charging the person concerned and putting him or her on trial for an offence or offences …… 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 or her on trial. Warrants issued for the purpose of such investigation could not be considered as requiring the surrender of a person for the purpose of being tried for an offence."

Submissions on behalf of the applicant

8.8 It was submitted that the evidence of Miriam Amoros Bas indicates that the procedure in Spain is equivalent to that which pertains in Sweden, as was considered by the Supreme Court in *Minister for Justice, Equality and Law Reform v. Olsson* [2011] 1 I.R. 384.

8.9 The Court was referred with particularity to the additional information dated the 14th June, 2012, wherein the issuing judicial authority explained the stage in the proceedings which had been reached in respect of the respondent. It is stated, in particular, that proceedings of the type which have been brought against the respondent are divided into three phases. The first such phase is the investigating phase or preliminary proceedings phase in which investigations take place. There is then an intermediate phase in which decisions regarding accusation or stay of the proceedings are taken and finally, the third phase of the proceedings is the stage at which an oral hearing takes places and judgment is given.

8.10 It is stated in the additional information that in the particular case of the respondent herein,

> *"…an order of* 'auto de procesamiento' *has been issued, as set forth in the EAW. The investigating phase has finished, too, but no Order of 'auto de conclusion' may be issued since Connolly is unavailable to the Spanish authorities. "*

It is further stated:

> "*Once Connolly is available to the Spanish authorities, a statement shall be taken from him and an Order of* 'auto de conclusion' *shall be issued in order to move to the intermediary phase and oral hearing phase. No other procedural steps regarding Connolly are pending, unless Connolly makes a request for other evidence to be given for his defence.*
>
> *However, the Public Prosecutor deems that there is sufficient evidence to indict Connolly and he will issue an indictment at the appropriate time. "*

8.11 It was submitted that there is no material distinction between the explanation given of the proceedings by the issuing judicial authority and the general procedure as set out in the affidavit of Miriam Amoros Bas. It was further submitted that it is common case that the respondent must be given an opportunity to put forward his side of the case before a formal and final decision can be made to send the case forward for indictment and trial. The information before the Court leads to the conclusion that, subject to the respondent being given an opportunity to put forward is side of the case, the public prosecutor is satisfied that there is sufficient evidence to indict the respondent and *'"he will issue an indictment at the appropriate time."* (emphasis added)

8.12 The applicant accepts that section 21A of the Act of 2003 provides that the surrender must be refused if *"the High Court ... 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."*

Section 21A(2) provides that:

> *"…it shall be presumed that a decision has been made to charge the person with, and to try him or her for, that offence in the issuing state, unless the contrary is proved"*

8.13 The applicant submitted that the presumption provided in section 21A(2) has not been rebutted, whether by the terms of the

European arrest warrant itself, the Affidavit of Miriam Amoros Bas or otherwise. It was further submitted that the argument made on behalf of the respondent, that it is not clear that a final decision has been made to charge and try him fails to have adequate regard to the provisions of section 21A(2).

8.14 In *Minister for Justice v. McArdle* [2005] 4 I.R. 260, 266-7, Murray C.J. stated that:

> "Warrants issued for the purpose of such investigations [in connection with the conduct of a criminal investigation] 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 procedures 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. "

8.15 It was submitted that the proceedings in Spain are not at a stage where the decision to try the Respondent is contingent on the outcome of any further factual investigations. In the instant case a decision has been made that there is sufficient evidence to indict the respondent and an indictment will issue at the appropriate time, but that this cannot occur prior to the respondent being arrested and brought before the investigating judge in order to be given an opportunity to put forward his side of the case.

8.16 It was urged that as O'Donnell J. stated in *Olsson* [2011] 1 I.R. 384 at 399:

> "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."

8.17 The applicant also relies on the passage in *Olsson* in which O'Donnell J. also held that it would be within the Framework Decision and the 2003 Act if, after further investigation the prosecution authorities decided not to prosecute the requested person because, for example, they had become convinced of his or her innocence. He held that what would be impermissible is the surrender of a person where the decision to prosecute that person was dependant on the further investigation *"producing sufficient evidence to put a person on trial"*. In those circumstances there would in truth be no decision to prosecute and no intention to bring proceedings. It was held that the surrender of Mr. Olsson was not prohibited by virtue of section 21A of the Act of 2003. In contrast, in *Minister for Justice, Equality and Law Reform v. Bailey* it was held that while a decision had been made which was equivalent to a decision to charge the appellant, no further decision had been made. In particular, it was manifestly clear from the material before the Supreme Court, that the appellant was sought for a criminal investigation and that no decision had yet been made to try him for the murder in question. At page 56 of the judgment Murray J. notes that a statement of 'key importance' is contained in the statement of the prosecutor which was before the Court and stated:

> "It must be clearly understood that the evidence in the case, supporting the charge against Mr Ian Bailey or exonerating him, is not yet complete."

It was held therefore that the facts in *Bailey* were distinguishable from *Olsson* and, in particular, that the evidence was that the decision to prosecute Mr Bailey was in fact *"dependent on such further investigation producing sufficient evidence to put a person on trial*" which was found by the Supreme Court to be *"impermissible"* in *Olsson*. It was further clear from the material before the Supreme Court in *Bailey* that a decision to try the appellant would not be made until the *"Phase D instruction ' was complete and that it was not yet complete."*

8.18 It was therefore submitted by counsel for the applicant that in the present case there is no evidence to rebut the presumption provided in section 21A (2) of the European Arrest Warrant Act, 2003, as amended. Further, it was submitted that insofar as there is evidence before this Honourable Court as to whether or not a decision has been made to try and prosecute the Respondent, such evidence indicates that a decision has been made that there is sufficient evidence to indict him and that an indictment will issue at the appropriate time. However, the actual indictment cannot occur prior to Mr. Connolly being produced before the investigating judge. The information before the Court demonstrates that while the respondent will be given an opportunity to put forward his side of the case to the investigating judge, the decision to prosecute is not dependent on the outcome of any further investigation producing sufficient evidence to put him on trial.

8.19 It was submitted therefore that the surrender of the Respondent is not prohibited by virtue of s. 21 A of the Act of 2003, as amended.

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

8.20 The Court agrees with the analysis of counsel for the applicant. As the Court understands the decision in *Minister for Justice, Equality and Law Reform v. Bailey* the Supreme Court did not depart from or modify the analysis of s. 21A by O'Donnell J. in Minister *for Justice, Equality and Law Reform v. Olsson* [2011] 1 I.R. 384. Rather, it seems to have been accepted that O'Donnell J.'s analysis was correct at the level of principle (even though O'Donnell J's analysis does not allude to the Irish Government's reservation, a matter on which much emphasis was placed in the majority judgments in the *Bailey* case). However, when what might be called the Olsson analysis was applied in the particular circumstances of the *Bailey* case it was impossible to conclude, on the evidence before the Court in that case, that a decision had been made to try the respondent in that case.

8.21 I think it is important in the circumstances of the present case to rehearse exactly what O'Donnell J. said in *Olsson*. He said the following at paragraphs 28 to 36 of his judgment:

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

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

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

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

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

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

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

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

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

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

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

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

[36] It is noteworthy, that on the evidence in this case, the position in relation to the respondent is not by any means unusual in the Swedish system, and indeed represents the norm in a number of European countries. It would be a surprising result if either the Framework Decision or the Act of 2003 were to be interpreted so as to prevent the execution

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

8.22 The Court is satisfied on the evidence before it in the present case that the respondent has indeed been charged, and that a decision has in fact been made to try him even though it has not been possible, in the absence of the respondent, for the public prosecutor to conclude the *auto de procesamiento*" stage of the proceedings by the making of an Order of *"auto de conclusion "*. Notwithstanding that an Order of *"auto de conclusion "* has not been made the Court has the express representation that the decision maker, namely the Public Prosecutor, that he deems that there is sufficient evidence to indict Connolly and he will issue an indictment at the appropriate time.

8.23 It is important to pay particular regard to O'Donnell J.'s remark at para. 35 of his judgment in *Olsson* that "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." I am satisfied that in the present case the evidence before this Court establishes that a potential prosecution of the respondent will not be dependent in any sense upon the fruits of an interview to be conducted with the respondent, and or on anything that might arise out of such an interview. Unlike in *Bailey*, a decision and intention to prosecute can be said to have crystallised in the present case.

8.24 In the circumstances the Court is not disposed to uphold the s. 21A objection.

9. Conclusion

9.1 In circumstances where the Court has upheld the objection based on the extraterritoriality, it is not possible to surrender this respondent and the Court must refuse to make an Order under s. 16(1) of the Act of 2003.